CONFERENCE PAPERS AND PRESENTATIONS





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Day 1



Hon Margaret Wilson, MP Speaker of the House of Representatives

Paper delivered at the 5th International Conference of Information Commissioners

Openness and transparency in Government

Beverley, David, Mel, Ombudsmen, Information Commissioners, investigating officers

and colleagues

It gives me enormous pleasure to be here today to open the 5th International Conference

of Information Commissioners.

In a year when we are celebrating the 25th anniversary of the establishment of the

Official Information Act (OIA) in New Zealand, it is timely to gather together and reflect

on the opportunities and challenges of maintaining openness and transparency in

government.

Good governance is about creating safe and just societies. When this is achieved citizens

grow up embracing the values which underpin a democratic society. They become the

best defenders of those values and advocates for good governance.

Over the next few days you will debate and discuss your roles in defending these values,

and in building a sense of expectation and commitment in favour of honesty, openness,

respect, and accountability in government. There has probably never been a more

important time to talk about and reinforce these principles – they are under attack in

many places. But if society is to thrive, then the ability of citizens to access information

which will help them to participate fully in that society is critical.

Twenty-five years ago, New Zealand enacted the OIA, encapsulating in statute the principle of freedom of information better than most similar pieces of legislation. The focus of the Act was information and the rights it created relating to how to access information. In essence the Act was designed to promote democracy through democratic decision-making that was transparent and accountable. Such decision-making is unlikely unless members of the public have access to the information on which decisions are made. The OIA gives us all that access and the opportunity to participate in the decisions that affect us all.

Six months go, in a speech to another legal conference, I raised what I see as an anomaly, namely, the exemption of Parliament from the coverage of the OIA. The handful of reporters who reported my speech could hardly contain their excitement at the prospect of being able to find out just how much taxpayers spend on Members' taxis, travel, accommodation, and phone calls. The Dominion Post² helpfully ran a list of questions it said you can't ask Members! The wider and more important issues barely got a mention.

With the exception of Michael Cullen, Peter Dunne and Rodney Hide, my colleagues were largely silent. Who could blame them? In the court of public opinion they had already been judged and found to be greedy. The media in New Zealand has little interest beyond the sensational, so Members of Parliament are right to be wary of any change. Any change to the coverage of the OIA then must have the trust and confidence of those whom it most affects.

But in Britain, The Independent³ newspaper reported the speech. Why, you may ask? Britain, which included Parliament within the Freedom of Information Act 2000 and which came into force in 2005, was poised to go against the tide with a Private Member's Bill to amend the Act before the House of Commons. The Bill failed to find a sponsor in the House of Lords, so it appears to have stalled and is generally assumed to be dead⁴.

 $^{\rm 1}$ Grant Liddell, The Official Information Act 1982 and the Legislature: A Proposal (1997) Legal Research Foundation Seminar

² 6 May 2007

³ 18 May 2007

⁴ The Constitution Unit, UCL Department of Political Science

It is a fair question to ask why, here in New Zealand, Parliament was exempted when the OIA was enacted and why it remains exempt today. It appears that at the time of the Danks Committee consideration of the issue of access to official information, the emphasis was on constraining the exercise of executive power⁵. Parliament was not considered to be part of the problem in this respect.

New Zealand was not alone in excluding Parliament from the jurisdiction of freedom of information legislation. Most Westminster-style Parliaments were not subject to such legislation. For example, Australia, Canada and the US Congress, are not covered by freedom of information legislation. In 1999 there was a Commonwealth Law Ministers Conference that considered the issue and recommended Parliaments should be covered.⁶ Freedom of information legislation that extends to Parliaments is now enacted in India, South Africa, Ireland, the West Indies and of course the UK.

The debate surrounding the enactment of the United Kingdom legislation - both the original Act and the Amendment Bill - provide a useful summary of the type of issues that arise when freedom of information legislation is extended to Parliaments.⁷ The primary concern of the Government was to ensure that parliamentary privilege was preserved.

The rationale behind this constitutional concept is that Parliament must operate independently on behalf of the public. While few would challenge this fundamental constitutional notion, the question is how far does such a concept reach? Does it extend beyond the formal Parliamentary business in the Chamber, committees, and in questions, motions and other 'proceedings of Parliament', to include matters of administration such as finance, security, personnel and such matters?

In the New Zealand context, matters of parliamentary privilege and 'proceedings of parliaments' are laid down in the *Standing Orders of the House of Representatives*,

 $^{^5}$ Dave McGee, $Parliamentary \, Applications for FOI, The Parliamentarian 2006/Issue Two <math display="inline">147$

⁶ Dr the Hon Lenny Saith, *Parliamentary Applications for FOI*, The Parliamentarian, 2006/Issue Two 147: *Enacting and Implementing FOI*, The Parliamentarian, 2006/Issue Three 211

⁷ The *Freedom of Information (amendment) Bill*, Bill 62 of 2006-7, Parliament and Constitution Centre, House of Commons Library, Research Paper 07/18 21 February 2007

which are interpreted in *Speakers Rulings*. Standing Orders have been amended from time to time to ensure there is a more open approach to proceedings. For example, Standing Orders incorporated the principle of natural justice when the Bill of Rights Act was enacted. This principle has extended to members of the public the right to respond to allegations made against them in the House or a select committee. This right is exercised on a regular basis by members of the public. More recently Standing Orders were amended to include the declaration and registration of Members of Parliaments' pecuniary interests as a check against abuse of power or conflict of interest allegations.

It may be argued that the combination of the Official Information Act, the Fiscal Responsibility Act and Standing Orders have created a regime of considerable freedom of information. These regulatory regimes operate within a culture of inclusion of the public in the proceedings of Parliament. There is also a practice within the Clerk's Office to observe the principles of the OIA and release information sought. As far as the proceedings of Parliament are concerned, there is little if anything that is not accessible to the public.

One area of concern that was identified was that the extension of the Official Information Act to Parliament may actually constrain access to information. All Parliamentary information is available to the public unless the House, by order, or a committee unanimously determines otherwise. Such orders are uncommon, and the normal process is that requests for access to parliamentary information are actioned without recourse to any tests such as the public interest test. It has happened, for example, that information declined for release by a Minister, was obtained without restriction from Parliament when the information was put before a select committee, and thereby held as part of the select committee records.

It would not be impossible however to ensure any freedom of information legislation did not have the perverse effect of restricting information that is already available. In fact in the area of proceedings of parliament, I foresee very little objection to a suitably worded amendment to the Official Information Act. A question may be what would be the added value if the OIA did extend to Parliament. In this context I think the recent publication

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 $^{^8}$ See David McGee, *Parliamentary Practice in New Zealand*, $3^{\rm rd}$ Edition for a detailed discussion of these matters.

⁹ See McGee, pp 437-439.

of Nicola White, *Free and Frank: Making the Official Information Act 1982 work better* provides a very useful analysis of some of the risks associated with coverage of the OIA for those of us who are committed to open access to information that informs public decision making.

While there are few problems extending coverage of the IOA to parliamentary proceedings, subjecting the administration of parliament to the same scrutiny of the OIA is a matter of real concern for some Members. While in principle I personally find it anomalous that the administration of Parliament is not subject to the OIA, I have come to have a greater understanding of the concerns of Members since I was elected Speaker. As a Minister I was well accustomed to the scrutiny of the OIA, not only for decisions I made as Minister but who I called on my phone, where I travelled, whom I met, when and where. As a Minister there is no privacy in the New Zealand context. I can understand however some of the concerns of those Members who have never experienced that scrutiny of their affairs.

Members appear to have two primary concerns. The first is that the information released to the public be accurate because of the consequences for the Members if it is not. This concern is real. Members have been stood down from Ministerial positions because they acted on advice from parliamentary service officials. Even though in this instance the Auditor-General found the Members had acted reasonably on taking the advice and were subsequently reinstated, the political cost was high. While I accept the legitimacy of the concerns, I still believe a process could be devised to check the information. It is interesting to note that a similar concern was raised about pecuniary interests of Members of Parliament being made public. To date there appears to have been no problem with that information being in the public arena. The real issue is basically one of trust. Can Members have confidence in the accuracy of the information and can they trust it will be reported correctly?

It should be noted in this context that recently a list of Members' entitlements and the administrative process applied to access them has been posted on the website. This is the first time this information has been made public. There was little media interest and the

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¹⁰ Report of the Controller and Auditor-General, *Members of Parliament: Accommodation Allowances for Living in Wellington* Interim Report March 2001 and Final Report, July 2001.

one article on the publication of the information was critical of Members. I suspect the media is only interested in individuals. I do think however that in reality there is now little information that is not accessible when it comes to Members' entitlements and how tax payers' money is expended by Members in the course of them fulfilling their duties as Members of Parliament. The Parliamentary Service also applies the principles of the OIA when information is sought by the public. When I checked very few requests for information have been received by the service, compared with other public agencies.

There is another concern however that may have more substance and that is the privacy of the communication between Members and their constituents, which was the essence of the Private Member's Bill before the House of Commons. It is important not to restrict the freedom of the public to communicate with their Members and for them to respond. Freedom of speech is a fundamental constitutional principle of our Parliamentary democracy. It needs to be vigilantly protected. Again however it would not seem impossible to work through a process where privacy was protected and the public interest was taken into account in any specific disclosure of information. The issue is again one of trust in the whole process.

In the context of the extension of the OIA to Parliament it is reasonable to revisit the justification for the exclusion of the Ombudsman Office and Auditor-General from the scrutiny of the Act. The Commissioner of the Environment is covered by the OIA so it is a legitimate question why the other two Officers are exempt. There is a real issue of who guards the guardians but such an issue is beyond the scope of my introduction and welcome to you. It is a tribute to both offices that I receive few complaints but I have wondered at the lack of independent oversight when some complaints have been made to the Speaker.

Apart from the issue of coverage of Parliament under the OIA, thanks to the Danks Committee and the OIA, the Government is now much more open than it was in 1982. A culture change has taken place and I think we can credit the Danks Committee and the OIA itself for that. There are other more subtle reasons – for example the OIA replaced the Official Secrets Act which had underpinned a culture of secrecy that effectively barred all access to official information.¹¹ The enactment of the OIA required

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 $^{^{11}}$ $Open\mbox{-}and\mbox{-}shut$ legislation? The Official Information Act John Belgrave, Chief Ombudsman, 21 July 2006

government agencies to change their mindset from the 'official secrets' presumption that information should be withheld unless the requester could demonstrate good reason for disclosure to the 'open government' presumption that information should generally be made available on request unless there was good reason for withholding it.

A huge range of information is released or made available as a matter of course. New technology makes it so much easier to simultaneously load lengthy reports onto websites. Gone are the days of queuing at the Government bookshop to buy your own copy. An interesting spin-off from this is that the media are not nearly as interested in material freely available and accessible on the website as they are in the same report if they have to formally request it. I'm not forecasting the death of the conspiracy theorist, because there is a view that if something is up on the website there is nothing to hide.

I was interested to note in my first scan of Nicola White's excellent and just released book on making the OIA work better¹² that she floats whether it is time to consider preemptive release systems, resulting in pre-emptive categorisation and release of much more government information. This had already been flagged in Ombudsmen Quarterly Review¹³. One advantage of proactive release cited was a large volume of information that might otherwise have had to be collated and duplicated for individual requests which would already be publicly available and require no further administrative effort.

While there is no obligation in New Zealand to consider proactive release, conventional wisdom suggests that agencies that do not do so risk ignoring best practice and setting themselves and their staff up for unnecessary stress and compliance costs. The real question however is when the release is made. Often requests come during a decision-making process and a premature public release would seriously affect the policy making process that relies on free and frank advice. What is also required is a better recognition of the evolution of government decision-making that is more consultative and participatory than in the past.

In conclusion may I finally observe that there is a culture of openness and transparency within our system of public decision-making in New Zealand. Of course there is always

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¹² Free and Frank Making the Official Information Act 1982 work better

¹³ Volume 13 Issue 1 March 2007

room for improvement and I am sure this conference will contribute to this important debate. I just want to end by endorsing the concluding statement of Nicola White in her book. She observed:

The New Zealand OIA has contributed enormously to democratic effectiveness in its first 25 years of life. As times have changed, so has the way in which the Act works. At present, the cynicism surrounding the day-to-day administration of the Act in the political field is having a slow and steady corrosive effect. It is corroding trust in government. I believe that trust matters, and that this corrosion cannot be ignored. I hope that the proposals in this book stimulate debate on how we address the problems with how the Act now operates, without sacrificing its undoubted strengths.

May I wish you all the best for a very stimulating debate.	





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Paper delivered at the 5th International Conference of Information Commissioners

Future Challenges For The RTI Movement

The Right-To-Information (RTI) movement has had a good ten years. Little more than a decade ago, transparency was not in vogue. The World Bank had not yet released its influential 1997 report on the importance of good governance. Transparency International had only just begun the publication of its annual corruption perceptions index. There were scarcely two dozen countries that had national RTI laws, most of them in the developed world.

Today, of course, we confront different circumstances. The concept of transparency is now so familiar that it has become, as Professor Christopher Hood recently observed, a "banal" idea, "taken as unexceptional in discussions of governance and public management." Almost seventy countries have national RTI laws. We have witnessed the emergence of an unprecedented global community of advocates, government officials, and academics interested in the promotion and study of RTI. And every day we hear stories about the ways in which RTI have helped to improve governmental accountability.

This is a considerable achievement. Nonetheless there are still several ways in which the RTI movement could be confounded. It is important -- and certainly consistent with our own insistence on the virtues of transparency -- to be candid about the challenges that the movement still confronts. I propose to outline five of these challenges.

1. The Workability of RTI Law

The first and most immediate urgent task is to deal directly with the reality that RTI law is a complicated policy instrument, easily prone to failure. We can view the problem of workability from three perspectives: those of users, administrators, and independent arbitrators.

First, the user's perspective. While lobbying for RTI laws, advocates have often understated the difficulties encountered when citizens actually exercise their statutory rights.

Users require three resources that are generally in scarce supply. The first is knowledge about bureaucracy and the law. Individuals who are effective in using RTI laws know what documents are held by government agencies, and where they are likely to be held. They also know how to file a request; understand when they are being put off, and when excuses are being improperly invoked; and know how to complain about bureaucratic recalcitrance.

A second requirement is gumption -- by which I mean the courage to exercise the right to information. This is a quality that is in surprisingly short supply, even among citizens who are well-educated and not dependent on governmental largesse. Even in jurisdictions that have long-established RTI laws, citizens worry that they will disrupt relations with government officials, or simply cause offense, by filing a request for information.

The third resource is persistence. Individuals must be prepared to pursue cases for months, and sometimes for years.

The difficulties encountered by users are aggravated by administrative shortfalls. But here we must deal candidly with the reality that RTI laws are not easily administered. They require special procedures and staff training. In every country that has established a passable RTI system, this has meant a significant investment of money. Today, however, many countries have taken the symbolical step of adopting an RTI laws without taking the substantive step of investing in administrative capabilities. Moreover it is not clear, given their poverty, that many countries are capable of developing capabilities like those in the rich democracies. One warning sign is the substantial

proportion of "test requests" that result in mute refusals in countries outside the first world.

Bureaucratic compliance might be better if enforcement bodies (that is, Information Commissioners) were effective in responding to problems of bureaucratic misbehavior. But commissioners have their own difficulties, which arise from a combination of resource shortfalls and problems of institutional design. As to the latter: commissioners are principally designed to resolve *cases* of alleged misconduct, not *patterns* of noncompliance that may involve hundreds or thousands of cases. This is an approach that is congenial to lawyers, who like to apply their forensic skills to particular disputes. But is also an approach that is easily confounded by errant bureaucracies. More cases of noncompliance increase a commissioner's workload, which results in delayed resolution of complaints, which further corrodes bureaucratic incentives for compliance.

These observations about the weaknesses of RTI law are informed by personal experience. I recently received a response to an RTI request that I filed with the U.S. Federal Bureau of Investigation five years ago; sadly I cannot say that this was the oldest of my U.S. requests. The delay was partly attributable to my own unwillingness to commit time and money in making an application for compliance to the federal court. I have also one complaint with the Canadian Office of the Information Commissioner that is now over two years old. I have seven complaints with the U.K. Information Commissioner that range in age from 21 to 30 months, without prospect of immediate resolution. (As a consequence I have stopped filing requests in the U.K, because -- at least in my case -- there is no effective remedy against bureaucratic non-compliance.) I recently spent more than two years fruitlessly pursuing a request for information under the United Nations Development Programme's Information Disclosure Policy.

Delay is so widespread, and so extensive, that I now find it possible to gauge roughly how many requests I could file in the rest of my working life. Assuming that I can handle two or three files at once, and assuming that each takes two or three years to reach a conclusion, I have perhaps two dozen requests left in me. In my own case, the grand promise of RTI has been reduced to a game of Twenty Questions. This should be regarded as a damning comment on the efficacy of RTI systems, even in wealthy democracies, for I am fortunate to have advantages -- in terms of education and position -- that are not shared by the vast majority of the world's population.

Moreover the evidence tends to support this skeptical view of RTI law. Who do we often find using RTI? Exactly those constituencies who have the advantage of the three resources that I described earlier: Businesses; current and former government employees; law firms; and well-funded interest groups. A case can be made, of course, that disclosure serves the public interest even in these circumstances. But it is a different and more complicated case than would be made if the *typical* requester were the citizen-hero who champions the dispossessed, as we often suggest.

I say this as a friend of RTI, wishing to see RTI laws work for the advantage of the vast majority of the world's citizens. However, attaining this goal will not be easy. Unless we grapple with the implementation challenges I have just described, we are at risk of achieving, on a global scale, the result that Antonin Scalia once said had befallen the U.S. Freedom of Information Act. The US FOIA, Scalia said in 1982, had become "the Taj Mahal of the Doctrine of Unanticipated Consequences . . . [The provisions of the law] were promoted as a boon to the press, the public interest group, the little guy; [but] they have been used most frequently by corporate lawyers."

2. The Changing Infostructure

A second RTI challenge may be peculiar to the developed countries. It arises because of changes in the governmental "infostructure" -- that is, the systems that are used by government organizations to contain and share information. (Professor Luciano Floridi defines the infostructure as "an organization's information assets that comprise the information base of the organization, including hardware, software, networks, infrastructure, information, and applications."). RTI laws were developed in an different and simpler era, so far as infostructure is concerned -- an era in which information was typically recorded on paper, contained in physical files and cabinets, and reproduced through relatively expensive photo-mechanical processes. This era has now faded away. Information is now typically digitized, and aggregated into vast electronic databases. The cost of storing and reproducing information has dropped dramatically, and consequently the volume of information held by government organizations has skyrocketed.

This technological transformation has profound implications for the operation of RTI systems. Increasingly, a request for information will pertain not to physical records, but

to digitized information held within government databases. In one sense this might seem to simplify the process of responding to RTI requests. After all, RTI officers might be able to use new document management systems to locate records that are responsive to a request more quickly.

On the other hand, new complications might be added. The volume of responsive records will probably increase substantially. Moreover, requesters might not want a specific record, but rather bulk data. This sort of request is much more complicated. Deciding precisely what to ask for, and whether it can be retrieved, requires a high degree of technical literacy on the part of requesters, RTI officials, and investigators within Commissioners' offices. Requesters may also lack the technical capacity to interpret bulk data after it is released.

Digitization also creates the threat of new impediments to access. Increasingly the databases that are used to warehouse government data are designed and maintained by private contractors.

Consider the following predicament, taken from personal experience. A request is made for information contained in a departmental database. The department replies that the database does not have the capability to download the requested information, because the department did not specify that capability when it procured the software. It is too expensive to hire the contractor to amend the software, says the department, which consequently refuses the request.

What has happened here? The department has effectively locked away a mass of information by the simple expedient of failing to insist that the contractor provide a capacity for retrieval. It should be added that this functionality can usually be added at little additional cost. But the department has no incentive to insist on it, and can justify its indifference by saying that the functionality is not essential to its "business needs." Nor does there appear to be a remedy for this predicament under major RTI laws. It is as though government departments have locked their filing cabinets and dropped the keys in the Thames (or the Potomac, or the Ottawa River).

3. Private and Quasi-Public Governance

A third challenge is the shift of functions to private or quasi-public organizations. It used to be said in the United States that certain activities -- known as "inherently governmental functions" -- could never be transferred out of the hands of government departments. We have now learned that this boundary line cannot be maintained in practice. There is nothing in the governmental sphere that could not be given to a contractor or autonomous agency. This creates significant difficulties for RTI systems, which are not well suited to these so-called "alternate service delivery mechanisms."

The problem is often framed as one of access to contract documents. While this is an important subject it is actually only one aspect of the larger issue. For example, should there be a right of access to *internal* documents of the contractor, if they pertain to the performance of some critical activity such as prison management or education? And if we acknowledge a right of access to such documents, how should it be exercised -- against the contractor directly, or through the contracting government?

Even more difficult are the cases in which critical services are delivered by organizations that are not tethered to a government department by contract. Air traffic control in Canada is a good example. We might add the National Electricity Reliability Council in the United States, which oversees the country's power grid; or the regulatory components of many of the world's major stock exchanges; or national organizations that run components of the World Wide Web. We lack generally accepted criteria for deciding when such organizations should be covered by RTI. And there is also little political support for the extension of RTI law to such organizations, even if the criteria should be decided upon.

The problem of assuring transparency when responsibilities are given to contractors and other non-governmental actors is not only, or even primarily, a rich-country problem. In the next thirty years, the developing world will undergo an unprecedented build-up of infrastructure, as a consequence of rapid urbanization and trade liberalization. Fiscal constraints, and pressure from eager investors, means that much of this build-up will be accomplished through private action. The ground rules for governance of such infrastructure are being negotiated now, and it is not likely that RTI will be properly accommodated in those negotiations.

4. Growing Complexity in the Security Sector

There are also mounting challenges in the sphere of national security. Of course, there is renewed sensitivity to security considerations in the post-9/11 era. In some countries -- notably the United States -- there are also serious problems in the operation of the security classification system, an invention of the early Cold War years that has become massive and unwieldy.

In addition, there have been important changes to the very structure of the security sector that threaten to undermine the right to information. In Iraq, for example, we have witnessed the substantial role of the private sector in functions that were once the exclusive preserve of governmental actors. Even combat roles are now fulfilled by contractors. This is only one instance of the threat to RTI posed by privatization.

A less obvious and even less tractable problem is the growth of intergovernmental security networks. By this I mean the interlinking of defense, intelligence and police organizations in different countries, and the corresponding growth of agreements on the sharing of information within these networks. One consequence is that the proportion of information held by one agency that has been received from other governments, often under strict assurances of confidentiality, continues to grow. This results in a quiet corrosion of national RTI requirements.

It is difficult to preserve openness in the security sector because of the deference that courts, legislatures and ombudsmen have traditionally shown to executives on national security issues. This is compounded by a massive mismatch in resources between security agencies and non-governmental watchdogs. The secrecy systems of most countries are highly complex. Few non-governmental groups have the resources to understand these systems, or to monitor changes such as the growth of transnational security networks.

5. Building Reliable Knowledge About RTI Systems

There is a final difficulty: the limits of our knowledge about the operations of RTI systems. As I noted earlier, there are now almost seventy national RTI laws, and many dozen sub-national laws. Some of these laws have been in force for decades. Still, consider how little we know about these basic questions:

- Who actually uses RTI laws?
- What sort of information do different kinds of requesters usually seek?
- What do requesters actually do with the information they obtain under RTI?
- Can we undertake a benefit/cost analysis of different types of requests, and distinguish those that yield great benefits at low cost, from those that yield little benefit despite substantial processing costs?
- To what extent do RTI laws simply reroute requests for information that were once handled by other means?
- How do RTI laws affect the internal operations of government agencies?
- How do fees and other administrative barriers -- such as requirements relating to the form of a request -- affect the demand for information?

These are important questions, some of which go to the core of the argument for RTI. Suppose, for example, that we found that many requesters did nothing at all with the information they received; how would we adjust our views about the value of RTI? Or suppose that the most costly requests came from affluent individuals or businesses: how would we adjust our views about fee policies?

Not only are these important questions; they are also questions that are frequently asked by government officials in poorer countries who are being encouraged to adopt new RTI laws. It is possible, of course, for any practiced advocate of RTI to hobble together a plausible answer to some (but not all) of these questions. Too often, however, these answers rely on anecdotes, selected because they bolster the case for adoption of an RTI law. Careful, reliable research is in short supply.

Why don't we do better in producing reliable knowledge about RTI? One reason, regrettably, is the impatience of funders and activists, who are reluctant to invest scarce resources in research that does not have a clear short-term payoff. Another reason is the defensiveness of government agencies, which are reluctant to support research whose conclusions cannot be controlled. (Hence the common resort to consultants, whose work can be more tightly controlled, but who often lack good knowledge of the RTI field.) Yet another reason is (again) the professional bias of lawyers -- whether situated in ombudsmen's offices, government departments, or advocacy organizations. Lawyers are good at interpreting law, and good at analysis of cases. They are less adept in studying complex bureaucratic and social systems.

We could know more about the operation of RTI systems than we do. And knowing more would be useful, in the long run. It would put us in a better position to make the case for RTI, or to adjust RTI systems so that benefits and costs are better balanced. There is an emergent community of new scholars who could be encouraged to undertake this research. However, good scholarship requires three things: a serious commitment of resources; tolerance of a long-time frame for production of results; and a willingness to cede complete control over the production of research to the scholarly community.

Only in the Foothills

A few months ago I had the good fortune to visit the Indian government's training facility for senior civil servants, the Lal Bahadur Shastri National Academy of Administration, which is located a few hours northeast of Delhi, on the edge of the Himalaya range. During a tea break I mentioned to an Indian colleague that the view of the mountains was breathtaking. My colleague corrected me. I was not looking at the mountains, he said; I was looking at the foothills. The mountains were hidden in the distance.

The RTI movement stands in a similar position. In the last decade the idea of transparency has seized public attention, and there have been great strides in persuading governments to acknowledge the right to information as a matter of principle. Compared to where we were only a few years ago, the prospect is spectacular. Nonetheless we are only in the foothills. Full realization of the RTI idea will require many more years of steady marching.

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International Conference
of Information Commissioners
26-29 November 2007 | Wellington | New Zealand

Annette King

Minister of Justice

New Zealand

Speech delivered at the

5th International Conference of Information Commissioners

It is good to see many of you again today after the launch of Nicola White's book last

night.

Thank you for this opportunity to address the 5th International Conference of

Information Commissioners. New Zealand feels privileged to be hosting this year's

Conference, particularly as it coincides with the 25th anniversary of New Zealand's

Official Information Act 1982.

I have only been Justice Minister for a matter of weeks, so in one sense I cannot pretend

to be an expert on freedom of information law.

But in another sense I am well qualified, having been a Minister under both the First Past

the Post and Mixed Member Proportional electoral systems, to talk about the impact that

different government arrangements have had on the operation of the Official Information

Act. I have experienced quite considerable changes at first hand.

For those of you in the audience who are not so familiar with New Zealand's Act I want

to briefly summarise the regime here before talking about the impact that changes to

government arrangements have had on the operation of the Act.

I am well aware of the significant constitutional importance of the Official Information Act. In essence the Act was designed to promote democracy through decision making that is transparent and accountable.

The Act gives New Zealanders the ability to request access to information held by public bodies and therefore to participate in decision-making processes.

However, the Act also requires a balance to be struck between these interests and the need to protect official information consistent with the public interest and the preservation of personal privacy.

The Act grew out of the report of a committee of experts chaired by Sir Alan Danks in 1980. The report, which was titled: Towards Open Government, said:

"The case for more openness in government is compelling. It rests on democratic principles of encouraging participation in public affairs and ensuring accountability of those in office; it also derives from concern for the interests of individuals. A no less important consideration is that the government requires public understanding and support to get its policies carried out. This can come only from an informed public."

The Official Information Act replaced the Official Secrets Act 1951, reversing the presumption that had previously guided the State sector's approach to information.

The Act required government agencies to change their mindset from a presumption of secrecy to a presumption of availability of information on request.

This fundamental change was designed to increase progressively the availability of official information to the public in order to promote accountability and participation.

The change in presumption was a significant U-turn in thinking, and I imagine that it came as something of a shock to Ministers at the time and to many in the public sector.

The widespread acceptance of the principle of open government in New Zealand is largely attributable to the Official Information Act.

While there have been other relevant major changes in public management since 1982 (such as the deregulation of the economy and, of course, the public sector reforms of the late 1980s), the Act has unquestionably had a major influence on the way the New Zealand Government does business.

I think it is fair to say that the Act has made the principle of open government central to the ethos of public administration.

The basic principles expounded by the Danks Committee remain relevant today. It is vital that the public have access to information so that they can participate in public affairs and can hold the Executive accountable for the decisions they make. Access to information promotes participation, transparency and accountability and is a prerequisite for effective democracy.

In my opinion the impact of the Official Information Act has contributed powerfully to the results of the 2007 Transparency International Report, which shows that New Zealand has the lowest level of perceived corruption in the public sector.

The index scores 180 countries on a scale from zero to 10, with zero indicating high levels of perceived corruption and ten indicating low levels. New Zealand notched the top score of 9.4.

As the long title suggests, the Act is designed: "to make official information more freely available". Official information is defined very broadly. There are no classes of documents that are outside the scope of the Act.

The Act covers Ministers of the Crown and almost all government departments, Crown entities and state-owned enterprises.

The underlying principle behind the Act is that official information shall be made available unless there is "good reason" to withhold it. The Act specifies what amounts to "good reason" for withholding information.

Conclusive reasons for withholding information include the likelihood that release will "prejudice the security or defence of New Zealand or the international relations of the Government of New Zealand" or would "prejudice the maintenance of the law" or "endanger the safety of any person".

The Act also provides other reasons for withholding information. These reasons exist only if withholding the information is necessary to, for example:

- protect the privacy of natural persons;
- protect confidential information in certain circumstances;
- maintain effective government by protecting advice and opinions in certain circumstances; or
- avoid harm to government's negotiations or commercial activities.

The reasons for refusal in this section all require a weighing of the interests needing protection against any countervailing public interest considerations favouring disclosure.

In addition, there are several administrative reasons for refusing requests; most importantly that substantial collation or research would be required to meet the request.

A requester who is dissatisfied with an agency's response can seek a review by the Ombudsmen's office.

The Ombudsmen have power to investigate, and can insist on examining documents at issue to see if the agency is applying the Act correctly.

Before I move on to the main part of my presentation, I would like to acknowledge Nicola White's research on the operation of the Official Information Act.

Her two year project has resulted in the launch last evening of her book, which focuses on the administrative provisions of the Act, and suggests directions for change in order to improve the way the Act operates. I understand that Nicola will be talking about her research in more detail on Thursday. I don't want to steal her thunder, but I would like to draw out some of the points she makes.

Nicola's research presents an overall picture of a government system that has become substantially more open and participatory in its general approach, but her research also illustrates that problems remain in terms of delays in responding to requests and with requests that are large and poorly specified.

Nicola observes that it is still difficult to find the right balance for protecting government advice and decision making, especially within the current political context. She also sees electronic information as a major challenge, in terms of the dramatic changes to volumes and manageability of information.

I believe that Nicola has accurately identified the challenges for the Act going forward and I look forward to hearing more about what can be done to solve these challenges.

I would now like to talk about the effect changes to New Zealand's government arrangements have had on the operation of the Act.

New Zealand's electoral system has changed markedly over the last 10 years. The move from a First Past the Post to a Mixed Member Proportional (MMP) electoral system in 1996 lessens the likelihood that one party will win enough seats to be sworn in as a single party majority government. An election may well result in a minority single party government, a majority coalition government, or a minority coalition government.

Currently New Zealand has a minority coalition government with Ministers from other political parties outside Cabinet. We also have confidence and supply agreements with other political parties. MMP has led to more debate, more consensus, and more national dialogue about governmental policies before they are enacted.

This has increased the need for consultation with coalition partners and other support parties and has come to occupy a more significant part of the process of formulating policy and legislation and generating Cabinet papers.

The Official Information Act is now operating in an environment that was not anticipated by legislators when it was developed. More complex government arrangements have resulted in a more complex process for responding to official information requests, especially as there is an increasing tendency for requests to have a political dimension.

For example, a request might cover policy work produced by officials, at the request of a Minister, for non-Ministerial Members of Parliament. A recent example of parties working together is the joint announcement made by the then Minister of Justice and the Green Party Justice spokesperson of a proposal to significantly increase the role of the Ombudsmen in relation to prisons.

The change in New Zealand's government arrangements in no way lessens the need for an Official Information Act. It does, however, pose a challenge to its effectiveness and workability.

To influence the actions of the Executive and hold it to account, adequate and timely disclosure of information throughout the policy and decision making processes is necessary. On the other hand, as Leo Donnelly from the Office of the Ombudsmen puts it, information is also the "oil" that drives the "machinery of government".

This means the Act cannot only be seen in the context of facilitating access to information held by public bodies. It is also about identifying those situations where the wider public interest in "good government" requires protection of information so that the orderly and effective operation of government is not stymied.

The Danks Committee considered that protecting the interests of effective government and administration raised some of the most difficult challenges. It said:

"There is widespread interest in the activities of government. The fact that the release of certain information may give rise to criticism or embarrassment of the government is not an adequate reason for withholding it from the public. To run the country effectively the government of the day needs nevertheless to be able to take advice and to deliberate on it, in private, and without fear of premature disclosure.

"If the attempt to open processes of government inhibits the offering of blunt advice or effective consultation and arguments, the net result will be that the quality of decisions will suffer, as will the quality of the record.

The process of government could become less open, and perhaps more arbitrary."

The legislators of the day recognised, even in an open and transparent system of government, the need for provisions to withhold information.

As a result the Act sets out grounds for withholding information in order to protect government decision making processes.

However, unlike most other freedom of information legislation, the Official Information Act does not distinguish between classes of documents.

For example, it does not exempt ministerial advice from its regime. Instead the Act takes a principled approach to the release of information, regardless of its form.

The fact that advice is considered confidential will be relevant to the application of the withholding grounds that protect government decision-making processes, but invariably there will be a number of factors required to make out the withholding test. In addition, any countervailing public interest in release must also be considered and weighed against the reasons for withholding.

This means that information such as Cabinet papers can be requested and released under the Act. Many agencies, for example, the New Zealand Police, in relation to its review of the Police Act, have taken a proactive approach by placing Cabinet papers on publicly accessible websites. In fact, New Zealand leads the world in terms of access to Cabinet papers.

There has, however, been an emerging trend of agencies seeking exemptions from the Act for certain types of information.

The Ombudsmen's latest Annual Report highlights that agencies appear to be concerned that the Act does not sufficiently protect sensitive information.

This trend seems to fits with Nicola White's finding that people do not perceive the protection provided by the withholding ground, which protects government advice and decision-making processes, to be reliable or effective.

Nicola's research indicates that it was common for the people she interviewed to comment informally that a good public servant will not write anything down that could be released under the Act.

As the Ombudsmen have noted, removing specific agencies or classes of information from the ambit of the Act would go against the Act's fundamental purpose. A more measured response is required.

The Ombudsmen have suggested that concerns about the effectiveness of the withholding provisions might be addressed by amending them. That may well be true, but much may be able to be done to draw new balances using the current words of the Act.

Until recently, the practice has been to allow Cabinet papers to be withheld on the basis of confidentiality of advice tendered by Ministers and officials, but only until Cabinet decisions have been made.

This approach seems to be evolving. It appears that the timeframes for some requests are justifiably being extended if disclosure, at a particular stage, would not be in the public interest. One example might be where disclosure was likely to cause confusion and prejudice what should otherwise be an orderly process for policy development and decision-making.

This approach will help where, as is frequently the case, policy decisions have been made but there is still a long road involving multi-party consultations before a Bill reflecting those decisions can be introduced into Parliament.

In an MMP environment, policy decisions are often only the starting point for developing a Bill.

The final shape of the Bill can be influenced by the political parties who offer their support. In a 121 member Parliament, Bills need the magic 61 votes to proceed and often compromises are made.

Another example of this evolution is the recent request the Ombudsmen received for copies of all CAB 100 forms received or prepared since the 2005 general election. CAB 100s are the forms attached to Cabinet papers that disclose consultation with departments, ministers, government caucus and political parties.

In this instance, the Ombudsmen accepted that the information could be withheld on the basis that it maintains the confidentiality of advice tendered by Ministers of the Crown and officials.

The Ombudsmen considered that Ministers would be inhibited in recording their political consultation intentions on the CAB 100 form if those forms became systematically and widely disclosed.

The Ombudsmen acknowledged the convention of confidentiality surrounding the government's political consultation process.

The need for such confidentially is heightened in the MPP environment where the Government of the day is reliant on negotiating sufficient political support in order to further its initiatives.

These examples demonstrate that concerns about the disclosure of information in an MMP context often relate to timing and the need to honour undertakings of confidentiality made during the process of inter-party negotiations during the deliberative phases of the policy process.

I think there is room for improvement in this area. However, the challenge will be to

retain the benefits of the current system, such as improving the quality of policy advice

and increasing participation in government decision making.

At the same time we do not want to create detrimental outcomes, such as putting officials

in the position where they feel that it is better to leave things unsaid or not fully reflect

matters relevant to particular decisions.

We also need to ensure we never resort to the ridiculous in the pursuit of providing

'official' information. A person requesting my 'thoughts' may find those thoughts do not

relate to any topic they were seeking information about.

In summary, I think it is fair to say that the Official Information Act has stood the test of

time. The Act is now 25 years old and has remained fundamentally unchanged.

Despite the increased complexity of the issues relating to release and withholding of

advice about government policy and decision-making processes I see no urgent need to

amend the Act in any significant way.

I do believe, however, that referring the Act to the Law Commission for their

consideration next year would be a sensible approach.

The effective operation of the Act in today's political landscape inevitably turns on how

the competing public interest considerations favouring either disclosure or withholding

are balanced.

I acknowledge that this issue poses a challenge to the Act's effectiveness and

workability, but I think that an appropriate balance can be arrived at.

Once again thank you for the opportunity to address this Conference. I hope you find the

next three days both informative and enjoyable. Thank you.

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 ${\bf Paper\ delivered\ at\ the}$ ${\bf 5^{th}\ International\ Conference\ of\ Information\ Commissioners}$

Governance and Right To Information (How RTI-Related Awareness is Key to Improved Governance)

The Right to Information Act (RTI Act) of India, which came into force on 12th October, 2005, is acknowledged as a landmark legislation and a high watermark in the evolution of Indian democracy. This Act was the final outcome of a series of judgements of Supreme Court of India, actions by civil society institutions and a growing discomfort within the government about excessive control over information by public authorities.

It was felt that a tight-fisted approach to information was directly related to growing corruption and was contrary to accountable governance. Transparency was thought to be the sun-rays which would not only light up the dimly lit nooks and corners of the State establishments but also would sanitize a putrefying system.

This awareness had earlier led to the enactment of Freedom of Information Act, 2002, which could not be implemented for over 3 years as the infrastructure required to be set up to give effect to the provisions of the bill could not be established. Thereafter, in the year 2005, the present RTI Act was introduced in Parliament and passed.

The RTI Act, in many ways, is a unique piece of legislation. This is possibly the only Act that gives to the common people the right to interrogate the government and its several instrumentalities, directly. Forcing public authorities to accept disclosure of

information obligation is also an accountability-enforcing-mechanism. Parliamentary democracies define accountability rather narrowly in an institutional sense. The Minister is responsible to the Legislature and a certain measure of confidentiality in the functioning of Government was thought to be an aid to making the Ministerial responsibility to the Legislature effective. Civil service anonymity was a necessary concomitant to Ministerial responsibility. Advice which the Minister received from his officers had to be kept outside the pale of scrutiny — except in clearly defined circumstances such as an official or a judicial enquiry. Most Secretariat office procedures, therefore, made file-notings by officials in Government departments, confidential — something not liable to be disclosed.

All this is now changing. The Indian RTI Act does not mandate that file-notings should be allowed to remain undisclosed, except under clearly defined circumstances.

This has potentiality to cause radical and far reaching changes in the accountability-matrix of parliamentary governance, which, like most other RTI-led changes, have been insufficiently appreciated as yet.

It is important, therefore, that the awareness campaign about RTI is started where it is needed the most — in the government.

The discourse about RTI is generally fixated on its importance for the citizen / individual and his rights. Improvement in governance is not just a spin-off from implementation of the RTI legislation, it is one of its principal goals. The Indian RTI Act recognizes this in its preamble, which, among others, states "to promote transparency and accountability in the working of every public authority". It further expatriates on the proposition in its Section 4(1) and Section 4(2), which enjoins public authorities to voluntarily disclose large swathes of information held, computerize and digitize information such that citizen is not required to resort to the provisions of RTI Act to access information.

There is only dim awareness about pro-active action by Government and public authorities, and about making the entire system RTI-compliant. Governments, both at the Centre and the States, have longstanding and, even elaborate programmes of administrative reforms and process-computerization, which though heavily focussed on

improvement of delivery of goods and services by public authorities, frequently overlook the disclosure / transparency aspects of the resultant changes.

Public authorities tend to treat the citizen as a consumer of the goods and services provided to him by the State. The RTI Act entitles the citizen to access information about the functioning of the State machinery engaged in delivery of these goods and services. The citizen can and must be apprised about how efficiently and effectively the machinery worked in performing its delivery functions. Several States in India have now, through the use of Information Technology, enabled the citizen to get information regarding a vast array of concerns such as birth and death certificates, tax payments, information regarding land records and changes in land holdings and so on. The public authorities consider this as a measure of their success that such mundane, but important information from the point of view of the citizen — obtaining which was earlier a laborious process — was now available to the citizen through the click of a button. While these achievements are doubtless creditable, these public authorities will also need to appreciate that the citizen is not content only with receiving information; he likes to know the processes that go into making this information available to him.

There seems to be inadequate sensitivity among the public authorities about the rights of the citizen to know not only the end result of the decision-making process but also about the accounts that go into making decisions.

Employees of public authorities have long got used to considering confidentiality as an integral part of governance. Rules / procedures of several State Governments provided that confidentiality of all government information was the norm and its disclosure the exception. A barrier was thus created between the rulers and the citizens, which over time, led to erosion of trust between the public authorities and the citizens.

Now that the Right to Information Act has made transparency an essential part of the system of governance, there is every likelihood that the regime of confidentiality shall slowly wither away, thereby increasing the level of confidence which citizens will place in their rulers. The Central Information Commission (CIC) of India has noticed that in the last two years that the RTI Act has been in operation there has been a progressive and discernible change in the approaches and the attitudes of the employees of the public authorities to the confidentiality of information.

Initially there was resistance to disclosing every single information that the citizen might ask for. Over time that resistance has evidently weakened and has given way to a studied indifference to the disclosure requirement. It is important that awareness is created among Government employees that transparency, not confidentiality, helps improve governance. The Commission had also noticed that employees of public authorities became willing adherents of a regime based on tight control over all information not because such adherence was good for the system, but because it insulated the public servants from public scrutiny of their actions. Information in the hands of private citizens assumes the characteristics of a powerful tool with which to make government accountable for its actions. It is this accountability which the public servants feared. An awareness is now dawning that there is greater safety to be had by voluntarily disclosing information than by withholding it. Employees of public authorities can use the threat of the information being disclosed as a shield to ward off pressures from seniors and from political leaders to do things civil servants would not ordinarily wish to do. The presence of the RTI Act, therefore, acts as an instrument to sober the political class and to encourage honest civil servants to discharge their functions with a sense of freedom and responsibility.

The public authorities are to be made aware that the RTI Act and the regime of transparency that it promotes is not a necessary evil but the very condition for transforming governance from a closed system to an open, transparent and accountable system.

The openly stated purpose in all matters related to governance is to perform a task efficiently, economically, responsibly and accountably. More often than not these objectives are overlooked — with unhappy consequences for governance — by public servants who are often insufficiently cognizant about the value of these objectives for democratic governance. With the RTI Act creating the right atmosphere for increasing transparency in all matters government, the civil servant now has an unprecedented opportunity to come into his own and to do his bit for democratic public administration. The Act has undoubtedly opened a new vista, but its success will critically depend upon the public authorities imbibing its spirit and vigorously carrying out the structural and technological changes essential for creating a heightened sense of awareness among its employees that confidentiality in governance is no more the norm, but only an exception.

Corruption and profligacy with public money has been the bane of public administration in many countries including India. Leaders, both in politics and civil services, have been attempting to address this question ever since India became free in 1947. Institutions dedicated to constant vigilance on the affairs of the public authorities, such as Vigilance Commissions, have been created at the Centre and in all States. Ombudsman is also in place in several States of India. The higher judiciary of India also oversees the functioning of the public authorities as well as the institutions dedicated to combat corruption. But it cannot be said that corruption has been eradicated. Some believe that with growing prosperity and ever increasing public expenditure, corruption has only increased.

The RTI Act is the latest instrument to combat corruption in public office. The Preamble makes a pointed mention of this objective of the RTI Act. It is only through transparency and more transparency that corruption can be combated. The changes which RTI compels the public authorities to accept create conditions for transparency and accountable functioning of the public authority and thereby limits, if not eliminates, the scope for corruption. An awareness will need to be engendered within public authorities that while the corrupt must be identified and punished, it is also necessary to fight corruption at a systemic level. The RTI is perhaps the most powerful tool to wage this battle. Nothing deters the corrupt more than the awareness that the citizen is maintaining a watch over him. The RTI Act is the citizen's watchdog.

In India, the coming into force of the RTI Act led to an unprecedentedly large number of requests for information from citizens pouring into all levels of public authorities at the Centre as well as the States. The **Appendix** to this paper contains the figures about the size of the RTI regime in the country and the response of the citizens. This was a signal from the people of India that they endorsed and approved those changes. It was for the political clan to read the sign of the times.

Some of the salient features of the Indian Right to Information Act, 2005 contained distinct pointers towards the intended changes in governance. Some of those are featured below:-

The Preamble

"An Act to provide for setting out the practical regime of right to information for citizens to secure access to information under the control of public authorities, in order to promote transparency and accountability in the working of every public authority, the constitution of a Central Information Commission and State Information Commissions and for matters connected therewith or incidental thereto.

Whereas the Constitution of India has established democratic Republic;

And whereas democracy requires an informed citizenry and transparency of information which are vital to its functioning and also to contain corruption and to hold Governments and their instrumentalities accountable to the governed;

And whereas revelation of information in actual practice is likely to <u>conflict</u> with other <u>public interests</u> including efficient operations of the Governments, optimum use of limited fiscal resources and the preservation of confidentiality of sensitive information;

And whereas it is necessary to <u>harmonise</u> these conflicting interests while preserving the paramountcy of the democratic ideal;

Now, therefore, it is expedient to provide for furnishing certain information to citizens who desire to have it."

Note: The Preamble to the RTI Act sets out not a theoretical but a practical regime for disclosure of information to promote the imperatives of an informed citizenry, transparency of information, containment of corruption and ensuring accountability of the instrumentalities of the government. It frankly recognizes, that in actual practice, the inherent conflict between public interest in disclosure of information and, the need for preservation of confidentiality in certain cases, may surface. It emphasizes the necessity of harmonizing these conflicting interests.

An awareness among the employees of public authorities about the value and the benefits of a transparent regime creates the conditions for harmonizing these various interests which are not necessarily compatible.

The Definitions of "information", "record" and "right to information":

"2(f) "information" means any <u>material</u> in any form, including records, documents, memos, e-mails, opinions, advices, press releases, circulars, orders, logbooks, contracts, reports, papers, samples, models, data material held in any electronic form and information relating to any private body which can be accessed by a public authority under any other law for the time being in force;"

"2(i) "record" includes—

- (a) any document, manuscript and file;
- (b) any microfilm, microfiche and facsimile copy of a document;
- (c) any reproduction of image or images embodied in such microfilm (whether emlarged or not); and
- (d) any other material produced by a computer or any other device;"
- "2(j)"right to information" means the right to information accessible under this Act which is held by or under the control of any public authority and includes the right to
 - (i) inspection of work, documents, records;
 - (ii) taking notes, extracts or certified copies of documents or records;
 - (iii) taking certified samples of material;
 - (iv) obtaining information in the form of diskettes, floppies, tapes, video cassettes or in any other electronic mode or through printouts where such information is stored in a computer or in any other device;"

Note: The CIC, in its decisions, has held that the right to seek information from public authorities by citizens extends only to information held in material form and thus, by implication, does not extend to questioning the public authorities about the nature of that information and the process of decision-making. In other words, the public authorities are not obliged to manufacture information for the information-seekers but are obliged to provide only that information which is held by them, or which is under their control. However, the citizen has the right to inspect the records and documents to glean for himself whatever information he wishes to have.

Obligations of Public Authorities:

Section 4 states as follows:-

"4	(1)		Every	public authority shall—
		(a)	manne inforn are ap time c	ain all its records duly catalogued and indexed in a er and the form which facilitates the right to nation under this Act and ensure that all records that oppropriate to be computerised are, within a reasonable and subject to availability of resources, computerised onnected through a network all over the country on
			facilit	,
		<i>(b)</i>	Ī	th within one hundred and twenty days from the ment of this Act,—
			<i>(i)</i>	the particulars of its organisation, functions and duties;
			(ii)	the powers and duties of its officers and employees;
				the procedure followed in the decision making process, including channels of supervision and accountability;
			(iv)	the norms set by it for the discharge of its functions;

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	(v)	the rules, regulations, instructions, manuals and records, held by it or under its control or used by its
		employees for discharging its functions;
	(vi)	a statement of the categories of documents that are
		held by it or under its control;
	(vii)	the particulars of any arrangement that exists for
		consultation with, or representation by, the members
		of the public in relation to the formulation of its policy or implementation thereof;
	(viii)	a statement of the boards, councils, committees and
		other bodies consisting of two or more persons
		constituted as its part or for the purpose of its advice,
		and as to whether meetings of those boards, councils,
		committees and other bodies are open to the public,
		or the minutes of such meetings are accessible for
		public;
	(ix)	a directory of its officers and employees;
	(x)	the monthly remuneration received by each of its
		officers and employees, including the system of
		compensation as provided in its regulations;
	(xi)	the budget allocated to each of its agency, indicating
		the particulars of all plans, proposed expenditures
		and reports on disbursements made;
	(xii)	the manner of execution of subsidy programmes,
		including the amounts allocated and the details of
		beneficiaries of such programmes;
	(xiii)	particulars of recipients of concessions, permits or
		authorisations granted by it;
	(xiv)	details in respect of the information, available to or
		held by it, reduced in an electronic form;
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		(xv)	the particulars of facilities available to citizens for
			obtaining information, including the working hours of
			a library or reading room, if maintained for public
			use;
		(xvi)	the names, designations and other particulars of the
			Public Information Officers;
		(xvii)	such other information as may be prescribed and
			thereafter update these publications every year;
	(c)	publi	sh all relevant facts while formulating important
		polici	es or announcing the decisions which affect public;
	(d)	provid	de reasons for its administrative or quasi-judicial
		decisi	ions to affected persons.
(2)		It sha	ll be a constant endeavour of every public authority to
		take s	teps in accordance with the requirements of clause (b)
		of sul	b-section (1) to provide as much information suo motu
		to the	public at regular intervals through various means of
		comm	nunications, including internet, so that the public have
		minin	num resort to the use of this Act to obtain information.
(3)		For ti	he purposes of sub-section (1), every information shall
		be dis	sseminated widely and in such form and manner which
		is eas	ily accessible to the public.
(4)		All m	aterials shall be disseminated taking into consideration
		the <u>co</u>	ost effectiveness, local language and the most effective
		metho	od of communication in that local area and the
		inforn	nation should be easily accessible, to the extent
			ble in electronic format with the Central Public
			nation Officer or State Public Information Officer, as
		-	use may be, available free or at such cost of the medium
			· · · · · · · · · · · · · · · · · · ·
		or the	print cost price as may be prescribed."

Note: This Section is the heart of the RTI Act. It sets out in clear terms that public authorities are required to take all actions necessary for improving governance. These may sound mundane but are crucial for giving to the public authorities an RTI-friendly profile.

Section 5 states as follows:-

(2)

Every public authority shall, within one hundred days of the enactment of this Act, designate as many officers as the Central Public Information Officers or State Public Information Officers, as the case may be, in all administrative units or offices under it as may be necessary to provide information to persons requesting for the information under this Act.

Without prejudice to the provisions of sub-section (1), every public authority shall designate an officer, within one hundred days of the enactment of this Act, at each sub-divisional level or other sub-district level as a Central Assistant Public Information Officer or a State Assistant Public Information Officer, as the case may be, to receive the applications for information or appeals under this Act for forwarding the same forthwith to the Central Public Information Officer or the State Public Information Officer or senior officer specified under sub-section (1) of section 19 or the Central Information Commission or the State Information Commission, as the case may be:

Provided that where an application for information or appeal is given to a Central Assistant Public Information Officer or a State Assistant Public Information Officer, as the case may be, a period of <u>five days</u> shall be added in computing the period for response specified under sub-section (1) of section 7.

(3)	Every Central Public Information Officer or State Public
	Information Officer, as the case may be, shall deal with
	requests from persons seeking information and <u>render</u>
	<u>reasonable assistance</u> to the persons seeking such
	information.
(4)	The Central Public Information Officer or State Public
	Information Officer, as the case may be, may seek the
	assistance of any other officer as he or she considers it
	necessary for the proper discharge of his or her duties.
(5)	Any officer, whose assistance has been sought under sub-
	section (4), shall render all assistance to the Central Public
	Information Officer or State Public Information Officer, as the
	case may be, seeking his or her assistance and for the
	purposes of any contravention of the provisions of this Act,
	such other officer shall be treated as a Central Public
	Information Officer or State Public Information Officer, as the
	case may be;"

Note: The Public Information Officer (PIO) is the kingpin of the RTI-regime. This Section states the position about the appointment of the PIO and, his role.

Section 6 states as follows:-

"6	(1)	A person, who desires to obtain any information under this Act, shall make a request in writing or through electronic means in English or Hindi or in the official language of the area in which the application is being made, accompanying
		such fee as may be prescribed, to—
		the Central Public Information Officer or State Public Information Officer, as the case may be, of the concerned public authority;

	<i>(b)</i>	the Central Assistant Public Information Officer or State
		Assistant Public Information Officer, as the case may be,
		specifying the particulars of the information sought by him
		or her:
		Provided that where such request cannot be made in writing,
		the Central Public Information Officer or State Public
		Information Officer, as the case may be, shall render all
		reasonable assistance to the person making the request
		orally to reduce the same in writing.
(2)		An applicant making request for information shall not be
		required to give any reason for requesting the information
		or any other personal details except those that may be
		necessary for contacting him.
(3)		Where an application is made to a public authority
		requesting for an information,—
	(i)	which is held by another public authority; or
	(ii)	the subject matter of which is more closely connected with
		the functions of another public authority, the public
		authority, to which such application is made, shall transfer
		the application or such part of it as may be appropriate to
		that other public authority and inform the applicant
		immediately about such transfer:
		Provided that the transfer of an application pursuant to this
		sub-section shall be made as soon as practicable but in no
		case later than five days from the date of receipt of the
		application."

Time Limit for Response by the PIO:

Section 7 reads as follows:-

"7	(1)		Subject to the proving to sub-section (2) of section 5 on the
	(1)		Subject to the proviso to sub-section (2) of section 5 or the
			proviso to sub-section (3) of section 6, the Central Public
			Information Officer or State Public Information Officer, as
			the case may be, on receipt of a request under section 6
			shall, as expeditiously as possible, and in any case within
			thirty days of the receipt of the request, either provide the
			information on payment of such fee as may be prescribed or
			reject the request for any of the reasons specified in sections
			8 and 9:
			Provided that where the information sought for concerns
			the life or liberty of a person, the same shall be provided
			within forty-eight hours of the receipt of the request.
	(2)		If the Central Public Information Officer or State Public
			Information Officer, as the case may be, fails to give
			decision on the request for information within the period
			specified under sub-section (1), the Central Public
			Information Officer or State Public Information Officer, as
			the case may be, shall be <u>deemed to have refused</u> the
			request."
"7	(8)		Where a request has been rejected under sub-section (1),
			the Central Public Information Officer or State Public
			Information Officer, as the case may be, shall communicate
			to the person making the request,—
			1 0 1
		(i)	the reasons for such rejection;
		(ii)	the period within which an appeal against such rejection
			may be preferred; and
		(iii)	the particulars of the appellate authority.
	<u> </u>		

(9)	An information shall ordinarily be provided in the form in
	which it is sought unless it would disproportionately divert
	the resources of the public authority or would be
	detrimental to the safety or preservation of the record in
	question."
	question.

Note: This Section entitles the applicant for information to receive a reply from the CPIO "as expeditiously as possible and in any case within 30 days of the receipt of the request". Should the CPIO fail to provide the information within the stipulated period, it shall be treated as "deemed refusal".

Penalties:

20(1)

Section 20 provides for penalty for delayed response to the RTI-application, for fraudulently withholding information, or giving false and incorrect information. The Section reads as follows:-

Where the Central Information Commission or the State Information Commission, as the case may be, at the time of deciding any complaint or appeal is of the opinion that the Central Public Information Officer or the State Public Information Officer, as the case may be, has, without any reasonable cause, refused to receive an application for information or has not furnished information within the time specified under sub-section (1) of section 7 or malafidely denied the request for information or knowingly given incorrect, incomplete or misleading information or destroyed information which was the subject of the request or obstructed in any manner in furnishing the information, it shall impose a penalty of two hundred and fifty rupees each day till application is received or information is furnished, so however, the total amount of such penalty shall not exceed twenty-five thousand rupees:

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Exemptions from Disclosure Obligation:

Section 8 lays down the grounds which exempt an information from the requirement of disclosure. These are listed below:-

"8	(1)	Notwithstanding anything contained in this Act, there shall
		be no obligation to give any citizen,—

(a)	information, disclosure of which would prejudicially affect
	the sovereignty and integrity of India, the security,
	strategic, scientific or economic interests of the State,
	relation with foreign State or lead to incitement of an
	offence;
(b)	information which has been expressly forbidden to be
	published by any court of law or tribunal or the disclosure
	of which may constitute contempt of court;
(c)	information, the disclosure of which would cause a breach
	of privilege of Parliament or the State Legislature;
(d)	information including commercial confidence, trade secrets
	or intellectual property, the disclosure of which would harm
	the competitive position of a third party, unless the
	competent authority is satisfied that larger public interest
	warrants the disclosure of such information;
	(e) information available to a person in his fiduciary
	relationship, unless the competent authority is satisfied that
	the larger public interest warrants the disclosure of such
	information;
(f)	information received in confidence from foreign
	Government;
(g)	information, the disclosure of which would endanger the
	life or physical safety of any person or identify the source of
	information or assistance given in confidence for law
	enforcement or security purposes;
(h)	information which would impede the process of
	investigation or apprehension or prosecution of offenders;
(i)	cabinet papers including records of deliberations of the
	Council of Ministers, Secretaries and other officers:

			Provided that the decisions of Council of Ministers, the
			reasons thereof, and the material on the basis of which the
			decisions were taken shall be made public after the decision
			has been taken, and the matter is complete, or over:
			Provided further that those matters which come under the
			exemptions specified in this section shall not be disclosed;
		<i>(j)</i>	information which relates to personal information the
			disclosure of which has no relationship to any public
			activity or interest, or which would cause unwarranted
			invasion of the privacy of the individual unless the Central
			Public Information Officer or the State Public Information
			Officer or the appellate authority, as the case may be, is
			satisfied that the larger public interest justifies the
			disclosure of such information:
			Provided that the information which cannot be denied to the
			Parliament or a State Legislature shall not be denied to any
			person.
((2)		Notwithstanding anything in the Official Secrets Act, 1923
			nor any of the exemptions permissible in accordance with
			sub-section (1), a public authority may allow access to
			information, if public interest in disclosure outweighs the
			harm to the protected interests.
	(3)		Subject to the provisions of clauses (a), (c) and (i) of sub-
			section (1), any information relating to any occurrence,
			event or matter which has taken place, occurred or
			happened twenty years before the date on which any
			request is made under section 6 shall be provided to any
			person making a request under that section:
			Provided that where any question arises as to the date from
			which the said period of twenty years has to be computed,
			the decision of the Central Government shall be final,
			subject to the usual appeals provided for in this Act."

Note: Two aspects of this Section merit comment. First, it provides for disclosure of all documents related with decisions of Council of Ministers once a decision has been made. This implies that a citizen shall have the right to scrutinize all documents and records relevant to a decision made by the Council of Ministers. This entitlement to the citizen is no doubt special, because all matters connected with cabinet papers were hitherto classified as 'Top Secret' or 'Secret' under the Official Secrets Act of the Government of India.

Second, this Act, quite uniquely, uses "public interest" as the reason to supercede an exemption and to disclose information. Ordinarily, the term "public interest" is the euphemism used by public authorities to deny information not only to the general public, but also to the Legislature.

First Appeal and Second Appeal:

An applicant is entitled to file a <u>first appeal</u> before a designated officer within the public authority, against an order of the PIO, and receive a decision within 30 days. He can file a <u>second appeal</u> before CIC within 30 days of receiving the decision from the First Appellate Authority (AA).

Monitoring and Reporting:

Section 25(5) states as follows:-

"25 (1)	The Central Information Commission or State Information Commission, as the case may be, shall, as soon as practicable after the end of each year, prepare a report on the implementation of the provisions of this Act during that year and forward a copy thereof to the appropriate Government.
(2)	Each Ministry or Department shall, in relation to the public authorities within their jurisdiction, collect and provide such information to the Central Information Commission or State Information Commission, as the case may be, as is required to prepare the report under this

			section and comply with the requirements concerning the
			furnishing of that information and keeping of records for
			the purposes of this section.
	(3)		Each report shall state in respect of the year to which the
			report relates,—
		(a)	the <u>number of requests</u> made to each public authority;
		(b)	the <u>number of decisions</u> where applicants were not entitled
			to access to the documents pursuant to the requests, the
			provisions of this Act under which these decisions were
			made and the number of times such provisions were
			invoked;
		(c)	the number of <u>appeals</u> referred to the Central Information
			Commission or State Information Commission, as the case
			may be, for review, the nature of the appeals and the
			outcome of the appeals;
		(d)	particulars of any disciplinary action taken against any
			officer in respect of the administration of this Act;
		(e)	the amount of charges collected by each public authority
			under this Act;
		<i>(f)</i>	any facts which indicate an effort by the public authorities
			to administer and implement the spirit and intention of this
			Act;
		(g)	recommendations for reform, including recommendations
			in respect of the particular public authorities, for the
			development, improvement, modernisation, reform or
			amendment to this Act or other legislation or common law
			or any other matter relevant for operationalising the right
			to access information.
	(4)		The Central Government or the State Government, as the
			case may be, may, as soon as practicable after the end of
			each year, cause a copy of the report of the Central
			Information Commission or the State Information
Щ			

	(1) to be laid befo case may be, befo where there are tw	e case may be, referred to in sub-section re each House of Parliament or, as the re each House of the State Legislature, to Houses, and where there is one House ature before that House.
(5)	State Information of practice of a publicits functions under provisions or spiritarecommendation	the Central Information Commission or Commission, as the case may be, that the case cauthority in relation to the exercise of this Act does not conform with the conform with the conform this Act, it may give to the authority expecifying the steps which ought in its a for promoting such conformity."

Note: The CIC has been authorized by the RTI Act to recommend to the government and to other public authorities to initiate steps to promote conformity of their rules, procedures and system of governance with the RTI Act. The Act thereby acknowledges the importance of systemic changes within the government framework to make the system progressively RTI-compliant. The CIC receives vast and diverse information regarding response of public authorities to different types of RTI-related queries. This enables the CIC to understand the strengths and the weaknesses of the various public authorities and to think out and suggest remedial solutions.

Preparing Awareness Programmes:

Section 26(1) reads as follows:-

"26	(1)		The appropriate Government may, to the extent of
			availability of financial and other resources,—
		(a)	develop and organise educational programmes to advance
			the understanding of the public, in particular of
			disadvantaged communities as to how to exercise the rights
			contemplated under this Act;

	,	
	<i>(b)</i>	encourage public authorities to participate in the
		development and organisation of programmes referred to
		in clause (a) and to undertake such programmes
		themselves;
	(c)	promote timely and effective dissemination of accurate
		information by public authorities about their activities; and
	(d)	train Central Public Information Officers or State Public
		Information Officers, as the case may be, of public
		authorities and produce relevant training materials for use
		by the public authorities themselves.
(2)		The appropriate Government shall, within eighteen months
		from the commencement of this Act, compile in its official
		language <u>a guide</u> containing such information, in an easily
		comprehensible form and manner, as may reasonably be
		required by a person who wishes to exercise any right
		specified in this Act.
(3)		The appropriate Government shall, if necessary, update
		and publish the guidelines referred to in sub-section (2) at
		regular intervals which shall, in particular and without
		prejudice to the generality of sub-section (2), include—
	(a)	the objects of this Act;
	<i>(b)</i>	the postal and street address, the phone and fax number
		and, if available, electronic mail address of the Central
		Public Information Officer or State Public Information
		Officer, as the case may be, of every public authority
		appointed under sub-section (1) of section 5;
	(c)	the manner and the form in which request for access to an
		information shall be made to a Central Public Information
		Officer or State Public Information Officer, as the case may
		be;

	(<i>d</i>)	the assistance available from and the duties of the Central
		Public Information Officer or State Public Information
		Officer, as the case may be, of a public authority under this
		Act;
	(e)	the assistance available from the Central Information
		Commission or State Information Commission, as the case
		may be;
	<i>(f)</i>	all remedies in law available regarding an act or failure to
		act in respect of a right or duty conferred or imposed by
		this Act including the manner of filing an appeal to the
		Commission;
	(g)	the provisions providing for the voluntary disclosure of
		categories of records in accordance with section 4;
	(h)	the notices regarding fees to be paid in relation to requests
		for access to an information; and
	<i>(i)</i>	any additional regulations or circulars made or issued in
		relation to obtaining access to an information in
		accordance with this Act.
(4)		The appropriate Government must, if necessary, update
		and publish the guidelines at regular intervals.
]	

Note: The RTI Act places the responsibility of creating awareness about the Act and, training those engaged in discharging duties under the RTI regime, with the Central and the State Governments. It insists that Central / State Governments regularly publicize certain essential information about the functioning of the public authorities for the general information of the public.

It can thus be seen that the RTI Act of India places great emphasis on systemic improvement within the government and links it to the larger aspiration, that as governance becomes transparent, the need for the citizen to take recourse to RTI Act shall be progressively reduced. Section 4 makes an explicit mention of this objective.

As soon as the RTI Act came into effect in October 2005, the Government of India, through its training establishments as well as of the State Governments, set out an elaborate programme of training the Central / State PIOs and the Assistant PIOs. This was the first-level training programme of a critical element of the RTI-regime, viz. the PIO and the APIO. By now, all PIOs and APIOs have undergone some training or the other.

A number of training institutes within the country have brought out manuals spelling out the responsibilities of PIOs, AAs and other functionaries in connection with the RTI Act.

With increasing pressure on public authorities by civil society organizations and private citizens for incremental disclosure of ever widening categories of information, there is a gradual, yet distinct, change in the attitude of these public authorities. Several of them have organized seminars and workshops to train their personnel and to sensitize them about the nuances of the Act. Simultaneously, efforts are being made to organize the functioning of such public authorities such that repeatedly requisitioned information is routinely disseminated through electronic means as well as manually.

A few cases have come to the notice of the CIC where public authorities have introduced changes in their own Acts and the Rules / procedures in order to make information available on payment of a certain cost which is different from the fee structure laid down by the RTI Act. The CIC has approved such practices as it is commensurate with the objectives of the RTI Act.

It is no truism that there are distinct and measurable efficiency gains to be had for the government if the RTI Act is effectively implemented. The CIC and the Government of India are currently engaged in discussions about how to create an institutional mechanism which will not only monitor RTI-related changes within public authorities, but also to assist the public authorities effect these changes as well as to encourage them to do so. More importantly, CIC has proposed to the Government of India to set up an "Institute for Transparency and Accountability Studies" (ITAS) within the aegis of the CIC, as a dedicated institution to study the functioning of the various public authorities and to actively assist them in making their systems transparent and accountable — in other words, RTI-compatible. The ITAS will function like a think-tank and build up a database for the use of all stake-holders.

The true index of the success of the RTI Act will no doubt be how the common citizen is able to use the provisions of the Act to receive quality information from the government, but equally important will be the measure in which the governments restructure their systems in order to make information routinely available to the citizen. Crucial to both will be an attitudinal change among employees of public authorities about their roles in the system and their approach to transparency in that system. To take liberty with a famous saying of *Aldous Huxley:* confidentiality resides in the minds of public employees and it is in the minds that the battle for transparency will be won. Critical to this battle will be increased awareness as well as cooperation among all stake-holders — the government and its various public authorities; the Information Commission; civil society institutions and the common citizen. I hope we are all headed in that direction.

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Appendix

RTI-Regime in India: 2006-2007

Number of Public authorities, CPIOs and Appellate Authorities

Public authorities	1237
Central Public Information Officers appointed by	4272
public authorities	
Appellate Authorities appointed by public	1558
authorities	

Receipt and Disposal of RTI-requests

Entities	Received	Disposal and its percentage			
		Accepted		Rejected	
		Nos.	Percenta	Nos.	Percentag
			ge		e
Public authorities	82252	71281	86.7	10971	13.3
C.I.C.	6849	3507	86.1	566	13.8

Penalties imposed by CIC under Section 20(1)

Number of CPIOs	89
Total Penalty Amount	Rs.1.13 million

Compensation awarded by CIC under Section 19(8)(b)

Total number of cases in which compensation has been	15
awarded to appellants by CIC under Section 19(8)(b)	



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Paper delivered at the 5th International Conference of Information Commissioners

A Proposal for Setting up the Institute for Transparency and Accountability Studies (ITAS)

I. INTRODUCTION

The Indian Constitution has established democratic foundations for the State and admirably sustained its functioning. More than half a century old history of democracy in India holds testimony to the intrinsic relationship between the state and the citizens as embedded in the Constitution. The Vision document of the Planning Commission states that India's economic and teleological transition is accompanied by a multifaceted political transformation which may well be slower, less clearly defined and less visible, but will nonetheless have profound impact on the functioning of the government 20 years from now. Going forward, Vision 2020 document defines good governance as 'farsighted and dynamic leadership to maximise national prosperity, individual freedom and social equity through responsive, transparent and accountable administration that removes all the bottlenecks to economic development (Annex - A). The democratic governance does not come without bottlenecks/dangers. In the context of dangers to democracy Mahatma Gandhi, said that "there is no human institution but has its dangers. The greater the institution the greater the chances of abuse. Democracy is a great institution and, therefore, it is liable to be greatly abused. The remedy, therefore, is not avoidance of democracy, but reduction of possibility of abuse to a minimum." ¹

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¹ Mind of Mahatma, Quoted at http://www.mkgandhi.org/momgandhi/chap72.htm sourced from Young India 7-5-Level 14, SolNet House, 70 The Terrace, P.O. Box 10152, Wellington 6143, New Zealand

Perhaps, seen in the context of what Mahatma has said the Right to Information Act has created a legal framework seeking to plug the possibility of abuse of democracy at operational level. Accountability and transparency go to the core of representation, they shed light on power structures in democracy they can illuminate bias and self-interest, and most importantly, lack of them can destroy legitimacy.² Furthermore, in the next 25 - 50 years time horizon, the Indian republic would be endowed with more enlightened and better informed citizens due to the increasing literacy levels and the impact of available and emerging communications technology that is penetrating far and wide. As a result, their expectations to share, participate and influence the matters of State would undergo transformation. So would be the speed and spread of their engagement in matters of State as a better educated and better informed electorate will be increasingly demanding of its rights and increasingly critical of non-performing governments and their individual members.³ Thus, at the end, transparency and accountable practices adopted by the bureaucracy alone would ensure that the communications between the State and the citizens are acceptable and convincing to the community. As such, the related operational systems/human resources need to be endowed with the capacity to respond swiftly to match the citizens' rising expectations and their increasing concerns.

2. This paper brings out the justification for creating ITAS and investing in its operations for capacity building in the context of delivering the core objectives of the Right to Information Act VIZ., accountability and transparency for democratic governance.

1931,p.99

² Based on: Rana Lehr-Lehnardt, NGO Legitimacy: Reassessing Democracy, Accountability and Transparency, Columbia Law School, Cornell Law School LL.M. Papers Series http://lsr.nellco.org/cgi/viewcontent.cgi/article="http://lsr.nellco.org/cgi/viewcontent.cgi/">http://lsr.nellco.org/cgi/viewcontent.cgi/

³ Planning Commission, Vision 2020: Development tends to reduce the extent of the disparities in some ways while aggravating them in others. Economic disparities aggravate perceptions of difference between sub-national, linguistic and communal groups, fostering ethnicity and communalism. A positive strategy for national security will depend on the secular and democratic values of the Indian nation deriving its strength from our culture, civilization and freedom. http://planningcommission.nic.in/reports/genrep/pl vsn2020.pdf

II. THE CONTEXT AND THE CHALLENGES

- 3. Democratic competition is inherently effective as a mechanism for revealing information. Therefore, the more developed the democracy, the more highly developed the institutions that guarantee transparency of policy and policy-making processes. The information thus revealed about preferences, the state of the world, and elite action, and prior policy impacts -- is useful both to elites and to ordinary voters. It enables citizens to monitor more effectively the behaviour of elected officials. It has the effect of reducing the probability of government officials adopting policies that are purely rent seeking or self-serving relative to the probability that such policies would be adopted in an undemocratic setting. It makes, over time, democracy a system of moderation and constraint, with equilibrium properties.⁴
- 4. In the context of economic growth and quality of governance⁵, research studies particularly those relating to economic policy performance indicate that the adjustment to (economic) shocks will tend to be worse in countries with deep latent social conflicts and with poor institutions of conflict management. Consequently, such countries will experience larger declines in growth rates following shocks. On the other hand,
 - democracies yield long-run growth rates that are more predictable;
 - democracies produce greater short -term stability;
 - democracies handle adverse shocks much better:
 - democracies deliver better distributional outcomes:
- 5. In a way to complement the above analogy of Dany Rodrick some other research studies⁶ from the World Bank have independently demonstrated that information flows, as proxied by two indices, transparency index and access to information index, are positively correlated with the quality of governance and hence accelerate growth.

Quote from: Quinn, Dennis P., and John T. Woolley, Democracy and National Economic Performance: The Search for Stability, School of Business, Georgetown University. June 1998. http://www.isr.umich.edu!cos/pewpa/archive/archive 98/19980012. odf#search='Democracv% 20and% 20N ational% 20Economic% 20Performance% 3A % 20The'

⁵ Dany Rodrick, Institutions For High-Quality Growth: What They Are And How To Acquire Them? http://www.nber.org/oaoers/W7540.odf, May 2004

⁶ Roumeen Islam, Do More Transparent Government Govern Better? World Bank Policy Research Paper 3077 June 2003

The ITAS is designed to work for strengthening the twin pillars (Transparency and Accountability) and thus indirectly contribute to growth. Therefore, investment in ITAS, in line with the Medium Term Appraisal recommendations on governance related issues, can qualify to the Plan expenditure.

- 6. The Right to Information Act, 2005 empowers citizens to request information about the decisions in the use of public resources as well as the related decision making processes while imposing matching obligations on the public authorities to respond to requests. The regime change induced by the RTI Act empowers the Central Information Commission vide Section 19(8)(a) to promote openness in the functioning of public authorities while strengthening their transparency practices by helping them to design efficient systemic innovations and quick transferring of information handling skills in conjunction with enhanced abilities for pro-active responses which can meet citizens' emerging needs for information on a continuous basis. Further, section 26 of the RTI Act imposes a challenging obligation on the public authorities to help citizens raise the quality of requests while investing on capacity building of their response systems and human resources. To meet these twin challenges, the proposed ITAS, in the Central Information Commission, would be engaged in collaborating with public authorities for evolving cost-effective and universally adaptable solutions within the mandate of the RTI Act. Given the core objective of the Act, the implementation challenges are complex, particularly in modulating citizen focused supply response by public authorities. Thus, maintaining equilibrium between demand for information from enlightened citizens and efficient supply by public authorities remains a constantly evolving challenge before public policy makers and hence needs constant innovations that can be induced and implemented by the ITAS.
- 7. For managing the mandate of RTI at operational level, the Act reiterates the core values of democratic governance and also unveils the contours of operational obligations for minimizing information asymmetry between the citizens and the State which have potential for enhancing their bond through increased credibility. However, "the mandate before public authorities emerging from the Act can only succeed with open attitude". The intrinsic assumption in RTI Act is that information about decisions of public authorities' and related decision making process should be a public knowledge with

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http://foi.missouri.edu/intematfoinews/foiasucceed.html accessed on 30.7.2005

accountability and transparency embedded in their practices unless there is a compelling reason for keeping them private/secret. The Mid-Term Appraisal of 10th Plan acknowledges that open government is a key element of governance reform⁸ and recommends for pressing for the adoption of Right to Information legislation across the country⁹. Now the legislation being in place and the Central Information Commission as having been created, the ability to supply information by the public authorities requires to be upgraded, and in some cases completely overhauled, more particularly the way in which they hold information about their functions and systemic operations in support of citizen requests/RTI Act implementation. Thus, the implementation challenge or RTI Act throws up an all-inclusive operational agenda for ITAS, which seeks to support the public authorities, State Information Commissions, civil society etc.,

- 8. These operations would involve objectively benchmarking the required degree of transparency and accountability in the functioning of the internal systems to autogenerate and supply reliable information that efficiently matches the potential demand as well as the expectations embedded in the RTI Act in particular and for good governance in general. Besides, scientifically exploring the ways and means for universal understanding and application of the concepts of accountability, transparency and obligations emerging from the RTI Act in its letter and spirit among all stake holders as well as pro-actively helping the government/public authorities to introduce innovations in the management of internal systems aimed at maximizing the expected outcome of the Act.
- 9. Exclusivity of the operations of ITAS vis-à-vis the existing think-tanks funded by government. The existing publicly funded policy think tanks/social science research institutions are oriented towards scholarly/ pure theoretical work. More over, their output has debatable applicability to the systemic problems at operational level. In general, the adaptability of their output into effective use of governance systems runs many risks, which can be better summarized, in the following scholarly words. "There is too much factual knowledge to grasp even a speck of the whole. This makes for an excessive diversity that lacks in coherent unity. With no coherency in the parts, there will be no coherent truth in the whole. Without coherent truth, there is only a relative truth. Relative

MTA X Plan (2002-07), Planning Commission pp 493, para 17.36

MTA X Plan (2002-07) Planning Commission pp xxvii, Recommendation No 303

truth makes for contradiction from different viewpoints, perceptions, and perspectives. Contradictions deny a common definition and meaning of truth, morality, justice, and beauty. They also deny common standards, values, principles, and virtues. Uncommon values lead to personal and social conflict and confusion; to the blocking of learning in education, to the disintegration of social unity". There is evidence to show that some of the existing institutions (including fully government funded) suffer with many institutional imperfections and operational rigidities, which are well documented by researchers. Most of the government funded institutions found to be wanting in their performance in relation to the money goes into sustaining these aging character. Historical performance of some of those institutions may also warrant bold decisions in the direction of Schumpeterian creative destruction to re-channel public funds for more productive outcomes.

10. In this background and since the solutions to the public authorities' emerging governance¹³ challenges, particularly focusing on RTI mandate, would require a mix of scholarly inputs as well as operational knowledge, while the response would require a team approach to quick fix system oriented solutions ensuring simultaneous skills

 $\frac{http://www.epw.org.in/show\ Articles.php?root=2001\ \&leaf=03\ \&filename=2287\ \&filetype=html}{http://www.epw.org.in/show\ Articles.php?root=2001\ \&leaf=01\ \&filename=2068\&filetype=html}$

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Edward J. Bartek A Global Theory of Knowledge for the Future, http://www.bu.edu/wcp/Papers/TKno/TKnoBart.htm

Responding to Economic and Political Weekly editorial and Mr. A Vaidyanathan's essay in the context of quality and quantity of social science research in India Mr. G.N. Ramu observed that "A well-designed and properly executed evaluation of performances of (these two groups of) researchers. taking into account their designated responsibilities (e.g., teaching, research and services such as advising government, NGOs and even the private sector) is likely to show that performance of researchers in a majority of research institutes falls short of expectations" and Mr. A. Vaidyanathan suggested ways to address the challenges of improving quality of research, by mentioning that "this is a big challenge which the academic and scholarly community must meet in return for staking a larger claim on public resources"

Please see

¹² Every piece of business strategy acquires its true significance only against the background of that process and within the situation created by it. It must be seen in its role in the perennial gale of creative destruction; it cannot be understood irrespective of it or, in fact, on the hypothesis that there is a perenniallul1 ... The fundamental impulse that sets and keeps the capitalist engine in motion comes fl'om the new consumers, goods, the new methods of production or transportation, the new markets, the new forms of industrial organization that capitalist enterprise creates. See http://transcriptions.english.ucsb.edu/archive/courses/liulenglish2S/materials/schumpeter.html

The Australian definition for governance seems to be more encompassing and capable of capturing the Indian concerns of governance: "Beginning narrowly and ending with a very broad definition, these are: 1. the management of public resources, or public administration. 2. the activities of government or the system of governing 3. government's interaction with civil society and citizens in general. This definition introduces actions directed *towards* government as well as *by* government. This includes the constraints and accountability mechanisms under which parliamentarians operate, and 4. the interaction of traditions, values, institutions and processes that shape society. In this definition, government is less central. While still an important player in some interactions, it may be marginal or absent in others." PI. See http://www.aph.gov.au/LIBRARY/Pubs/rn/2001-02/02m11.pdf#search='Good%20governance%20and%20Australia'

transfer to the public authorities. Such teams can effectively function on flexible terms consisting of scholars, practitioners, activists and experts with built-in quality control mechanism to validate their output for authenticity and adaptability.

11. Currently no 'lean-think-tanks' exist as their institutional structures neither provide required flexibility for self-dissolving team formation nor allow easy entry for practitioners and experts unless they join on long term commitments. Hence, ITAS is being envisaged as a lean, flexible, and modern organization driven by performance. Its architecture seeks to balance the long term requirement of scholarship with appropriate compensation package and short term task driven team formation with flexible entry and exit options without long-term financial commitment. In the international context, Canada has a dedicated a Center that has focus on governance reforms and to create systemic changes. USA has some non-profit enterprises viz., the Performance Institute, engaged in transferring knowledge to transform governance. In UK too non-profit agencies work for implementation of Freedom of Information Act. There are many such instances from other mature democracies. In India, the civil society is engaged only in representing the demand side of the RTI Act related work, while none exists on addressing issues of imperfections on the supply side of R TI work.

III. ENTERPRISE ARCHITECTURE

12. The *fundamental values* that form a basis for the work, its architecture and the reasons for CIC to be associated with this venture.

The core values of democratic governance are embedded in the Indian Constitution. The legislation on Right to Information not only reinforces those values but also seeks to gear up the governance systems for accelerated transformation of current information handling practices¹⁸ to translate cherished values into visible action. Accountability and

¹⁶ International Center for Democratic Governance especially for capacity building at local government level see. http://www.icdg.uga.edu/mission/

 $^{^{14}}$ In contrast many institutions exist as white elephants as argued in the EPW article.

¹⁵ Dissolving upon completion of the task.

 $^{^{17}}$ The Performance Institute is a private, nonpartisan think tank improving government results through the principles of performance, competition, transparency, and accountability $\underline{\text{http:/www.performanceweb.org/index.asp}}$

¹⁸ relating to Administrative. financial, political distributive decisions and actions of the executive and their advisors - in house, inter-departmental or outsourced.

Transparency are the twin pillars on which the edifice of various democratic governance institutions at various levels are raised, seen, felt, experienced and tested by the citizens. As such, there is a need for focused and scientific diagnosis of emerging problems for designing objective solutions and contextualizing them to sharpen the skills, to orient the systems and to modulate the policies for strengthening these pillars. Such pillars have to withstand the shocks - the known and the unknown, as well as the predictable and the unpredictable - in political or economic sphere. Therefore, well-analyzed response with well designed systems and their operations on a continuous basis would bring the State and the empowered citizen closure to each other and strengthen their bond to withstand any shocks. ITAS in CIC is designed to deliver such responses effectively by

- engaging the scholars,
- attracting activists, and
- allowing practitioners

to team up on task-specific client focused assignments while ensuring the quality of the output through an oversight/supervisory committee consisting of independent professionals.

13. Accordingly, investing in RTI infrastructure, through establishment of an Institute to create, lead and sustain a network of partners with shared mandate¹⁹ for furtherance of the core values established in the Indian Constitution and reiterated by the Indian Parliament in the RTI Act would be an investment that would increase democracy dividends. Such investments would be used for capacity building, skill transfer, protransparency institutional architecture, systems designing for modernizing decisions support, decision making, decision recording, decision retrieval mechanism in Central, State and local governments. The guiding principles for the Institute in its endeavour would be as follows:

- (a) to be non-partisan;
- (b) to be ethical in actions and relationships;
- (c) to foster policies that support the public trust;

19 For e.g.,: government, government sponsored or non-profit ventures engaged in furthering the cause of transparency and accountability and right to information.

- (d) to lead similar agencies at State level as a pre-eminent source of knowledge in the field;
- (e) to promote accountability standards and best practices, and
- (f) to focus on multi-jurisdictional transparency policy issues.
- 14. **Legal Character of ITAS.** Considering the associated rigidities flexibilities in the context of financing and operational independence, in fact, the Institute would have to be created in one of the two routes for legal structure. These are: registering the Institute (i) as a Society or (ii) as a non-profit Company²⁰ u/s 25 of the Companies Act. A society route is preferable over that of a company as the ITAS outputs are in the nature of public-goods²¹ and difficult to be commercially priced at least in the initial phase of its operations. However, in order to achieve fuller success in this direction, it is felt that, to start with, the task may be handled in the CIC as an Institute. After the Institute's take off and reaching a particular height, analysing the outcome and its experiences critically, the Institute can very well be converted into a Society by plugging the loopholes and adding fresh inputs that were identified during its term. By the assured State patronage and flow of funds in the initial stages, the management of the organisation as an Institute would tend to perform efficiently and effectively. Once, its varied training approaches and innovative publications become popular nationally and internationally, gradually its training programmes can be organised on payment basis. Similarly, its publications can be priced.

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Non- Profit Company could be explored through equity participation by CIC/DoPT or any of its affiliates. It would come with flexibility to expand the equity base, transfer its ownership/ control, or progressively divest ownership without complications. ITPO is one example. But its business operations and premises rental income doesn't provide any parallel to the envisaged operations of ITAS. In the absence of any opportunities for business critical to keep the ITAS away from the legal obligations of a SOE i.e., state owned enterprise. For e.g., NASSCOM's holding in National Institute of Smart Governance (NISG), Hyderabad is justified, as perhaps the NISG's activities expand the market for Software and IT products and thus serve the industry interests represented by NASSCOM.

Public goods like analytical research output dissemination relating to governance while the private goods are client specific outputs like systems designs. technology transfer, training, manuals, communicating with citizens through mass media including hosting of websites in all Indian Languages for Public authorities etc., Theoretically, Public goods have two distinct aspects-"non excludability" and "non rivalrous consumption." Non excludability means that non payers cannot be excluded from the benefits of the good or service. If an entrepreneur stages a fireworks show, for example, people can watch the show from their windows or backyards. Because the entrepreneur cannot charge a fee for consumption, the fireworks show may go unproduced, even if demand for the show is strong. The second aspect of public goods is non rivalrous consumption. Assume the entrepreneur manages to exclude non contributors from watching the show (perhaps one can see the show only from a private field). A price will be charged for entrance to the field, and people who are unwilling to pay this price will be excluded. If the field is large enough, however, exclusion is inefficient because even non payers could watch the show without increasing the show's cost or diminishing anyone else's enjoyment. That is non rivalrous competition to watch the show. See http://www.econlib.org/library/Enc/PublicGoodsandExternalities.html

It can also take up related publication assignments from various State Information Commissions on payment basis. Thus, as it grows successfully, it would tend to become self-sustained financially, partly if not fully. Thereafter, with its own revenue earnings and government support partially, it can grow further and would ultimately necessitate converting the Institute into a Society.

15. The ITAS enterprise architecture and its difference from that of similar existing institutions. ITAS would work in a non-profit environment; aims to contain operational costs and strive not to be a cost-center. It would deliver public-goods, some client specific and other with universal focus. As such the financial and governance mechanism seeks to be flexible without attracting long-term financial risks and liabilities. ITAS seeks to avoid the commonly witnessed trouble experienced by most of similar bodies in the course of delivering their mandate, which tend to expand their empire, and demand new funds for new functions, but never admit that their job has become unnecessary and that they should be abolished.²² Most of the organizations, even in corporate sector, suffer with many imperfections due to their architecture. A recent McKinsey analysis²³ referring to 21st Century Organisations says that "Corporate organizational structuresdesigned vertically, with matrix and adhoc overlays-make professional work more complex and inefficient.' Another Report²⁴ brings out the advantages of pull systems working on decentralized platforms as against the prevailing practice of top to down push system, particularly for innovations in a competitive environment.

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²² See: Around the World in 80 Ideas, Into the Sun set - 4th idea at http://www.adamsmith.org/80ideas/idea/4.htm

²³ The 2 I SI Century Organization - McKinsey Quarterly 2nd October 2005 http://www.mckinseyquarterly.com/article abstract yisitor.aspx?ar= I 628&L2= I 8&L3=30&srid= I IO&gp=O

[•]Professional employees, who create value through intangible assets such as brands and networks, now constitute up to 25 percent or more of the workforce in financial services, health care, high tech, pharmaceuticals, and media and entertainment.

[•]Making professionals productive enables big corporations to be competitive, yet most of them do little to improve the productivity of these employees .

[•]Corporate organizational structures-designed vertically, with matrix and ad hoc overlays-make professional work more complex and inefficient.

 $[\]bullet \textbf{Companies must change their organizational structures dramatically to unleash the power of their professionals and to capture the opportunities of today's economy. } \\$

Push systems-characterized by top-down. Centralized, and rigid programs of previously specified tasks and behaviOJ~hinder participation in the distributed networks that are now indispensable to competitive advantage. Most companies now mobilize resources by deploying push systems. in the mistaken belief that they promote efficiency. However, More versatile and farreaching pull systems-characterized by modularly designed, decentralized platforms connecting a diverse array of participants-are now starting to emerge in a variety of arenas. As pull systems reach center stage, executives will have to reassess almost all aspects of the corporation.

²⁸ See, Government Information Sharing: Calls for Action (March 2005) and Enterprise development Tool Kit V.3 (Oct 2004) at https://www.nascio.org/hotIssues/EA/

Therefore, the architecture is aimed to control/contain potential bureaucratic expansion or scholarly pursuit of actions with no consequences on public affairs. Unlike the existing institutions of its kind the ITAS would be created on a lean and flexible structure. Its focus would be on performance management through constant quality oversight and competitive recruitment, retention policy as well as a flexible compensation package, which is designed, not to create a permanent liability on ITAS.

16. ITAS' work will be:

- > to prepare data bases on RTI related issues
- > to undertake case studies
- > to study the impact of RTI Act
- > to conduct surveys
- > to prepare syllabi for various educational and training institutions in RTI.
- > to organise conferences, seminars and workshops
- > to convene training programmes for citizens, RTI practitioners and activists and members of staff in CIC/SICs
- > to prepare films, slides and other documents relating to RTI
- > to publish national/international RTI journals, newsletter on RTI, annual report of CIC and annual data on RTI: "Status Report RTI in India"
- > to undertake compilation and classification of decisions of CIC and their publications
- ➤ to study the impact of RTI on other Acts and Regulations, especially those relating to Competent Authorities
- ➤ to interact with the public authorities, civil society, assess their needs and identify problems in the context of RTI Act
- ➤ to undertake any other work assigned by CIC and Department of Personnel and Training

17. ITAS would have 5 units, viz:

- (i) Training
- (ii) Research and Innovation

- (iii) Publications and Media
- (iv) Legal Research
- (v) Administration

18. **Training Unit**: Section 25 of the RTI Act lays down that:

"(1) The appropriate Government may, to the extent of availability of financial and other resources,— (a) develop and organise educational programmes to advance the understanding of the public, in particular of disadvantaged communities as to how to exercise the rights contemplated under this Act; (b) encourage public authorities to participate in the development and organisation of programmes referred to in clause (a) and to undertake such programmes themselves; (c) promote timely and effective dissemination of accurate information by public authorities about their activities; and (d) train Central Public Information Officers or State Public Information Officers, as the case may be, of public authorities and produce relevant training materials for use by the public authorities themselves."

The experiences of all the stakeholders in the RTI Act can be collected and collated by ITAS. It would be the best forum for passing on the message of the RTI Act, its modalities and purposes. It can form the vital link between the Government, the public authorities, the citizens and the Information Commissions.

19. Research and Innovation Unit: The decisions being given by the various Information Commissions independently of each other, have opened up vast areas of information to the citizens. The time bound manner in which information has to be given under the RTI Act requires excellent records management. Considerable work has been generated for the bureaucracy in answering RTI requests. However, there is no method of getting a feed back regarding the impact of RTI Act on the Indian democratic framework. ITAS would be in an ideal position to do impact studies and to show areas in which improvements in the functioning of public authorities are required. It would also bring out negative impacts, if any, of the RTI regimen. ITAS can offer suggestions to public authorities and to the Information Commissions how to improve the functioning of the RTI regimen. ITAS can do surveys and prepare data base of RTI for the entire country which could include data base from the Central and the States.

- 20. Publication and Media Unit: ITAS could bring out an annual publication showing the "Status of RTI in India", which can give a broad picture to know how the RTI regimen is functioning. Further, it could bring out publications dedicated to RTI which could consist of case studies, easy to use manuals, international journal on RTI etc. It could prepare syllabi for various educational and training institutions in RTI. It could prepare films, slides and other documents relating to RTI as well. It could analyse decisions and have a dialogue with the media to highlight decisions which have a wide impact on the public. It could bring out publications of best practices being followed by all the State Information Commissions. It can organize national and international seminars and other forums for discussions on RTI. It could also publish the annual report of the Central Information Commission, the data of which would further help ITAS to do more research into RTI.
- 21. <u>Legal Unit</u>: Section 19(7) states that "the decision of the Central Information Commission or State Information Commission, as the case may, shall be binding". Further, Section 22 of the Act reads as follows:

"The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in the Official Secrets Act, 1923, and any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act".

However, no proper study has been done regarding the impact of RTI on other laws. The RTI Act has included in its ambiance competent authorities such as:

- (i) the Speaker in the case of the House of the People or the Legislative Assembly of a State or a Union territory having such Assembly and the Chairman in the case of the Council of States or Legislative Council of a State;
- (ii) the Chief Justice of India in the case of the Supreme Court;
- (iii) the Chief Justice of the High Court in the case of a High Court;
- (iv) the President or the Governor, as the case may be, in the case of other authorities established or constituted by or under the Constitution; and
- (v) the administrator appointed under article 239 of the Constitution;

It is, therefore, necessary to study the impact of RTI Act on the functioning of these competent authorities vis-à-vis the executive. Even the relation between the Information Commissions and these competent authorities needs to be spelt out very clearly. ITAS will be in a position to review existing laws and suggest amendments to them so that the RTI Act 05 and the laws of the country are in consonance with each other and the areas of conflict and coordination are duly identified. The transparency brought in by the RTI Act will no doubt impact their way of functioning of the Competent Authorities. Since the competent authorities work under their own independent laws as well as under the Constitution of the country, the impact of RTI Act on these laws and ways of functioning needs to be thoroughly studied.

- 22. Administration Unit: This unit will provide the administrative framework for ITAS and will take care of administrative, financial and budgetary aspects as well as the establishment matters. Except Administration Unit which will be headed by a Joint Secretary, all other units will be headed by prominent professors in the related field who could be of the level of Additional Secretary. Similarly, except Joint Secretary who can be taken up on long-term deputation to have continuity, Professors will be taken up on contract basis or on short-term deputation.
- 23. Each unit would need a pedestal of one full section consisting of 1 Section Officer, 4 Assistants, 1 Stenographer, 2 Data Entry Operators, 2 UDC/LDC and 2 Peons. Every unit, other than Administration, would require 2 experts from the respective fields or who are experts in the field of RTI and 2 practitioners from client departments. In addition, Administration Unit would require an officer of the rank of Deputy Secretary and a Librarian. The Unit heads will have to be provided complementary staff viz. Private Secretaries, Data Entry Operators and Peons. There has to be a pool of at lest 4 vehicles with drivers, one each farash and sweeper.
- 24. The core activities of ITAS would be engaging:
 - anticipating the emerging challenges to systemic accountability and transparency in governance as well as offering, generic or client specific, operational solutions - on its own, in partnership and on demand; and
 - mining, aligning, linking and disseminating public policy/resources use related information and evolving policy options for (a) records management (b) publication (c) skill enhancement and (d) associated

system refinements

- in inventing and strengthening various democratic governance practices
- in designing and innovating operational systems to match the practices
- in establishing benchmarks for assessing the output of the operational systems and governance practices, and
- by effectively devising means to efficiently transfer the enabling skills (a) to those who manage and/or operate the systems, and/or (b) those who are effected by those systems; with intense interface between technology, governance and the community, more particularly for enhancing accountability and transparency in governance and its related transactions.
- 25. Inducing reforms through two pillars viz. accountability and transparency in government systems requires considerable ingenuity, skill, and finesse. The key problem is how to combine the maximum flexibility and independence for the task-managers while keeping tight financial control over public expenditure. Therefore, the ITAS' mission would be to foster excellence in accountability and transparency at every level. As a corollary to the outcome objective and in support of sharpening the skills, and improving the systems, institutional structures and their practices in the context of supply and demand management with in the scope of RTI Act - the Institute would be effectively engaged in (i) capturing information on resource use and (ii) converting it into knowledge by (a) accumulating, (b) analyzing, (c) applying, (d) anticipating, (e) creating, (f) managing, (g) recording, (h) retrieving, (i) releasing, (j) reporting and/or (k) sharing it for the use of the practitioners, the partners and the public (iii) along with the required tools, the latest skills, the systemic designs and the objective public policy inputs for effective conversion of such knowledge into efficient governance practices. Such practices package would be delivered as a public-good or / and as a private good as the case may be and as per the clients requirement and Center's priorities - viz., (a) on demand and for a price or (b) in anticipation on its own and (c) as created by it or its partners through the use of its own resources or shared resources or barrowed resources or such other resources as received in *gratis* or on any other negotiated terms.
- 26. The Institute's output is characterized by its potential uses. There would be two streams of output i.e., those to be delivered in long term and those in short term. The main users are the government departments and other public authorities. As such, the

services are either client specific or for general purpose in nature. While identifying needed skills for good governance and arranging for skill transfer, systems development, program specific policy inputs, analysis, evaluation, MIS etc., fall in the first category, exploring issues that have wider governance and public policy implications including methodology, policy tools thru research and experiment fall in the second category. The first one being client specific solutions they ought to be priced services. The second would be scholarly work and are in the nature public goods hence need upfront funding by sponsors endowments viz. corporates, endowments and recurring grants including projects based funding from sponsors like World Bank, UNDP, DflD etc.

- 27. In the short term (within next 2 years), and in the context of designing systemic standards and sharpening the RTI related capacity of public authorities, the market is very wide and so are the complexities of the challenges. The following are the illustrative activities.
 - Capacity building of public authorities for disclosures under Sec. 4 of RTI
 Act
 - Orienting the authorities towards cost effective transparent dissemination practices
 - Training all PIOs, appellate authorities and NGOs, citizens
 - Assessing technology needs and prescribing formats, manuals for systemic change
 - Reviewing the accountability practices and transparency norms
 - Assisting the public authorities to manage change towards enhanced transparency and accountability practices
 - Providing language services for dissemination through web content

That being so, assuming that all the public authorities would have to build-up their HR capacity and create suitable infrastructure for implanting the RTI in next three years, the anticipated annual expenditure of each public authority would be at least Rs. 1 crore annually. Thus, the total market size would run into more than Rs. 500 crore per year. (50 Central Ministries & Independent Departments, a dozen apex bodies, large number of Departments within the Ministries and Autonomous organizations and together with

PSUs would be more than 500 authorities at macro level). Thus, in the short run the Institute would have to evolve standards, pool practitioners and match them with scholars with flexibility in their work styles to serve the market and share the opportunities along with partners quickly. The team members would be drawn as and when required from a pool of about 150-200 resource persons enrolled from across the departments/public authorities and for which a special dispensation for deputation (3-4 months) has to be made.

- 28. In the long run (after 2 years), the intensity of issues handled in the short term would be reduced and more challenging issues would have to be addressed. In this endeavour, the Institute has to pool intellectual resources and evolve appropriate business plans. Engage them in scholarly work. Create institutional infrastructure. Widen its intellectual network. Explore new frontiers of knowledge. Evolve public goods. Create new products relating to RTI Act. Viz., advocacy and RTI act implementation intellectually support the Information Commission. Position itself as a reliable adviser to State and local governments on Accountability, Transparency and Right to Information. Some of these activities can be priced; but most of the output of this nature cannot be priced. The resource persons would be recruited on contract terms for a period of 3-5 years term.
- 29. The challenge for the Institute is to focus equally on both products and subsidize the public goods by turning out the priced goods competitively all the times. The competitive edge for the Institute would have to come from the (i) flexibility to be given to government officials to be attached with the Institute for task specific short term assignments and (ii) a directive to be issued by the DOPT for Departments to demand the services offered from the Institute as part of RTI Act implementation.



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 ${\bf Paper\ delivered\ at\ the}$ ${\bf 5^{th}\ International\ Conference\ of\ Information\ Commissioners}$

Strategies to Create a Culture of Openness: A Multifaceted Approach –
Different Actors, Different Roles and Responsibilities, Different Tools
and Resources

ABSTRACT:

In Canada, the Freedom of Information legislation first saw daylight in the late 70s. The legislation did not and still does not address the roles of multiple stakeholders in creating a culture of openness. While such an omission might be expected in legislation, there is unquestionably a need to foster such a culture, not the least because a culture of openness is precisely what was envisioned with the passage of FOI legislation. We now recognize that governments, commissioners, universities, NGOs, civil servants and citizens all have roles to play in reaching the legislation's objective. We also recognize that training and education are important in the mobilization and animation of these actors, and to creating and sustaining a culture of openness. This understood, there are important questions to address when contemplating the training and education dedicated toward fostering open government: What are the different components included in the term 'training' and what are the tools and technologies available for the delivery of such training? Who should be responsible for the different aspects of training and what should be done if one fails to step up to the plate? And how to make sure the training is objective and presented in a comprehensible manner so that the public policy intentions of the legislator can be achieved? This paper intends to address these questions.

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CHAPTER I. INTRODUCTION

On December 2nd, 1766, Adolphus Frederick proclaimed the world's first freedom of information law: "Freedom of Writing and of the Press (1766)". Anders Chydenius played a crucial role in creating the new law. Juha Manninen wrote:

Already in his essay on the causes of emigration Chydenius emphasized that in a free state wide learning and knowledge is needed because the majority must settle matters. A free people could not entrust its matters to the few. The more numerous the subjects participating in the deliberations are, in some way or other, thought Chydenius, the better shall they represent society, and the less possible is it to silence them with threats, the less possible it is to bribe them.³

Two hundred and forty one years later, many laws, recognizing a right of access to government's information have been adopted but, as advocates of open government have discovered, legislation alone does not ensure open government.⁴ A good piece of legislation is only one component, a very important one in attaining a truly transparent and open government. In 2006, former Information Commissioner of Canada, John Reid, said: "A strong, freedom of information law is essential, but insufficient in itself, to the task of changing an entrenched bureaucratic culture of secrecy. As well, there must be tangible, clear leadership from the elected and non-elected heads of government in support of openness".⁵ More recently, in 2007, the new Information Commissioner of Canada, Robert Marleau, said "Ultimately, leadership responsibilities for the implementation of the Right to Know rest with all of us."⁶

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¹ Juha Mustonen, *The World's First Freedom of Information Act: Anders Chydenius' legacy today*, (Kokkola: Anders Chydenious Foundation, 2006) at 8.

²²² *Ibid.* at 4.

³Ibid. at 37: Juha Manninen, Anders Chydenius and the Origins of the World's First Freedom of Information Act.

⁴ *Ibid*. at 5.

⁵ Information Commissioner of Canada, *Introductory Remarks for the Workshop on Strategies for Changing Bureaucratic Cultures* – 4th International Conference of Information Commissioners, (Manchester, England, June 14, 2006) www.infocom.gc.ca/speeches/speechview-e.asp?intspeechId=127.

⁶ Information Commissioner of Canada, *Right to Know and a Culture of Openness in the 21st Century : A Matter of Leadership*, (Right to Know Seminar, Ottawa, Ontario, October 3, 2007) www.infocom.gc.ca/speeches/speechview-e.asp?intspeechId=148>.

How can we be leaders and understand the right to access information if there is no training? As Chydenius said learning and knowledge is needed. This is even more important when it comes to creating a culture of access. As the title of this paper indicates, creating a culture of openness requires a multifaceted approach. Training is one of the components and training in itself means a lot of things.

Taking a step back and considering the broader, somewhat more political issues that affect all jurisdictions, I propose in the next pages, based on my experience with the Canadian system, to provide strategies and discussions that answer the following questions:

What are the different components included in the term 'training' and what are the tools and technologies available for the delivery of such training? Who should be responsible for the different aspects of training and what should be done if one fails to step up to the plate? And how to make sure the training is objective and presented in a comprehensible manner so that the public policy intentions of the legislator can be achieved?

CHAPTER II. TRAINING AND DELIVERY

In this chapter, I intend to provide an overview of the many components of training and to propose tools to deliver training in the field of access to information.

A. DIFFERENT ASPECTS OF TRAINING AND DELIVERY METHODS

Many stakeholders mention 'training', but do not always refer to the same thing. What, then, is meant by 'training'? For the purpose of the discussion, I will be focusing on those who administer the access to information and protection of privacy legislation.

Education and training can be supplied in many ways. Based on my research, I have prepared the following list summarizing the many types of training methods.⁷

⁷ Treasury Board of Canada Secretariat, *FIS Training Framework*, <www.tbs-sct.gc.ca/fin/sigs/FIS-SIF/tl/lf/framework/FISTraFra3_e.asp>; John Mihall and Helen Belletti, *Adult Learning Styles and Training Methods*, February 16, 1999 <www.adr.gov/workplace/pdf/learstyl.pdf>; Business Link, *Fit the training to your needs* <www.businesslink.gov.uk/bdotg/action/layer?topicId=1074447749>.

- 1. Instructor-led/classroom training
- 2. Seminar/networking
- 3. Workshop
 - Group
 - Individual
- 4. Computer based training (CBT) (ex.

CD-ROM)

- 5. Web based training (WBT)
- 6. On the job (OTJ) training
 - Mentoring
 - Simulation
 - -Job shadowing
 - Coaching

- 7. Moderated discussion group
- 8. Reading
- 9. Audio/video conference
- 10. Integrated Internet based methods
- 11. Simulation
 - Structured exercise
 - Role play
 - Demonstration
- 12. Job aids
- 13. Help desk/hotline
- 14. Facilitated Group Discussion
- 15. Case Study

The method chosen should include a mix of both active and passive learning, so that people of both learning styles learn with their preferred way.

Let us look at three training delivery methods: In-house training, distance learning and external delivery.⁸

a) In-House Training

A qualified and knowledgeable employee should be responsible of the knowledge development for a given department, so as to suit its particular needs, and adapt to them. Although the use of external contracted experts might be less expensive in certain circumstances, this arrangement is usually better adapted to the contextualized learning needs of the departmental organization with the condition, of course, that this teacher is well-trained. An internal employee, committed to open government can also press from within to foster better understandings of the value of information access laws and practices. Someone with both a lot of knowledge in the field, and good teaching methods should be chosen.

The challenge with this system is to insure cohesion among the different parties and keep the same standards everywhere. Likewise, while the potential for the in-house trainer to advocate for open government exists, it is also true that as a departmental employee the

<www.businesslink.gov.uk/bdotg/action/layer?topicId=1074447749>.

⁸ Business Link, *Fit the training to your needs*

same individual is open to sanction and isolation if efforts to promote open government go against the departmental culture, the departmental leadership, or that of the government.

b) Distance Learning

Such methods include study books, internet and computer based tools, and audio and video presentations reinforced by student tutorials and seminars.

Distance education, using Internet, possesses extraordinary capacity to expand the reach of formal education and training (and most particularly education). To the extent that promulgating a uniform general body of theoretical and factual information is important, and it clearly is important, distance education and training using asynchronous communication modalities is very useful.

In Canada, study books and CD-Rom tutorials have been created at the University of Alberta. These include audio sound and short videos. Such multimedia devices can be quite practical, but they must be updated regularly.

The new technologies can provide an important avenue for acquiring usable information and knowledge about access to information. At the University of Alberta, we experimented with use of this technology through two demonstration projects: the CD-ROMs and the Internet (Glossary). Our experience revealed the potential of the new media but also provided a cautionary note concerning the costs and difficulties of producing such resources. They are costly to produce, and can often date quickly. If educators and organizations are prepared to invest sufficient resources, and are prepared to continue their investments, the new media provide an important means to promote understandings of information access and privacy protection. Additionally and importantly, the new technologies provide opportunities for online discourse and citizen information sharing. On balance, this is for the good, although it also opens prospects for loads of misinformation (a general and significant problem with the Internet).

c) External Delivery

An external training source, provided by an academic institution like a university or college, a private training organization or by a commissioner's office or by different access and privacy associations can be a way to give employees different views and opinions on a same topic.

The U.S. Department of Labor provides a description of the training managers and specialists roles.⁹

Training managers

Training managers provide worker training either in the classroom or onsite. This includes setting up teaching materials prior to the class, involving the class, and issuing completion certificates at the end of the class. They have the responsibility for the entire learning process, and its environment, to ensure that the course meets its objectives and is measured and evaluated to understand how learning impacts business results.

Training specialists

Training specialists plan, organize, and direct a wide range of training activities. Trainers respond to corporate and worker service requests. They consult with onsite supervisors regarding available performance improvement services and conduct orientation sessions and arrange on-the-job training for new employees. They help all employees maintain and improve their job skills, and possibly prepare for jobs requiring greater skill. They help supervisors improve their interpersonal skills in order to deal effectively with employees. They may set up individualized training plans to strengthen an employee's existing skills or teach new ones. Training specialists in some companies set up leadership or executive development programs among employees in lower level positions. These programs are designed to develop leaders to replace those leaving the organization and as part of a succession plan. Trainers also lead programs to assist employees with job transitions as a result of mergers and acquisitions, as well as technological changes. In government-supported training programs, training specialists function as case managers. They first assess the training needs of clients and then guide them through the most appropriate training method. After training, clients may either be referred to employer relations representatives or receive job placement assistance.

Planning and program development is an essential part of the training specialist's job. In order to identify and assess training needs within the firm, trainers may confer with managers and supervisors or conduct surveys. They also evaluate training effectiveness to ensure that the training employees receive, helps the organization meet its strategic business goals and achieve results.

Depending on the size, goals, and nature of the organization, trainers may differ considerably in their responsibilities and in the methods they use. Training methods include on-the-job training; operating schools that duplicate shop conditions for trainees prior to putting them on the shop floor; apprenticeship training; classroom training; and electronic learning, which may involve interactive Internet-based training, multimedia programs, distance learning, satellite training, other computer-aided instructional technologies, videos, simulators, conferences, and workshops.

⁹ U.S. Department of Labor, *Human Resources, Training, and Labor Relations Managers and Specialists* < http://stats.bls.gov/oco/ocos021.htm >.

Finally, knowledge obtained from education and training must be regularly updated. Additionally, in countries, where there is more than one official language, for example in Canada (French and English), I have found it is quite important that the training material be produced and made available in both languages. An inability to do this segregates people, and from a philosophic perspective insults the very concept of information access.

B. TRAINING TAILORED FOR PARTICULAR DUTIES AND FUNCTIONS

In Canada, there is an ongoing project to define the role and functions of the "Information and Privacy Professional (IPP)". In the first phase report of CAPA-CAPAPA's Professional Standards and Certification Project, the authors have elaborated a list of obligations and tasks for each of three principal roles identified for this vocation: administrator, executor and advisor.¹⁰

The first and most important aspect of the training is selecting the general objectives required for each functions. These objectives can be later divided into theoretical knowledge and the practical skills or "know-how", that will form a qualified and skilful staff needed to administer the law.

For example, the administrator has to, among other things identify issues, the executor must interpret rights, and the advisor focuses on advocating the principles of access to information and protection of privacy. There are theoretical, factual knowledge and practice knowledge aspects to each of these key tasks, and therefore education, training, and knowledge strategies that can develop practitioner understandings. Transcending all these roles, and practice within each, are moral and ethical standards and problem-resolution challenges that can be addressed through education and training.

Stakeholder knowledge requirements of information access and privacy protection theoretical, practical and contextual particulars will differ. Information access and privacy protection administrators, for example, require substantial exposure to theoretical and practice (or technique) knowledge, which appropriately involves a combination of

<www.capa.ca/PSCP%20Professional%20Standards%20Report%20Mar%2027%202007%20_4_.pdf>.

¹⁰ Canadian Access and Privacy Association and Canadian Association of Professional Access and Privacy Administrators, *Professional Standards/Competencies*, Professional Standards and Certification Project, Phase 1, Report, p. 22

formal theoretical and procedural education, training in practice particular, and a steady diet of information on particulars and developments in the field of practice.

For lawyers, librarians, information technologists and other professionals some measure of theoretical education is useful in additional to specific professional practice development through a combination of education, training and information.

Business sector privacy administrators, politicians and engaged members of the general public, as well as business sector and NGO administrators also possess different learning and informational claims and requirements.

Politicians and the members of the public require understandings that principally build appreciation of access and privacy legislation, and an appreciation of the substantive ideas behind the legislation and the idea of open government. Presumably, the knowledge requirements deepen the more involved politicians and advocates become in championing open government.

Private sector and NGO employees responsible for administering access and privacy matters within their organizations need more than passing familiarity with key knowledge elements, and general managers in these organizations require passing familiarity. Similar to other stakeholder cohorts, there will be differences in requisite knowledge levels and the focus of knowledge requirements depending on the roles that these employees adopt.

Thus, education, training and information dissemination objectives will differ depending on the stakeholder cohort.

CHAPTER III. WHO'S RESPONSIBLE FOR THE TRAINING?

Training is the responsibility of all the stakeholders. Governments, universities, commissioners, NGOs, professional associations and private sector organizations all have a role. If one of these actors fails to do its share, it is there responsibility of the others to step in and provide such training.

A. GOVERNMENTS/ADMINISTRATIONS

In Canada, at the federal level, the *Access to Information Act* (R.S.C. 1985, ch. A-1, ss. 5 and 70) is very short on words with regard to the training of civil servants. Since its coming into force, it has been Treasury Board's responsibility.

CASE STUDY: Canada – Federal Level and Provincial Level (Saskatchewan)

Treasury Board of Canada Secretariat offers some workshops during the year.¹¹ The Canada School of Public Service offers a one 3-day course on access to information.¹²

In Saskatchewan, an on-line training course, on access and privacy, is available for employees in departments, boards, commissions, and agencies of Executive Government. The course takes about 2 hours to complete.¹³ Out of 5 modules, one deals with the right to access government information.

B. COLLEGES/UNIVERSITIES

Colleges and universities have a very important role to play. In addition to providing academic programs or courses on different topics related to access and privacy, they should aim at establishing institutes or research centers which will produce research, policy analyses and provide information services and learning opportunities that add to the general stock of scientific knowledge on access to information. Such academic centers will aid policymakers, access to information administrators and others in their considerations and practices.

Some of the function and purposes of these specialized institutes would be to:

- Establish strong links with the information and privacy commissioners, governmental administration responsible for access to information and civil society organizations;
- Link the University's community of scholars with national and international networks of scholars, programs, centers and institutes (university-, government-, and civil society-based) that focus on access to information issues;

^{11 &}lt;www.tbs-sct.gc.ca/atip-aiprp/index_e.asp>.

^{12 &}lt;www.csps-efpc.gc.ca/corporate/list_e.asp?loid=237>.

¹³ <www.justice.gov.sk.ca/privacyEG>.

- Bring science and constructive discourse to the great and continuing debate over access to information's "willed future";
- Promote a culture of openness among government and civil society leaders, and the general citizenry in the consideration and debate of access to information issues;
- Promote understandings of freedom of information goals, purposes and reasons to be; and
- Conserve a record of scientific research, discourse, policy analysis and relevant data.

CASE STUDY: The University Of Alberta's Information Access And Protection Of Privacy (IAPP) Certificate Program

In 2000, the Faculty of Extension at the University of Alberta, played a pioneer role in the development of an academic program for Information Access and Privacy Professionals. At the time, Dr. Edward C. LeSage Jr., Director of Government Studies, had already developed extensive programs for municipal/local administrators, and had just begun an initiative that would see all course instruction provided over Internet. Coincidentally, the municipal sector was coming under the jurisdiction of the Province of Alberta's *Freedom of Information and Protection of Privacy Act*, legislation passed in 1995. Hence, an introduction, Internet-based, freedom of information and privacy protection course was inaugurated as part of the municipal/local administration program. Soon Dr. LeSage and a group of stakeholders realized that the demand was much more generalized than the municipal sector; surprisingly, no formal university-based program of study existed in Canada for information access and privacy protection administrators, even though the Federal and provincial governments had legislation 20-25 years of age.

The first course "Information Access and Protection of Privacy Foundations" was offered in January 2001. Since, the University now offers a 5 course certificate, composed of 4 core courses and 2 optional courses. Each course requires about 65 hours of study and takes one semester to complete. For more information consult www.govsource.net.

The IAPP Program provides participants with theoretical and practice-oriented knowledge pertinent to the administration of information access and protection of privacy legislation. To achieve this, GS has codified and otherwise accumulated and organized core theoretical and practice knowledge relevant to this emerging field within the IAPP Certificate Program. IAPP boasts some of the nation's leading experts in information access and privacy protection as course instructors and subject matter experts.

Currently, six courses are offered (Information Access and Protection of Privacy Foundations; Privacy in a Liberal Democracy; Privacy Applications: Issues and Practices; Information Access in a Liberal Democracy; Information Access Applications: Issues and Practices; Health Information Access and Privacy). The six courses are designed for online learning. There are six modules per course and 30 pages per module of original material written by a wide range of Canadian experts. Each module contains an average of 35 pages of complementary readings, a list of optional readings, definitions of key terms/words, and a list of study and discussion questions.

The delivery of these courses is done through the Internet using Web-CT. This asynchronous learning, which accommodates all the time zones, is assisted by an experienced instructor and one or two markers depending on the number of students. One course takes one semester of complete. Term papers are submitted online and the exams are done online.

This program alone has made some significant improvement on the managers' perception of the access to information functions in a department. For example, one student wrote: "On a personal note, I am pleased to inform you that my job description was revised with a new title (FOIP & Records Administrator) and higher classification level. My organization's wish to consolidate IAPP responsibilities to my position and my willingness to work towards IAPP certification are the two major factors for this great new opportunity for me. Certification (and working towards it) DOES make a difference for anyone who would like to seriously pursue a career in IAPP." In the last 3 years, job descriptions for FOIP coordinators include a requirement for some specialized training in access to information from a recognized university or college.

C. ASSOCIATIONS/NGO'S

Professional associations also have an important role to play in providing continuing education, practical training, awareness tools and fast information communications to their members.

However, the question is what might they offer? It depends on the circumstances of the educational provider network among other things. This said, public (legal) education on information access and privacy protection is an area in which NGOs might do an especially good job of offering training and information.

Professional associations can offer tailored training session to meet their memberships' particulars needs.

CASE STUDY: Association Sur L'accès Et La Protection De L'information (AAPI) – Québec, Canada

In the province of Québec, since 1991, the Association sur l'accès et la protection de l'information has been very active in the access and privacy community. This association is composed of private and corporate membership. Every two months, it publishes a bulletin to inform the members on various events and developments in the field. The association also holds an annual conference during which prizes are given to organizations and individuals who have demonstrated leadership in the field.

The Association offers some awareness training tools on its website and also offers more than 6 courses as part of its training program. In 2005, the Association has published a comprehensive practical guide for access and privacy administrators: "Guide pratique sur l'accès et la protection de l'information". And in 2008, the Association will launch a more comprehensive training program based on the Guide. For more information: www.aapi.qc.ca.

D. COMMISSIONERS/OMBUDSMEN

First, it must be kept in mind that commissioners like ombudsmen are created by the legislation, hence their powers and competencies are those expressly listed in the act and any that follows to accomplished them.

Providing training to help the public in their exercise of their right to know is an area in which commissioners might make direct efforts. But, given their mandates, this is also an area in which those who possess expertise in public legal education can make a significant contribution. Commissioners support would be useful, but it is also important to understand that public legal educators, like academics, should also work independently from commissioners, and commissioners should support this independence. Simply put, there will be times when these external organizations will be honestly at odds with government organizations (even commissioners), and this is not necessarily a bad thing. In any event, external organizations will be able to reach persons that the commissioners might not be able through networks and processes that they have developed. This does not obviate a public outreach role for commissioners (this should exist and be aggressively exercised); rather, there is a complementary and (even) potentially dynamic relationship that can develop.

CASE STUDY: Saskatchewan IPC – Office of the Information Commissioner of Canada

Information commissioners can play an active role in the training and education of public servants, individuals, and politicians. In 2003, the Information and Privacy Commissioner of Saskatchewan published an access and privacy guide aimed at members of the legislative assembly and their staff.¹⁴ This guide is available on the Internet and provides in less than 20 pages a good overview of what access and privacy legislation entails in practice.

At the federal level, after experiencing significant difficulty in recruiting qualified persons to occupy investigator positions, the Office of the Information Commissioner of Canada created an investigator training program for individuals who have the potential to progress to middle and senior level investigator positions. The program involves individual coaching, training, tutoring, developmental assignments, and testing, all designed to provide career progression from PM-02 to PM-05 level without intervening competitions. Twelve to 18 months, approximately, will be required at each level. ¹⁵

¹⁴ Information and Privacy Commissioner of Saskatchewan, *Saskatchewan MLA Constituency Office : Access & Privacy Guide*, (November 2003, revised January 2006)

<www.oipc.sk.ca/Resources/ConsituencyOfficeGuide2006.pdf>.

¹⁵ Information Commissioner of Canada, 2006-2007 Annual Report, p. 17 www.infocom.gc.ca/reports/2006-2007-e.asp>.

The Office of the Information Commissioner of Canada also decided to make available to all other government institutions, and interested members of the public, the office's manual used to train and guide investigators in understanding the exemptions contained in the Act and assessing whether or not they have been properly invoked by government.¹⁶ The Commissioner hopes that this manual, titled 'GRIDS', will assist ATIP administrators across government.¹⁷

E. PRIVATE SECTOR

Private sector is a very wide term which can include, private training institutions, law firms, associations, and so on.

Private training provides can offer significant products, and among these academic educators would be preferable for more extended and ambitious programs assuming, of course, that there is a culture of outreach and engagement within the post-secondary system. However, if the Canadian experience provides anything it is that the active support and continuing interest of Commissioners are essential to promote such programs. When working with private sector contractors, this support and interest likely should be most directed; liaisons and working relations with universities necessarily will be less prescriptive, but these will also involve longer-term and deeper engagement (assuming that the academic institution will be developing more complete and rigorous materials and programs, and that all involved in are it for the longer term).

CHAPTER IV. HOW TO FIND THE RIGHT BALANCE?

A. COLLABORATION AMONGS THE STAKEHOLDERS

Is the best training something that helps officials see both the requester and the commissioner's perspective on the legislation as well as that of the department and the minister?

Some of the best training will help officials to see both the requester and the commissioner's perspective on the FOI legislation as well as that of the department and

¹⁶ Information Commissioner of Canada, 2006-2007 Annual Report, p. 17

<www.infocom.gc.ca/reports/2006-2007-e.asp >.

¹⁷ Information Commissioner of Canada, 2006-2007 Annual Report, p. 17

<www.infocom.gc.ca/reports/2006-2007-e.asp>; <www.infocom.gc.ca/grids/default-e.asp>.

the minister. But this brings us back to Chapter 2, in which we addressed the important question concerning the definition of what constitutes training.

It is best, as discovered, to conceive of 'training' as something manifold and layered. It is also useful to think of it as continuing. For example, the core program at the University of Alberta was conceived as professional education for individuals who were practicing in the field but required a theoretical education that could be tested and applied as they worked in information access and privacy protection administrative positions in government and other sectors. It is quasi-professional education, dedicated to covering (and sometimes codifying) the foundation knowledge metes and bounds of the growing field. However, the University of Alberta developed and provides products such as an annual conference that served to bring new developments, other information, and critical perspectives to a broader community of information access and privacy protection practitioners. Training with governments and industry provides additional educational and training opportunities that focus appropriately on the particulars of sectoral context and policy specifics, and on the often-divergent interests and purposes of those working within those sectors. In short, like almost all education and training directed at those who practice from a complex knowledge base, what is and should be offered necessarily will be complex and nuanced and offered through a number of venues, and by a number of providers.

B. ACCEPTANCE

To the extent that these ministers are members of parliament, given that most information commissioners work for parliaments and not governments, presentations and reports to parliaments provide important avenues through which to communicate the value and importance of information access. Presentations to parliamentary committees, as well as public speeches that are covered by the media, are other important means to distribute the message.

Ministers and senior policy makers will accept, in their guts (not only their heads) that openness is in their own self-interest as well as in the public interest <u>if</u>: they are exposed to the thought, they have the resources and techniques to take action on the thought, they have the mandate to take action on the thought, they are willing to act (and if not, what would seem to prevent them from doing so), and if they are willing to learn from the consequences of their actions (in other words, to be continually attentive).

Training only addresses aspects of this sequence of positive action. More significantly, perhaps, enlightenment, while important and ideal, may not even be a necessary factor in getting officials to act. Political pressure, and concerns over public reactions to government failure to be open, may be at least as important. Thus, when considering training or education, one should be careful to not place too much bearing weight on its efficacy. Training and education are clearly important co-determinants in developing public-regarding and rule-regarding behavior. However, the force of law, political pressure within the parliamentary and extra-parliamentary political domains, and pressure by the press are essential levers to pry information out of governments and to ensure the system is 'gamed' as little as possible. True, and importantly, education and training of these external entities can advance the purposes of the legislation. Whether such education and training can and should be provided by commissioners is something to think about.

Some education (elucidation) should be directed at the press, providing information and building understanding amongst members of the Fifth Estate so that they can fulfill their important roles in this business. But, commissioners are the last agencies to be doing this. Education and training should also be extended to the legal and other professional communities (e.g., librarians and information specialists) that have a natural interest in open access.

C. WHAT TO DO IF EVERYTHING FAILS?

One could ask: If all the training fails to bring about a change in culture, is it time for Commissioners to get tough with the sanctions available to them?

Indiscriminant or heavy-handed use of sanction powers that commissioners do possess might have unwelcome consequences if the public administration culture sees information access legislation (and the commissioner's office) as illegitimate. Sanctions must have a scintilla (or more) of legitimacy in the minds of those upon whom they are laid. A certain delicacy in their application is required in circumstances where the work of commissioners is not regarded as important or legitimate. This suggests that commissioners consider using sanctions to 'educate' administrators and politicians on the wisdom of access, and the wisdom of parliament's laws that pertain to information access. Sanction powers provide a means to enter into serious discussions with officials

concerning the logic of information access. Graduated responses to failures to properly and openly administer information access legislation also seem in order; with this said, it should be understood that a graduated response entails a willingness to use full sanctions if officials are incorrigible.

CASE STUDY: Office of the Information Commissioner of Canada

This excerpt of the 2005-2006 Annual Report of the Information Commissioner of Canada shows a good example of a measure that could be taken when faced with a non-compliant administration.¹⁸

For several years, a number of institutions were subject to review because of evidence of chronic difficulty in meeting response deadline. In his 1996-1997 annual report to Parliament, the former information commissioner [John Grace] reported that delays in responding to access requests had reached crisis proportion.

In 1998, at the beginning of this Information Commissioner's term [John Reid], the "report card" system was commenced. Selected departments were grated on the basis of the percentage of the access requests received that were not answered within the statutory deadlines of the Access to Information Act. Under the Act, late answers are deemed to be refusals. Initially, the report cards were tabled in Parliament as specials reports; since 2001-01, they have been included within the commissioner's annual report.

With the introduction of the report cards, the Information Commissioner initially observed a dramatic reduction in the number of delay complaints: from a high of 49.4 percent in 1998-99 to a low of 14.5 percent of complaints in 2003-04.

CHAPTER V. CONCLUSION

In conclusion, training must be conceived as something manifold, layered and continuing. Nowadays, many tools and mediums exist for the training to reach employees, citizens, managers and officials; the choice of the tool or medium will depend on the objectives to be attained by the particular training program.

¹⁸ Information Commissioner of Canada, 2005-2006 Annual Report, p. 19 www.infocom.gc.ca/reports/pdf/oic05_06E.PDF>.

To create a culture of access and provide training in the field of access to information, every stakeholder must be involved and ready to do its part. If one fails, it puts more pressure on the others, who will have to be creative and develop tools or program to reach those who are left with no training.

Strategies to create a culture of openness

Me Marc-Aurèle Racicot



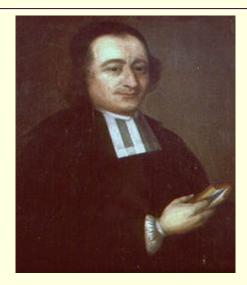
Adolphus Frederick

- Freedom of Writing and of the Press
- **1766**

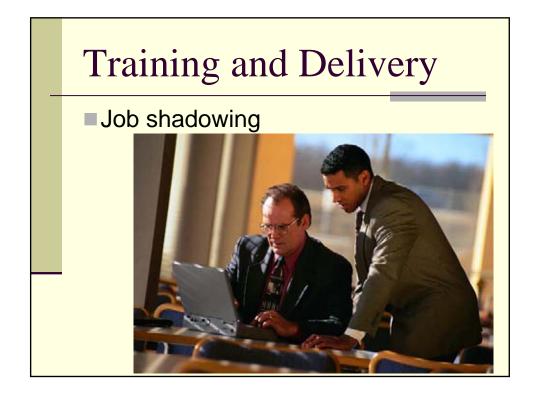


3

Anders Chydenius







Training and delivery

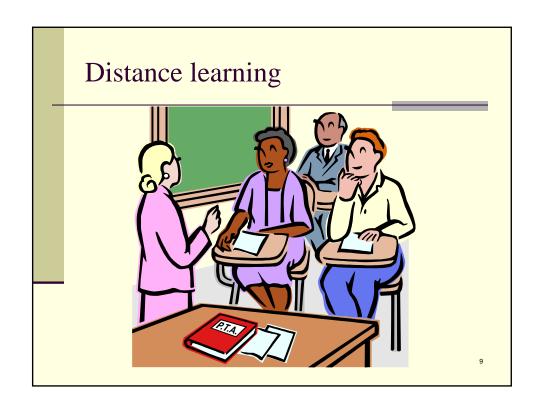
Web based training



On the job training

Mentoring







Annual Report 2005-2006



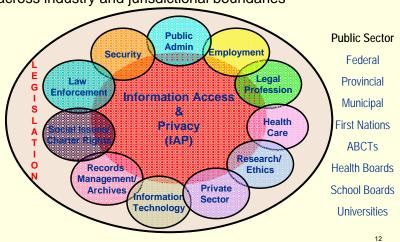
"For many years, there has been a recognition that those who administer access to information and privacy rights constitute a new profession - a profession having specialized knowledge, specific ethical obligations, and direct impact on the rights of Canadians."

Information Commissioner of Canada

11

IAP Professionals

- require knowledge of practices in many related domains
- possess unique knowledge and skills in the IAP field
- work across industry and jurisdictional boundaries



Professional Stardards Project

- Three essential roles:
 - A. Administrator
 - B. Executor
 - C. Advisor

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Professional Standards Project

- Competencies defined in terms of required:
 - A. Knowledge
 - B. Abilities
 - C. Personal Suitability Factors (attitude, judgment...)

IPP Competency Profile

ROLES	Competencies	Indicators
A. Administrator	6	17
B. Executor	9	33
C. Advisor	9	24

15

Administrator role: Comptencies

- 1. Understanding Principles, Rights and Jurisdiction
- 2. Managing Casework
- 3. Modeling Transparency and Confidentiality
- 4. Perceiving Globally
- 5. Managing Information
- 6. Developing IP Programs

COMPETENCY #22 (advisor role)

Competency #22	Description (Knowledge, Ability, Pers. suitability)	Competency Attainment Indicators
Rendering Professional Opinions	Capability to make their own assessment of an access and privacy matter and to articulate and support that view as a professional opinion, integrating views from legal counsel and other experts as appropriate.	1. Clearly formulates opinions displaying to recipients the IPP's own assessment of a matter. 2. Consistently reflects and credits the influence of other participants, including legal counsel, in the assessment of a matter. 3. Cites constraints and caveats on the general applicability of the opinion rendered.

Who is responsible for the training?

Partership of Everyone



Who is responsible?

■Government administrations



Stephen Harper Canada's 22nd Prime Minister

19

Who is responsible?

Colleges and Universitites



IAPP CERTIFICATE PROGRAM

■ This online program focuses on the theories, concepts, issues and best practices involved in the appropriate administration of access and privacy legislation.

2

IAPP Certificate Program

- Growing demand to provide a set of courses that includes a comprehensive understanding of the IAPP field and its essential practices.
- Flexible, national professional development that may facilitate career advancement and mobility.

IAPP Certificate Program

Professional Development Advantage

- Understand the legislative environment
- Increase on the job efficiency
- Acquire specialized knowledge required to work effectively with planners and developers
- Network with practitioners
- Continued learning through participation

23

IAPP Program Structure The Curriculum

6 courses offered in English and French

- 4 core
 - Information Access and Protection of Privacy Foundations
 - Privacy in a Liberal Democracy
 - Privacy Applications: Issues and Practices
 - Information Access in a Liberal Democracy

2 elective

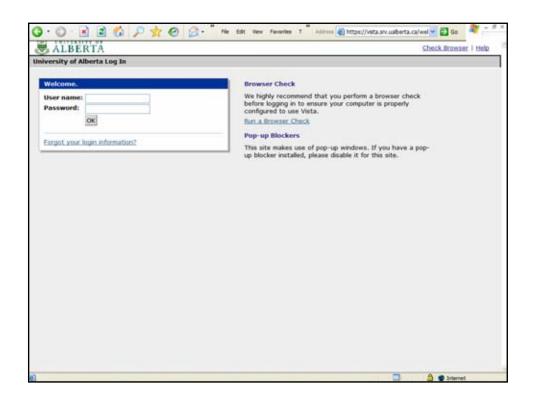
- Information Access Applications: Issues and Practices
- Health Information Access and Privacy

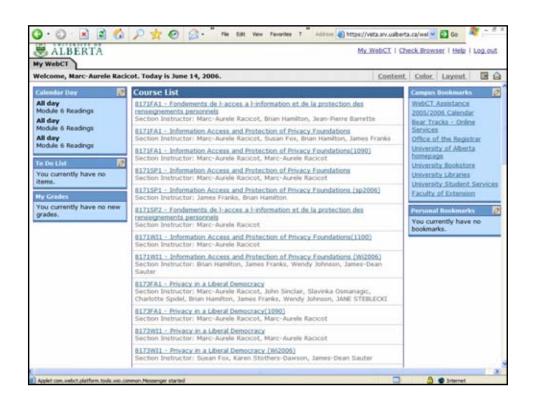
IAPP Program Structure Material

- Courses are designed for on-line learning
- 6 modules per course
- 30 pages per module of original written material by a wide range of Canadian experts
- An average of 35 pages of Supplementary Readings per module
- List of Optional Readings
- Definitions of Key Words
- Study and Discussion Questions

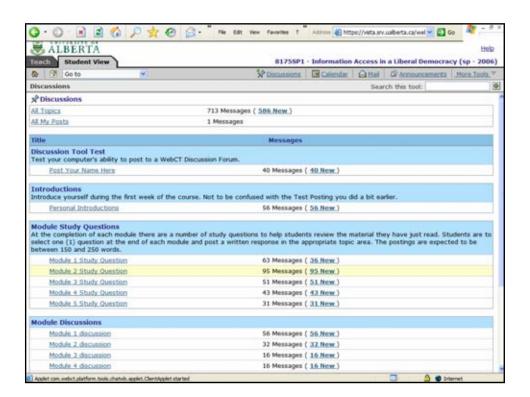
Courses - Delivery

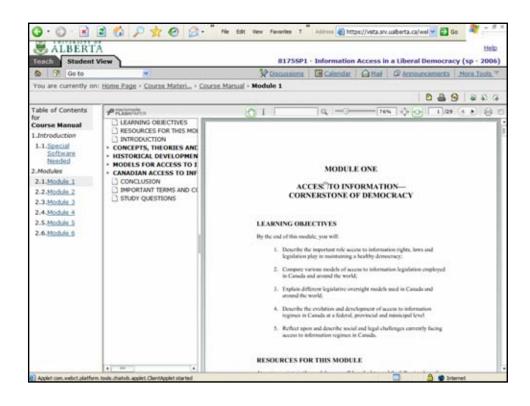
- On-line through Web-CT virtual classroom (assistance of an IT technician)
- 1 course = 13 weeks = avg. 65 hours
- An experienced instructor is assisted by one or two markers for the delivery of the course
- Asynchronous learning to accommodate all the time zones
- Final exam [3 h] completed on-line

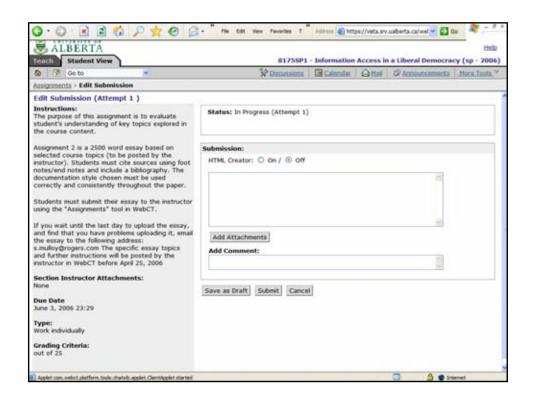


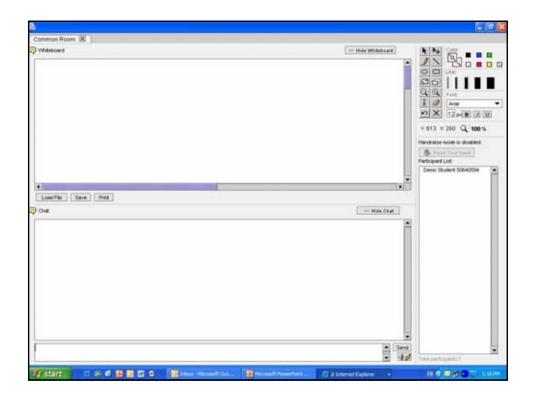


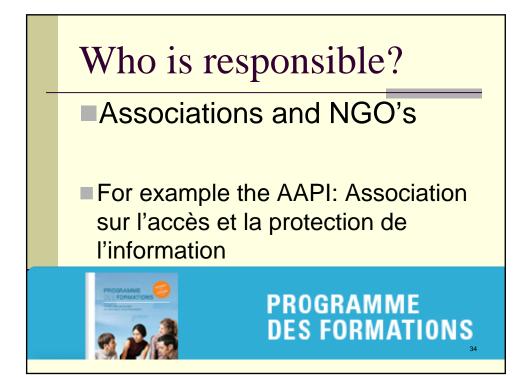


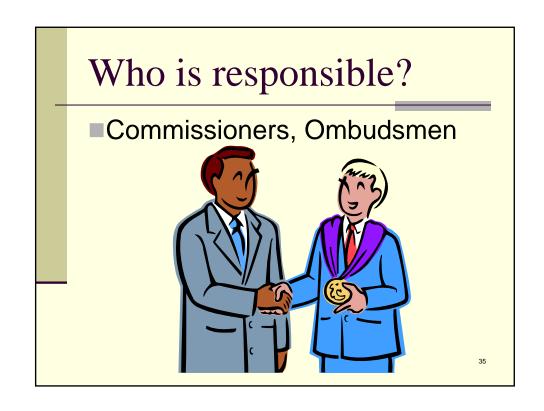


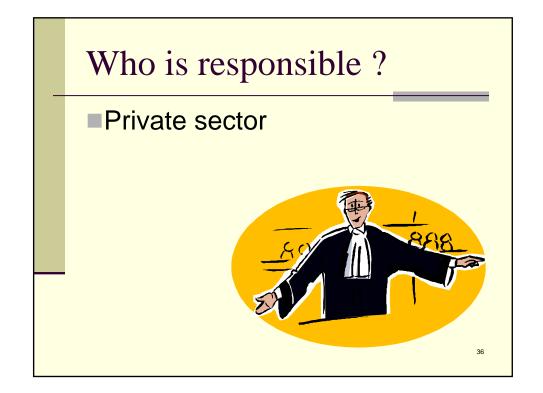












Conclusion

- Creating a culture of openness is everyone responsibility.
- "It is the spirit and not the form of the law that keeps justice alive." (Earl Warren)
- "Laws alone can not secure freedom of expression; in order that every man present his views without penalty there must be spirit of tolerance in the entire population." (A. Einstein)

THANK YOU - MERCI

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Megan Carter

Director

Information Consultants Pty Ltd

Paper delivered at the 5th International Conference of Information Commissioners

"FOI With Bite: Recipes for Openness"

ABSTRACT

This paper attempts to answer the question: what are the essential ingredients required for FOI to have an impact on the openness of government agencies? The author draws on experiences in several English-speaking jurisdictions to propose that the major requirements for success include four sets of factors.

Firstly, it is critical to have a framework of accountability in which the information released under FOI can be effectively deployed by citizens. FOI is far more powerful when information thus obtained can be used to challenge and change the decisions of government. Secondly, strong legislation needs to contain clearly stated objectives, an emphasis on disclosure, narrowly framed exemptions, public interest tests, low fees, protection from liability for officials, penalties for breaches, and independent external review. Thirdly, crucial administrative supports for FOI include adequate resources for both agencies and review bodies, firm requirements for training and compliance, and strong leadership and support from the highest levels of government. Finally, it is essential that appropriate training be provided to the staff according to their role in the process. Strategies to ensure that training material and guidelines are high-quality, up-todate and consistent with review decisions must be developed. Specific benefits for both the agencies and for individuals can be presented along with judicious use of cautionary tales and dangers to be avoided. The training can be conducted by government and nongovernment providers, although the potential for Information Commissioners to be involved may be limited by their legislatively-prescribed role and their resource levels.

Is training on its own sufficient? The author believes that training is a necessary ingredient in the overall recipe for open government. But only when it is conducted in the context produced by the other factors described, is training likely to result in noticeable movement towards the "culture of openness and participation" which is the target.

"FOI With Bite: Recipes for Openness"

INTRODUCTION

Good afternoon. To begin, I should declare my interests. I have worked as an FOI practitioner and trainer for just over 25 years – half inside government and half as a private consultant. I have been an in-house FOI trainer in a single agency; provided FOI training across the whole of government from a central agency; worked on joint training with Information Commissioners; worked with universities and NGOs; and as a sole private sector provider. I have experience in 8 jurisdictions, including the local, state and federal levels in Australia, in Ireland and the United Kingdom, and I am currently working on a project in China on introducing FOI. I have made decisions on over a thousand FOI applications, at first level and as a reviewer, and have trained over 6,000 public servants in FOI. Having also written a book on the public interest balancing test, made my own FOI requests and taken a number of them to external review, I see FOI from multiple perspectives.

In preparing this paper, I reflected on the many training situations I had been involved in, to identify the ingredients most likely to achieve greater openness. I wanted to be able to give you the perfect recipe. I had almost finished, when I realised that first I needed to discuss the most important aspect of effective training for openness: the legal and administrative contexts in which training is delivered. To extend the metaphor, a well-trained chef can only produce good results in a clean kitchen, with proper resources (including good staff and sufficient time) and strong support from the managers of the restaurant. And of course, plenty of customers to taste their wares! So here's my menu for your consideration:

Essential Ingredients for FOI With Bite

1. Accountability framework

- 2. Legislative components
- 3. Administrative support
- 4. Training

1. ACCOUNTABILITY FRAMEWORK: INFORMATION IS POWER ... BUT ONLY IF IT CAN BE USED

Openness is much easier to achieve when FOI is part of an overall administrative law package that allows citizens to make effective use of the information they gain under FOI, even to challenge or change the decisions of government. For individual citizens, the ability to challenge a decision (at little or no cost) not to grant a pension or benefit, or a visa, can change their life circumstances dramatically. Without such avenues, citizens may obtain information under FOI revealing poor decision-making, even corruption, but be unable to do anything with the information other than write letters of complaint or seek media attention.

As an example of how an accountability framework can be constructed, in the mid-late 1970s the Commonwealth of Australia introduced several pieces of reforming legislation, culminating with FOI itself in 1982.

These were:

- Administrative Appeals Tribunal Act 1975 (AAT)
- Ombudsman Act 1976
- Administrative Decisions (Judicial Review) Act 1977 (ADJR)
- Freedom of Information Act 1982 (FOI)

Later legislation (*Archives Act 1983 and Privacy Act 1988*) extended what FOI had begun in the areas of information use and disclosure, and records management. There are of course other accountability mechanisms such as external audit and whistle-blowers protection, but these are outside the scope of this paper.

Using the package of mechanisms a citizen may seek information from government (under FOI); seek the reasons for decisions (under ADJR); complain about delays and maladministration (Ombudsman); and challenge decisions on points of law (ADJR) or their merits (AAT). All of these things are within the reach of the ordinary citizen at effectively no cost, other than costs for legal representation. When I have conducted

training in jurisdictions without such mechanisms, FOI is often seen as a toothless tiger – information is power only if it can be used. It gives people "pieces of paper" rather than information. Public officials' awareness of the potential uses of the information makes them take FOI more seriously.

Hand-in-hand with this is the need for the public to be aware of their rights to use FOI (and other mechanisms) in the first place. Legislation is tested and improved as a result of usage, and without people using it, much of FOI is pointless. Whose role is it to educate the public? I would say it is the responsibility of every government agency and every public official who interacts with the public. FOI should be embedded into all of government's dealings with citizens. Realistically, this can be achieved by FOI rights being incorporated at a central level into all relevant publications (web and print), charters of rights, template letters, policies and procedures. A regular program of public education sessions, working with non-government agencies in their sector, is an effective strategy. As each has a somewhat different perspective to offer, participation by government agencies, Information Commissioners, non-government agencies and the media are all useful. If government fails to provide, the other bodies should step in, providing they have sufficient resources.

2. SPECIFIC LEGISLATIVE PROVISIONS TO GIVE FOI SOME 'BITE'

The most important ingredient to achieve a culture of greater openness is the legislation itself. To those of you in the audience who are working to bring FOI to a new jurisdiction, I want to assure you that there are specific elements of the legislation that are very much worth fighting for. The main elements that in my view are required for FOI to effectively promote openness are:

- Clearly stated objectives with an emphasis on disclosure;
- Broad requirements for proactive disclosure and publication;
- Narrowly framed exemptions, with public interest tests on a majority of them;
- Low fees and charges, or at least waivers on the grounds of hardship and public interest;
- Protection from legal liability for officials in making disclosure decisions;
- Administrative defences to minimise abuse of the Act;

- Penalties for breaches and improper or obstructive conduct;
- Requirement for agencies to collect and report statistics on FOI performance;
- Independent external review bodies with powers and sanctions.

Time does not permit me to address all of these, so I will select a few aspects to discuss briefly.

Exemptions as a Limit on Openness

Just a few words about one of my favourite subjects, public interest and FOI. Probably the most difficult aspect of FOI decision making is assessing the factors in favour of disclosure versus the factors against disclosure: weighing the competing public interests against each other. Openness is best achieved in a regime where there are public interest tests within the legislation, but a further benefit is that public servants' awareness is increased by exposure to discussions of public interests in favour of disclosure, while undertaking the balancing tests. These tests force the public servants to think about the interests of, and benefits to, the wider community.

Most importantly, of course, the critical information of government must be able to be released under the FOI legislation. As Justice Michael Kirby, now of the High Court of Australia (then President of the NSW Court of Appeal) said, speaking extra-judicially, in his discussion of the seven deadly sins of FOI:

"The second deadly sin is to pretend to FOI but to provide so many exceptions and derogations from the principle as to endanger the achievement of a real cultural change in public administration."

A very common instance of this is the exemption for Cabinet documents, which lies at the heart of the decision-making processes of government. The way this exemption can be abused was described by the Queensland Public Hospitals Commission of Inquiry in 2005. The Commissioner, the Honourable Justice Davies, a retired judge of the Queensland Court of Appeal, accepted evidence that:

¹ Hon Justice Michael Kirby "Freedom of Information: The Seven Deadly Sins". Justice: British Section of the International Commission of Jurists 40th Anniversary Lecture Series. London 17/12/1997. http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_justice.htm

"... governments of both political persuasions ... abused the Cabinet process in order to avoid information deemed sensitive or politically embarrassing falling into the public arena. This was because s36 of the *Freedom of Information Act* 1992 provided for an exemption from Freedom of Information disclosure of documents which, in effect, were submitted to Cabinet."

Commissioner Davies also accepted the evidence of an officer who "procured a 'fridge trolley' in order to deliver and retrieve documents associated with Cabinet submissions which collected surgery waiting lists in Queensland public hospitals in response to a Freedom of Information application which had been lodged seeking hospital waiting list documents."

In other words, any documents which the Minister wanted to exclude, were simply loaded onto the trolley and trundled through the building where Cabinet met, and this was sufficient to meet the tests for exemption under FOI.

The Commissioner went on to find that:

"The conduct of Cabinet, in successive governments, in the above respect, was inexcusable and an abuse of the *Freedom of Information Act*. It involved a blatant exercise of secreting information from public gaze for no reason other than that the disclosure of the information might be embarrassing to Government."²

The sorry situation described above was the result of amendments made to the exemption concerning Cabinet documents, about which the Queensland Information Commissioner said:

"In fact, so wide is the reach of s.36 and 37, following the 1993 and 1995 amendments, that they can no longer, in my opinion, be said to represent an appropriate balance between competing public interests favouring disclosure and non-disclosure of government information. They exceed the bounds of what is necessary to protect traditional conceptions of collective Ministerial responsibility (and its corresponding need for Cabinet secrecy) to such an extent that they are antithetical to the achievement of the

² p.476 Hon Geoffrey Davies Queensland Public Hospitals Commission of Inquiry November 2005 Chapter 6 Part F - A culture of concealment and its consequences http://www.qphci.qld.gov.au/

professed objects of the FOI Act in promoting openness, accountability and informed public participation, in the processes of government."³

No amount of training of FOI practitioners can compensate for the overly broad reach of this exemption provision. To say nothing of the example set for them of role-models at the highest levels of government deliberately avoiding possible release of information by this conduct.

Another mechanism which frustrates openness and furthers secrecy are conclusive Ministerial certificates which effectively preclude the Commissioner or Tribunal from a review of the merits of the exemption decision. The recent Australian High Court case *McKinnon v Secretary, Department of Treasury*⁴ affirmed the limits on review caused by such certificates, resulting in increased political pressure on the government to reform this aspect of the legislation.

Costs as a Deterrent

Excessive fees can be used to frustrate a culture of openness. The costs of using FOI should not be prohibitive to the average user. The majority of non-personal FOI requests are not made by ordinary citizens. From the little we do know about usage statistics, the media are probably the heaviest users in terms of making non-personal requests, with business users the next largest group.

Where FOI is too costly, individual citizens will not make use of it. Estimates of costs for large-scale non-personal requests can run to tens of thousands of dollars. So an affordable FOI regime, or one with sufficient waivers on the grounds of financial hardship or public interest, is an essential ingredient. The waivers should themselves be subject to appeal, and the powers of the appeal body (or Information Commissioner) have to be sufficient to enforce a fair and proper interpretation of these terms. If this is done, then non-government organisations, lobby groups, and ordinary citizens will make use of the legislation, and will ask the kinds of questions which will lead to an increase in the openness of government. To quote Justice Michael Kirby again, "The fourth

⁴ McKinnon v Secretary, Department of Treasury [2006] HCA 45; (2006) 229 ALR 187; (2006) 80 ALJR 1549 (6 September 2006) http://www.austlii.edu.au/au/cases/cth/HCA/2006/45.html

³ p.21 Third Annual Report: Office of the Queensland Information Commissioner 1 July 1994-30 June 1995

deadly sin is to render access to FOI so expensive that it is effectively put beyond the reach of ordinary citizens."⁵

Powerful External Review as a Remedy

Perhaps the most significant way that the legislation can achieve openness is to endow a strong external review body, such as an Information Commissioner, with sufficient power to enforce the law. This means the power to make binding decisions, i.e. overturn any decisions which are not in keeping with the legislation; the power to place sanctions on agencies who are not applying the Act properly, and penalties of sufficient force which can be imposed at a personal level, so that public officials are very clear that there will be consequences for their failure to comply. If the Commissioner lacks some of these powers, a higher level review body, usually a court, should have the powers.

FOI can be seen as toothless if the external review body lacks power. However the external body also has to have sufficient resources to be able to deal with the volume of cases in a timely manner, without the chronic backlogs which have beset most Commissioners I have worked with. It is hardly a deterrent to the recalcitrant public servant to know that a failure to respond within the time limit, a "deemed refusal", can be appealed to the review body, when that body will not be able to deal with it for months or even years to come. By the time it is dealt with, the political heat may well have gone out of the issue, or so they may hope.

3. ADMINISTRATIVE SUPPORT FOR FOI

Without key administrative components, even the best-framed legislation will be hard-pressed to achieve openness. These administrative supports include:

- Strong leadership and support for FOI from the highest levels;
- Adequate staff and other resources to undertake FOI responsibilities in agencies;
- Initial and refresher training for all relevant staff;
- Compliance with FOI embedded as a performance measure;
- Adequate records management systems;

⁵ Hon Justice Michael Kirby "Freedom of Information: The Seven Deadly Sins" Justice: British Section of the International Commission of Jurists 40th Anniversary Lecture Series. London 17/12/1997. http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_justice.htm

• Adequate resources for external review bodies.

FOI 'Champions'

To take the first point, clear leadership from Ministers and Chief Executives is critical during implementation, and it needs to be further reinforced when the inevitable embarrassments occur following FOI disclosures. Sadly, the more usual response from governments to such embarrassments is to weaken the legislation through retrograde amendments or to cut resources to FOI, making it unworkable. In Australia we will have had 25 years (as of next week) in which to see the effects of these factors.

In 1996 the Australian Law Reform Commission undertook a wide-ranging review of the federal FOI Act, and noted:

"4.12 The culture of an agency and the understanding and acceptance of the philosophy of FOI by individual officers can play a significant part in determining whether the Act achieves its objectives. A negative attitude, particularly on the part of senior management, can influence an agency's approach to FOI and seriously hinder the success of the Act in that agency."

A more recent report commissioned by media representatives discussed the continuing culture of secrecy in Australia, including the following comments on FOI performance by senior officers:

"There are few visible signs of leadership and advocacy for open government principles within government. On the contrary, some comments by prominent officials do nothing to affirm the importance of FOI. For example the Secretary of the Treasury, Dr Ken Henry, has said that as a result of FOI requests which he judged were "motivated by a desire to either embarrass the Government and Treasurer or the Department", communication on sensitive policy issues is likely to be verbal rather than committed to paper.

⁶ ALRC Report 77 Open government: a review of the federal Freedom of Information Act 1982 http://www.austlii.edu.au/au/other/alrc/publications/reports/77/

These observations about the dangers of FOI send a message to officers across the public service about how FOI gets in the way of what might be regarded as proper public administration."⁷

In such a context, how realistic is it to expect junior officers to make the courageous decisions to release any contentious material under FOI? In some agencies, occupying an FOI position can be seen as career suicide.

FOI on Starvation Rations

Quite simply, to implement and maintain FOI properly costs money. (It should be noted however that even the most generous estimates of its cost show it to be a tiny fraction of the money spent by most governments in disseminating information of their own choosing.) In some jurisdictions, governments have stated that FOI will be brought in at no net cost, thus dooming it to failure. Sufficient funds have to be made available for pre-implementation work: setting up the infrastructure of FOI, preparing material for proactive publication schemes, conducting records management audits, preparing policy guidelines, developing information technology support systems, and providing training. The ongoing maintenance of FOI requires sufficient resources to deal with requests, particularly if low fees do not bring in any revenue to support the function.

However, where significant work has to be undertaken in areas such as improving records management, it is important that the management of government agencies see this as an investment, as a benefit in itself, and one that will lead to greater efficiency for themselves as an organisation. It may not be possible to produce historical data to demonstrate that within the particular agency, but there is a growing body of (anecdotal) evidence across the world, in countries that have implemented FOI, to show that records management improvements flow from FOI and more than pay for themselves over the long term.

4. TRAINING FOR FOI WITH BITE

Who Should be Trained?

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⁷ p. 104 **Report of the Independent Audit into the State of Free Speech in Australia** Report; Chaired by Irene Moss, AO; Commissioned by: Australia's Right To Know Coalition 31st October 2007; http://www.news.com.au/files/freespeechinaustralia.pdf/

If training in FOI is delivered only to the practitioner levels of an organisation, then FOI will not succeed in achieving openness. The training has to begin at the top, even if only in the form of briefings at a strategic level. The chief executive officer and executives of all public sector organisations have to be aware of FOI and its implications. More than that, they have to be aware of the penalties for non-compliance and Parliament's instructions to achieve a more open and participative democracy. However, where there is no direction from the top, or worse, a direction against FOI from the top, then no amount of training of the junior officers, who are the practitioners, will achieve openness.

To make clear the level of support for FOI and its objectives, senior officers could attend or introduce the training courses. An alternative I have used is that at the beginning of each training session, I showed a short video with a statement of support for the aims of the legislation from the Attorney-General and the Premier of the jurisdiction. This sent a clear message to the trainees about the top-level support for the concept of openness.

Ideally, target groups for training in an organisation would be:

- The executive, or most senior, officers (at least at a strategic level)
- The practitioners, who undertake the actual decision-making at initial and internal review levels
- Any staff who are involved in records management functions (as their role in locating the documents is crucial to being able to make proper decisions)

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The rest of the staff of the organisation should have at least an awareness of FOI, so that they can see how it impacts on their everyday work. For each document that they create, they know that it could ultimately be released under FOI; for all records that they handle, they know that they must be able to be retrieved for an FOI request.

Challenge of Getting to The Right People.

In the course of my work I have rarely managed to get the attention of a CEO or Minister for more than 10 minutes to work with them on understanding FOI, outside the context

of a specific FOI request (and then it is usually about arguing exemptions). Even Ministerial advisors, those key players, are too busy to attend more than a half-hour briefing. I am often asked to condense what would be a 2-day training course into a 15-minute timeslot on the agenda of a busy Executive meeting. I have developed several ways of handling this, such as using headline FOI horror stories, and take it as an enormous achievement to have my timeslot extended to half an hour. I was recently asked to prepare a brief but terrifying presentation for an executive group, where the senior Legal Advisor wanted the penalties emphasised – examples are in the two slides shown here. But to be truly effective in a move to greater openness, there needs to be far more education at the highest levels.

Quality of Training

The training itself has to be of consistent and of high quality. In terms of consistency, a good example is the state of South Australia, which has amended its FOI Act to require that FOI decision-makers must be accredited through completion of approved training. This ensures a consistency in interpretation and approach, and also establishes a camaraderie and a network amongst the practitioners, so that they are able to provide mutual support, particularly given the occasional requirement to make difficult decisions which have internal political consequences inside their organisations. Practitioner networks are an essential ingredient of effective FOI, and have been used to great effect in jurisdictions such as Ireland, the United Kingdom and Australia.

The training has to be based closely on the specific legislation, enhanced by reference to the interpretation of it by appeal bodies. In jurisdictions with a large body of relevant decisions, it is an increasing challenge to keep guidelines and training materials up to date. It is difficult even to provide an accessible, digestible body of case law to practitioners, especially to those (the majority) not legally qualified. As examples, the body of case law at federal level in Australia, or at Commissioner level in Queensland, or Tribunal level in Victoria, would run to thousands of pages. Some approaches have been: to provide bulletins with summaries of recent decisions; provide a well-designed index (by section of the Act, or topic-based) to full-text decisions online; provide an annotated Act, with relevant decision extracts in footnotes; or to convert them into manuals of guidance for practitioners. Reading these decisions is enormously beneficial to practitioners in seeing the analysis and reasoning behind decisions, as well as reinforcing the role and power of the external review body. However, with some decisions over 100

pages in length, it is daunting for practitioners struggling with statutory deadlines and backlogs.

Clarity and Consistency in Interpretation

The interpretation and policy of the act need to be clearly stated, so that all public officials can apply them consistently, legally, and properly, and these policies should be endorsed at the highest levels.

In one jurisdiction with which I was involved, we arranged for the policy manual to be endorsed by Cabinet, the highest level of government. When in doubt, and when it was challenged in a training or decision-making context, its support from the highest levels was clear. I have also trained where it was made a mandatory requirement for the senior officials of all public sector agencies to attend briefing sessions of at least one-half day duration, and all decision-makers and internal reviewers were required to attend a two-day training course. Attendance was recorded and reported, and those who failed to attend were contacted by a senior manager and their attendance was rescheduled. This resulted in the entire body of FOI decision-makers being trained prior to implementation, and gave a firm foundation for the consistent and proper application of the Act.

In that same jurisdiction, the Information Commissioner set out a clear statement supporting the intention of the Act in achieving greater openness in government from the earliest decisions. The exemption provisions were explained in great detail, the public interests were carefully weighed and considered, and the decisions provided clear guidance for the decision-makers within agencies on the interpretation that would be placed on the Act by the review body. Over subsequent years, in challenges to the courts, these decisions were all upheld on points of law, which added to the clarity and certainty of the interpretation.

I am sad to say that, after a period of years, which you might call the 'honeymoon', the government's response to these clear statements of openness in interpreting the Act resulted in the Act itself being amended to reduce the level of openness. This has occurred in several jurisdictions and is an all too common pattern.

Who Does The Training?

In terms of the role that Information Commissioners can play, in many jurisdictions this is prescribed by the legislation. In some they are required to take a broad role including training and outreach; in others, they are limited to a narrower role relating only to the resolution of disputes. This affects their ability to participate in offering training programs, as their funding is frequently tied to those roles they are explicitly charged to perform under the legislation. Some Commissioners' resources are so limited that they operate with a constant backlog of appeals, leaving them no time to undertake training, however keen they may be to do so.

Where the occupants of freedom of information positions are themselves professionals, such as lawyers or information specialists, their professional associations and academic institutions have a role to play. Indeed, many of the courses they would undertake to enhance their knowledge of FOI would make them eligible for accreditation or continuing education points. However, such courses are not always suitable for the non-professional or administrative level FOI people, as they frequently assume other legal knowledge and use legal jargon not directly drawn from the FOI sphere.

Another strategy which has had some success is to have external speakers involved in the training, for example, representatives of the media who have made use of the legislation. Sometimes this has the effect of stultifying discussion from the group members who are at least a little anxious in front of journalists; however, their perspective is certainly a valuable one. Non-government organisations with a history of involvement in FOI (such as the Campaign for FOI in the UK) can also provide training, although they may not have the same level of acceptance by the bureaucracy.

Where the agencies, especially the FOI lead agencies, fail to deliver training, who then has the responsibility? If lack of staff or financial resources is the problem, it may not matter, as there will be no one to attend the training. If attendance at training can be mandated, and Commissioners are sufficiently resourced to provide it, then they are well placed to do so in terms of their knowledge and commitment to the concepts of openness and accountability. As most jurisdictions with which I am familiar do not have mandatory training, we must develop ways of enticing decision-makers to attend. In an era of economic rationalism, emphasising the cost-savings from reducing FOI appeals and complaints is effective. Where FOI is embedded into performance contracts of senior

staff, and their performance pay is tied to achieving certain FOI goals, this provides additional incentives to train their staff to manage FOI well.

Carrots: Selling the Benefits of FOI

As with all messages, when you are selling something, it makes sense to point out its benefits to your audience. FOI is designed to make the government more open and accountable, but this can be perceived as exposing one's own agency to criticism and embarrassment. Public officials who would (by releasing the documents) be the instrument of that criticism may be subject to pressure, or worse. During the training, it is important to emphasise the protection of individual officers from legal consequences of release, and the benefits of FOI to the organisation quite apart from achieving openness from the public's point of view. This becomes easier once there is a longer history of FOI within the jurisdiction, as specific examples can be used to support the claims of achieving these benefits. With FOI in so many countries around the world now, there are numerous instances of such benefits which can be marketed from other jurisdictions. I have a collection of press clippings and cartoons, featuring what you might call the good news and the bad news of FOI disclosures, which can make the FOI message more memorable.

Some of the most obvious benefits in the countries I have worked in have accrued to the internal efficiency of the organisation itself, in records management and the quality of decision-making generally. Records hold information, and information is the lifeblood of FOI. If information cannot be located, then no decisions can be made to release it, and no openness is achieved. Overhauling the records systems has been an inevitable ingredient in FOI implementation, and it is one that is frequently ongoing as there is no perfect solution.

But improvements in records management don't just benefit FOI processes. Improvements in records management benefit the entire organisation. Instead of having boxes of papers literally in the basement, the attic, in cupboards, under the stairs, the records are located, decisions are made about whether they need to be kept, and if so, for how long. Where they do not need to be kept, they can be destroyed, thus minimising the haystack which has been building up over the years, such that good quality information can't be found. The sheer volume of records can be dealt with and brought under control. In areas such as electronic information, where there are still many challenges, FOI has

drawn attention to areas such as deficiencies in emails. As many of you would know, emails are a popular type of document requested under FOI, as applicants know that emails are where people are not on their guard. Addressing and remedying such deficiencies benefit the entire organisation.

FOI, in tandem with other accountability mechanisms, highlights deficiencies in administrative decision-making. The potential for exposure exists for every decision made, for every document created. An awareness of this seems to have been sufficient to improve the standards of decision-making in many areas of government. The benefits to the clients are obvious; the benefits to the government agencies include a reduction in complaints, appeals, and cases lost in courts and tribunals.

So the benefits in records management and decision-making are great selling points for FOI; while placing a figure on the savings is not possible, they are discernible to many public servants.

Another selling point is to appeal to the public officials as FOI users themselves. Of course they can use FOI as citizens, in the data protection sense of seeking access to records about their health or tax matters, or for wider policy issues. However in some places, one of the unfortunate results of selling FOI to public servants as users has been that they, as a group, have become very active users of FOI. The main area of interest has been to do with their own personnel records, more specifically those where there has been a dispute with their organisation. The Australian Commonwealth made amendments to the FOI Act to restrict such use, by making public servants utilise the provisions of the Public Service Act to seek access before they were able to exercise their rights under the Freedom of Information Act. This came as a response to, not hundreds, but literally thousands of requests from unhappy employees about numerous aspects of employment, (including but not limited to) appeals against promotion, grievances, and disciplinary matters.

This has also had the unfortunate effect of giving FOI something of a bad name to the executive of the organisation, where it may appear to them that inordinate amounts of time are being spent on, as they see it, airing the dirty laundry of purely internal matters of staff administration. So while this is still a good selling point in terms of public servants using FOI, it should be used with some caution.

Sticks: Awareness of The Consequences

"You can change behaviour, even if you can't change attitudes." This was something we used to say when conducting training to introduce Anti-Discrimination legislation in Australia. FOI is also a change process, and one where attitudes matter. If people are aware of the sanctions that will be applied for non-compliance with legislation, if the trainees believe that the top level of their organisation expects them to apply the legislation fairly and properly, then their behaviour will comply even if their private views about the level of openness were different. It is probably a matter of generations to change attitudes thoroughly, and even after 25 years of FOI in Australia, we are still not there. However I see progress in the fact that the younger recruits don't believe there ever were "bad old days" when you could not find out why you didn't get a promotion, let alone read the comments made about you. They expect openness, at least as regards themselves, so it is easier to extrapolate from that to being open in their work.

Training to provide knowledge alone is not sufficient, though it is an essential beginning. In order to change behaviour, and perhaps eventually change attitudes, the types of training that are most effective are those that are interactive, where they can observe the behaviour of other members of the group, and where feedback can be given by the instructor. Role-plays, case studies, exercises, and discussions are therefore the most effective methods.

I have often wished for more sanctions to be applied by Information Commissioners and others, so that I would have a greater supply of "horror stories" to tell in training courses. Even when Commissioners have used their powers to enter premises and search for records, I have noticed the entire agency taking FOI much more seriously after such events. I am certain that a serious financial penalty or jail term would have a salutary effect.

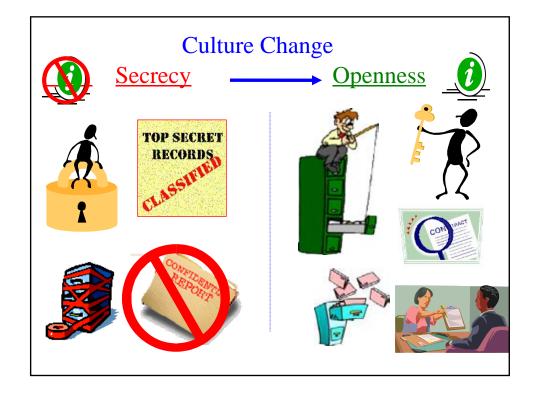
CONCLUSION

If training alone could achieve openness, I would have seen much more dramatic changes from my 25 years of work in FOI. There is a vital role for training, and without training, the other ingredients would not be sufficient to achieve a change in the culture towards openness. However with none of the other ingredients, training will achieve

nothing; and when most of them are lacking, it can achieve, at best, pockets of openness, but never the wholesale shift of government which is the goal.

So the ideal recipe for openness is the right combination and quantity of ingredients, constant stirring and a watchful food critic. In the face of the many interlocking challenges facing us all, openness can only grow in importance. I hope these FOI recipes have provided food for thought and discussion. Bon Appetit!





Recipe for openness

- Some carrots
- Some sticks
- A clean kitchen
- A high-level chef
- Well-trained apprentices
- A tough food critic









Essential Ingredients

- 1. Accountability framework
- 2. Legislative components of FOI
- 3. Administrative support for FOI
- 4. Effective training



Accountability Framework

"Information is power"
- only if it can be used

◆ FOI as part of package allowing citizens to use the information they obtain to challenge decisions of government

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Administrative Law package

- ♦ Administrative Appeals Tribunal Act 1975 (AAT)
- ♦ Ombudsman Act 1976
- ◆ Administrative Decisions (Judicial Review) Act 1977 (ADJR)
- ♦ Freedom of Information Act 1982 (FOI)

These allow people to:

- obtain documents and reasons for decisions
- challenge decisions on their merits or on points of law
- complain about delay or maladministration



FOI legislation: Carrots

- Clearly stated objectives with an emphasis on disclosure
- Broad requirements for proactive disclosure and publication
- Narrowly framed exemptions, with public interest tests on a majority of them
- ◆ Low fees and charges, or at least waivers on the grounds of hardship and public interest
- Protection from legal liability for officials in making disclosure decisions
- Administrative defences to minimise abuse of the Act

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FOI legislation: Sticks

- Penalties for breaches and improper or obstructive conduct
- Requirement for agencies to collect and report statistics on FOI performance
- Independent external review bodies with powers and sanctions



Exemptions - too many, too broad

"The second deadly sin is to pretend to FOI but to provide so many exceptions and derogations from the principle as to endanger the achievement of a real cultural change in public administration."

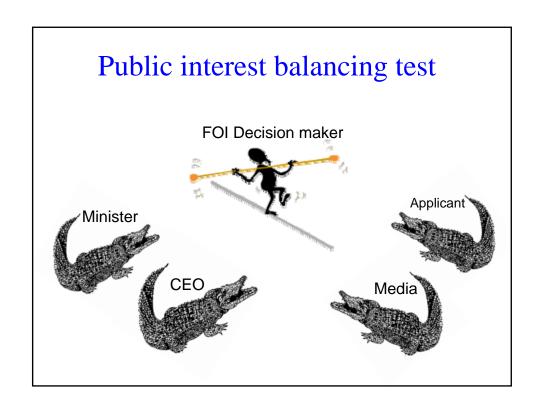
- Justice Michael Kirby

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Public Interest Tests

- Public interest tests increase likelihood of disclosure
- They increase awareness in decision-makers of factors leaning towards openness
- Difficult to apply and require careful guidance and training for the decisionmaker

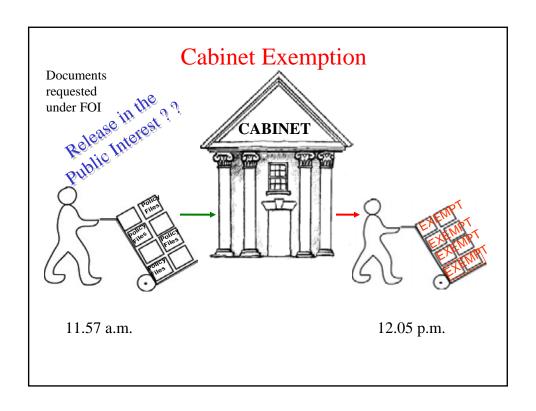


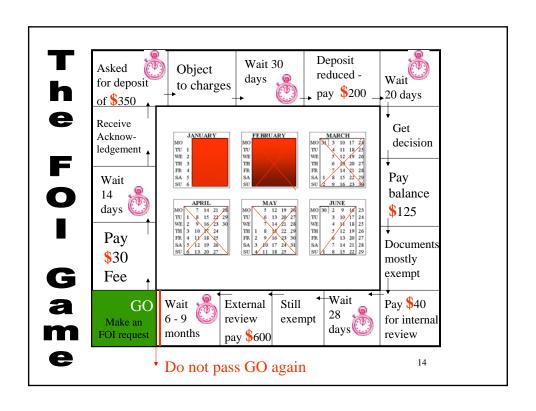


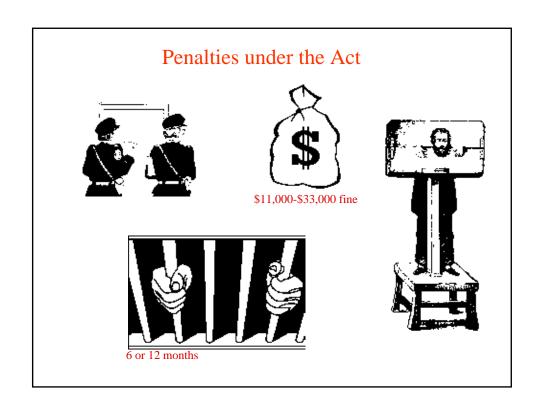
Expansive Exemptions

"The conduct of Cabinet, in successive governments, in the above respect, was inexcusable and an abuse of the *Freedom of Information Act*. It involved a blatant exercise of secreting information from public gaze for no reason other than that the disclosure of the information might be embarrassing to Government."

- Hon Geoffrey Davies (Queensland Public Hospitals Commission of Inquiry)









Administrative Support for FOI

- Strong leadership and support for FOI from the highest levels
- Adequate staff and other resources to undertake FOI responsibilities in agencies
- Initial and refresher training for all relevant staff
- Compliance with FOI embedded as a performance measure
- Adequate records management systems
- Adequate resources for external review bodies



Who should be trained?

- The executive, or most senior, officers (at least at a strategic level)
- The practitioners, who undertake the actual decision-making at initial and internal review levels
- Any staff who are involved in records management functions
- ◆ All staff need awareness level training

17

It could be YOU!

Don't let a breach of the Information Act happen on your watch.

Penalties:

6 or 12 months jail Fines between \$11,000 and \$33,000

Privacy damages up to \$60,000





Training quality & consistency

- Accreditation of decision makers (required by legislation)
- Consistent centrally-issued guidance
- Guidance endorsed by highest level of government
- Guidance and training materials need to incorporate external review decisions
- Mandatory training for certain groups

19



Who provides training?

- Central / lead FOI agency
- ♦ In-house within government agencies
- Information Commissioners
- Universities
- Professional associations
- ♦ Private sector
- ♦ Non-government organisations



Carrots: Selling the Benefits of FOI

- ♦ Benefits to the public
- Benefits to public servants
 - as users of FOI themselves
- Benefits to the organisation
 - improved records management
 - improved quality of decision making
 - improved relations with clients





Sticks: Awareness of Consequences

- "You can change behaviour, even if you can't change attitudes."
- Awareness of penalty provisions against individual public servants as well as against agencies
- External review body applying sanctions is a deterrent

23

Recipe for openness

- Some carrots
- Some sticks
- A clean kitchen
- A high-level chef
- Well-trained apprentices
- A tough food critic











Rt. Hon. Sir Geoffrey Palmer

President, Law Commission

Paper delivered at the 5th International Conference of Information Commissioners

A Hard Look at the New Zealand Experience with the Official Information Act after 25 Years

I. INTRODUCTION

- New Zealand's Official Information Act 1982 ("OIA") has now been in force for 25 years. In some respects, the writer was present at its creation, serving on the Select Committee in Parliament that dealt with the Bill and as Opposition Spokesman, and later, when in government, as Minister of Justice. As Minister of Justice, I oversaw a number of amendments to the Act. The most significant change was to the ministerial veto. Changes were made to ensure that the veto was a Cabinet decision, not an individual ministerial decision. That change effectively put a stop to the use of veto. The political cost was too high. Furthermore, the Act and its principles were adapted to Local Government and a separate Act under the stewardship of the Hon Dr Michael Bassett, the Local Government Official Information and Meetings Act 1987 was passed.
- Much of the credit for the OIA should go to then Minister of Justice and Attorney-General, the Honourable Jim McLay. He managed to achieve passage of the bill in face of opposition from both his Prime Minister and the Treasury. The Treasury opposed the Bill at the Select Committee, no doubt with the permission of and on

I am most grateful to Zoë Prebble from the Law Commission who provided valuable research assistance on this paper.

the instruction of the Minister of Finance who was also the Prime Minister, the Rt Hon Sir Robert Muldoon. The Prime Minister said the Act would be a "nine day wonder".²

- The Danks Committee that devised the policy comprised a mixed membership of public servants and outsiders. Sir Alan Danks, the Chairperson, had had experience primarily as an academic economist. The other outsider from Government was Professor KJ Keith, then an outstanding academic lawyer from the Faculty of Law at Victoria University of Wellington.
- The Deputy Secretary of Justice and law reformer par excellence, Jim Cameron, was one of the Committee members. So was Bryce Harland, an Assistant Secretary of Foreign Affairs and one of New Zealand's most distinguished diplomats. The Chief Parliamentary Counsel, Walter Iles, was a member of the Committee, as was the Secretary of Defence, Dennis McLean. Also members were the Secretary of Cabinet, Mr PG Millen and Dr RM Williams, the Chair of the State Services Commission. This was a highly accomplished group of people who understood well the system of New Zealand government. The Committee was able to tailor a set of recommendations that would work.
- There were other public servants of distinction involved in the Committee's work. These included Mr GS Orr, a former Secretary of Justice, Mr JF Robertson, Secretary of Justice, Frank Corner from Foreign Affairs and Bruce Brown from the same department. New Zealand should look back at this accomplishment with pride. It is not often matters of such importance and difficulty are accomplished so elegantly.
- Looking back it is hard to resist the conclusion that the development of the OIA was the biggest policy game in town at the time. It was a significant constitutional change. Resources were devoted through the Information Authority to get the Act going, conduct a programme of education for public servants and to generally see that the Act was properly supported from an administrative point of view. The Information Authority was very successful in this early work under the Act.

See KJ Keith "Institute of Policy Studies: Seminar on the Official Information Act 1982" (Institute of Policy Studies, Victoria University of Wellington, Wellington, 1989) 7.

- Perhaps the most signal lack in recent years has been a failure of institutional support, education and commitment. The OIA is a sophisticated open-textured Act that is difficult to operate because it is not rules-based. But much of its success flows from the very fact that it is not rules-based. It does require a lot of government commitment, support and effort to ensure that it can work.
- In this paper, I first describe the features of the Act. Then follows an account of the most prominent analyses of the Act that had been done in recent years. This body of research taken as a whole is very useful. And I have set out to summarise it because of its value. The Law Commission in 1997, Steven Price and Nicola White have all done serious work that provides a base from which to carry out some preliminary evaluation of the Act. It is also important to look at the New Zealand Act from some other eyes, particularly those of Rick Snell from the University of Tasmania whose views are summarised in the paper.
- It turns out that an evaluation of the OIA's performance is very difficult. Such an evaluation goes to the quality of governance, which is a particularly difficult concept to measure. Yet, even if exact empirical measurements of the Act's successes and failures are not possible, some evaluative footholds are available. Evaluation of the OIA, or indeed any Act that has been in force for some time, is very important. It is a mistake not to check periodically that an Act is working well in practice. An Act like the OIA should not be allowed to go stale or run out of steam. It may require attention, some changes around the edges, and importantly, better administrative support, education and training.

II. FEATURES OF THE ACT

It is useful to begin here with an outline of the OIA and how it operates. The OIA is designed to ensure that official information is made available to those who request it unless there is good reason to withhold it.³ The presumption is in favour of disclosure.⁴ The Act has a wide reach. It applies to all government departments and ministers and most government entities. However, it does not apply to MPs, the courts, tribunals, Royal Commissions, and other inquiries, or to the

Official Information Act 1982, s 5.

See generally, Ian Eagles, Michael Taggert and Grant Liddell *Freedom of Information in New Zealand* (Oxford University Press, Auckland, 1992).

Parliamentary Service Commission.⁵ The purposes of the Act are set out in section 4. They are:

- (a) To increase progressively the availability of official information to the people of New Zealand in order—
 - (i) To enable their more effective participation in the making and administration of laws and policies; and
 - (ii) To promote the accountability of Ministers of the Crown and officials,—and thereby to enhance respect for the law and to promote the good government of New Zealand:
- (b) To provide for proper access by each person to official information relating to that person:
- (c) To protect official information to the extent consistent with the public interest and the preservation of personal privacy.
- Section 5 of the Act enshrines the principle that "information shall be made available unless there is good reason for withholding it". Sections 6 and 7 provide a number of reasons that are regarded as being conclusive for the withholding of information. The section 6 reasons are that information would be likely:
 - (a) To prejudice the security or defence of New Zealand or the international relations of the Government of New Zealand; or
 - (b) To prejudice the entrusting of information to the Government of New Zealand on a basis of confidence by—
 - (i) The government of any other country or any agency of such a government; or
 - (ii) Any international organisation; or
 - (c) To prejudice the maintenance of the law, including the prevention, investigation, and detection of offences, and the right to a fair trial; or
 - [(d) To endanger the safety of any person; or]

Geoffrey Palmer New Zealand's Constitution in Crisis: Reforming our Political System (John McIndoe, Dunedin, 1992) 132.

- [(e) To damage seriously the economy of New Zealand by disclosing prematurely decisions to change or continue Government economic or financial policies relating to—
 - (i) Exchange rates or the control of overseas exchange transactions:
 - (ii) The regulation of banking or credit:
 - (iii) Taxation:
 - (iv) The stability, control, and adjustment of prices of goods and services, rents, and other costs, and rates of wages, salaries, and other incomes:
 - (v) The borrowing of money by the Government of New Zealand:
 - (vi) The entering into of overseas trade agreements.]
- Where those reasons are applicable, the information will not be given unless the government wants to release it.
- 13 Section 9 contains a further list of more common reasons for withholding information. These are not conclusive reasons, but are subject to a balancing test. They will justify withholding information unless "in the circumstances of the particular case, the withholding of that information is outweighed by other considerations which render it desirable, in the public interest, to make information available" in order to:
 - (a) Protect the privacy of natural persons, including that of deceased natural persons; or
 - [(b) Protect information where the making available of the information—
 - (i) Would disclose a trade secret; or
 - (ii) Would be likely unreasonably to prejudice the commercial position of the person who supplied or who is the subject of the information; or]
 - (ba) Protect information which is subject to an obligation of confidence or which any person has been or could be compelled to provide under the authority of any enactment, where the making available of the information—

- (i) Would be likely to prejudice the supply of similar information, or information from the same source, and it is in the public interest that such information should continue to be supplied; or
- (ii) Would be likely otherwise to damage the public interest; or
- (c) Avoid prejudice to measures protecting the health or safety of members of the public; or
- (d) Avoid prejudice to the substantial economic interests of New Zealand;
 or
- (e) Avoid prejudice to measures that prevent or mitigate material loss to members of the public; or
- (f) Maintain the constitutional conventions for the time being which protect—
 - (i) The confidentiality of communications by or with the Sovereign or her representative;
 - (ii) Collective and individual ministerial responsibility;
 - (iii) The political neutrality of officials;
 - (iv) The confidentiality of advice tendered by Ministers of the Crown and officials; or
- (g) Maintain the effective conduct of public affairs through—
 - (i) The free and frank expression of opinions by or between or to Ministers of the Crown [or members of an organisation] or officers and employees of any Department or organisation in the course of their duty; or
 - (ii) The protection of such Ministers[, members of organisations], officers, and employees from improper pressure or harassment; or
- (h) Maintain legal professional privilege; or
- [(i) Enable a Minister of the Crown or any Department or organisation holding the information to carry out, without prejudice or disadvantage, commercial activities; or]

- (j) Enable a Minister of the Crown or any Department or organisation holding the information to carry on, without prejudice or disadvantage, negotiations (including commercial and industrial negotiations); or
- (k) Prevent the disclosure or use of official information for improper gain or improper advantage.
- There is not a great deal of precision in most of these tests and the categories are broad. This means that the decision-making process is a crucial element of the legislation. It is the Ombudsmen who police the release of information under the Act. In marginal cases, it can be difficult to predict whether information sought will be released. The guidance given and decisions by the Ombudsmen are critical here.
- Requests for information are to be made with "due particularity", ⁷ but there is no formal requirement that requests should be in writing. The Ministry of Justice is required to publish a directory of information, ⁸ which includes details of all departments and organisations covered by the Act, what they do, what sorts of documents they hold, a list of all manuals and similar documents containing policies, principles, rules or guidelines that the department applies, and a statement of how to gain access to information, including details of which officers to contact. All information that is held is subject to the Act, not just information acquired after the Act came into force.
- In the Act as it first operated, decisions on requests had to be made "as soon as reasonably practicable". However, it soon became evident that this led to delays. Amendments in 1987 required decisions to be made within 20 working days of the request. There is provision to extend the time limits in some circumstances, for instance, if there is a large quantity of information that requires a lot of time to search through, or if consultation may be needed. If an extension is granted, notice must be given to the requester specifying the reason for the extension and its length.

Geoffrey Palmer and Matthew Palmer *Bridled Power: New Zealand's Constitution and Government* (4 ed, Oxford University Press, Auckland, 2004) 232.

Official Information Act 1982, s 12.

Ministry of Justice *Directory of Official Information 2005* (Wellington, December 2005) http://justice.org.nz/pubs/reports/2006/directory-of-official-information/index.html (accessed 20 November 2007).

- When information is supplied, section 15 of the Act provides that charges "shall be reasonable and regard may be had to the cost of the labour and materials involved in making the information available." Charges can be required to be paid in advance.
- 18 Section 16 of the Act specifies a number of ways in which the information may be made available:
 - by providing a reasonable opportunity to inspect the document;
 - by providing a copy of the document;
 - as a written transcript, where it is a recording or similar matter;
 - by giving a summary of its contents.
- Documents can have material deleted from them if there is reason to withhold some of the information. The information must be made available in the way that the requester prefers unless that would impair efficient administration or there is a good reason under the Act.
- 20 Requests for information can be refused on the grounds specified in section 18. These are:
 - that good reason exists for withholding the information in terms of the tests discussed earlier;
 - that, for some sensitive categories, the existence of the information can be neither confirmed nor denied;
 - where making the information available would be contrary to a specific Act or would be a contempt of court or of the house of Parliament;
 - where information is or will soon be publically available;
 - where the information or document does not exist or cannot be found;
 - where the information cannot be made available without substantial collation and research;
 - where the information is not held by the department, minister, or organisation dealing with the request;

- where the information is frivolous or vexation or the information requested is trivial.
- 21 If a request is refused, the department, minister, or organisation must, if the requester asks, give reasons for the refusal. The requester must also be informed that he or she has the right to ask the Ombudsmen to review the decision. Where such a request is made, the Ombudsman investigates the matter. The Ombudsman has no power of decision but can recommend as he or she thinks fit. The Ombudsman can make recommendations if he or she thinks the request should not have been refused, or that the decision complained of is unreasonable or wrong. These recommendations and reasons are then reported to the appropriate department, minister, or organisation as well as to the complainant. Where such a recommendation is made, the information must be made available within 21 days, unless the Governor-General, by Order in Council, directs otherwise. This collective power of Cabinet to veto the Ombudsmen's recommendations was inserted in 1987 to replace the individual ministers' power of veto, which had been the most controversial feature of the Act. In addition, a requester whose request is declined can seek a judicial review of the making of an Order in Council.

III. ANALYSES OF THE ACT

There have been a number of interesting analyses of the OIA in recent years. In this part of the paper, I have selected four significant analyses of the Act for detailed attention. Three of these are New Zealand perspectives of the Act and a fourth analysis offers an Australian perspective.

Law Commission Report

The first analysis of the Act that will be discussed in this paper is the Law Commission's review of the Act and eventual report in 1997. As its preface indicates, the report was some time in the making: 10

The Law commission received the reference in 1992, and in December 1993 circulated a draft report to a wide range of public sector organisations and bodies who use the Act to request official information. In 1994, with the approval of the

Law Commission *Review of the Official Information Act 1982* (NZLC R40, Wellington, 1997).

¹⁰ Ibid, xi.

Minister of Justice, the Commission decided to delay publication of its final report. The decision was motivated in part by the Commission's competing work commitments; but also by a recognition that publication in the period before New Zealand' first MMP election might cause the report to date prematurely in light of subsequent political and administrative developments.

- 24 The Law Commission report began by discussing the changing context of the OIA. It said that while the Act itself had undergone relatively little change since it was passed, a number of other developments had significantly impacted on requesters and agencies subject to the Act. Changes in the social and political context identified by the Commission related to:¹¹
 - changes in the role and structure of the state;
 - increased consultation in lawmaking and policy making;
 - the introduction of a mixed-member proportional electoral system (MMP); and
 - growing international influences on the making of public policy and law.
- The Commission said that the Act had largely weathered these changes well. It put much of this down to the Act's open textured standards, as opposed to precise rules, which had allowed the Act to "change with the times" and had given the Ombudsmen flexibility in interpreting it.¹²
- The Law Commission was satisfied that the Act was generally achieving its stated purposes. The Act had made the principle of open government central to the ethos of public administration. In the core public sector, it was increasingly recognised that, in most cases, official information can and will be released. The Commission considered that the quality and transparency of policy advice had improved as officials knew that their advice could eventually be released under the Act. Nowledge that policy advice will eventually be released under the Act.

¹¹ Ibid, 13.

¹² Ibid, 13.

¹³ Ibid, 3.

¹⁴ Ibid, 5.

- 27 However, the Commission also identified a number of problems with the Act and its operation. The major problems identified were:¹⁵
 - the burden caused by large and broadly defined requests,
 - tardiness in responding to requests,
 - resistance by agencies outside the core state sector, and
 - the absence of a co-ordinated approach to supervision, compliance, policy advice and education regarding the Act and other information issues.
- 28 The Commission considered that neither the problems nor the terms of reference brought into question the underlying principles of the Act.
- The Commission's report contained two groups of conclusions and recommendations. The first group responded to the major problems identified in the report. In the Commission's view, these warranted immediate consideration. The second group involved fine-tuning of the Act. These were thought to be less urgent given the Commission's overall conclusion that the Act generally achieves its stated purposes. The conclusions and recommendations emphasised the importance of administrative as well as legislative response to the problems identified in the report. However, many of the Commission's recommendations were not acted upon.
- As indicated above, the Commission made recommendations in respect of particular problems associated with large and broadly defined requests. These recommendations were intended to encourage dialogue between the agency holding information and the requester. Not all of these recommendations were acted upon however. For instance, the Commission recommended that sections 12 and 13 of the Act be amended, but this did not occur. More successful was the Commission's recommendation to repeal section 18(f), which related to agencies' ability to refuse requests where the information requested cannot be made available without substantial collation and research, and replace it with a broader, more flexible section 18A. Subsection 18(f) was not repealed, but it was supplemented by a new section 18A in 2003. 17

¹⁶ Ibid, ch 2.

¹⁵ Ibid, 1.

The new sections 18A and 18B were inserted from 22 October 2003 by section 3 of the Official Information Amendment Act 2003.

- In respect of problems with tardiness responding to requests, the Commission recommended that the government should shorten the time limit for processing official information requests from 20 working days to 15 working days. It considered that developments in electronic technology and information management in the years since the Act was passed meant a shorter time limit was realistic. It suggested that the time limit set out in section 15(1) should be reviewed within three years, with a view to reducing it to 15 working days. This did not occur however. The Commission also endorsed the Ombudsmen's emphasis on agencies obligation to respond to requests as "soon as reasonably practicable" rather than the 20 day time limit.
- The Commission made several recommendations about how to foster a coordinated approach to the administration of the Act. It said that the Ministry of
 Justice should be given responsibility for developing this more co-ordinated and
 systematic approach to the functions of oversight, compliance, policy review and
 education in respect of the Act. It also recommended that adequate resourcing
 should be given to existing institutions, such as the Office of the Ombudsmen and
 Ministry of Justice, to improve the administration and understanding of the Act. It
 noted that the Ombudsmen's work in publishing guidelines and case notes and
 holding seminars and training sessions is very valuable in improving the operation
 of the Act, and stressed the importance of adequate funding being made available
 for these activities.
- The Commission's report also contained other conclusions and recommendations as to how the Act and its administration might be fine-tuned.

Steven Price's Analysis of the Act

The second analysis of the Act discussed in this paper is the research of Steven Price, of Victoria University of Wellington, into the Act in practice. His research was conducted over several years, ¹⁸ and culminated in a speech and research paper. ¹⁹

Steven Price "The Official Information Act: Does it Work?" (2006) NZLJ 276.

Steven Price *The Official Information Act 1982: A Window on Government or Curtains Drawn?* (New Zealand Centre for Public Law, Victoria University of Wellington, Occasional Paper 17, November 2005).

Methodology

- The main data for Price's research was obtained by making OIA requests of all the national-level agencies subject to the OIA as listed in the Directory of Official Information seeking copies of OIA requests they had received, their responses and any related documentation. Specifically, he requested:
 - the 10 most recent OIA requests and responses;
 - the 10 most recent requests and responses where information was withheld;
 - the last 5 requests and responses where a time limit extension was sought; and
 - the last 5 requests and responses in which the minister or minister's office was consulted before the response was prepared.²⁰
- 36 The results of these hundreds of OIA requests were themselves mixed:²¹

Although I mentioned in my request letter that my research was being overseen by a supervisory committee that included an Ombudsman and a former Secretary for Justice, 13 agencies did not respond, even after a follow-up letter. The average response time to my letter was 21.7 working days. Almost a third arrived late, with no extension. Thirteen organisations lawfully granted themselves extensions and five then missed the new deadlines. One unlawfully gave itself two extensions, and still failed to supply the information within the third deadline. Some deleted the names of all the requesters on grounds of privacy; some even deleted the names of the officials responding to the requests. One agency even deleted its own name from some of the responses it supplied.

- Price's other data comprised information gained through interviews he conducted with frequent requesters and officials.
- Price then analyses the data this data in his research paper. His aim was "to provide a picture of the OIA in operation, focusing in particular on responses whose legality seems questionable."²²

²⁰ Ibid, 7.

Price "The Official Information Act: Does it Work?" above, n 18, 276.

²² Ibid

Not one OIA, but two

- 39 Price concluded from his research that, in practice, we have not one OIA, but two. The first OIA is the set of rules that apply to straightforward requests that are unlikely to embarrass anyone. These comprise the bulk of OIA traffic. They are usually processed well within the 20-day limit, with little or no information withheld, and no charge. There is much to be happy about in respect of how this first OIA operates.
- The second OIA, on the other hand, is the set of rules that apply to difficult or politically sensitive requests often from journalists or opposition MPs. These kinds of requests are often processed quite differently to straightforward, uncontroversial requests. They have different time limits they are often overdue without an extension, some take more than a year. They are more likely to be transferred to the minister's office, often with questionable or no justification. Many are refused outright. Information is withheld, either wholesale, or in larger than necessary chunks. Price noted, with more than a little sense of irony, that his own OIA requests for the purpose of this research apparently fell under this second, much less user-friendly OIA. It is this second class of requests about which Price considers there is cause for real concern.

Requesters' views of OIA

As mentioned above, in addition to his OIA requests, Price also conducted a series of interviews with requesters and officials. Frequent requesters that Price spoke to were generally ambivalent about the OIA. On the one hand, they acknowledged that it was a powerful tool, and meant that a lot of information was accessible to them. No one wanted to go back to the way things were before the Act.²³ On the other hand, they thought the Act and the way it operates in practice had some major limitations, and were sceptical of Ministers' and officials' motives and knowledge of the Act.²⁴ They said many officials wrongly believed that OIA requests must be in writing. They also suspected that officials interpret requests as narrowly as possible. This led requesters to word their requests in broad, sweeping terms so as to minimise risk of missing something.²⁵ Information was sometime

Price *The Official Information Act 1982* above, n 19, 14.

²⁴ Ibid, 11.

²⁵ Ibid.

refused for illegitimate reasons not set out in the Act.²⁶ They also thought officials often used the withholding clauses that are set out in the Act improperly, deciding not to release information and then fishing through the Act for justification.²⁷

- Requesters reported frustrating delays, particularly with regards to more controversial or sensitive material. They listed what they saw as a number of common stalling tactics. They thought the aim of such delays was to wait out the newsworthiness of a story, that is, let the possible scoop go stale. Sometimes large charges were imposed, in a way that seemed designed to deter them from pursuing requests. They also thought that sometimes too much information is withheld, when parts of it could be released. They told Price of more serious suspicions, such as that information sometimes gets shredded or is given back to sources in order to avoid disclosing it. They often suspected the information they received might be incomplete.
- Of course, the data Price gained through these interviews was necessarily anecdotal. It was also quite subjective some of the most serious suggestions were suspicions rather than provable claims. Notwithstanding this subjectivity, and indeed even supposing such suspicious are not in fact correct, the mere existence of such doubts and suspicious is a serious matter. The aim of the Act is not just open government, but surely also that it should be clearly and observably open. Both openness and the appearance of openness are necessary for requesters and the wider public to be confident that the principle of open government is actually operating.

Officials' views of OIA

Price's interviews with officials revealed that they were also ambivalent about the Act, although for different reasons:³²

They supported the concept of open government and the principles behind the OIA.... Many said that the possibility of their advice becoming public strengthened its quality.... However, officials also said the OIA is an enormous burden to

²⁶ Ibid, 12.

²⁷ Ibid, 12.

²⁸ Ibid, 11 – 12.

²⁹ Ibid, 13.

Ibid, 12 - 13.

³¹ Ibid, 14.

³² Ibid, 15.

administer. They criticised many requesters for not thinking hard enough about the precise information they wanted or for simply trying to get officials to do their research for them.... Requests, they said, were increasingly taking the form: "all documents relating to Y including emails (and deleted emails), minutes, briefings, memos, drafts, correspondence, reports, aides memoire, file notes, Cabinet and Cabinet committee papers." This could create days of work – sometimes weeks or months".

- The task of responding to requests can be complex and time-consuming. Officials said it is also often thankless, as some requesters are demanding, abusive and suspicious.³³ Processing OIA requests is not always well resourced within departments and it is not high-status.
- Officials also reported feeling cautious in some instances about releasing information. They are aware that the media does not always present information in its fullest context. Information gained by politicians through the OIA is seen as even more likely to be presented sensationally or used for "political grandstanding". Furthermore, the standards in the Act are open-textured and nebulous and decisions made by officials under the Act are subject to review.

Tension between requesters and officials

- 47 Price's paper identifies a tension between requesters' and officials' views of and approaches to the Act. Each group was to a certain extent suspicious of the other.
- Officials felt that requesters often framed their requests much too broadly, and suspected that many were "fishing expeditions" or were a lazy attempts by requesters to get officials to do their research for them. Regardless of requesters' motives for framing requests broadly, such requests are more resource-intensive for officials than more narrowly-defined requests would be.
- However, requesters reported a pragmatic pressure to frame requests more widely. They said they often felt that officials would read requests as narrowly as possible. Broadly-framed requests therefore face less of a risk of missing information because of narrow interpretation by officials.

³³ Ibid, 16.

³⁴ Ibid, 17.

The way that these suspicious play out in practice is not good for the efficient administration of the Act. Nor is it good for either officials or requesters. In fact, it is a vicious circle – officials and requesters each distrust the other, and as a result begin to give each other reasons for this distrust, whether or not those reasons existed in the beginning. The groups become locked into competitive tactics.

Good uses of OIA

Price identifies deficiencies with the way the OIA operates in practice. Analysing the data he gathered through his own OIA requests, he explores in detail a number of problematic grounds on which requests are refused.³⁵ However, his research paper also has an optimistic note. He lists situations in which the OIA has led to some very good outcomes.³⁶ He acknowledges that "earth-shaking OIA revelations are rare", although he lists a few examples that might fall into this category.³⁷ But he highlights the significance of "ordinary" OIA requests, which have a real impact on freedom of information in New Zealand. He says that "a good proportion of [these] are about holing decision-makers accountable, seeking a window on the processes of government and marshalling resources for research, political opposition or public critique."³⁸

Nicola White

The third analysis of the Act discussed in this paper is the major research project undertaken by Nicola White while she was a Research Fellow at the Institute of Policy Studies at the Victoria University School of Government. Her research culminated in a book published in 2007.³⁹

Motivation for undertaking research

In her book, White explains that she felt the concept of open government had gained real traction and acceptance both with officials and requesters. 40 Like Price, she acknowledged that this had resulted in some significant changes in behaviour

Ibid, 33 - 48.

Ibid, 30 - 31.

³⁷ Ibid, 29.

³⁸ Ibid.

I am very grateful to Nicola White for allowing me access to a pre-publication copy of her book. Nicola White *Free and Frank: Making the Official Information Act Work Better* (Institute of Policy Studies, Wellington, 2007).

⁴⁰ Ibid, 6.

across government. However, she was concerned that the in practice, there was too much unnecessary conflict surrounding the Act's processes and operation. These arguments ranged in scope from apparently petty procedural matters to high constitutional questions. While officials and requesters alike believed in the Act and its principles, officials hated processing OIA requests and requesters did not like the treatment their requests received. The aim of her research project was to understand what was going on with the Act, and why, and to see if it was possible to improve the situation.

Context of the OIA today

White notes that the OIA cannot be analysed in a vacuum. It is one part of a wider picture of today's information climate. White refers to other factors, such as the key role that information plays in today's society, or the "information age". She also refers to changes in the relationship between citizens and the state. She stresses that this relationship is government by consent, and citizens have the tools, literacy and energy to pursue information if they wish. White also refers to the value that is placed on accountability – the executive is held accountable through the democratic process and mechanisms such as judicial review. Information is crucial to this. Finally, she also refers to the changes brought about by the MMP electoral system during the past 20 years, which has, among other things, strengthened Parliament.

According to White, the overall information context in New Zealand today is that the Executive is, on the whole, more constrained, accountable, open and participatory than before. There is greater dissemination of government information to citizens, and consultation with citizens by government.⁴¹

Literature review and interviews

White's research comprised a comprehensive literature review and interviews with requesters and officials. She notes ten themes that she observed in her research:⁴² government is now much more open under the OIA; many OIA requests are processed easily; in many areas, there is still significant uncertainty; the role of the ombudsmen regarding the OIA is settled; delay is and always has been a problem; large requests are hard to manage; there needs to be more training for officials

⁴¹ Ibid, 13.

⁴² Ibid, 90 – 92.

regarding OIA requests; protecting government decision-making remains contentious; electronic information will provide a major challenge; and it may be time to consider pre-emptive release systems.

What works well

White makes a number of positive observations about the OIA. First, she notes that it has played a key role in developing a culture of more open government. It has spawned a number of related Acts, such as the Public Finance Act 1989; Fiscal Responsibility Act 1994; Criminal Procedure Bill; and consultation provisions in statutes such as the Local Government Act 2002. It has also effected other significant changes. For instance, examination scripts are now routinely returned; most departmental manuals and procedures are now easy available; many departments regularly publish reports and research papers, sometimes also including internal and external think-pieces; and it is now a regular occurrence to publish all background reports, including Cabinet papers, that accompany any major government announcement.

Secondly, White notes that the basic system for processing OIA requests generally works well. She refers to Price's research, agreeing that straight forward requests are generally processed efficiently. Thirdly, the quality of decision-making and advice has improved as a result of the scrutiny to which officials know their advice will be subject. Fourthly, she observes that the Office of the Ombudsmen has been very effective in its role as the review authority. Thirdly, where the observes that the Office of the Ombudsmen has been very effective in its role as the review authority.

What does not work well

White also lists a number of respects in which the OIA is less successful. First, she notes that there is often a political dimension to OIA requests. Sometimes information is inherently of political consequence. In other cases, if the requester is an opposition politician or a journalist, he or she may make an issue into one of political consequence. White says this is a simple reality. The important question is how well the OIA and associated regime manages this political-administrative interface. Her view is that this interface is difficult. She considers that this is at

⁴³ Ibid, 214 – 215.

See Phillip A Joseph *Constitutional & Administrative Law in New Zealand* (3 Ed, Brookers, 2007) 8.5.1(7)(c) and 19.7.6.

White, above n 39, 217.

⁴⁶ Ibid, 218.

⁴⁷ Ibid, 218.

least in part due to uncertainty about the relevant principles or rules that should guide behaviour – judgments are often highly subjective, and it is uncertain tow what extent political considerations can impinge on behaviour regarding OIA matters. She contends that this uncertainty is "a breeding ground for suspicion and distrust" between officials and requesters.⁴⁸

- Secondly, White notes the problem of large OIA requests.⁴⁹ When a request is large or poorly specified, officials may extend the timeframe for responding, charge for part of the work involved in responding, or if neither of these approaches would render the request manageable, refuse the request altogether. White considers that the grounds in the Act for imposing a charge are too broadly worded. As a result, charging can appear inconsistent, arbitrary and illegitimate. She cautions that this can raise suspicions and distrust in requesters who are made to pay a charge. They often feel that the real reason for the charge is to discourage them from pursuing a request.
- Thirdly, White says that timeframes timeframes under the Act are problematic. Those responding to requests often granted themselves extensions to the 20-day upper time limit and many simply returned information late without extension. White notes that requesters, particularly media and opposition politicians, often suspected that delays were used deliberately and tactically. Again, this was a source of mistrust and suspicion.
- White's fourth point is that official modes of information management and storage have not yet caught up with the advances in information technology of recent years. A great deal of this information is generated, and is subject to the Act, but officials cannot effectively comply with the Act unless such electronic information is readily accessible by them.
- 63 Fifthly, White questions the Act's effectiveness in practice with regards to protecting government advice and decision making processes.⁵¹ This is an important aim of the Act, but there is some way to go on this. For instance, she says that many officials will avoid writing things down so that they can avoid the

⁴⁸ Ibid, 221.

⁴⁹ Ibid.

⁵⁰ Ibid, 224.

⁵¹ Ibid, 225.

Act, even when this is an inefficient way to work.⁵² The Act itself might protect such information, were it to be written down, on various withholding grounds. However, White argues that officials are simply too uncertain about how these open textured grounds operate, that they will not chance it. She argues that the Act fails to achieve one of its aims of protecting government advice and decision-making processes because it is too open-ended and uncertain.

White's sixth criticism of the Act is that its administrative impact is simply too big of a burden. While it is difficult to measure this burden, she says that anecdotal evidence suggests it is too big.⁵³ Seventh, the public sector's systemic expertise with regard to the OIA is not nearly as good as one might expect or hope given that it has been in effect for 25 years.⁵⁴ Officials are much less clear than they should be about what they should be doing under the Act, and what its basic "rules" are. One of the reasons White gives for this is that the case-by-case approach taken to decision-making under the Act and by the Ombudsmen. Decisions are made within separate departments, and by the Ombudsmen, one at a time on the facts of each case. Specific more concrete "rules" have not built up.

White's eighth point is that there is insufficient "balance" in the system. The Danks Committee called for balance on all sides – requesters should be reasonable in their requests and officials should be reasonable in processing them. White thinks this balance is lacking in the current systems. Requesters sometimes use requests to annoy, punish or slow down government. Those responding to requests also use tactics from time to time, such as delaying, imposing charges, or reading requests as narrowly as possible. The final point is that the OIA has not operated well to build trust between requesters and responders: 56

The system as it works now is eroding trust in the state sector rather than building it.... [I]n essence, the ambiguity of the rules leaves people free to judge behaviour against different standards, or to infer motives and conduct from their own perspective. Often that means that people see political manipulation and game-playing where in reality there may be careful administrative process and ordinary

⁵² Ibid, 226.

⁵³ Ibid, 227.

⁵⁴ Ibid, 228.

⁵⁵ Ibid, 230.

⁵⁶ Ibid, 231–232.

interplay with the political level of government. But because the rules are unclear, suspicion breeds.

As suspicion and distrust grow, people engage in ever more behaviour based on low trust, like specifying OIA request in more and more detail. That in turn creates "black letter responses" that may miss the point or appear overly formalistic and/or obstructive, which then fuels more distrust. And so the spiral goes. Overall, behaviour moves further away from the ideal of reasonable and balanced discussion and cooperation that the Danks Committee hoped for, and that the ombudsmen exhort people to adopt.

Developing rules and categories

White's conclusion is that the problems with the Act in practice are strongly related to the broadness and openness of its principles. She says it is time to go back to legislative design basics, and consider firmer rules and categories again⁵⁷ These further developed categories of information and administrative rules regarding release of official information could be developed over time, in light of experience with OIA requests. The rules would sit underneath the existing OIA framework and provide more detailed guidance for its administration.⁵⁸

Rick Snell, University of Tasmania

The fourth analysis of the OIA discussed here is an Australian perspective, offered by Rick Snell of the University of Tasmania. Snell has a long background in freedom of information law, and was the editor of the Freedom of Information Review for many years.

Comparative perspective

Snell advocates a comparative and/or multi disciplinary approach to freedom of information and information management. Official information is an area that has had and is having a very rapid uptake across various jurisdictions. He thinks it is important to move beyond descriptive overviews of FOI legislation to comparative studies. Yet, to date there has been relatively limited research of this kind:⁵⁹

⁵⁷ Ibid, 242.

⁵⁸ Ibid, 92.

Rick Snell "Using Comparative Studies to Improve Freedom of Information Analysis: Insights from Australia, Canada and New Zealand" (Conference Paper, 6th National and 2nd International Congress on the Right to Information, Mexico, 8-11 November 2005) 19 - 22.

Freedom of information has only received limited study as [a] marginal subject in a marginal field – administrative law –. Indeed freedom of information is rarely covered in administrative law courses (or at best receives a fleeting mention in the rush of other topics like the ombudsman that are given a few minutes at the end of the course for completeness sake) sometimes in media law units and increasingly in some journalism courses or occasionally in information management courses....

A comparative perspective may allow a better understanding of what design choices, legislative architecture, administrative reforms and other steps that may be necessary to bed down a successful adoption of open government in the long term.

69 From this point of view, Snell's comparisons of New Zealand's OIA with Australian FOI laws are of considerable interest.

Administrative (non)compliance

- Snell proposes administrative compliance as a useful measure of the efficacy and well being of any FOI regime. There should be administrative compliance with both the spirit and letter of FOI laws. Requests should be processed in a timely fashion by a bureaucracy committed to achieving the maximum disclosure possible in the particular circumstances at the time of the request. Decisions on release should be made on the merits of the request, and should be free of political and other considerations that are not set out in the legislation. The public interest should be a key determinative question. 60
- Snell refers to a model of compliance according to which administrative responses to requests can be broken into five categories:⁶¹
 - 1. Malicious non-compliance (where the intention is to avoid complying with the Act, for instance, the destruction of records subject to a FOI request; avoiding responding to a request; or removing compromising information from files);
 - 2. Adversarialism (the practice of testing the limits of FOI laws, without engaging in obvious illegalities, in an effort to ensure that the interests of governments or

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⁶⁰ Ibid, 26.

Ibid, 27–29. Snell refers to categories proposed in Alasdair Roberts "Freedom of Information Project: Limited Access: Assessing the Health of Canada's Freedom of Information Laws" School of Policy Studies, Queen's University, 1998) and adds extra categories himself.

- departments are adequately protected. New Zealand is not immune to this kind of non-compliance);
- Administrative non-compliance (in which public bodies undermine rights of access due to inadequate resourcing, deficient record keeping, or other weaknesses in administration);
- 4. Administrative compliance (in which public bodies comply with Act's requirements):⁶² and
- 5. Administrative activism (according to which officials not only comply with the Act, but are proactive, for instance by providing additional assistance or guidance to requesters. This category highlights the difference between technical compliance and an active pursuit of the objectives and spirit of the legislation.
- Administrative compliance and non-compliance are part of a spectrum of possible behaviour. Clearly, as successful FOI regime is one in which administrative compliance is largely achieved. The mark of a very healthy regime may well be that there is also at least some administrative activism as well.
- Snell notes that the Australian FOI Acts were greeted with more enthusiasm at their inception than the OIA was in New Zealand. While there were initially concerns in New Zealand that the broad principles of the OIA would not work well in practice, the rules-based Australian Acts were expected to work better. Yet, Snell argues that today, the OIA is much more effective than the Australian provisions:⁶³

In Canberra, where we were promised a new democratic right, we now have public officials who will fight all the way to the High Court to deny access to old policy documents.

We have a Canberra public service that appears, by actions and words, nervous about any level of transparency, and a cabinet that insists it needs to keep every bit of advice and discussion completely under wraps in order to function....

Rick Snell "The Truth is out there: In Wellington not Canberra" (news blog, Sydney Morning Herald, 11 January 2007).

The Ombudsmen in New Zealand have detected a "compliance culture" within some organisations, that is a culture of minimum compliance with the statutory regime. *Report of the Ombudsmen for the Year Ended 30 June 2004* [2004] AJHR A.3, 25.

But look at New Zealand where the Official Information Act was [initially] treated as a joke. Their Act grants access to so much cabinet information that there are guidelines published on the internet on releasing it.

According to the administrative compliance criterion, Snell is fairly disparaging of Australian FOI laws: "The picture in Australia has been described as on of 'frustration, delay and the haphazard provision of information". He argues that they are enduring a "death by a thousand cuts". Material that in Australia receives automatic exemption, such as Cabinet papers, in New Zealand is routinely available.

Snell is aware of some problems with the OIA that emerge in practice: "Unfortunately there is mounting evidence that even in New Zealand the art of managing and sustaining the tensions between open government and other policies is a continual one rather than a reform that can be achieved by the simple stroke of a pen." He notes that instances of administrative non-compliance are likely to occur in almost any FOI regime. This is as true of New Zealand as of any other jurisdiction. However, he thinks that New Zealand does better than other jurisdictions like Canada and Australia. He puts the success of the OIA in this regard down to several factors: legislative architecture; history; and the nature of the FOI constituency in NZ, that is, the officials that have "bought into" the ethos of the Act.

IV. EVALUATION

The ultimate issue about the OIA is whether it has contributed to good governance in New Zealand. It is important to know how the OIA has affected New Zealand's system of government and the decision-making processes within government. When the concept of good governance is unpacked a number of ideas lie beneath it. The idea of openness and transparency is certainly one element of good governance, and it is an objective that the OIA aims directly at. The idea that there should be accountability for public decisions is frequently said to be an element of

⁶⁴ Ibid, 25.

Rick Snell and Peter Sebrina "Information Flows: The Real Art of Information Management and Freedom of Information" (2007) 35 Archives and Manuscripts 55.

Rick Snell "The Kiwi Paradox – A Comparison of Freedom of Information in Australia and New Zealand" (2000) 28 Federal Law Review 575.

Snell "Using Comparative Studies to Improve Freedom of Information Analysis" above, n 59, 51.

good governance.⁶⁸ Another element is the notion that public participation in government decisions is to be encouraged – democracy is often said to be an exercise in self-government by the people.⁶⁹ Openness in official information contributes to the public's ability to participate in this way.

- Government decisions must be seen to be legitimate by those to whom they apply. The Government has also to be seen as trustworthy and reliable. Availability of official information can be said to contribute those aims as well. When information is available, it demonstrates that there is nothing to hide and nothing being hidden. All these points were explicit in the Danks Committee analysis. Surprisingly, one element that appears to have been absent was the need for government to be free of corruption. It seems clear that the OIA contributes considerably to meeting that value. Most decisions cannot be hidden and neither can the reasons behind them.
- These ideas concerning good governance exist at such high level of abstraction that it is difficult to measure whether they have been achieved in any empirical or quantitative sense. It is difficult to prove what the Act has or may have done for the quality of governance in New Zealand. The United Kingdom did without freedom of information legislation until 2000. I suspect that it would not be easy to demonstrate whether that fact impeded the good governance of Britain.
- In the New Zealand context, it would also be a mistake to assume the OIA is the only possible factor impacting on the availability of official information. For instance, it is also possible to build a human rights analysis for freedom of information. Section 114 of the New Zealand Bill of Rights Act 1990 that guarantees the right to seek and receive information.
- 80 In matters of governance and constitutions it is hard to tell what is a cause of what we do not always know what we do not know.⁷⁰
- Assessing the performance of the OIA in New Zealand after 25 years is not simple.

 The first issue is what criteria should be applied to such assessment. The most

Dawn Oliver Constitutional Reform in the United Kingdom (Oxford University Press, Oxford, 2003).

See Grant Liddell "The Official Information Act 1982 and the Legislature: A Proposal" in *The Official Information Act* (Official Information Act Seminar, Legal Research Foundation, Wellington & Auckland, 1997) 6, 12.

Zoë Prebble "The Epistemology of the Constitution: Do We Know our Constitution when we See it?" (LLB(Hons) research paper, Victoria University of Wellington, 2005) s IV.B.

obvious methodology is to compare the aspirations expressed in the Danks Committee recommendations in 1980 with what has actually happened. But there are considerable methodological difficulties in trying to work out the answer. Assessing standards like accountability and public participation in public affairs is an open-ended and indeterminate inquiry, especially given New Zealand's constitutional arrangements. Let me set the scene by quoting from a recent article I wrote about New Zealand's constitutional arrangements of which the OIA now must be regarded as part:⁷¹

Despite the apparent simplicity of New Zealand Constitution, or perhaps because of it, many complexities lurk not far beneath the surface. Even the core is indefinable, and writing this article brought to mind Lewis Carroll's delightful nonsense poem, "The Hunting of the Snark," in which the Snark is both imaginary and elusive. The New Zealand Constitution in 2006 is neither readily accessible nor easily understood. The New Zealand Constitution is flexible and, to a large extent, uncodified and fluid. The Constitution is both malleable and mysterious. It is an iterative Constitution in a state of constant and often silent evolution. The cumulative effect of decisions by the Executive government, the Parliament, and the courts alter its features, if not its fundamental configuration, every year. In a constitution like New Zealand's, law and politics tend to merge into each other – political battles are more influential in determining what the rules are than court decisions. It should be observed that almost every constitution inevitably appears as a work in progress.

- It is important when evaluating the OIA to recognise that the biggest constitutional change in New Zealand in the 20th century was the adoption of the mixed member proportional representation system for electing members of Parliament ("MMP"). This has caused the current situation where we have eight political parties represented in the Parliament. There is a strong tendency under this type of electoral system for there to be a minority government. The diversity of points of view that are now represented in the New Zealand Parliament is substantial.
- The first MMP election occurred in 1996. As such, the experience with the OIA falls into two phases: from 1982 until 1996 the OIA operated in the context of a first-past-the-post electoral system ("FFP"); and from 1996 to 2007 it has operated

Geoffrey Palmer "The New Zealand Constitution and the Power of Courts" (2006) 15 Transnational Law and Contemporary Problems 551.

in the context of a proportional system. It might be postulated that operation of the OIA has been under greater pressure, and pressure from more points of view, under MMP than it was before. But it is difficult to see how to make much of this distinction, except to say that it may be important.

- The Danks Committee report titled "Towards Open Government" was a document of high quality and considerable liberality. Some of the most able public servants of their generation served on this committee. In a sense, the policy objectives the Committee sought from the project can be summarised as follows:
 - A better informed public that can better participate in the democratic process. 73
 - The minimisation or elimination of secrecy in government. Secrecy is an important impediment to accountability when Parliament, the press and the public cannot properly follow and scrutinise the actions of Government.⁷⁴
 - Public servants should also be held accountable through greater flows of information about what they are doing. They make many important decisions that affect people and the permanent administration.⁷⁵
 - Ensure better information flows, as these will produce more effective government and help towards a more flexible development of policy; with more information available, it is easier to prepare for change.⁷⁶
 - Ensure that more public information is available as this will enhance public cooperation with Government.⁷⁷
- Hard headed analysis of the sort that auditors insist on would probably have to conclude that it would be impossible to measure whether the Danks Committee objectives have been met. Take the last one. How do we decide whether public cooperation with Government has been enhanced? How many variables must be analysed in order to answer such a question? Even if it has been enhanced, what

Committee on Official Information ("Danks Committee") "Towards Open Government: General Report" (Wellington, 1980); "Towards Open Government: Supplementary Report" (Wellington, 1981).

Tbid, para 22.

Tbid, para 23.

⁷⁵ Ibid, paras 24–25.

⁷⁶ Ibid, para 26.

⁷⁷ Ibid, para 27.

causal role did the OIA may play in this? The question of whether more flexible development of policy has occurred as a result of the Act, or due to some combination of other factors, is similarly imponderable.

The policy-making process in New Zealand has changed and developed considerably since the time the Act came into force. In the New Zealand context it is incontestable that MMP has placed more checks and balances around executive policy development machinery than previously existed. The process of winnowing out and testing proposals is more rigorous than it was under FPP. But the policy may not be better nor the process by which it is generated. It is harder under MMP to pursue consistent policy objectives over time. There tends to be a loss of coherence in pursuing a broad policy framework because MMP generally works on the basis of concurrent majorities. The group of political parties in Parliament that form a majority to support one measure that passes will not necessarily be the same as the group that supported the previous one that passed.

MMP also opens up the policy-making process to greater contestability. Pressure groups and lobbying can be more effective than they were under FPP. Public service policy analysts have to aware of these tendencies and factor them into the process of developing policy. It is also clear that the OIA does put public servants under notice that their advice is likely to become public at some point and will be scrutinised, particularly by those interests who are affected by it. That is likely to cause better analytical approaches that proactively attempt to identify and address or combat arguments against proposed policy. Both the OIA and MMP have put public servants under greater pressure than they were previously under.

The place of the Public Service in providing policy advice has become plainer as a result of the OIA. The fact that a government has not followed official advice in a particular instance becomes known in a way that it previously did not. This places pressures on the Cabinet system, especially in relation to collective responsibility. The constitutional conventions in this regard have had to be altered in New Zealand to reflect the political needs of coalitions. The "agree to disagree" provisions in the Cabinet Manual are used from time to time.⁷⁸

Cabinet Office, Department of Prime Minister and Cabinet Cabinet Manual 2001 (Wellington, 2001) 3.2–3.24.

- 89 The other development over the period has been that public servants no longer have a monopoly over policy advice. There are many more contestable sources of policy now than there used to be for instance, think tanks, consultancies, governments abroad, special advisers and lobbyists. There is a lot more consultation in the Government than there used to be. The Government does not appear to be a Leviathan, ⁷⁹ that is to say an omniscient and omnipotent creature from which dictates are delivered on high.
- One of the Danks Committee's objectives was that, since public servants make many important decisions, they should be held accountable through greater flows of information regarding what they are doing. This has probably been achieved to some degree. Under the Act, an individual can secure information of interest to their affairs. Individuals and can, more effectively than before, find out if they have been fairly treated. In routine cases at least, it is probably quite simple to get the sort of information that individuals require in many instances. Of course the operation of the Ombudsmen in New Zealand preceded the OIA.
- 91 The Act has reduced the anonymity of the Public Service. The removal of the cloak of secrecy has allowed critics of policies to get down to what the real issues are and not be put off by prevarication or flimflam. It is possible to find out why decisions were made or at least the basis upon which they were articulated, which may not be quite the same thing. Thus, the accountability of the public service seems pretty clearly to have increased as a result of this Act. The accountability of ministers has been increased as well because it can be discovered when they did not follow advice.
- It can hardly be contested that secrecy is an important impediment to Executive accountability to Parliament, the media and the public. There is no doubt that much more information now comes out than was previously the case. Yet, in some ways the plethora of information may actually impede accountability rather than increase it. There is such a mass of material around all the time that many important issues are not analysed effectively simply because there is so much to choose from.

Thomas Hobbes *Leviathan* (reprint of 1651 edition, Penguin Books, Baltimore, 1968).

Important information may be swamped, possibly even deliberately, by large volumes of less important or irrelevant information.⁸⁰

There is a certain ambiguity about the term "accountability" within Westminster systems of government. There is the political accountability of public servants to elected politicians. There is accountability of ministers to Parliament. There is accountability to the law. There is accountability to the general public in the sense that decisions have to be explained and defended. But whatever form of accountability is being discussed, it cannot be effective without information. In its classical form, the doctrine of ministerial responsibility protected civil servants and held ministers accountable. The OIA has made it clear what public servants recommend and what Ministers decide. To some extent, that fractures the appearance of unity between the two. Whether there is any great harm in this is not easy to say.

A heavily analytical approach to the OIA in terms of the constitutional principles upon which it is based turns out to be virtually impossible. I am inclined to the view that the Act has improved things so far as the objectives to which it was aimed are concerned. But how can we be sure? One way to test the issue is to consider the counterfactual. What would be the reaction if there was a serious proposal to repeal the Act and go back to the Official Secrets Act? Put in that way, the case in favour of the OIA is clearly unanswerable. There would be no political or public support a move to return to the way things were before the Act. It would be seen as undemocratic. I doubt that any political party that would be prepared even to propose it. So, based on the ordinary democratic principles about how policy gets accepted, it would seem to be impossible that New Zealand could go back. It is not in the nature of the political culture.⁸¹

The question thus becomes whether we can go forward, and how. The recent studies of the OIA in practice demonstrate in my view that there is a need to reassess it. Both the studies of Nicola White and Steven Price are based in part on interviews with users, some of whom are unhappy. After 25 years, all legislation

Alastair Morrison "The Games People Play: Journalism and the Official Information Act" in *The Official Information Act* (Official Information Act Seminar, Legal Research Foundation, Wellington & Auckland, 1997) 30, 35.

For a discussion of the Official Secrets Act 1951, see Geoffrey Palmer *Unbridled Power? An Interpretation of New Zealand's Constitution and Government* (Oxford University Press, Wellington, 1979) 158–162.

should be reviewed. A recent United Kingdom Law Commission report was strongly in favour of a systematic approach to post-legislative scrutiny. We should not pass laws and never look at them again. It is important to revisit them after they have been in effect for a while and evaluate how well they are fulfilling their purposes in practice, and whether they are having any unforeseen or undesired consequences. The OIA can be no exception to this.

After 25 years, the Act is not at the top of people's minds in the way it was when it first came into force. When you have been in the business of government and legislation for a while, you realise that legislation/legislative regimes can wax and wane over time. After 25 years, no Act should be free from sytematic review. There are some problems with its operation. We should analyse what these are.

I have little doubt that more resources were devoted to training public servants about their obligations under the Act when it was first in force than are now. The failure to provide adequate support for officials who have to administer the Act has undoubtedly impaired its operation. This point has been noted by the Ombudsmen. Any legislation requires proper administration and training if it is to work effectively. A statute like the OIA that operates across the whole of Government should, in my view, have support from the State Services Commission. The enterprise is a whole of Government operation and needs to be administered in a consistent and fair manner across the whole of the public service and the crown entities to which it applies.

I should say that the view I take is that the basic principles of the Act are appropriate. I do not favour a rules-based approach. I think the open-textured manner of the New Zealand Act has served us well. It has the great virtue of avoiding judicialisation of the issues. This is an Act that is overseen by the Ombudsmen. They perform this role very well. However, it is not a role that would be appropriate for the Ombudsmen to perform if the Act were remodelled according to a rules-based template. The principles-based structure of the Act allows the Ombudsmen flexibility to ensure that sometimes competing aims of the Act are kept in balance. For instance, there is an Ombudsmen's ruling to the effect

UK Law Commission *Post-Legislative Scrutiny* (UKLC, R 302, London, 2006).

Office of the Ombudsmen Report of the Ombudsmen for the Year Ended 30 June 2002 [2002] AJHR A.3 10.

that the OIA can in some instances be applied less rigorously to advice from the Department of Prime Minister and Cabinet ("DPMC") to the Prime Minister because the nature of its work is to give instant advice:⁸⁴

In our 2002 annual report, we commented on the issues raised concerning the confidentially of advice from the Department of ... DPMC to the Prime Minister. We noted that there was no basis for blanket withholding of such advice as an exempt "class" of information. However, ... the characteristics of the relationship between DPMC and the Prime Minister will mean that sections 9(2)(ba)(i) ("...information subject to an obligation of confidence...") and 9(2)(g)(i) ("... free and frank expression of opinions...") are often relevant. Subject to the circumstances of the particular case and any countervailing public interest considerations, those provisions are likely to provide good reason for refusal in many cases.

99 I also do not believe that the burdens the Act places on public servants can be a valid reason for alternating its principles. This may indeed be a real concern and challenge to public servants trying to do their work from day to day. However, if the Act imposes a heavy administrative burden on officials, that is relevant to issues of resourcing and support. It should not be used as an argument to undermine the principles of the Act, although it may justify some tweaking.

All four of the analyses of the Act discussed in Part III of this paper identify a certain number of practical difficulties with the Act's operation. In some instances, there may even be problems with administrative non-compliance, adversarialism or possibly even in rare instances malicious non-compliance. But I believe it is a mistake to attribute such shortcomings to the open-textured, principle-based structure of the Act. Rigid, defined rules do not guarantee that non-compliance of the kinds discussed above will not occur. Legislation comprising rigid or defined rules generally also comprises space to slip through the odd loophole. There has been a significant culture change during the time the Act has been in force. No one would like to return to the days before the Act was passed. This culture change

Office of the Ombudsmen Report of the Ombudsmen for the Year Ended 30 June 2005 [2005] AJHR A.3 22.

See discussion of these categories in para 71.

See Marie Shroff "Behind the Official Information Act: Politics, Power and Procedure" in *The Official Information Act* (Official Information Act Seminar, Legal Research Foundation, Wellington & Auckland, 1997) 19; and John Belgrave "The Official Information Act and the Policy Process" in *The Official Information Act* (Official Information Act Seminar, Legal Research Foundation, Wellington & Auckland, 1997) 24.

may not have reached its final point – we might well wish it to continue a little further. But imposing rules is not the way to achieve this end. Instead, we should stick with our principles-based approach, continue to use the Ombudsmen as overseers of the Act, and provide additional resourcing, support and education so that the Act can work more effectively in practice.

V. CONCLUSION

- 101 After 25 years, New Zealand's OIA needs some systematic reconsideration. My firm view is that the first principles of the Act do not need change. While this view may be appear at first to be somewhat path-dependent, that impression is misleading. I do not propose that we should retain the Act's principles and opentextured approach merely because that is the way the Act is currently organised. We should retain the basic framework of the Act because it is sound. However, the Act needs some adjustment at the edges.
- 102 In order to make these necessary adjustments, an open and transparent process needs to undertaken. The research reviewed in this paper suggests such a process would be of value.
- One way of doing this would be for the government to refer the Act to the Law Commission. That would mean that a discussion paper of the issues would be prepared following consultation. Public submissions would be taken on it. Policy proposals would be fashioned and then recommended to the Government. Such a process could result in a desirable refurbishment of an important constitutional statute 25 years after its creation. I shall recommend it for the consideration of the Government for the Law Commission's work programme next year.

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An Australian Perspective on the Operation of FOI Laws

A response to Sir Geoffrey Palmer's 'A Hard Look at the New Zealand Experience with the Official Information Act after 25 Years'

> Andrew Podger November 2007

History of FOI

- Australia and NZ laws both enacted in 1982 (25 years ago)
 - amongst first 13 nations to do so
- · Part of wider administrative reforms in Australia including
 - Administrative Appeals Tribunal
 - Administrative Decisions (Judicial Review) Act
 - Ombudsman
 - Administrative Review Council
- Response to
 - 1960s/1970s agenda re individual rights
 - growing size and complexity of government
- Complementing formal (upward) accountability to Parliament
 - with more direct (outwards) accountability to those affected by administrative decisions
- Followed by New Public Management Reforms

Australian FOI Act Object (s3)

- ...to extend as far as possible the right of the Australian community to access to information in the possession of the Government of the Commonwealth by:
 - (a) making available to the public information about the operations of departments and public authorities...
 - (b) creating a general right of access to information ... limited only by exceptions and exemptions necessary for the protection of essential public interests...
 - (c) creating a right to bring about the amendment of personal records...
- (2) It is the intention of the Parliament that the provisions of this Act shall be interpreted so as to further ... (the above object)... and that any discretions conferred by this Act be exercised as far as possible to facilitate and promote, promptly and at the lowest reasonable cost, the disclosure of information.

Context is Critical (1)

Broad features of Australian and NZ public administration

- Common features
 - Parliamentary democracies, Westminster heritage
 - Professional public service, apolitical, impartial, accountable, responsive to elected government
- Major distinctive features
 - Australia: federal system, bicameral, first-pastthe-post
 - NZ: unitary system, single chamber, MMP

Context is Critical (2)

More subtle distinctions

- NZ's more 'independent' public service
 - role of State Services Commission
 - application of the merit principle
- Australia's more political control
 - role of ministerial advisers
 - management of communications

Context is Critical (3)

Common underlying forces

- Communications revolution
- Increased community expectations
- Power of the media
- Professional political management including of communications

Australian perspective on Steven Price's analysis

•Two components to system	Aus. same
- straightforward requests processed well	Same
- Difficult and politically sensitive requests processed differently, often overdue, many refused etc	Same if not worse
•Requesters' and officials' contrasting views	Same

Australian perspective on Nicola White's Ten Themes

New Zealand themes		Australia
1.	Government much more open	Questionable
2.	Many requests processed easily	Yes
3.	Still significant uncertainty	Yes
4.	Role of ombudsmen settled	No
5.	Delays a problem	Yes
6.	Large requests hard to handle	Yes
7.	More training needed	Yes
8.	Protecting government decision- making remains contentious	Yes, indeed
9.	Electronic information a challenge	Yes, indeed
10.	Time to consider pre-emptive release	Yes, indeed

Recent Australian developments/ cases

- High Court decision (McKinnon vs Secretary, Department of Treasury)
 - role of 'Final Certificates'
- Ombudsman's views
 - review of 'final certificates'
 - extend his role ('Information Commissioner')
 - increase consistency, training
- Media campaign on Free Speech Irene Moss report
- Victorian Government measures
 - removal of 'final certificates'
 - extend role of ombudsman
- · Electorate briefs for ministers
- 'Work Choices' advertising campaign

Future directions for Australia

- A. Clear-cut improvements (cf NZ good practice)
- Extend role of ombudsman as information commissioner
- · Limit or remove final certificates
- Increase training, consistency
- B. More difficult issues
- Protecting government decision-making
- Defining 'documents'
- Managing the media, and media responsibilities
- Re-balancing public service values of responsiveness and apolitical professionalism
- Achieving the right 'balance' in the public interest





Colin Bruce

Country Director
Comoros, Eritrea, Kenya, Rwanda, Seychelles and Somalia

Paper delivered at the 5th International Conference of Information Commissioners

Keynote Address: Freedom of Information, Human and Economic Development

The World Bank

Nairobi, Kenya



A. Introduction

I am delighted to have been invited to deliver a key note address during this conference of distinguished information commissioners.

I will speak on the impact of Freedom of Information (FOI) on human and economic development. This is a subject that is gaining global attention among development policy makers and practitioners because access to information contributes to better governance, accountability and transparency. And good governance is increasingly recognized as critical for establishing an environment for accelerated, equitable and sustained development to take place.

B. Access to Information and Development

Compared to a few years ago, development practitioners are paying much more attention to governance, voice and accountability as factors in human and economic development. What is significant is how far we have come in addressing the issue of governance as a constraint to development.

Before 1995, it was taboo at the World Bank to talk about governance or corruption openly, let alone engage governments behind the scenes on this subject. This changed when Mr. James Wolfensohn was appointed President of the Bank. In his very first address to the annual meetings of the Bank and the International Monetary Fund (IMF) in October 1995, Mr. Wolfensohn talked about corruption as a serious problem in development.

We have come a long way since then in integrating governance and anticorruption in our work. Between November 2006 and January 2007, the Bank was involved in extensive global consultations that led to a new strategy on Strengthening Bank Group Engagement in Governance and Anticorruption Strategy. The key message from these consultations is that the Bank should continue to assist the poor by striving to stay engaged even in poorly governed countries. Another important outcome of these consultations is that the Bank should scale up its engagement with stakeholders involved

in promoting good governance—including the private sector, civil society, media, parliamentarians and faith-based organizations.

Indeed, the focus of this conference is on how to increase governance dividends through improved access to information, especially through Freedom of Information legislation. The fundamental question is how to scale up the global trend of increasing the citizens' rights to information by ensuring FOI legislation, culture and implementation arrangements are embedded in the development process of countries.

C. Defining Access to Information

Access to information refers to the right of interested parties—the public, civil society, media, etc—to receive information held by governments. This right, which typically is protected by international and national laws, provides that official documents should generally be available and that any exceptions should be limited and specific.

Access to information is also recognized as a human right. The United Nations Millennium Declaration states that "the right of the public to have access to information" is essential to guarantee human rights, democracy and good governance."

Public access to information is essential for effective and democratic governance. It increases government accountability to its citizens and reduces opportunities for corruption. Informed citizens are better equipped to take advantage of opportunities, access to services, exercise their rights and negotiate more effectively. They are able to hold the state and non-state actors accountable.

It is important that this information is relevant, timely and presented in forms that are clearly understood by the citizens, including the poor people, who desire it. In this respect, it is not sufficient to make information available in documents or data bases. Access to information entails proactive, user-friendly, culturally appropriate and interactive processes that the citizens have the right information that enables them to participate actively in decisions that affect their lives.

D. Perspectives on Information

Access to information can be viewed from several perspectives:

- Information as a public good. The ability of citizens to request for and receive information on the workings of the government is one of the hallmarks of an open society and the basis for holding public officials accountable. Indeed, it is a public good and serves the public interest.
- Information from a social and political perspective. Strong democracies are built on freedom of information. There can be no independent electoral process where citizens or voters do not have sufficient information to make rational decisions.
- Information as an economic input. Access to information decreases uncertainty in the market, reduces volatility and improves the macroeconomic environment. Open information flow enables private businesses and individuals to make better choices in markets.

E. Role and Responsibilities for Information

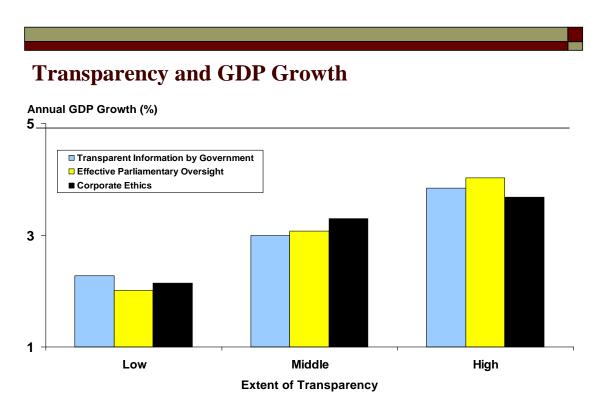
Governments. Since information is a public good, governments need to play a role in its supply. The responsibility of the government is to make information available to citizens about the economy and markets—publication of data and statistics.

Civil society groups and the media play an important role in promoting access to information as a right. Governments are most responsive where those groups are most active. We have powerful examples in many countries around the world, where the civil society, media, parliament and other interest groups have played a critical role in improving the access of the public to government information.

These groups are ensuring increased flow of information from governments and public authorities to citizens, especially to those who have poor access to information.

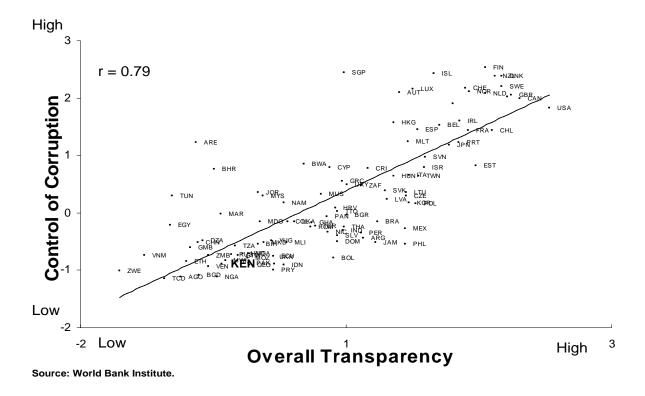
F. Empirical Evidence on the Importance and Impact of Access to Information

Studies by the World Bank and from other sources suggest that transparency is associated with better socio-economic and human development indicators, as well as with higher competitiveness and lower corruption.



Source: Annual GDP growth over 1999-2001 is taken from WDI 2002; GDP is computed in PPP terms. The various transparency / governance variables drawn from Executive Opinion Survey, 2002.

A 2002 World Bank Institute study, Governance and Growth, that measures six dimensions of governance using data covering 170 countries shows a strong correlation between transparency and growth (Gross Domestic Product). Countries with low access to information, parliamentary oversight and corporate ethics are indicated to have low growth rates while those with high transparency, effective parliamentary oversight and corporate ethics also tend to have high rates of growth.



Global evidence shows that the more people know about their governments and its institutions, the better they will be governed. FOI legislation is one of the avenues that steadily nurtures a more informed citizenry and, as a result, injects greater probity and accountability. Evidence of this include the following:

- A 2006 survey by Privacy International reports that the New Zealand Law Commission found in 1997 that "the assumption that policy advice will eventually be released under the [FOI] Act improved the quality and transparency of that advice."
- Likewise, the Australian Law Reform Commission and Administrative Review Council found "the [FOI] Act ... had a marked impact on the way agencies make decisions and the way they record information...[it] focused decision-makers' minds on the need to base decisions on relevant factors and to record the decision making process. The knowledge that decisions and processes are open to scrutiny, including under the FOI Act, imposes a constant discipline on the public sector."

A new Comparative Study in 14 countries around the world by the Open Society Justice Initiative entitled Transparency and Silence also makes the important conclusions about the link between access to information and accountability:

- Transitional democracies outperformed established ones in providing information about government activities. For instance, Bulgaria, Romania, Armenia, Mexico and Peru did better in answering citizens' requests for information than France and Spain.
- In analyzing 1,900 requests for information filed in the 14 study countries, countries with access to information laws performed better than those with no law or with administrative provisions instead of a law.
- Government failure to provide information is common. The study found that 47 percent of the requests received no response, with South Africa, Chile and Ghana performing especially poorly in this respect. Kenya also featured at the lower end of the scale on Government response to information requests.

Our most recent experience in the World Bank illustrates how greater transparency can impact the quality of decision making and accountability. During 2001-2005, I headed the group in the World Bank that was responsible for Bank policies, including its disclosure or freedom of information policy. We went through two major rounds of changes during that period—all of them requiring extensive discussions and negotiations across many continents with different traditions of openness.

Many practical issues were raised by stakeholders within and outside of the Bank, including concerns that transparency in decision making could impede the deliberative process, make staff less candid in their advice, and involve considerable costs in making information available and answering questions raised by the information released.

In the final analysis, we found no credible evidence that these fears materialized. On the contrary, when the 2006 Global Accountability Index assessed 30 of the world's most powerful organizations, from intergovernmental, corporate and non-governmental sectors, it found that most organizations (26 out of 30) recognize the importance of

transparency and have made a commitment beyond what is legally required of them. Of these, however, only nine have an organization-wide policy that identifies what, when and how information will be disclosed and what the conditions for non-disclosure are. These are Action Aid International, Global Environment Facility (GEF), IMF, Nestlé, Organization for Economic Co-operation and Development (OECD), Pfizer, World Bank, World Trade Organization (WTO) and World Wide Fund (WWF) International. [The other organizations instead rely on vague commitments to guide their approach to transparency, through statements such as "we will report our progress and challenges in an open and transparent manner" which do not offer any clarity on what information will be disclosed and under what conditions].

We also have further evidence from our annual Doing Business global studies, which show that better access to information induces the better responses from governments and the private sector on improving the business environment—which contributes further to growth. In Doing Business 2008, Kenya and Ghana were ranked among the top 10 countries worldwide in business climate reforms. One of the significant aspects of the business licensing reforms undertaken by Kenya was a study on the licensing requirements that the business sector needed to comply with, some of which even the government was not aware about. This enabled the Government to simplify 110 licenses and repeal eight others that were found to be of no economic value. These reforms in Kenya and other countries would not have been possible without access to the relevant information on the constraints impacting on the private sector.

G. Progress in Implementation of FOI legislation

An increasing number of countries are putting in place laws and implementation arrangements that guarantee citizens access to Government information. In September 2006, there were about 70 countries with access to information laws, compared to only 12 countries in 1990.

In Africa, there are only two countries—South Africa and Zimbabwe—that have enacted FOI laws. However, several others are making progress towards FOI legislation. These include Botswana, Ghana, Kenya, Lesotho, Mozambique, Nigeria and Uganda.

These ongoing initiatives towards FOI legislation as well as governance reforms taking place in many countries are improving opportunities for citizens' participation and underpinning prospects for growth. A World Bank Institute (WBI) study, Governance Matters 2007, shows that the countries that made the most significant strides in improving governance performance from 1998-2006 are in Africa. The report cites Kenya, Rwanda and Algeria as having made "sharp improvements" in various dimensions of governance. The report measures six dimensions of governance—voice and accountability, political stability, government effectiveness, regulatory quality, rule of law and control of corruption. Several other countries, including Angola, Libya, Sierra Leone, Democratic Republic of Congo, Liberia and Tanzania recorded improvements in one or more of the governance indicators.

Kenya is one of these countries that was cited as making the most progress in voice and accountability. It also received the 2007 global UN award for Public Service excellence for improving transparency, accountability and responsiveness in the public service through performance contracts. However, it does not have an FOI law as yet, although there has been substantial groundwork by the Government, civil society, parliament, media, development partners and other players towards FOI legislation. Elections are due in December 2007 and we hope that the new parliament will move quickly to enact a progressive FOI law.

H. Challenges of Scaling up FOI legislation

The practical challenges ahead for the international development community is facilitating the implementation of FOI laws in countries that have recently enacted the legislation, and supporting countries that are making progress towards legislation. An even greater challenge is to have interventions in countries that are yet to make any progress towards FOI legislation.

There is need for countries making progress in enacting or implementing FOI legislation to ensure that the following cardinal principals are built into the legislation:

 First, FOI legislation presupposes that all government information is for public access and there should be no secrecy. The legislation places the burden on government officials to demonstrate that any particular information sought by citizens falls outside this description.

- Second, every person has a right to make a request for information without being compelled to explain reasons for seeking such information.
- Third, countries that still have official secrets laws should be compelled or persuaded to repeal them to remove the legal basis of withholding information. The FOI legislation should define clearly the categories of information that can be withheld from the public—for instance, to protect privacy and national security.
- Fourth, public authorities need to be obliged by law to proactively make available and distribute information about what they do and how they function through the most effective communication channels, including electronic systems.
- Fifth, the information made available needs to be timely, reliable and of quality to enable the users make objective decisions.

I. World Bank Support for Access to Information

The World Bank Group and other development agencies are supporting many countries to have FOI and other transparency and accountability initiatives embedded in their national and corporate governance frameworks. An important component of this work is the growing engagement between the World Bank Group and a broad range of stakeholders, including governments, the private sector, media, parliaments, civil society, and faith based organizations. In Kenya, we are working with these stakeholders and partners to ensure that the Government finally implements a progressive FOI law.

In all the countries where we are engaged, we recognize that the passage of the FOI legislation is just one step towards increasing public access to information. Our assessment indicates that there are practical challenges that follow in the implementation of the legislation. These include the following:

- Systems and tools that need to be developed to support implementation.

 Guidance notes, procedures manuals, records management and information-technology based monitoring systems need to be developed. In India and a few other countries, for example, much attention was placed on developing and passing the law without the other issues relating to public information capacity being addressed. As a result, some people were denied information not because the Government did not want to share it, but because it did not have the capacity to respond to the numerous demands from the public. Thus, it is important to focus some attention to build and/or strengthen the capacity for policies, procedures, skills, etc.
- Awareness and training. All public authorities need to proactively raise awareness about the law and its key provisions. There is also a need for a comprehensive training strategy and program for government officials. Governments would also have to identify who will have responsibility for undertaking training, monitoring the implementation of the training program, and preparing training modules and materials. Government departments would have to produce a users' guide or manual for the public, and update them regularly.
- Records management. Effective records management is critical to successful implementation of FOI legislation. The India FOI law states that "Every public authority shall maintain all its records duly catalogued and indexed in a manner and form which facilitates the right to information under this Act and ensure that all records that are appropriate to be computerized are, within a reasonable time and subject to availability of resources, computerized and connected through a network all over the country on different systems so that access to such records is facilitated".

The Bank is committed to providing analytical, technical and financial assistance towards the implementation of FOI legislation in countries that need our support. We have done so in countries such as Mexico, where WBI in partnership with the Mexican Freedom of Information Institute is supporting effective use and implementation of access to information legislation through a series of face-to-face workshops for state and federal officials. These workshops enable participants to exchange knowledge,

experiences and challenges of implementing FOI legislation. WBI's information and governance program is also supporting workshops in other countries, including a recent one in Kenya, on enactment and implementation of FOI.

We are also supporting other initiatives that governments are undertaking to improve transparency and accountability. In Kenya, for instance, we have two important projects that were approved by the Board of the World Bank in March 2007.

- The first one, a US\$114.4 million Transparency and Communications
 Infrastructure Project (TCIP) will provide information technology
 infrastructure that will facilitate the disclosure of information by Government
 agencies and feedback from citizens to these agencies. TCIP—which is part
 of a regional project that also benefits Madagascar and Burundi—will give
 Kenyans access to information on how the Government budget is spent
 locally and enable them to access all Government forms through digital
 villages. The project will also accelerate e-Government services such as the
 digitization of Land and High Court Registry records, and drivers' license
 registration.
- The second one, a US\$ 20.5 million National Statistical System (STATCAP)
 Project, will help Kenyans produce and have access to timely, high quality
 and relevant economic, poverty, governance and other development data.

The Bank is also participating in several other transparency and accountability programs. These include supporting the strengthening of the independence of the Judiciary to improve Kenya's justice system and strengthening parliament's oversight functions to ensure timely action, for instance, on public accounts. We are also supporting several civil society and research groups to increase voice and accountability through citizens score cards.

J. Conclusion

The challenge of scaling up access to information globally, and especially in developing countries, needs a strong partnership to ensure that better legislation and implementation mechanisms are adopted. This forum provides an important element of that partnership.

in such deliberations, and that you will use your considerable influence to reach across
the developing world to promote and facilitate greater freedom of information.
Thank you.

Going forward, I hope that you will continue to include institutions like the World Bank

International Conference
of Information Commissioners
26-29 November 2007 | Wellington | New Zealand

Ms. Maja Daruwala

Director, Commonwealth Human Rights Initiative

Paper delivered at the

5th International Conference of Information Commissioners

Good morning Hon'ble Commissioners, my host the New Zealand Information

Commission, Ladies and Gentlemen, thank you for inviting me to speak.

Besides the pleasure of being in the company of so many thoughtful advocates of right to

information, I accepted this invitation with alacrity because I do so admire New

Zealand's efforts: not only its openness but also the way it keeps these efforts under

constant review so as to improve governance processes

Since coming here my admiration is enhanced because though this is a conference of

information commissioners there is such a welcome and equality in the space and respect

given to civil society. It is impressive and this is best practice to be carried home into

our societies.

Now, what new thing is it that can I possibly tell an audience steeped in promoting and

protecting access to information?

Perhaps the best thing to do is to talk from the experience of watching the theory of

openness and access, participation and transparency become a reality in the arenas where

I work.

My talk is not intended to be a learned dissertation on the finer points of administrative law but rather something I hope will provide some insights to those who are struggling to get transparency or are in the process of trying to get government openness and accountability in their own societies.

Before I begin talking about the right to information or freedom of information or access to information as you call it, it is important to set the context of my organization and the context of the environment in which our areas of work play out – that is, in the developing countries of the Commonwealth.

CHRI is an international non partisan non governmental organization. It is mandated to work across the 53 countries of the Commonwealth and its mission is to work for the *practical* realization of human rights- this is where the focus on right to information comes in.

Relevance

Far be it from me to tell an experienced audience like this the *value* of the right to information. However, in the developing country contexts in which we work the perspective on the right to information has to be informed by the needs of its potential beneficiaries/users. For us they are the poor.

It is not sufficiently recognized that more than 30% of the world's population lives in the Commonwealth. More than a third of these live on less than 1 USD a day. Almost 2/3rds live on less than 2 USD per day and are amongst the poorest of the poor.

The poor within the Commonwealth are not merely poor in income alone, but poor in opportunity, poor in voice, poor in their ability to participate meaningfully in seminal decisions made by governments that will affect their lives in the most basic ways; poor in their ability to question how their governments function; poor in power to hold their governments to account.

In the age of information the people of the Commonwealth over 1.6 billion of them are essentially poor in information.

At the same time most governments within the Commonwealth are steeped in the culture of secrecy, closed; many are corrupt and uncaring. There are long histories of military dictatorships, one man tyrannies, feudal oppression, oligarchic rule by elite castes and bureaucracies. There are continuing histories of missed opportunities to deepen democracy; messed up aid giving; untargeted ineffective and damaging development.

Yet at today's date all governments preen themselves as democracies and swear that all governance is being done in the name of the people, for the people, by the people.

But the poor remain. They remain amongst us not because they are lazy and feckless but because they are badly governed. The presence of poverty is an indication of bad governance and this constant stealing of opportunity and benefit is a violation of human rights.

RTI - not a tool of administration alone

In these circumstances access to information cannot be viewed primarily as a tool of administration to enhance already strong governance practices as in richer countries or as the right primarily of relevance to the media but must be viewed in the context of extremely poor people living in states where democratic governance is very fragile and subject to vagaries of personality rather than the certainties of established systems - witness Zimbabwe, Pakistan, Fiji.

Watching the arrogance of power and its inefficiencies rights advocates and people like me see the right to information as a singular matrix right lying at the transect of human rights and good governance on which depends the realization of all other rights – the right to political freedoms as much as the right to food, shelter, housing, education and livelihood.

Access to information is, as the Indian Supreme Court helpfully pointed out, 'the obverse side of freedom of speech and expression', 'inherent to democracy;'- and of course it is, as mentioned, vital for poverty eradication, necessary for sustainable development, essential for deepening democracy, reducing corruption and improving government performance.

In this circumstance access to information has to be reinforced as a guaranteed public good; a fundamental right - vital to the survival of the poorest. This is how CHRI views it.

It is in this context that the demand for a guaranteed right to information has grown and is spreading across Commonwealth countries. to date out of 53 – now 52 since Pakistan's suspension -there are about 13 countries only that have a right to information law. The passing of the law in South Africa has catalysed activity in Africa and most recently UK, India, Uganda have passed laws.

India is the only country in South Asia with an effective access to information legislation. It is often the crucible of CHRI's experience and hosts some 80% of the Commonwealth's population.

I cite India as illustration because it is a good example of the evolution of the law, the advocacy around the legislation, recent practice and challenges to implementation that typically surround right to information issues. And if I may, I would like to concentrate on its experiences to illustrate the right to information in action.

The call for guaranteed access to information in India has been driven the poor labouring classes.

All too frequently the majority poor in India –which means most Indians- only experience governance as oppression and exclusion: as a weight; as unaccountable power, as unfettered discretion as having the ability to make or break their lives.

So unequal is the relationship between citizen and government that it is not for nothing that even after colonial rule has become a vague memory the government is frequently referred to as *mai baap* – both mother and father from whom flow all penalties, plenty and power.

Schemes and mother and father:

India has myriad food for work schemes; national employment guarantee schemes for people living below the poverty line; subsidized self financing housing schemes; a process for identifying who is below the poverty line and who is eligible for subsidized food and essential rations; for free health care; for maternity benefits; for job priorities; for education concessions.

All these are administered either directly by governments or through subcontractors and food is distributed through ration shops. Contracts are awarded; minimum wages are set; work is distributed amongst the needy; money is disbursed to the agents for payment; similarly highly subsidized food is distributed to contracted fair price shops for sale to those holding ration cards. So you can see, the system is really mother and father to the poor.

The system has been set for years. Getting benefits and certification that you belong to a category depends on officialdom or middlemen. Poor and illiterate people have to depend on their honesty or the correct exercise of their discretion. The dependence means there is little scope to question and certainly less means to do so.

So people find themselves cheated; find themselves refused benefits; told they don't qualify; told there is no good grain, no essential cooking oil, no kerosene for the lamp available in the fair price shops; no place for their child in school; told that the teacher need not come every day; told that no medicines have come from the Centre to the village health care station.

They are told that they will only be given a lesser rate of payment for work than is stipulated; they are provided payment for only two days work when they have worked a week; or that the money for a scheme that ensures them paid labour even if backbreaking has been completed and there is nothing to pay out left.

People organized themselves:

In one area of the country people organised around these issues and began to ask to be shown the books of account - the muster rolls that show how many people have been paid per day how many have worked and a true account of how government money has been spent.

They sat out in the open and asked to be read the muster roles so they could tally them against their own experience and that of their peers. The local functionaries, the government agent of the area; the contractors who were hand in glove indeed the state government refused to give the information.

Taking a leaf out of Mahatma Gandhi's book the people began a sit in for days and weeks until the rolls were read out. Inevitably huge discrepancies were discovered and unbelievable, finally after a long battle, money was returned and superior people had to apologize and beg forgiveness.

The poor, though unlettered are neither foolish nor weak nor ignorant. They realized that it was information that had given the victory and began to insist that information be given them as of right. Their actions were driven simply by the need to survive. Around this they built a movement. Their slogan: *apna paisa apna hisab* – this is our money these are our accounts.

Symbol of the people's spirit:

I will tell you one story of this battle that has always remained with me as a symbol of the cruelty of power and the spirit of people who must do or who must die.

A very old and illiterate woman and her husband kept count of how much day labour they were owed by the government contractor - marking each day of work on the wall of her mud hut. She was one of the ones sitting in and demanding information about the true state of accounts. While they did this, her weak and ill husband died. Then she would make only one mark on the wall in her calculations. This was the tally that countered her toil against the lies in the register. It took a long time but finally she got her money. That is why I always think of RTI as a survival right....

The sheer injustice of a myriad of these stories combined with the work being done by urban rights advocates, the media attention, and strong support from parts of the political power structure meant that the demand for law became irresistible and a new right to information law was finally passed at the national level in October 2005 and came into effect a year later.

The Right To Information Act

The law was strongly influenced by civil society groups that had lead the grassroots movement and now combined with urban based advocates of the right: together we monitored and contributed to the drafting process.

Here I must acknowledge Charmaine Rodriguez who worked with us at the time and provided the drafts with unsolicited advice, pestered government officials, and re-wrote drafted countered and hammered things into shape for what seemed like unending hours.

Making a law of value to the poor:

Our main concern was to create a law and procedures, which would allow it to be used by the most vulnerable, and geared it to that goal.

Some of the salient features are:

- Name: we argued endlessly over the name: should it be the freedom of information or access to information law or to call it the right to information act. Everyone decided it was imperative to have the word *right* in it, signaling that it was a fundamental right belonging to the people and most importantly signal that the government was merely enabling it at long last. This also meant that as a fundamental right it could not be restricted except to limits stated in the constitution.
- We looked at the law through what my colleagues at work laughingly call the female principle: Fundamental Elements Must be Maximum Access and Limited Exemptions.
- To change the prevailing culture of secrecy we insisted that the first principle in the law must be that all government held information is in the public domain except for a narrow band of exceptions which could be withheld if it was more in the public interest to withhold than to give.
- The burden of proving that it was in the public interest to withhold the information than to give it lay with the person wishing to withhold the information. Any information that Parliament could ask for could be asked for by an individual. The fact that the Act overrides all other legislation like the dreadful Official Secrets Act and requires all other legislation to conform to it was an important inclusion.

- Simple access procedures were geared for poorest of the poor; taking contexts into account we were concerned to see how do you fashion a law for a public that can't read and write; some measures included were, oral applications; a duty to assist; a duty to pass on the applications within government departments; a duty to inform about progress of applications; to give information within a short stipulated time; and low fee structure.
- We sought independent appeals mechanism to promote and protect the right;
 Ombudsmen and Information Commissioners at state level and for the center:
 two parallel but hopefully consulting systems. But these are even then not close enough to the people.
- We insisted that there should be penalties for not giving information without reasonable cause and certainly for withholding information maliciously and for questionable practice like giving wrong information. There was a lot of resistance to this.
- Because we knew that the law would have to work hard to change a bureaucracy steeped in a culture of secrecy and because as you know, there is information you know; information you don't know; and information you don't know you don't know we insisted that: the definition of information be broad and inclusive. It includes records, manuscripts, file, file notings, the discursive process, opinions, advices, logbooks, contracts, samples, models, electronic data, and information relating to private bodies which a public authority has under the law. You can get certified copies, samples, models, and inspect public works to take samples from this. Public servants were obligated to i) ensure that policies, regimes and arrangements were made that facilitated information giving to the public at large and ii) there was a duty to make information visible. There was a duty to publish all kinds of information, which was till then opaque and unknown.

For myself proactive disclosure is probably the most important provision in the law. By this I mean information that government has to make available without having to be asked for. Here the onus is on government. This is vital to the success of any access legislation.

Routine provision of information by law forces government to explain itself; it demystifies departments and huge bureaucracies; it lays bare the process by which decisions are made, who makes them, how they are arrived at; how benefits are

distributed; what schemes are in hand; what are planned; who is responsible for what; where the buck stops; norms; etc.

Equally provisions for monitoring and promotion of open governance such as annual reports to parliament; department by department scrutiny; explanations of how many departments have made progress in making laws happen all assist in effectuating the law.

Now Ladies and Gentlemen, you may say this is all common or garden stuff for such information to be out in the public domain. But in jurisdiction after jurisdiction it is not. It is wonderment when departments open up to tell, to give account, to have to explain this in itself is a bounteous gift.

In an African country about 3 years ago I asked the police public relations officer to share newspaper cuttings in a file and he said "Sorry ma'am these are top secret." and indeed that is how the file was marked. Media cuttings read by millions had become top secret in the hands of the police department.

It is from that point that we have to work outward into the light.

By insisting that reasons for decisions be made public, criteria, norms of functioning and modes of functioning be made plain and published, the scope for abusing power is cut down hugely; challenge is possible; and indeed it is under this provision that many people in the grassroots are using the right to information not only to get information they need but to challenge authority and to use this provision to right government functioning and as a redressal mechanism.

Challenges

So is all well now?

It is very important to watch this space because the same excuses for avoiding giving information; bitter complaints of overwork; frivolous and vexatious requests; the cost of information storage & giving; backsliding and genuine problems associated with actuating a new law are going to emerge in similarly situated jurisdictions. How we can guard against them is vital to think through.

Political will: this is vital. The very top must signal leadership for change; public servants must feel they are not going to get into trouble for giving information; there should be no equivocation.

Willingness to back the law must also be demonstrated through plans for implementation preparedness, monitoring, training, evaluation of progress and constant incentives to departments and individuals who do well.

That is the ideal, but of course but we work the realities.

Almost immediately on assenting to the Act the President's office wanted out; the Prime Minister's office wanted out: the judiciary were careful not to say they wanted out but made it clear that they would run by their own rules and any rules imposed by Government of India would amount to nibbling away at their independence. It is strongly resisting giving information about how selections to the higher judiciary are made and refusing pertinent questions about how a judge was elevated to the Supreme Court when he had not been recommended by the Chief Justice. The Central Bureau of Investigations wanted out and so did the Central Vigilance Commission though they are both anti-corruption agencies themselves. The armed forces of course wanted out and all are making their cases before cabinet. Encouraged by this universal cry for *purdah* even a small municipality in Gujarat wanted out. It just felt 'heck why not give it a try to be out of this tiresome law'.

We should have been even more careful with the law. At present it allows absolute discretion to the executive to take whole intelligence and security institutions out of the purview of the RTIA but there should have been justifiable criteria to guide that decision put in the law rather than mere certification. Thankfully even certified agencies are not completely out of the purview of the law but must give information where it relates to corruption or human rights violations. But still it is too easy to wriggle out of disclosure.

Another resistance is disobedience. There is a practice amongst strong bureaucracies in developing countries of disobeying government's own laws. There are just too many examples but perhaps the one most illustrative of the situation is the Department of Personnel and Training. This is the department that is tasked with promoting the RTI law.

It has FAQs up on its website one answer says that there is no access to information to file notings – what you call the deliberative process. But the law clearly says there is. The Information Commissioner says there is; there is in fact no doubt about it. But this area has been a particularly bitter battle ground. Barely 6 months into the Act the government discovered the power of the Act for the people and wanted to bring in an amendment that would remove file notings – the x-ray of the anatomy of decision making - out from the Act as well as refuse to disclose the names of who gave advice and opinion. Now this is vital stuff in a country like India where there is far too much extraneous influence peddling in government decision-making and too much nexus between flexible bureaucrats politicians and influential others.

Knowing who wrote what on the file and in whose hands the file has been is as as much a sword of accountability as a shield for bureaucrats who are giving good unbiased advice based on logic and reasoning. But it was sought to remove this on the grounds that it impedes candour. But the amendment was never brought to Parliament because of the huge protests by civil society including myself. We were implacably against this. However, despite the explicit ruling of the Information Commissioner that the offending FAQs and answers be removed the Department has simply not done so. So the question of the Information Commission's own ability to get enforcement comes into play.

Another error in our law is that the promotion of the RTI law is left within government to the Department of Personnel and Training. In my view it should have been with the Information Commissions at Centre and in the various states and a budget allocation assured. The Department is small; the resource pool is small; training has been subcontracted out; it is more orientation rather than training; it needs more depth; more rigour and giving information has to be incentivised.

That brings me to the oversight bodies; the Information Commission is an appeals body and not an advocate for the right to information. This was an error when the law was being drafted. The Information Commissions at centre and state should have been tasked with promoting the law and disseminating its usage. He has the right to levy fines and to take people to court but it all takes too long and the Information Commissioner's decisions must be backed by strong machinery. At present no consequences flow from refusal to publish under the proactive disclosure sections. To my mind the law should

have clearly said that refusal or neglect to publish will be deemed refusal to give information and will be punishable.

The frailties of commissions are coming to light. It took long too appoint; there is a capture by bureaucrats. Yesterday's bureaucrats are today's right to information champions. This is not to tar them with the same brush or to condemn them all but there are other professionals, academics, activists who are being excluded by a poor process by which appointments are made; the RTI law could not remedy this. It has to be remedied by changing other parts of a system of rule by elites.

The frailties of commissions are evidenced by uneven decisions and inconsistent ones. The talent pool to support the commissions is inadequate. Inadequate infrastructure doesn't help. Most commissioners are not lawyers. Decisions often appear based on expediency rather than a steady reasoning that would lead to a growing body of reliable jurisprudence. Mounting arrears is becoming a major danger to the efficacy of the law. Countries seeking to pass legislation have to work through refinements to ensure true independence but it is a thorny problem whose fulcrum is based in society rather than in the clauses of law.

Monitoring and evaluation of progress: the reports of all departments are to be given **annually to the CIC.** But very few have been provided the first reports for a short period have been sent to Parliament but are not yet out in the public.

So with all these frailties is the Right to Information Act working? Has anything changed on the ground? Was it worth the battle? The answer to that question must be a resounding, yes.

Yes. For me, the Act is the best things since sliced bread: only second to reforming the police - which may never ever happen. The champions of RTI have sought to protect the Act and been successful. Right after it was passed the National Campaign for the People's Right to Information embarked on dissemination across the country; CHRI itself has trained over 3000 bureaucrats. It has trained media, brought it on to the agendas of large networked civil society groups, public enterprises, chambers of commerce, trades unions and development workers privileging those who would either use it or

spread the word. Citizen's groups have formed in major cities to promote the right as well and there is a watchdog element to many.

The people have ownership of the act. Sure, the majority still don't know about it. But powerful segments within media, the law and the middle classes, the bureaucracy itself, who have the ability to battle for information know about it now and we seem to have reached the tipping point where it would not be easy to rescind the law or restrict or amend it without a real battle. The people believe in its power.

Conclusion

At the present time there are two competing trends: the constitutional imperative and the authoritarian impulse which, in the 9/11 world is gaining huge legitimacy from the actions of the West, the rollback of belief and adherence to fundamental principles and which is providing every rogue and criminal and corrupt government with the excuse to shut down information availability, derail the march toward good governance and the realization of human rights. At the same time amazingly at the beginning of May, China released its freedom of information legislation which is due to take effect in May 2008.

On the other hand there is another trend: to rollback on legislation which has proved to be too good for government comfort levels. India, for example has tried to rollback the possibility of people getting hold of information in file notings which x-ray what considerations went into a decision making process. Equally, all sorts of institutions are trying to get exemptions. Similarly, in the UK, MPs feel they don't want so much scrutiny; in the US everything is hostage to the 'war on terror'. There is also another model to be reckoned with: as in Zimbabwe, which has passed laws that pretend to give access but in fact act as a clog or a curb on information giving and are intended to do nothing more than restrict access to information. So let me instead end with a story that to me demonstrates the link between our work to promote right to information and real life.

For our masters who complain that the right to information is too permissive, too expensive to maintain, too onerous to retain, too dangerous for us all to have, let me finish with a story. [Apologies to David Banisar and Marc Aurelec who have heard it before]

In a small village of about 2500 poor people. The roads are terrible; electricity is scarce

and health care 8 kms away. There are absolutely no provisions for more serious, sudden and life threatening emergencies and none for childbirth – a common enough occurrence. Women have been known to deliver and die on the way to the health care centre and it is not unusual to see four or five men carrying the woman in delivery on foot all the way to centre.

Government is supposed to provide minimum health care. A health worker is supposed to come to Boru thrice a week to provide immunization, food supplements and special care of TB patients, children and pregnant women. Boru is lucky if she comes three times a month. When she does come she sits in one place. If people come to her fine. If not, she leaves in half an hour. The villagers have been complaining bitterly about this state of affairs for the past four years. Complaints to the doctor the district administration and the local Member of Parliament have elicited nothing more than promises.

Along came the right to information and CHRI paralegal training on how to use it and suddenly Gulambhai a concerned citizen decided enough is enough. He applied to the medical unit for information: what he asked were the facilities for pregnant women, the number of health workers assigned to visit, how often were they required to visit and what were their responsibilities.

This information is to be routinely made available without specific requests being made but never is. Since it was nowhere to be found Gulambhai submitted his 'request in writing'.

Almost immediately- and certainly before any formal response was forthcoming - things on the ground seemed to take on a life of their own and a turn for the better. Villagers were filled with wonderment at the makeover of the health worker. She started visiting regularly – almost every day, provided the basic healthcare hygiene vaccinations preventive care, child care, and made sure to visit every area of the village. The visits made an immediate impact on general health.

But what about the application? Pleased with the outcome of their small foray most villagers didn't much care if public information was not forthcoming. Change had come about. There seemed little point in wasting time or energy going into appeal or running behind the information.

However Gulambhai felt it was important to utilize the right and get accountability. They felt it was just as important to get the information. The sudden change in the behaviour of the health worker may be temporary. To ensure its permanence it was necessary to make norms related to provision of health care visible and widely known to all.

So Gulambhai sent the doctor a reminder. Three days later the great doctor who would normally never have spoken to the lowly Gulambhai landed up at his doorstep. The villagers joked that he must have lost his way; so unheard of is a home visit by a government doctor.

The doctor actually sat in Gulambhai's house and over tea and biscuits asked politely where had he learnt about this RTI act, who had taught him to make applications, why he needed the information and what use was he going to put this information to. Gulambhai was not prepared for these questions. Initially nervous he explained that a lot of people like himself in his village had attended trainings and were well aware of the new law. He himself now devoted a large part of his time raising awareness about laws and rights and procedures amongst his fellow villagers. He talked about the problems in his village – lack of health facilities, irregular visits by the health worker, and the plight of the villagers. He ended by saying that it was only when people know their rights would there be real change in society. All that said he heaved a sigh of relief and felt proud of himself.

Now it was the doctor's turn to be surprised. He assured Gulambhai that he would personally ensure that the health worker came regularly and suggested that Gulambhai or any other villager visit him at the Public Health Center and draw his attention to any problems and shortfalls.

The visit from the great man left Gulambhai with new respect and status but most of all it indicated the subtle shift in power that having information and using the law makes in unequal relationships between bureaucracies and people in whose service they are supposed to be.

A week after the doctor's visit the information was received by post. The villagers were

thrilled.

Much of the information was what is required to be provided without request. Logical pursuit of the inquiry would have thrown up questions about what had been happening in previous years: where had the medicines to be distributed gone; what finances are allocated to the village's health care and how do they get spent; who was supervising the errant health worker; how is their performance assessed. But for now these lines of inquiry were not going to be pursued nor was the whole system going to change radically. The villagers felt that the provision of regular services and the personal visit of the doctor was a huge success for their endeavours.

That, ladies and gentlemen, is what the right to information is. It is power equalized. It is democracy in action. It is development you can see. It is participation you can hold in your hand. It is accountability that comes to your house. It is transparency you can see in your village. That is what the right to information is.

For the poor it is excalibur. It is those first words that gave the small child Alladin access into the riches in the dark cave of the thieves: *open sesame* – let me in. Let me be part of the riches that have been stolen from me and kept from me. Let me have my heritage. Let me have my right. Let me live my life.

16



Kevin Dunion

Scottish Information Commissioner

 $\label{eq:Paper delivered} \textbf{Paper delivered at the} \\ \textbf{5}^{\text{th}} \textbf{International Conference of Information Commissioners}$

Designing an Effective Oversight Body

There is no 'one size fits all' model of Freedom of Information enforcement. We are all aware of the distinctions and nuances between the roles of Commissioners and Ombudsmen, often reflecting the political cultures which determine whether enforcement is based upon persuasive recommendations or enforceable decisions.

When the Freedom of Information (Scotland) Act 2002 was being developed the legislators looked at the experience of other countries such as New Zealand, Ireland and Canada. Now that we have a fully functioning freedom of information regime, in turn we receive requests for advice and assistance from other countries. I am aware therefore of the appeals system in Jamaica which consists of a panel of three individuals coming to a decision on an appeal or that proposed in Malawi which would have a multi member representative panel with civil servants, voluntary organisations and the media represented on it.

In Scotland it's fair to say that we have adopted a "strong" enforcement model by choosing to have a Commissioner who is able to determine whether or not authorities must disclose information and whose decisions can be appealed only to the higher courts. As a Commissioner I have a range of powers to assist me in my investigations and enforcing my decisions. If an authority does not co-operate with my investigations I can issue an Information Notice under which they must provide me with the information necessary, which could be the original documents in dispute, or copies of internal emails

but also information which is known to the authority even if it is not written down. If I find an authority has destroyed information to frustrate a Freedom of Information request then I have put in place procedures with the police which mean that the Fraud Squad will work with me on an investigation to determine if a criminal offence under the Freedom of Information (Scotland) Act has taken place. (If an authority is found guilty of such an offence they (and that includes individual officers), are liable to fines of up to £5000.) Once I have issued a decision requiring the release of information then I can enforce such a decision by giving notice to the courts if an authority has not complied and again they may be liable to the same sanctions as would apply for contempt of Court.

Of course just because these powers are available it does not necessarily mean that they need to be or will be used. This is a matter often left to the judgement of the Commissioner. Furthermore there are many aspects of the work on which the legislation is silent and it is not clear what Parliament intended the Commissioner to do: for example the Scottish Act says nothing about publishing decisions. We know that in some jurisdictions for example Canada publication of Commissioners decisions do not take place; in others like Queensland full details are made available. I have chosen, even though not required, to publish my decisions in full, identifying the applicant and the authority. I could have chosen differently and initially some doubted whether authorities should be 'named and shamed' or that applicants should not have the right to privacy when making their appeals- but now it is accepted.

In practice it seems to me that the effective nature of an oversight regime is formed by a combination of the powers available in law and the inclinations of the Commissioner (or equivalent). I want to look therefore at what in practice it has been like working within the scope and limitations of my legislation and what political expectations and cultures can do in terms of bringing pressure to bear either to take a soft or hard approach to enforcement.

Notwithstanding the powers available to me, it has been suggested on many occasions - largely by those in public authorities -that the expectation is that the powers will not be normally fully exercised. The arguments are put as follows.

- 1. The Commissioner should hold his powers in reserve and for example issue formal Decision Notices, Information Notices or practice recommendations only as a last resort. It is argued that these should be seen as a "nuclear" option and the *possibility* of the formal exercise of his powers should be sufficient to secure cooperation from authorities.
- 2. Preference should be given to settle disputes between the authority and the applicant through an informal process with the intention of avoiding the need for an informal decision.
- The Commissioner should avoid 'naming and shaming' authorities either in his media work, his submissions to the Parliament or within notice of his decisions.
- 4. Where a formal decision is necessary then an advance draft of this should be provided to the public authority forewarning them of what the Commissioner intends to say. The merits of this are that the authority may act upon the draft recommendations without need for a formal decision, and at least there is also the possibility for the authority correcting any errors of facts. There is the added advantage of being able to alert in particular elected representatives such as Ministers of the likely outcome.
- 5. Finally it is suggested that if a heavy handed enforcement approach is used then there is the possibility of a lack of cooperation from the authority who may adopt an entirely formal relationship with the Commissioner e.g. responding only when required to do so, at the limits of any time scales given. This may have the consequence of frustrating the Commissioner's investigation through e.g. insisting that officials consult with trades union officials or be represented by lawyers when required to give statements.

Despite the blandishments and warnings, by and large I have not been attracted to these arguments. Firstly this is because some of the claimed benefits may come at a cost in terms of operational efficiency, or may entail some unfairness for the applicant (such as

sharing the draft with the authority but not the applicant.) Secondly I am mindful of the need to be -and seen to be- independent of authorities. Arrangements which may be perceived as being driven by a concern to avoid embarrassment to or criticism of authorities, to their embarrassment, may suggest too close or sympathetic a relationship. This has to be avoided, particularly given the third consideration which is whether such arrangements will hinder the change of culture by authorities in response to the new freedom of information laws.

In my view it was quite clear that in Scotland, the political intent behind freedom of information was to tackle a culture of secrecy prevalent within central government but also within public authorities generally. Over many years the effect of the Officials Secrets Act was to create a need to know culture which had been largely resistant to voluntary codes of openness - such as that applying to central government and local government in Scotland and even to European Directives such as that on Access to Environmental Information (which has been largely ineffectual despite being passed into law in Scotland in 1992) - because of the weak or non existent enforcement regime which attaches to these.

The Freedom of Information (Scotland) Act was a hard won piece of progressive legislation. It was scrutinised and toughened up in Parliament, and the power of a independent Commissioner to determine whether authorities (including central government and Parliament) had appropriately withheld information, and to conclude what was in the public interest was repeatedly cited as a safeguard against politicians and officials simply using the exemptions as a reason for continued secrecy. In my view, then, it was not appropriate for me as a Commissioner to be equipped with powers and then decline to use them if this was to be the detriment of any applicant or the public interest. That is not to say that on every occasion or for any conceivable reason that the formal powers are used; - there is no benefit in being officious or disproportionate. However it is crucial that there is public confidence in an independent decision maker. I am not - and must not be perceived as being - naturally more sympathetic to public authorities than applicants, sharing their views as to the worthiness of the applications being made to them or the irritation they feel regarding a frequent applicant. Nor am I a mediator: whilst mediation may be helpful in securing for an applicant with information

which might otherwise be withheld, essentially at this early stage in the freedom of information life cycle in Scotland I uphold the rights of people. To that end I have adopted an approach which is not just even handed but seeks to instil a view that the Act is founded upon the premise that information will be released unless there is a good legal reason not to do so and secondly that an applicant is entitled to a decision by me when they make an appeal as provided for by our Freedom of Information Act.

Accordingly when the Act came into effect I did not take the view that there was a honeymoon period by which the authorities would be allowed to be ignorant of the requirements of the Act – there was ample warning of the legislation coming into effect and training courses and materials had been developed and circulated to authorities. I did not take the view that the demands of the legislation be quietly ignored or relaxed. For example in Scotland an authority must respond to a request within 20 working days and there is no scope for extension (as there is in England) to consider public interest matters. As a result authorities in Scotland do strenuously attempt to meet the deadlines and in the vast majority of cases they do supply the information or a reason for withholding within the 20 working days. If they don't this is always addressed within the decision notice and if it was the case that an authority was systematically failing to meet the deadlines this would become the basis of issuing a practice recommendation to the authority. So far I have had no reason to do so.

Secondly I have issued over five hundred formal decisions (although I should point out that hundreds of appeals have also been informally settled or voluntarily withdrawn after the involvement of my staff). The decision is an opportunity for the authority's and the applicant's cases in submission to me to be summarised and presented fairly, for my consideration of the legislation and of the information withheld (so far as far as this is possible) to be set out in detail and then for my conclusions and requirements to be clearly identified. This provides clarity both to the applicant and to the authority and also provides an accumulation of precedent. In a country where Freedom of Information is new and the interpretation of the legislation is of interest then I think the decision notices, which are published on my website, are an important tool and it is part of my responsibility for disseminating information to authorities and to the public about the FoI Act.

I think the decision notices also satisfy the need for demonstrable independence and fairness. Even where applicants don't get the information they want they regularly contact my officers to thank us for the consideration we have given and the reasons for our decision being set out in full.

There is a particular interest in the arguments made for withholding information. Decision notices are an important medium for addressing and where necessary rebutting these. We will all be aware that in coming to our decisions that submissions are made by authorities which seek to interpret the legislation or even circumscribe the Commissioner's scope for decision making. In Scotland strenuous efforts have been made by central government officials to argue that the intention of the legislation was that certain classes of documents should be automatically exempt and only released if there was overwhelming public interest to do so. In particular this claim is applied to advice given to Ministers but also more generally to the internal deliberations of civil servants. I have taken the view that this class based approach is not consistent with the legislation and have often ordered disclosure. Two such decisions were appealed to the Court of Session, (our Court of Appeal), and the Government lost, with the Court agreeing that what mattered was the content of the information, (not just whether it could be classed as advice or exchange of views,) and whether or not substantial harm would come about from the release of this information.

Arguments made in support of a broad exemption owe much to seeking to maintain the value, and even the pre-eminence of old ways of working, which are being challenged by freedom of information. Some of those values are embedded in the legislation such as the notion of collective Cabinet responsibility which requires that even where policies have been hotly contested a united front must be maintained by Ministers in public – so that information which might reveal splits can be exempted under our legislation. Others are conventions which FoI threatens to dilute – giving an insight into the nature and content of the views, advice and even identity of officials when the norm has been to allow them to anonymously work behind the scenes. What those in authority seek to do is to continue business as usual, so far as possible, within the framework of the new legislation. In that respect the Freedom of Information Act was perhaps expected to

simply formalise the existing code of practice on access to official information. But this thinking has been criticised by campaigners who pressed for freedom of information legislation saying that the effect would be no more than a Reason for Secrecy Act, by which the authority would still continue to withhold information as it always did but only now requiring formally to say why it was doing so in the expectation that its broad brush view of exemptions would be accepted by a Commissioner.

Does taking a robust line mean therefore that there are to be no concerns over the loss of cooperation or that it is never appropriate to speak informally to an authority or seek to settle a dispute between the authority and the applicant other than by formal decision. That is not what I am saying, and I know that in many mature regimes informal settlement of appeals is now the norm. I recognise too that It is often in the interest of the applicant, in the interest of the investigation progressing and in the interests of a fully informed decision to have goods lines of communications with authorities and there is no doubt that my investigating officers have built up a good relationship with specialist counterparts in public authorities. In that respect we can understand what genuinely gives rise to concern -for example specifically how commercial interests may be harmed by the release of information or how individuals privacy or safety may be compromised. But we must be mindful that applicants must have confidence that such discussions are not meant to assist the authority in finding a way to withhold information.

The biggest justification for independent enforcement is whether more information is released as a result than would otherwise have happened especially if this results in a consequent general acceptance that similar information should be released or even published. In Scotland certainly we can point to many key cases where not only has specific information been released but the culture and future response of the authority has been altered as a result. Often such release has been required in spite of strenuous arguments about the likely prospect of harm from my decision. I have required the surgical mortality rates of every surgeon in Scotland to be published despite arguments that this might discourage clinicians from high risk procedures. This was probably the first time such comprehensive release had happened anywhere in the world but it is now soon to become routine in the rest of the UK and as I understand from a recent US Supreme Court decision may also happen there. We have also caused statistics on

registered sex offenders to be published, and the police are now preparing to routinely publish these at the local level, despite fears that this would give rise to vigilante attacks or cause offenders to evade monitoring by the police. Finally we have dismissed the view that entire contracts between public authorities and contractors can be regarded as confidential and have ordered the release of a contract lasting for 30 years and costing £1.3 billion pounds to operate the Royal Infirmary of Edinburgh. This has immediately prompted other health boards to release details of their contracts.

This is not about naming and shaming, it is not about exercising indiscriminate power or simply challenging authority. It about recognising that the decisions in themselves in terms of the release of certain information are important and the reasons for those decisions and the prominence given to them in the media are also part of the change of culture which freedom of information laws in Scotland and I am sure in many countries were meant to bring about.

Of course what the Act was intended to do and what the political response is to the Act in effect may be different matter depending on whether there has been a change of heart or a change of Government. So far in Scotland we have been fortunate that, no matter the irritation sometimes felt by those in authorities about how the information has been used, no impediments have been put in the way of the new rights. However we are all aware of amendments to legislation elsewhere exempting whole categories of documents; or of new fee charges which have the effect of discouraging applications

In conclusion, being effective in the oversight of freedom of information laws requires us to be aware of the political culture of our own countries and the strengths and fragility of our legislation, which may be vulnerable to repeal, amendment or withdrawal of cooperation. It is in the exercise of our judgement that we become effective but I am sure we all do so guided by the core principles of independence, transparency and respect for the rights of the citizen.



Tough at the top

Kevin Dunion, Scottish Information Commissioner

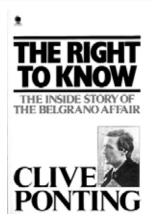
5th Information Commissioners International Conference
Wellington, New Zealand November 2007

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No Right to Know



- Official Secrets Act Declaration
- " I am aware that I should not divulge any information gained by me as a result of my appointment to any unauthorized person either orally or in writing without the previous official sanction of the Department appointing me.."
- (Signed by civil servants on appointment)



New Right to Know





Freedom of Information (Scotland) Act 2002

Access to Information held by Scottish public authorities

Right to Information

1 General Entitlement

(1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.



Softening enforcement



- Use enforcement powers as a last resort
- Informal resolution not formal decisions
- Avoid 'naming and shaming'
- Prove draft decisions to authority
- Avoid losing the cooperation of authorities

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Tougher enforcement



- Full decisions set precedent
- Transparency over outcome of appeals
- Maintain respect for requirements of the law
- Avoid detriment to applicant
- Preserve independence of role

Surgical mortality rates



- Surgical audit of mortality compromised?
- High risk procedures avoided?
- Outcome
- Disclosed No impact on audit or clinical practice



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Sex offenders statistics



- Vigilante attacks?
- Sex offenders resisting being monitored?
- Outcome
- Disclosed No negative outcomes



Commercial contracts



- 8000 page contract; £1.2 billion; 30 year duration
- Actionable breach of confidence if disclosed?
- Outcome
- Disclosed company took no legal action

Secrets of £1.2 billion hospital PFI deal to be revealed

Landmark FoI victory for campaigners

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Core principles



- Independence
- Respect for rights in law
- ① Transparency
- Uphold the public interest



Prof. John McMillan

Commonwealth Ombudsman*

Paper delivered at the 5th International Conference of Information Commissioners

Designing An Effective FOI Oversight Body – Ombudsman or Independent Commissioner?

Introduction

An essential feature of freedom of information legislation is that an independent body must be given power to review the merits of disputed agency decisions on exemptions, charges and other FOI issues. Which body is best placed to perform that role – a court, tribunal, ombudsman, specialist FOI or Information Commissioner, or a combination of those options?

Australia has grappled with that issue for twenty-five years. Each option has been adopted by one or other of the nine Australian legislatures. The issue is now back on the agenda following the election in November 2007 of a new national Labor Government that made a campaign commitment to establish an independent commission with three commissioners – a Freedom of Information (FOI) Commissioner, a Privacy Commissioner, and an Information Commissioner to head the new agency. The Queensland Government has also established an inquiry into FOI that is looking at the same issue.

I acknowledge the assistance in developing this paper from Paul Bluck of the Commonwealth Ombudsman office, and Chris Wheeler, NSW Deputy Ombudsman.

See 'Government Information: Restoring Trust and Integrity', Australian Labor Party Election 2007 Policy Document, October 2007.

The recent debate in Australia has focussed on three issues that intersect:

- whether to separate or combine the Ombudsman and FOI Commissioner functions
- whether to separate or combine the Information and Privacy Commissioner functions
- whether to separate or combine the complaint investigation and determinative functions.

As those issues indicate, the debate has moved away from using courts and tribunals as the major FOI oversight body. Partly this reflects a preference for the low cost and flexible role that an ombudsman or commissioner can play. Partly too it recognises the inherent disadvantage faced by an FOI applicant in tribunal or court proceedings, who does not have specific knowledge of the contents of a document for which an exemption claim has been made.

The shift to an ombudsman or commissioner acknowledges also the need for an FOI champion in the system of government. Unless there is an FOI champion, open government will dwindle in importance. Governments and their departments are not inclined naturally to be open and inclusive. Moreover, the functions of government are spread across hundreds of different departments, authorities and committees, all of which are subject to the FOI Act. The operation of the Act will be patchy and uneven unless there is a single oversight body that can focus attention on the whole-of-government responsibility to comply with minimum legislated standards for openness.

I will start with a brief sketch of the development of FOI laws in Australia.

The Australian Experience

• Development of FOI laws in Australia (in nine jurisdictions)

Australia has a federal system of government, with nine government jurisdictions: a national (called the Commonwealth) system of government, six State government systems, and two Territory systems. Federations offer the opportunity for experimentation and diversity in devising laws. That has been the experience in Australian FOI development. Most of the major options for FOI oversight have been

adopted in one or other jurisdiction. Australia therefore provides an interesting case study in FOI design.

Federalism also provides a setting for contest between government systems to outperform each other in designing laws and programs. It is noteworthy that inquiries into FOI laws have recently been established in three Australian jurisdictions (Commonwealth, Queensland, and NSW) and reforms were implemented in another in response to a damning Ombudsman report (Victoria).²

• Ombudsman with an FOI function (Commonwealth, New South Wales, Victoria, South Australia, Tasmania, Australian Capital Territory)

The first Australian Freedom of Information Act was enacted by the Commonwealth Parliament in 1982. This occurred soon after the introduction of a new system of administrative law. It was therefore understandable that the oversight option chosen at the time was a combination of the Commonwealth Ombudsman and the Administrative Appeals Tribunal. The Ombudsman could investigate complaints about agency administration of the FOI Act, and make recommendations change agency decisions and practices. Most FOI decisions – on exemptions, charges and processing refusals – could be appealed to the Administrative Appeals Tribunal, which could make a fresh decision in substitution for the decision under review.

Five other jurisdictions – NSW, Victoria, South Australia, Tasmania and ACT – also relied upon the Ombudsman to perform an FOI oversight role. There were some modifications. For example, the Victorian and ACT Ombudsmen were authorised to commence or intervene in tribunal proceedings on behalf of FOI applicants.³ In NSW an agency can remake an FOI decision in response to a suggestion or recommendation by the Ombudsman.⁴ In Tasmania, the Ombudsman has a determinative function, to decide any issue that an agency can decide and to substitute a new decision.⁵

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The Commonwealth inquiry is to be conducted by the Australian Law Reform Commission (www.alrc.gov.au). The Queensland inquiry is being conducted by the Freedom of Information Independent Review Panel appointed by the Queensland Government (www.foireview.qld.gov.au). The inquiry in NSW is being undertaken by the NSW Ombudsman, following a government failure to establish a joint inquiry with the Ombudsman (www.ombudsman.gov.au). In Victoria, see Victorian Ombudsman, *Review of the Freedom of Information Act 1982* (2007), available at www.ombudsman.vic.gov.au.

Freedom of Information Act 1989 (ACT) s 57; Freedom of Information 1982 (Vic) s 57.

⁴ Freedom of Information Act 1989 (NSW) s 52A.

Freedom of Information Act 1991 (Tas) s 48.

• Separate Information Commissioners (Queensland, Western Australia) and Privacy Commissioners (Commonwealth, New South Wales, Victoria)

The more recent trend in Australia has been to confer the FOI oversight function on an independent Information Commissioner. An office by that name was established in both Queensland and Western Australia in 1992, when FOI was enacted in both States. The Queensland Act provided that the Queensland Ombudsman would fill the role pending the appointment of an Information Commissioner. The Ombudsman fulfilled that role until 2005 when a Commissioner was appointed, although the Ombudsman always gave separate badging and accommodation to the Information Commissioner office.

The office of Information Commissioner in Western Australia always operated as a separate office, although it was recently co-located with the Ombudsman.

The Information Commissioners in both Queensland and WA (as well as the Ombudsman in Tasmania) have a determinative function. That is, they can review any decision of an agency (for example, that a document is exempt) and substitute a new and preferable decision. In 2007 in Western Australia the Government proposed that this determinative function would be transferred to the newly-established State Administrative Tribunal, and that the Information Commissioner would be confined to the roles of conciliating disputed FOI cases and reviewing the FOI processes of agencies. In both States the Information Commissioner position is held by an Acting appointment, while the office is being reviewed.

A development that predates the creation of Information Commissioners was the creation of independent Privacy Commissioners. They have been created by the Commonwealth in 1986, Victoria in 2000, and NSW in 2002. The Privacy Commissioners discharge a similar role to the Information Commissioners, of dealing with individual complaints, making binding determinations, promoting the objects of the legislation, conducting training and public education, and monitoring agency performance under the legislation.

• Combined Information and Privacy Commission (Northern Territory)

The Northern Territory is the most recent jurisdiction in Australia to enact freedom of

Freedom of Information Act 1992 (Qld) ss 88, 89; Freedom of Information Act 1992 (WA) s 76; Freedom of Information Act 1991 (Tas) s 48.

Freedom of Information Act 1992 (Qld) s 61(2).

Privacy Act 1986 (Cth); Information Privacy Act 2000 (Vic); Health Records and Information Privacy Act 2002 (NSW).

information and privacy legislation, which commenced operating in 2004. FOI and Privacy principles are contained in a single Act, the *Information Act*, that is administered by an (Acting) Information Commissioner.

As noted earlier, the national Labor Government elected in 2007 foreshadowed during the election that it would establish a single agency, with an Information Commissioner, FOI Commissioner and Privacy Commissioner. The division of responsibility between the three commissioners was not spelt out. The Ombudsman and the Administrative Appeals Tribunal would lose their current FOI oversight role.

 Appeals on FOI and Privacy to an administrative tribunal (Commonwealth, New South Wales, Victoria, Australian Capital Territory) or court (SA)

As noted earlier, the approach first adopted in the Commonwealth was to give the determinative function to an independent tribunal, the Administrative Appeals Tribunal. A prominent reason at the time for doing so is that the FOI law was enacted at a time when there had been an unbroken tradition of government secrecy and control of information. The view was taken, rightly I think, that a tradition of official reticence would be broken only by a sudden break from the past. Part of the shock treatment was that the final decision on FOI disclosure would rest with an independent legal tribunal that would conduct open hearings in resolving the great contests about openness and secrecy.⁹

The same approach has since been followed in other Australian jurisdictions that have established a comparable administrative tribunal with a general jurisdiction to review administrative decisions on their merits – in New South Wales, the Administrative Decisions Tribunal; in Victoria, the Civil and Administrative Tribunal; in the ACT, the Administrative Appeals Tribunal; and, as currently proposed in WA, the State Administrative Tribunal. In some jurisdictions, prior to the establishment of a general jurisdiction administrative tribunal, the appellate body was the District Court. That is still the position in South Australia. ¹⁰

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Eg, Senate Standing Committee on Constitutional and Legal Affairs, *Freedom of Information* (1979) at paras 27.2, 27.23.

¹⁰ Freedom of Information Act 1991 (SA) s 39.

A later development that has clouded the picture a little is that the filing fee for commencing an action in an administrative tribunal has steadily grown. It is currently \$639 in the Commonwealth. It is also more common now for government agencies to be legally represented (often by senior barristers) in FOI tribunal proceedings. The steady growth in the jurisdiction and membership of tribunals means also that it is perhaps less likely that the tribunal member hearing a case will be experienced in dealing with FOI issues.

The Case for a Separate Information Commissioner and Ombudsman

This section of the paper looks at factors that weigh in favour of creating the office of Information Commissioner separately from the Ombudsman. The following section discusses factors that weigh in favour of combining those functions in the one office.

• Giving a separate and prominent profile to FOI

The creation of an independent Information Commissioner is a clear signal of the importance attached to freedom of information laws. The underlying message is that the FOI Act is a law of fundamental constitutional importance that warrants supervision by a specialist independent office.

The dedicated role of an Information Commissioner is to be the FOI champion in government. The chief responsibilities are to promote open government ideals and ensure that all executive agencies honour both the letter and spirit of the FOI law. There are many parts to the role – dealing with complaints from the public about FOI decisions and service delivery issues; providing guidance and direction to agencies about FOI practice; conducting FOI training for agencies; providing similar guidance to members of the public about FOI processes; auditing agency compliance with FOI laws; and providing leadership in government on open government philosophy.

All of those functions sit easily and comfortably in the separate office of an Information Commissioner. An Ombudsman is able to discharge similar functions, although it is more common for an Ombudsman to focus on complaint and investigation functions, and to play less of a role in training, public education, and doctrinal leadership.

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ACT, \$237; NSW, \$55 application fee, and \$230 for an appeal panel; Victoria, free for personal information cases and \$192.80 in other cases.

Consequently, if an Ombudsman is to be the FOI champion, it is probably best to confer upon the Ombudsman a separate statutory role of Information Commissioner, with added profile and additional resources for the task.

• Facilitating a determinative role for the Information Commissioner

An abiding principle of Ombudsman work is that the office is neither the representative of government nor the advocate of the complainant. The Ombudsman maintains a neutral and balanced position on all issues in government. A traditional way of safeguarding that principle is to confer recommendatory and not determinative functions on the Ombudsman. The final decision always rests with the agency, subject to a possible appeal to a tribunal or a court.

Consequently, a determinative role in FOI matters would not sit easily in an Ombudsman's office. There is, on the other hand, a similar argument that the role does not sit easily with an Information Commissioner, and that the determinative function best belongs to a tribunal or court. The predominant work of an Ombudsman or Commissioner is complaint handling and investigation. That work is discharged more effectively and quickly when there is a strong and trusting relationship with government agencies, based for the most part on cooperation and informal exchange of documents and opinions. It threatens that relationship if the Commissioner or Ombudsman has the option, at the end of the process, of making the final determination on an FOI issue, particularly an FOI exemption issue.

Nor is it uncommon for government agencies in FOI disputes to instruct senior legal counsel to present their views, and to insist on an adversarial hearing to resolve disputed factual and legal issues. Hearings of that kind are more suitably conducted by a tribunal than by a commissioner or ombudsman.

Insulating the Ombudsman from political and media battles over information disputes

There is a greater chance that agencies will take a defensive and combative stance in FOI matters than in other areas of administrative dispute. Disclosure of information can cause great political damage to governments and embarrassment for officials. Disputes about public disclosure of government secrets are often hard fought. As the NSW Deputy

Ombudsman, Chris Wheeler, has observed, 'control over the dissemination of information is of vital interest to people who are in power. Politicians and public officials are likely to perceive FOI legislation as creating risks for them personally, or political risks for the government of the day or risks of damage to the reputation of their agency'.12

It may be easier for an Information Commissioner than an Ombudsman to take an activist and combative stance in resolving public disclosure disputes. In a sense, it is part of the job of being an FOI advocate and champion. There is more of a risk for an Ombudsman that an activist stance could damage its preferred approach of being outside the battle, and being an advocate of nothing more than legal compliance and good government.

Option of combining Information and Privacy

Some Information Commissioners, internationally and in Australia, have responsibility for both FOI and Privacy. The function of a Privacy Commissioner does not fit as easily in an Ombudsman's office. The complaint and investigation function is common to both, but this tends to be only a smaller part of the Privacy Commissioner's role. Privacy Commissioners have developed a broader focus on how personal information and data is managed by government – what can be collected and how, the way it is stored, how long it can be retained, the use that can be made of it, and who it can be disclosed to.

To discharge those functions properly, the Privacy Commissioner must devote considerable effort to training, development of policies and guidelines, public education, and monitoring agency performance. Increasingly, too, Privacy Commissioners have broadened their jurisdiction and focus to include the management of personal information in the private sector, particularly by banks and finance companies, large corporations, and hospitals and medical centres.

The argument can equally be put that those functions require an office that is separate from all other offices – not just the Ombudsman, but from an Information Commissioner as well. Indeed, there is a risk that the FOI and privacy functions will clash if located in the one office: one function is principally concerned with public disclosure of

¹² Chris Wheeler, 'FOI - the Need for Review', paper delivered to the Government Lawyers CLE Conference, Sydney, 30 October 2007.

information, the other with confidentiality and protection of information. Whether that clash is best resolved within one agency, or between two agencies, is a challenging issue.

• Jurisdiction over decisions of Ministers

Another important jurisdictional feature is that the Ombudsman cannot look generally at ministerial decisions. And yet, FOI legislation generally applies to the official documents of Ministers. 4

There is no reason in principle why an Ombudsman cannot be given jurisdiction to look at ministerial decisions, ¹⁵ but it is always important that functional changes of that kind occur deliberately and not inadvertently. Of course, the same issue arises of oversight of ministerial decisions for an Information Commissioner.

There are countless instances of Ombudsmen and other statutory office holders having to make decisions that bring them into conflict with Ministers. This is inherently part of an oversight role, but there are risks for the statutory oversight agency if conflict with Ministers and senior government officials is a regular (and inescapable) occurrence. This provides an added reason, in the mind of some, for conferring the ultimate determinative function in FOI matters on a tribunal, headed by a judge. The tenure and traditions enjoyed by judicial officers is an important safeguard if there are large battles to be resolved in government.

The case for combining the Information Commissioner and Ombudsman in a single office

• Drawing on the tradition, stature and settled character of the Ombudsman

A distinct benefit that an Ombudsman can bring to any new function is that the office has a tradition, credibility and respect to draw upon. In Australia, Ombudsman offices have been operating successfully for over thirty years. In that time, they have developed a

Eg, Freedom of Information Act 1982 (Cth) s 11(1)(b).

Eg, *Ombudsman Act 1976* (Cth) s 5(2)(a).

Eg, I have explained in another paper that the Commonwealth Ombudsman inescapably has this role when preparing reports for Parliament on persons held in immigration detention for more than two years: see J McMillan, 'The Expanding Ombudsman Role. What Fits? What Doesn't?' (2008), available at www.ombudsman.gov.au.

successful model and philosophy for safeguarding the public and dealing with problems in government.

The importance of this stability and strength should never be understated. There are many other complaint, oversight and monitoring bodies that have had a shorter or more turbulent life. Even in Australia, for example, the FOI function has been less controversial when discharged by an Ombudsman's office than when discharged by an Information Commissioner. Contrast, for example, the recent decision of the Victorian Government to implement all the Ombudsman's proposals for reforming the FOI Act, with the public criticism of government made by the outgoing FOI Commissioner in Western Australia for undermining the independence and stature of the office. It is noteworthy too that all three Information Commissioner positions in Australia – in the Northern Territory, Queensland, and Western Australia – are currently held by Acting appointees.

• Relying on the greater staffing and other resources of the Ombudsman

The greater size of an Ombudsman's office gives it a practical advantage in recruiting staff, training staff, providing career variation and opportunities for staff, and retaining good staff. By contrast, small offices with a specialist oversight function can face greater difficulty in staff recruitment than larger offices with a broader jurisdiction and range of work.

It is probable also that an Ombudsman's office requires less staff to discharge an FOI function, because it already has corporate, human relations and IT staff for other Ombudsman functions. Another advantage of this greater staffing capacity is the ability to deal more easily with peaks and troughs in complaint work, by shifting staff from one area of the office to another. Equally, an established Ombudsman office is often well-placed to discharge a new function within weeks of the new function commencing, whereas a new office may take months to navigate the establishment phase.

These points are relevant in another way in Australia, because of its expansive geography. My own office maintains nine different offices around Australia. We are thus better placed than any office located in a single city to deal with government issues, wherever they arise, and to develop a working relationship with regional government

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¹⁶ Information Commissioner, Foreword to the 2007 Annual Report.

offices and the local community. Equally, by recruiting staff from around Australia than in a single city, my belief is that we recruit a more diverse range of talented staff.

• Integration with other Ombudsman work

There is a substantial overlap between general Ombudsman work and FOI work. Many of the issues are the same – complaints about delay in dealing with an application, about an agency's interpretation of a person's application, the sufficiency of a reasons statement for an adverse decision, the adequacy of a search for missing documents, or a refusal to handle a burdensome request. Those complaints are resolved more by applying principles of good administration that are at the heart of Ombudsman work generally, than by applying specialist FOI jurisprudence. The Ombudsman also has coercive statutory powers that may be needed in exceptional cases to obtain documents, enter premises and take evidence on oath.¹⁷

FOI issues frequently arise in combination with other administrative issues. For example, complaints to the Ombudsman frequently allege that an immigration visa was wrongly denied or a social support benefit wrongly revoked, and that a subsequent FOI request for the documents relating to that adverse decision was not properly handled. The Ombudsman is able to provide a seamless service by dealing with both issues concurrently. This enhances access to administrative justice.

To handle the large number of complaints that are received each year touching all areas of government, Ombudsman offices have established proficient contact arrangements with all government agencies. These arrangements facilitate the speedy and informal resolution of complaints, whatever the issue. This enables FOI complaints to the Ombudsman to be resolved efficiently.

In addition to individual complaint and public contact work arising from FOI disputes, there is a need for the underlying objectives of FOI – greater transparency and accountability in executive government – to be promoted. Those objectives align closely with other Ombudsman work. Indeed, FOI is a natural supplement to that work, and will give the Ombudsman's office an insight into an agency's record keeping and attitude to transparency. Many Ombudsman offices have demonstrated their commitment to FOI by

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Eg, *Ombudsman Act 1976* (Cth) ss 9, 13, 14.

undertaking own motion investigations into FOI administration and publishing manuals on FOI administration.¹⁸

Options for Reducing the Gap between the Alternatives

There are necessarily some differences between an Ombudsman and an Information Commissioner, although their primary aim is the same. It is to ensure the smooth and effective operation of the FOI law, as the legislative platform for open government. There are ways of bringing their roles even closer together, by the way in which an Information Commissioner office is established and operates.

• Co-locating offices

The Ombudsman and the Information Commissioner can be physically co-located. This can lead, at least at an informal level, to greater cooperation and consultation between the offices. There are also possible cost-savings in sharing facilities and corporate resources.

• Creating an office within an office

The two offices can be joined yet separated if the role of Information Commissioner is created as a separate statutory office that is discharged within the Ombudsman's office. The Information Commissioner could be given a separate statutory persona, or be given the status of a Deputy Ombudsman who is subject to the direction of the Ombudsman but otherwise having the power to act independently. That is essentially how the Queensland Information Commissioner operated for many years. There is also a precedent for this approach in the current structure of the office of the Commonwealth Ombudsman, who also discharges separate statutory roles of Postal Industry Ombudsman, Defence Force Ombudsman and ACT Ombudsman.¹⁹

• Emphasising 'soft' enforcement options

One difference between an Ombudsman and an Information Commissioner is that the

Eg, Commonwealth Ombudsman, Needs to Know: own motion investigation into the administration of the Freedom of Information Act 1982 in Commonwealth Agencies, June 1999; Commonwealth Ombudsman, Scrutinising Government: Administration of the Freedom of Information Act 1982 in Australian Government Agencies, Report No 2/2006; NSW Ombudsman, NSW FOI Manual.

See Ombudsman Act 1976 (Cth) ss 19B, 19L; and Ombudsman Act 1989 (ACT).

latter is usually given a determinative function, whereas the Ombudsman is not. This difference need not be large in practice, if the Information Commissioner relies on other means to change agency decisions. For example, most Ombudsman offices find that their powers of consultation, persuasion, recommendation and publication are adequate in most circumstances to prompt agencies to change decisions of which the Ombudsman disapproves. Equally, the publication of guidelines and practice manuals can be effective in indicating the decisions that should be made in individual cases.

• Focusing on administration of FOI and Privacy laws, rather than on heroic conflicts FOI can be a public battleground between the government, on the one hand, and the media and the community on the other. Individual decisions – such as exemption claims that are made by way of conclusive certificates – are often portrayed as heroic conflicts between secrecy and openness, between democracy and despotism.

It is debatable whether disputes of that kind advance FOI objectives, or obscure the finely-balanced nature of the arguments and the issues to be decided.²⁰ A core objective of the oversight body, whether Ombudsman or Information Commissioner, is to crystallise disputes and resolve them by applying principles in an even-handed and dispassionate manner. In fact, the obstacle that most people face in making FOI requests is not autocratic resistance by executive government, but inferior administration of the FOI Act by agencies. FOI objectives are best advanced if the oversight body devotes considerable attention to reviewing and improving agency administration.

• Parliamentary oversight

If an oversight body reports to a parliamentary joint committee established for that purpose, it can bolster the respect given to the oversight by government agencies. They know they can be the subject of adverse comment to the parliamentary committee and can be called to account in a testing or embarrassing manner in a public forum. The parliamentary committee can likewise develop expertise and stewardship in that area of government practice.

In short, FOI will be strengthened and enlivened if a joint parliamentary committee is

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Eg, see J McMillan, 'The FOI Landscape after *McKinnon*' (2007) *Public Administration Today* 42.

established to monitor FOI (and, possibly, privacy). The oversight body, whether a Commissioner or an Ombudsman, should report to it regularly.

Which option?

The arguments in favour of an Ombudsman or an Information Commissioner are evenly weighted. There are some advantages that an Ombudsman can bring to the function – such as its greater resources and experience in administrative oversight. There are likewise some advantages on offer with an Information Commissioner – for example, it is easier to give a Commissioner a determinative role and oversight of ministerial decisions.

Generalisations can be unsafe, but history – in Australia and internationally – seems to suggest another difference. The FOI oversight function usually has a higher public profile when discharged by an Information Commissioner. The Commissioner is more notable for strident advocacy of FOI, and for making landmark rulings on FOI exemption claims. On the other hand, the FOI oversight function is more stable over time when discharged by an Ombudsman's office. Conflicts are more often avoided, and those that occur are soon overshadowed by other features of Ombudsman work that portray its sound relationship with executive agencies and the support it receives from government.

If an Ombudsman is the chosen option, it seems preferable to bestow the function by conferring it upon the Ombudsman as a separate statutory role of Information Commissioner. And, whichever option is chosen, there is much to be said for allowing appeals to be heard by an administrative tribunal with a merit review function. The tribunal provides a better setting, in difficult or hard-fought cases, for allowing the expert presentation and adjudication of competing arguments. The division of responsibility between the tribunal and a commissioner (or ombudsman) also lessens the risk that the fate of FOI will rest on the health of the current relationship between a commissioner and the government.

Another factor that can be decisive is the size of the government jurisdiction and the expected FOI caseload. In a small jurisdiction where the number of FOI cases is low, it

makes more sense to give the oversight function to the Ombudsman rather than create a small and possibly awkward separate office. By contrast, in a jurisdiction that handles a large FOI caseload, a separate office is easier to justify. This can, however, be countered by geography. In a geographically large country such as Australia, there are practical advantages in merging the FOI function in an Ombudsman's office that already maintains a national operation.

At the end of the day, there is a need for either an Ombudsman or an Information Commissioner to play an oversight role. Simply stated, FOI will not work well across government unless there is an FOI champion.



Designing effective oversight:

Ombudsman or FOI Commissioner?

Presenter

John McMillan Commonwealth Ombudsman

The main options

- Separate or combine
 - the Ombudsman and FOI Commissioner functions?
 - the Information and Privacy Commissioner functions?
 - the investigative and determinative functions?



The Australian Experience

- Development of FOI laws in Australia (in nine jurisdictions)
- Ombudsman with an FOI function (Cth, NSW, Vic, SA, Tas, ACT)
- Separate Commissioners for Information (Qld, WA) and Privacy (Cth, NSW, Vic)
- Combined Information and Privacy Commission (NT)
- Appeals on FOI and Privacy to a merit review tribunal or court



The case for separating the Information and Ombudsman functions

- Giving a separate and prominent profile to FOI
- Facilitating a determinative role for the FOI Commissioner
- Insulating the Ombudsman from political and media battles over information disputes
- Option of combining Information and Privacy
- Jurisdictional issues



The case for combining the Information and Ombudsman functions

- Drawing on the tradition, stature and settled character of the Ombudsman
- Relying on the greater staffing and other resources of the Ombudsman
- o Integration with other Ombudsman work



Options for reducing the gap between the alternatives

- Co-locating offices
- o Creating an office within an office
- o Emphasising 'soft' enforcement options
- Focusing on administration of FOI and Privacy laws, rather than on heroic conflicts







Anja-Maria Gardain Office of the Berlin Commissioner for Data Protection and Freedom of Information

 ${\bf Paper\ delivered\ at\ the}$ ${\bf 5}^{\rm th}$ International Conference of Information Commissioners

How do We Design an Effective Oversight Body?

The Berlin Commissioner for Data Protection (DP) and Freedom of Information (FOI) looks back to only 8 years of 'expertise' in FOI-matters, because the Berlin FOI Act entered in to force as late as in 1999 being the second FOI law in the Federal Republic of Germany. 20 years before that, in 1979, the office was established as DP Commission with the status of 'Supreme State Authority'. This status is only held by an authority, if its rights are guaranteed by the constitution. Thus, Art. 47 of the Berlin Constitution stipulates that to protect the [fundamental] right to informational self-determination, parliament elects a DP Commissioner. He/She is appointed by the Speaker of the House and subjected in person to his/her supervision, but only as far as duties arising from public services law are concerned. The position outside of the administrative hierarchy is the most independent one a control body in Germany can have. It is unique to the DP Commissioners as well as to the Accounting Offices.

This introduction is necessary to make clear and understand right from the beginning that becoming a FOI-Commissioner meant in a way to profit from this kind of strong image the Privacy Commissioner already had. When the Green Party in Berlin promoted the FOI Act, the DP Commissioner supported the proposal by stressing that DP and FOI are not mutually exclusive but 2 sides of the same coin which can be harmonized. Maybe this clear statement of someone who ostensibly should be hostile to the idea of FOI was one of the main reasons why the Berlin FOI Act eventually was passed.

Also, the last political opponents were won by the offer of the DP Commissioner to act as mediator in cases where either the claimant or the public institution needed help. Thus, no new costly institution was necessary. This is one of the pros for our institutional design, having DP and FOI 'under one roof'. Another advantage of this structure is that there is no time-consuming discussion or even lawsuit between 2 institutions which argue about access to information or non-access because of DP. The split is in our opinion conflicting with one of the main FOI-pillars which is the right to a non-bureaucratic access to information. Having 2 institutions can mean an additional level of bureaucracy to the disadvantage of the requestor.

More details to find out what oversight body could be the most effective for the benefit of the requestor shall be given by using the following 3 categories to show what we have (A), what we do not have (B) and what we need (C).

(A) What We Have...

- 1. We have a <u>clear office title</u> which reflects both of our functions in 'chronological order'. We think that this is the most transparent description of who we are and what we do. Other titles as 'Information Commissioner' are shorter and more practical, yet less concise because for citizens it is not obvious what stands behind the wide word 'information'. If we could change the office title, we would swap the functions to show that FOI is the general rule and DP the exception to it.
- 2. We have a status of 'Supreme State Authority' inherited from the DP-status as initially described. An important consequence is that we have our own budget in the amount of almost 4 Mio €per year which is granted by parliament and which guarantees our autonomy.
- 3. We have a <u>mediating role</u> which is not named in the Berlin FOI Act but widely recognized as such following section 18 para. 2. It states that every person [which includes citizens and staff from public institutions] has the right to call upon the Commissioner for DP and FOI. We encourage the public body to answer the request properly. In contrast, the DP Commissioner acts as stakeholder for the right to privacy.

4. We have a <u>duty to report to parliament</u>. It has established its own (and named as such) 'Subcommittee for DP and FOI' which meets every second week to publicly discuss our findings with us and members of parliament and government departments. Sometimes they can be convinced under the pressure of the politicians to change their attitude. But the minimum result of the discussion is to raise again the awareness for FOI-matters.

(B) What We Do Not Have...

- 1. We do not have the rights of a DP Commissioner. His 'sharpest knife' in the public sector, the right to lodge an official complaint, is combined with a deadline for a statement which must be given by the public institution. Although this formal procedure reflects a certain intensity of the infringement, the practical effect is limited as the Commissioner's complaint is not binding the agency.
- 2. We do not have <u>additional budget for FOI-matters</u>. We did not get more money nor more staff for our new task. And we did not claim it for one single reason. Opponents to the FOI law often stated that public institutions would be flooded by FOI-claims so that this new task could not be fulfilled without more personal (which for budget reasons would obviously not be granted). We did not want to fuel this fear by asking ourselves for more staff. This reluctance has lead to changes concerning our internal institutional design. The new task of mediator was initially equally shared between the DP-experts in our office, e.g. the expert in charge of DP matters concerning the Home Office was also in charge of FOI requests against the Home Office). The advantage was that everybody was confronted with those 2 sides of the coin (DP and FOI) and not only a few colleagues.
- 3. We do not have the <u>right to issue decrees or sanctions</u> against public institutions nor do we have the <u>right to go to court</u>. The reason for this was indirectly given in my introduction. As the FOI-role was considered as a kind of annex to the older DP-function with its constitutional background, the new role could not lead to more competences. In view of the time factor, we do not think that these rights make an oversight body more effective (as long as the claimant has his own right to go to court).

(C) What We Need...

- 1. We need more manpower. There is only one person in our office (myself) doing the mediating job in addition to other tasks. With more staff our office could do 'own motion investigations'. For example we would like to verify whether the agencies follow the rule in section 17 para. 4 Berlin FOI Act. It states that every public body must have indexes which indicate the order and existence of files as well as their purpose. Also, we could offer regular FOI-training for civil servants at the Academy of Administrative Studies.
- 2. We need more interaction with the media to promote FOI. If we have cases which could be of interest for the press, we arrange a contact between the requestor and journalists, but they do not often report on such cases. In contrast, we do not interact too much with civil society organisations (e.g. by joining their press releases) in order to maintain our independent status as mediator.
- 3. We need a legal duty of agencies to consult our office (at least in cases of doubt). There are still cases which end up in court because simple demands of access to information have been answered insufficiently.
- 4. We need a <u>legal right to be heard by court</u>, especially if we have been involved before. Sometimes courts do not properly consider our written statements which we have given to the public body. A hearing to make clear what we mean would be most helpful.

At the end of this overview, you certainly share my view that our office does not have too much (executive) power. But don't you think it is in some ways more effective for the benefit of the claimant?

4

Anja-Maria Gardain
Office of the Berlin Commissioner
for Data Protection and
Freedom of Information



28 November 2007

5th ICIC / 26-29 November 2007 / Wellington, New Zealand

How do we design an effective oversight body?

- Berlin FOI Act and Commission since 1999
- second law in the Fed. Rep. of Germany ("developing nation" in this respect)
- Data Protection (DP) Commission since 1979
- "Supreme State Authority" / constitutional status
- to protect the fundamental right to informational self-determination

28 November 2007

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- FOI Act was promoted by Green Party
- Proposal was supported by DP Commissioner
 - DP and FOI are 2 sides of the same coin
 - Offer to act as mediator
- DP and FOI "under one roof"
 - No new costly institution
 - No time-consuming procedures between
 2 (separate) institutions

28 November 2007

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How do we design an effective oversight body?



- More details are given by using 3 categories
 - (A) What we have...
 - (B) What we do not have...
 - (C) What we need...

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- (A) What we have...
 - 1. Clear office title reflecting our functions
 - Inherited status of "Supreme State Authority" with own budget
 - 3. Mediating role
 - 4. Duty to report to parliament (once a year)
 Its "Subcommittee for DP and FOI" meets every 2nd week.

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How do we design an effective oversight body?



- (B) What we do not have...
 - 1. Rights of a DP Commissioner
 - 2. Additional budget for FOI-matters
 - 3. Right to issue decrees or sanctions, right to go to court

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- (C) What we need...
 - More manpower
 (for "own motion investigations" and FOI-training)
 - 2. More interaction with the media
 - 3. Legal duty of agencies to consult our office
 - 4. Legal right to be heard by court

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How do we design an effective oversight body?



 No more powers than that but in some ways more effective for the benefit of the claimant?

Thank you for your attention!

28 November 2007

5th ICIC / 26-29 November 2007 / Wellington, New Zealand

3



John R Taylor

Deputy Ombudsman

Ombudsman Victoria

Paper delivered at the 5th International Conference of Information Commissioners

Own Motion investigation into the Freedom of Information Act
A Review Conducted by Ombudsman Victoria

ABSTRACT

Own motion review of the Freedom of Information Act

In June 2006 the Victorian Ombudsman released his report of an own motion investigation into the Freedom of Information Act (FOI Act). This paper looks at the background to the review, including the basis for it; the development of a discussion paper; and agency responses. It is also a behind-the-scenes commentary on conducting a wide ranging systemic review and how to best achieve outcomes.

The Ombudsman made recommendations that included legislative change; that the Department of Justice take a stronger leadership role in providing guidance to FOI agencies; and that practice notes and guidelines be issued.

Since finalising the review the Victorian Government has committed to amending the FOI Act in line with the Ombudsman's recommendations.

BACKGROUND

The *Freedom of Information Act* (FOI Act) was passed by the Victorian Parliament in 1982, coming into operation on 5 July 1983. It followed the commencement 6 months

earlier of the Commonwealth *Freedom of Information Act* 1982 and was the first FOI Act of any of the Australian States and Territories. Although it was introduced and passed by the Cain Government, it followed the introduction of Freedom of Information Bills by the earlier Thompson Government.

FOI is regarded as one of the pillars of modern democratic government. A lack of trust in the willingness to administer the FOI Act in accordance with the legislation and its objects could harm confidence in the institutions of democratic government.

On 2 February 2000 the Victorian Attorney-General Robert Hulls referred to changes made to the FOI Act to 'foster a new culture of open and accountable government' and issued guidelines to assist the administration of the FOI Act and to require departments and agencies 'to make decisions under the FOI Act consistent with three key principles vital to a healthy democracy:

- Well informed people are more likely to become involved in both policy making and government
- A government open to scrutiny is more accountable, and
- People have a general right to know what information government holds about them.'

Scope of Investigation

In August 2004 the Ombudsman commenced an investigation of his own motion into the performance and compliance of departments and agencies with the FOI Act, having regard to:

- The timeliness and adequacy of responses to FOI requests
- The policies and practices adopted by departments and agencies for handling FOI requests
- The adequacy and effect of protocols and arrangements between the departments and contractors on the keeping and availability of documents where public functions are performed by bodies other than departments or agencies
- Obligations under other legislation including the *Public Records Act* 1973, the *Health Records Act* 2001 and the *Information Privacy Act* 2000, and
- The legislative requirements imposed for departments and agencies.

At that time there were 10 government departments which were the subject of the investigation.

They were:

- Department of Education and Training (DET)
- Department of Human Services (DHS)
- Department of Infrastructure (DOI)
- Department of Innovation, Industry and Regional Development (DIIRD)
- Department of Justice (DOJ)
- Department of Premier and Cabinet (DPC)
- Department of Primary Industry (DPI)
- Department of Sustainability and Environment (DSE)
- Department of Treasury and Finance (DTF)
- Department for Victorian Communities (DVC).

The Ombudsman also commenced an investigation at the same time in his then capacity as Police Ombudsman into the policies, practices and procedures of Victoria Police in relation to the FOI Act, having regard to:

- The timeliness and adequacy of responses to FOI requests
- The provision of services by contractors and the adequacy and effect of protocols and arrangements between the police force and contractors on the keeping and availability of documents
- The legislative requirements imposed for the police force, and
- Obligations under other legislation including the Public Records Act and the Information Privacy Act.

The investigation in relation to departments was conducted under section 14 of the *Ombudsman Act* 1973. The Ombudsman commenced the investigation into Victoria Police as Police Ombudsman under the *Police Regulation Act* 1958 ('PRA'). In November 2004 amendments to the PRA created the Office of Police Integrity ('OPI') and, as Ombudsman, he is now also the Director, Police Integrity ('DPI'). As DPI, he was able to continue the investigation in relation to Victoria Police under a transitional provision in the amended Act.

To conduct the investigation, we employed an experienced barrister, together with one full time staff member with extensive experience in dealing with FOI complaints.

Discussion Paper

Following a review of complaints files and initial consultations with FOI practitioners, in May 2005 we issued a Discussion Paper seeking comment from the departments and agencies consulted, Members of Parliament with a specific interest in FOI, FOI practitioners and members of the public.

We advertised the review in the media, seeking written comments from interested parties. The paper set out issues which emerged from the consultations that have taken place with FOI officers and FOI users. It also set out information about the way in which the FOI Act was at the time given effect, existing powers of review, and matters which are the source of frequent complaint by users and administrators of the Act. A copy may be found at www.ombudsman.vic.gov.au.

Comment was sought on a range of issues including:

- Part II statements—publication of information by agencies
- Processing requests, including assessing the request and timeliness
- Reasons for decision
- Constructive possession
- Third party consultation
- Access charges
- Review of decisions
- Privacy and health records
- Open government
- Legislative issues.

Ombudsman Role Under the FOI Act

The Ombudsman has power to enquire into or investigate administrative actions taken in any Government department or public statutory body. Complaints are frequently made to the Ombudsman about a wide range of matters relating to the administration of the FOI Act. The Ombudsman does not generally conduct an investigation where the complainant has a right to apply to the Victorian Civil and Administrative Tribunal (VCAT) for review of a decision on an FOI request, unless the Ombudsman considers that in the particular circumstances it would not be reasonable to expect the complainant to resort to that right, or that the matter merits investigation in order to avoid injustice¹.

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¹ Ombudsman Act section 13(4)

The Ombudsman does not act as an alternative avenue of appeal to VCAT in respect of decisions under the FOI Act refusing applicant's access to documents.

One of the current problems with the FOI Act is that it makes a number of specific references to the Ombudsman, leading to some ambiguity whether complaints to the Ombudsman about FOI matters are made and handled under the Ombudsman Act or the FOI Act.

Specifically, the FOI Act makes reference to the Ombudsman in relation to:

• Voluminous requests

A complaint may be made to the Ombudsman about a decision to refuse access to a document on the ground that the request is voluminous or that it is apparent from the request that it relates only to exempt documents and that an edited copy could not be provided. If the complainant applies to VCAT for review of the decision the Ombudsman must provide a written report to VCAT².

• Lost documents

Where the decision is that a document does not exist or cannot, after a thorough and diligent search, be located, the applicant must be informed of the right to complain to the Ombudsman³.

• Charges certificate

An applicant who wishes to apply to VCAT for review of a decision as to the amount of a charge for access to a document must first obtain a certificate from the Ombudsman that the matter is of sufficient importance for the Tribunal to consider⁴.

Delay

An applicant may complain to the Ombudsman before or after expiry of the 45-day period, concerning failure to make a decision on an FOI request. An application to the Tribunal under this provision shall not be made before the Ombudsman has informed the applicant of the result of the complaint in accordance with the

² FOI Act section 25A(40)

³ FOI Act section 27(1)(e)

⁴ FOI Act section 50(2)(c)

provisions of the Ombudsman Act⁵. A certificate from the Ombudsman that there has been unreasonable delay operates as a deemed decision by the principal officer of the agency to refuse access, entitling the complainant to immediately apply to VCAT for review⁶.

Intervention

The Ombudsman may intervene in an application before VCAT⁷. This is not an action we have taken in recent years. The criterion is that the Ombudsman shall have regard to:

- (a) The importance of the principal involved in the matter
- (b) The precedential value of the case
- (c) The financial means of the applicant
- (d) The applicant's prospects of success, and
- (e) The reasonableness of the agency's action in withholding the document.

The question of the source of power to investigate in FOI complaints is important. The bodies to which the FOI Act applies⁸ are defined differently from those in relation to which the Ombudsman is given power to enquire into or investigate.

The FOI Act talks about agencies, with an 'agency' meaning 'a department, council or prescribed authority'. The Ombudsman Act gives the Ombudsman jurisdiction over 'any Government Department or Public Statutory Body... or any member of staff of a municipal council'⁹.

Whether the Ombudsman has power to enquire or investigate the handling of FOI requests by some agencies may therefore depend upon which Act is seen as the primary source of power. In particular, it is unclear whether complaints in relation to the handling of FOI requests by Victoria Police should be dealt with by the Ombudsman or the DPI¹⁰.

Complaints about the administration of FOI are frequently made to the Ombudsman in relation to lost documents, delay, and decisions to refuse access to documents. A large

⁵ FOI Act section 53(2)

⁶ FOI Act sections 53(2) and 53(3)

⁷ FOI Act section 57

⁸ See FOI Act section 5(1), definition of 'agency' and section 5(2)

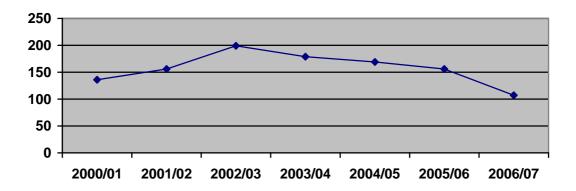
⁹ Ombudsman Act section 13

 $^{^{10}}$ See Ombudsman Act section 13(3A) and PRA subsections 86N and 86NA

proportion of those complaints are found to be substantiated or result in clarification or rectification.

Graph Showing Complaints Received by Ombudsman Victoria since July 2000

FOI complaints received by Ombudsman Victoria



Complaint Issues

In 2003/04, at the time of developing the discussion paper, the Ombudsman received 179 FOI complaints, as follows:

Delays in processing requests		30%
Lost or non-existent documents		23
Unreasonable charges	5	
Voluminous request (s25A referrals)	2	
Refused access to documents	14	
Intervention by Ombudsman	(1 inst	ance)
Other		26

This breakdown of complaints by type is generally typical, with delay in processing being the most common source of complaint.

By 2006/07, FOI complaints had reduced to 107. However delay still amounted to 30% of all complaints, despite steps taken by the departments to increase resources to FOI units following the Ombudsman's own motion investigation.

Use of FOI

The Attorney-General publishes an annual report on the operation of the FOI Act¹¹. The report of 2003-04¹² records information from 378 agencies which are subject to receiving FOI requests. The 10 Departments (including Victoria Police) received less than 22% of the total number of requests. Victoria Police received more FOI requests than any other agency (2,198 in 2003-04), but only four Departments (DHS, DOI, DOJ and DET) were listed in the 'Top 30' agencies.

In 2003-04 133 applications were made to VCAT¹³ for review of decisions refusing access to documents, of which 16 applications were made by Members of Parliament. In 2005/06 the number of applications to VCAT was almost the same (132).

Consultation with Ministers' Offices

As part of their portfolio administration, Ministers are advised about potentially sensitive FOI requests. There are sound reasons for this which are expressed in the Attorney-General's Improved Accountability Guidelines for FOI. Ministers and their staff may hold, or be aware of, documents relevant to a request. They may also be aware of matters relevant to the application of exemptions. The Improved Accountability Guidelines state that, in making a decision, 'the FOI officer should take into account the views of Ministers, Ministerial advisers (who are in effect representing the Minister), the Principal Officer in an agency and any other relevant person'.

The Improved Accountability Guidelines also require that 'where documents relate to a Minister's portfolio (except personal requests) and/or where the Minister could be asked by the media or in parliament to comment or explain, the agency will provide a brief to the Minister'. The brief is to be provided five days prior to the proposed release and include issues apparent from the documents proposed for release; background to the FOI application including the date of receipt; and the terms of the request. The Guidelines state that it is not the responsibility of the FOI officer to follow up if no input is received by the proposed release date.

Where the request relates to a Minister's portfolio or matters involving possible issues of liability (sometimes referred to as 'sensitive' requests), the Minister's office will be

¹¹ FOI Act section 64(1)

¹² Annual Report by the Attorney-General of Victoria on Freedom of Information for 2004

¹³ The figure of 133 excludes a number of apparently invalid and otherwise anomalous applications.

advised of the request when it is received. After the request has been fully processed, a brief is sent to the relevant Minister's office containing a copy of the request, the decision, the documents to be released, and an outline of the issues apparent from any documents to be released and background to the FOI request. Generally the Minister's office is given five days notice of the decision before it is sent to the applicant. Where the request is only for personal information and is not otherwise sensitive, it is sent directly to the applicant without any briefing to the Minister. The matters on which Ministerial briefings are provided vary between departments, as does the extent of the briefings.

FOI officers consulted in preparing the paper advised that the Minister's briefing includes a copy of the proposed decision letter. Some departments have a practice of asking the program area responsible for the document search to provide to the FOI Unit, along with the search results, a draft briefing and in some cases any draft Proposed Parliamentary Questions for inclusion in the Minister's briefing.

FOI officers reported differing practices between departments, with some waiting for advice that a briefing to the Minister's office has been noted before sending out the decision unless the 45-day decision period has already expired, and others sending the decision on the fifth day after the briefing is provided whether or not the briefing has been noted.

All FOI officers consulted reported that the briefing on the proposed decision is sent to the Minister's office by way of advice. While some said there may have been occasions when the Minister's office was then able to advise of further documents which should have been included in the response, decisions on release were not altered as a result of the briefings.

Report on the Review

The Ombudsman received 63 submissions from agencies, organizations and individuals with a particular interest in FOI. DOJ prepared a 'Whole of Victorian Government' submission. In addition, separate submissions were received from DOJ, DHS, DOI, DPC, DTF, DVC and Victoria Police.

Submissions were also received from 12 councils, health agencies, universities, a media outlet, legal authorities and a number of interested citizens.

Investigation process

Evidence was gathered by a range of means, including:

- statistics
- reviewing policies and procedures
- data on staff resources
- interviews with agency staff
- holding several forums
- examining agency files.

In June 2006 the Ombudsman tabled his report on the review of the FOI Act in the Victorian Parliament (see www.ombudsman.vic.gov.au).

KEY FINDINGS

Statistics

- The 10 departments and Victoria Police receive 18 per cent of all FOI requests but are responsible for more than 67 per cent of applications to VCAT.
- The great majority of FOI requests are for information for private purposes, with only a relatively small number being for political or media use. Full access is given in response to 77 per cent of all requests. However, only 36 per cent of requests to departments and 31.5 per cent of requests to Victoria Police are given full access.
- Delay was a key issue. Only 56 per cent of FOI decisions by government departments in 2003-2004 were made within the statutory time frame of 45 days. Nearly 21 per cent of decisions took more than 90 days. Of requests dealt with by the Department of Human Services in 2003-4, 42 per cent of decisions were made within the statutory time limit and 37 per cent took over 90 days. This has improved however and since early 2005, the Department of Human Services has made over 65 per cent of decisions within the statutory time limit.
- Victoria Police has been unable to meet the statutory time requirement in a large proportion of cases. In the period from January to September 2005, Victoria Police had on average 365 active files of which, on average 147, or over 40 per cent, were more than 45 days old (the percentage over 45 days at any time varied between 24 per cent to 52 per cent).

• Its 10 officers each handle an average of 200 requests per annum compared with an average of about 48.5 for other departments.

File Examination

- In many of the files examined requests were handled promptly, diligently and well.
 However, many files demonstrated undue delay.
- The Attorney-General's Guidelines advise five days should be allowed for noting by the Minister's office of decisions on sensitive FOI requests, but this was exceeded in many cases, often exacerbating delays.

Case study 1

A request for access to a report commissioned by a department, regarding a survey for a project, took about 35 days to process to the point of preparation of a proposed decision. The program area had recommended access be denied, in part because it believed the report was liable to be misinterpreted. The FOI officer decided to release the report. The proposed decision was then sent to the Minister's office for noting. The FOI officer then waited 26 days for advice that the Minister had been fully briefed on the sensitivities of the report. Release of the decision and the report was then further delayed until the return from leave of an officer who was thought best able to handle any press reaction to the document. The final notification of decision was 23 days overdue.

Case study 2

Internal review took 160 days. The proposed internal review decision remained with first the department's executive and then the Minister's office for lengthy periods. The decision was further delayed waiting on the preparation of PPQs. The original decision to refuse access to documents had obvious problems and was most likely incorrect. One of the problems identified included the decision to exempt certain information because a third party who was consulted objected to its release, despite having no reason or basis for the objection. There was no reference on file to these problems, which appear to have been completely overlooked in the internal review.

• In several cases examined the reasons given for claiming exemptions were misleading. In some cases departments asserted requests were unclear or voluminous with little or no justification. In many cases they failed to give proper assistance to applicants in amending their requests. The effect was to delay answering the request without appearing to exceed the time limits of the Act.

Case study 3

A department decided that a request for documents detailing expenditure on office improvements including art and furniture did not include in its scope expenditure on promotional posters and hire furniture. The applicant was not made aware of the decision to exclude these specific items.

As a result, the released documents gave a misleading impression to the applicant. In my opinion the applicant should have been made aware of the interpretation that was being applied and should have been allowed to ask for the further material. Deliberate withholding of information and documents on spurious and technical grounds betrays the public's trust in the FOI process.

- In a number of cases, requests were said to be unclear when it appeared they were 'voluminous'. This extended the time available to the agency.
- Some decisions showed little regard for the objects of the Act. Some responses
 provided material that might technically be relevant to the request but was of little or
 no value to the applicant. Some took advantage of every available exemption to
 provide as little material as possible.

Case study 4

A request sought access to documents relating to consultancy services provided by a specified company. The department adopted a definition of "consultancy services" taken from the Victorian Government purchasing Board's (VGPB) Supply Policies and Guidelines which excluded "contracts". The applicant was not made aware of the definition that had been applied or that a number of documents were then treated as irrelevant on the basis that they related to 'contracts' and not 'consultancy services'. A file note referred to the exclusion of some documents as 'lucky'.

The VGPB's definition of 'consultancy services' may be appropriate in its context but was irrelevant to the request as made. In my opinion the response was misleading.

• In many cases statements of reason were inadequate. The material facts on which the decision was based were not stated and the documents for which exemption was claimed were not identified or linked to the reasons given. The reasons given for

denial of access upon internal review were generally more considered and careful than the initial reasons for the decision.

- Examination of cases indicated little evidence that multiple requests overwhelmed the resources of the department. It did not support the need for an extension of time available to agencies to respond.
- The files examined did not suggest that third party consultation was necessarily a source of undue delay.

Case study 5

A request was made for access to a report commissioned by a department. Access was denied to the body of the report on the grounds that it was 'not necessarily representative of final decision that may be taken ... release... would give rise to unnecessary conjecture, could be misleading and is capable of causing mischief and undermining the integrity of the decision-making process' and that the document contained information relating to the personal affairs of individuals. The reasons stated that many comments made to the person who prepared the report 'were informal in nature and some were expressed to be confidential. It would therefore be unreasonable to disclose the personal affairs information of those persons.'

These reasons exemplify the formulaic responses often given for denial of access which fail to reflect the real nature and content of the document. For the most part the references in the report to comments and submissions were paraphrased and anonymous, and the few identifiable references to individuals could have been deleted. Whether release of the document would have led to the predicted ills is hard to say, but nothing in the reasons explained why it was likely, reflected the content of the report, or indicated any balancing of factors in favour of release. Other applicants also requested the report and, following an application to VCAT, the report was released, but by then decisions on the report's implementation had been made.

CONCLUSIONS

Many of the difficulties experienced by applicants and FOI officers relate to the
interpretation of requests and whether they are valid under section 17(2), i.e. does
the request provide sufficient information to enable the identification of the
document/s.

- While multiple requests and complex requests for sensitive documents can be demanding, it is part of the general flow of work for departments and other agencies for which their FOI units should be adequately resourced.
- The 45 days allowed for processing under the Act is already longer than is allowed by most Australian jurisdictions and the Ombudsman did not see grounds for the time to be extended for multiple requests. However, he recommended that up to a further 30 days be allowed for the purpose of consultation with affected third parties.
- If there is a reason that a decision cannot be made within 45 days, the agency should immediately advise the applicant in writing, providing details.
- At present few Victorian agencies fully comply with the publication requirements of Part II statements. This affects applicants' knowledge of the documents available and their ability to clearly frame requests.
- Departmental record management systems are often not designed or sufficiently well maintained to be an efficient tool for an FOI search.
- Victoria Police, the Department of Human Services, and some other departments
 have acquired software that enables them to edit electronically scanned copies of
 documents with a considerable saving in time over the previous manual methods.
 This would be a useful tool for other agencies and should be explored by them.
- Departments frequently claim exemptions on grounds of confidentiality or personal
 information without contacting the third parties whose interests are involved to
 establish and/or confirm the grounds for those exemptions.
- In many cases information about the reasons for exemption is prepared for internal
 use and advice but is not given to the applicant. In most cases where information
 such as a schedule of documents and the reasons for exemption is already prepared
 for advice to management or the Minister's office, it should be provided to the
 applicant.
- Some departments have pro forma documents and procedures that do not correctly reflect the requirements of the Act.

A summary of the recommendations and outcomes is at Attachment 1.

Legislative Review

- While it is not necessary to establish a single regime to cover both access and privacy, the Ombudsman recommended the Act be amended to use the expression 'personal information', consistent with the Information Privacy Act.
- The review identified a number of sections of the Act which required amendment to
 ensure greater clarity about jurisdiction and improved ability to meet the objects of
 the Act.
- It was noted that The Department of Justice has a key leadership role to provide support and guidance to benchmark the performance of agencies.

Leadership and Open Government

The examination of FOI files and discussions with FOI managers has highlighted the importance of leadership in setting the culture within which FOI requests are dealt with.

The Act has a major role in supporting open government which is an important democratic principle. The executive managers of departments and other agencies therefore have a critical role in ensuring that the objects of the Act are met in reality and is not given mere lip service.

That is not to suggest that all FOI requests can or should be granted, or that both genuine disputes and mistakes do not occur from time to time. There are examples of times when granting an FOI request has been inappropriate and has caused real harm. Some applicants, including some 'professional' applicants, repeatedly generate requests that are unclear and lacking in focus and which are frequently either invalid or voluminous.

The challenge for agencies therefore is to maintain the openness which is a part of the objects of the Act while still protecting the interests of the public and of business and individuals in relation to confidential and private matters. In reaching that balance FOI officers inevitably are subject to pressures both from within the agency and from applicants.

Proposed changes to the Act

The Department of Justice proposes to make other legislative changes as well as those recommended by the Ombudsman, as follows:

• The Amendment Bill aims to introduce a new provision allowing part of a body to be a prescribed authority in the regulations. The new provision will also allow the Department of Justice to complete recommendation 11.

• Consequential changes to other sections of the Act resulting from proposed changes to Part II of the Act.

• Consequential changes to certain legislation due to proposed removal of conclusive certificates in relation to Cabinet documents.

Comments by Premier

Finally, the Victorian Government has publicly committed to providing greater access to government information. In a recent media statement, the Premier Mr Brumby said that:

"New FOI legislation would implement reforms of the FOI process recommended by the Ombudsman" ¹⁴.

In my view, the proposed amendments to the FOI Act will go a long way towards achieving that outcome.

.....

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¹⁴ Brumby vows to strengthen accountability in Victoria – Press Release 7/8/07

Attachment 1 - Summary of Recommendations and outcomes

No	Recommendation	Outcome
	Legislative recommendations	
1	Section 25 of the Act be amended in terms similar to section 22 of the Commonwealth FOI Act to enable agencies to delete material that is not within the scope of the request where deletion is both practicable and not contrary to the applicant's known wishes.	Agreed and implemented as part of the Terrorism (Community Protection) Further Amendment Bill (2006).
2	Section 21 of the Act be amended in terms similar to section 15(5) and 15(6) of the Commonwealth Act, so that where an agency or Minister determines in writing that the requirements of section 34 make it appropriate to extend the period referred to in section 21: a) the period is taken to be extended by a further period of 30 days; and b) the agency or Minister must, as soon as practicable, inform the applicant that the period has been extended.	Agreed. This recommendation is being considered as part of the development of an FOI Amendment Bill due for introduction into Parliament in the Spring 2007 session.
3	Section 21 of the Act be amended to extend the period for making a decision by up to 30 days where: a) a document which may be exempt under section 33 by reason of information that may be disclosed relating to the personal affairs of a person (including a deceased person), to enable the agency to seek the views of the person who is the subject of that information (or in the case of a deceased person, their next-of-kin); and b) where there is reason to believe that a document may be exempt under section 35, to enable the agency to seek the views of the person or government by or on behalf of whom the information was communicated, for the purpose of determining if the information was disclosed in confidence and, in the case of sub-section 35(1)(b), whether in all the circumstances it is against the public interest for the	As per recommendation 2

No	Recommendation	Outcome
	information to be disclosed.	
4	The expression 'personal affairs' in section 33 of the Act be amended to 'personal information' to be consistent with the Information Privacy Act 2001.	As per recommendation 2
5	Section 25A(8) of the Act be repealed.	As per recommendation 2
6	The Ombudsman Act be amended to expressly provide that, subject to the provisions of the Act, the functions of the Ombudsman include enquiring into or investigating administrative actions taken in any agency within the meaning of the Act and in connection with the Act.	As per recommendation 2
7	Section 50(2)(e) be amended to provide that a person who has consented to the release of a document may not apply to the Victorian Civil and Administrative Tribunal (VCAT) for review of the decision to release that document, so that the 60 day reverse-FOI period will not apply.	As per recommendation 2
8	Section 33 be amended to adopt the definition of 'next of kin' in section 3 of the Human Tissue Act 1982.	As per recommendation 2
9	The Act be amended to clarify that where the decision is that no documents exist relevant to a request, a complaint can be made to the Ombudsman and there is no right of review.	As per recommendation 2
10	As part of any wider review of the Act, consideration be given to review the burden placed on the RSPCA by its declaration as a prescribed authority.	As per recommendation 2
11	As part of any wider review of the Act, consideration be given to the possibility of amendments to allow FOI obligations for non-government bodies declared as prescribed authorities to be limited to those functions or activities which are supported, directly or indirectly, by government funds or other assistance.	As per recommendation 2
	Process recommendations	

No	Recommendation	Outcome
12	Victorian FOI agencies adopt the following practices, to be	Agreed.
	supported by practice notes issued by the Department of	The 10 Departments and
	Justice:	Victoria Police have
	a) where an agency finds uncertainty or ambiguity in	implemented those
	interpreting a request, it advises the applicant as soon as	recommendations which
	possible. Consultation with applicants by telephone or in	were not already part of
	person, where appropriate, is encouraged to expedite the	their standard procedures.
	process;	Practice Notes addressing
	b) where applications are unclear or potentially voluminous	these issues have been
	the agency, where appropriate, assist the applicant to	drafted and posted on the
	make a valid and non-voluminous request. This is to be	FOI Online website.
	done by giving information such as a fair indication of	
	the documents or classes of documents it holds that may	
	relate to the subject of the request or of the type of	
	information recorded by the agency and the way in which	
	it is kept;	
	c) agencies not adopt artificial definitions or constructions	
	of the terms in which a request is expressed. Any	
	reasonable doubt is to be clarified as soon as it is	
	identified. The applicant is to be advised if an	
	exclusionary definition is applied and the documents or	
	classes of documents excluded;	
	d) subject to the recommendation that section 25 of the Act	
	be amended, where only part of a document appears	
	relevant to the topic, the agency is not to delete the	
	irrelevant information unless it is clear the applicant	
	would be satisfied with the relevant part only of the	
	document. Except with the agreement of the applicant,	
	only discrete parts or sections of documents are to be	
	deleted for irrelevance;	
	e) where documents do not exist or cannot, after a thorough	

etice Notes
issues
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OI Online

No	Recommendation	Outcome
	c) when it is proper for information to be withheld.	
14	DOJ issue practice notes setting acceptable standards for handling FOI requests, including decision letter and a set of standard-form letters.	Agreed and Practice Notes addressing these issues have been drafted and posted on the FOI Online website.
15	DOJ provide advice to all FOI agencies on any significant developments in FOI including legislative changes and decisions interpreting the Act.	Agreed and Agencies are advised of significant developments in FOI by direct notification (letter, e-mail, etc) and via FOI Online website.
16	In addition to holding monthly meetings of department FOI managers, DOJ facilitate the sharing of experience and expertise amongst other FOI agencies.	Agreed. DOJ has already convened a number of professional development seminars and regional FOI forums and more of each is planned.
17	Victoria Police maintain more detailed data on FOI requests, particularly in relation to timeliness.	Agreed and implemented.
	Administrative recommendations	
18	The Ombudsman recommended that:	
	Guidelines are issued indicating that where government agencies engage non-government entities to carry out functions prescribed by statute, they ensure that the terms of contract give the agency the right of access to documents produced in the course of performing those functions.	Agreed and Practice Notes addressing these issues have been drafted and posted on the FOI Online website.
19	A mechanism is implemented to collect and record the level	Agreed and to be

No	Recommendation	Outcome
	of officers involved and the time spent responding to FOI requests.	implemented as part of the collection of data for the 2007/08 FOI Annual Report.
20	Agencies provide access to documents in electronic form where requested by applicants, unless it would be unreasonable to do so.	Agreed and to be implemented, where appropriate.
21	Either a guideline is issued or the Act amended to define the expression 'routine request'.	Agreed and Practice Notes addressing these issues have been drafted and posted on the FOI Online website.
22	Either a guideline is issued or the Act amended in relation to applying and waiving charges.	Agreed and Practice Notes addressing these issues have been drafted and posted on the FOI Online website.
23	VCAT be given power to declare a person a vexatious applicant, with the effect that further applications by that person may be made only with the consent of VCAT.	As per recommendation 2
24	Government departments and agencies review their compliance with Part II of the Act.	As per recommendation 2
25	Part II is reviewed as a matter of urgency, giving consideration to adopting a system of publication schemes on the model of the United Kingdom FOI Act.	As per recommendation 2
26	DOJ should monitor the compliance by agencies with Part II.	As per recommendation 2



Emily O'Reilly

Information Commissioner Ireland

 $\label{eq:Paper delivered} \textbf{Paper delivered at the} \\ \mathbf{5}^{\text{th}} \ \textbf{International Conference of Information Commissioners}$

"Own Motion" Investigations into Systemic FOI Problems The Irish Experience

Thank you for your words of welcome, Madam Chairman. I greatly welcome the opportunity that this conference provides to meet with my peers, both to discuss FOI issues in general and, in this instance, to share our thoughts on the use of "Own Motion" investigations.

My talk this morning is structured in five main parts, namely:

- the powers I have as Commissioner in this area, and my view on their usefulness;
- why the FOI Act grants these powers to the Commissioner;
- how I have used the powers;
- why I have used them; and
- what benefits have accrued from such use.

I do not intend to systematically summarise each of the 6 relevant investigations undertaken by my Office in the main body of this paper - such summaries have been included in the Appendix for those of you interested in the outcome of the investigations. However, I will refer in a general way to the issues giving rise to those investigations, and the conclusions that were reached, in the context of my comments under the three headings I've just mentioned. Therefore, I think it worthwhile to initially list each

investigation by title and main issue covered. The investigations undertaken by my Office thus far are, in chronological order:-

List of Published Reports and Commentaries

Study of Section 15 and 16 Manuals published by public bodies (report published September 2000). This report examined the extent to which public bodies had complied with their statutory obligations to publish two reference books prescribed and described under sections 15 and 16 of the Irish FOI Act. The intention of these sections was to encourage public bodies to describe their functions, powers, duties and decision making processes in the context of encouraging them to be open about their activities, in turn leading to greater voluntary dissemination of information. The section 15 manual contains a general description of the organisation, its functions, powers and duties and the classes of records held by the public body. The section 16 manual requires the publication of the rules, practices, guidelines and interpretations used by the body in its decision making under any enactment or scheme which affects members of the public. Section 16 manuals must include an index of any precedents kept by the body for the purposes of such decision making.

The Freedom of Information Act - Compliance by Public Bodies (published July 2001). This reported on an investigation by my Office into the general practices and procedures adopted by public bodies in complying with the provisions of the FOI Act in the 3 years following commencement of the Act.

The Application and Operation of Certain Provisions of the Freedom of Information Act, 1997 (published March 2003). This report considered the practical impact that proposed changes to the FOI Act would have on decisions on records, based on the effect such proposed changes would have had on decisions made by my Office.

Review of the Operation of the Freedom of Information (Amendment) Act 2003 (published June 2004). This reported on an investigation by my Office into the effects of the Amendment Act and the introduction of fees for access requests.

Review of the Operation of Section 10(1)(a) of the Freedom of Information Acts, 1997 and 2003 (published February 2007). It has frequently been the experience of my Office in processing reviews of FOI decisions of public bodies that records which could not be found at initial decision stage were located following intervention by my staff. I decided

that this issue was worth probing further, which led to on an investigation into the use by public bodies of Section 10(1)(a), the provision under which public bodies can refuse requests on the basis that requested records do not exist or cannot be found.

Suggested amendments to improve the operation of the Freedom of Information Acts, 1997 and 2003 (published March 2007). This reported on an analysis by my Office of the current FOI Acts and, in particular, what specific changes could be made to improve how they operate. Having described the "Own Motion" investigations undertaken by my Office, I will now summarise, and present my views on the usefulness of, the statutory powers I have in this area.

1 STATUTORY POWERS:

1.1 Summary of statutory powers:

These powers are set out in sections 36, 39, and 40 of the FOI Act.

Section 36 provides power for my Office to investigate at any time the practices and procedures of public bodies in compliance with the provisions of the Act, and in enabling and facilitating citizens to exercise their rights under the Act. Three of the six reports I listed at the outset were produced under this provision. Section 36(2) required the Commissioner to investigate the general compliance of public bodies with the provisions of the Act within 3 years of commencement of the Act. While not an "Own Motion" provision in that this investigation was a statutory requirement, I think it is worth including in this paper as it covers similar ground to that dealt with in my other investigation reports. The Compliance investigation completed in July 2001 was initiated under section 36(2). The power to prepare a report on the findings of an investigation initiated under this section is set out in section 36(4).

Section 39 provides power for my Office to publish commentaries on the practical application and operation of the Act. The Review of Operation of the Amendment Act and the Suggested Amendments reports were prepared under section 39.

Section 40 requires the Commissioner to produce an Annual Report and lay it before the Oireachtas (Parliament). While also clearly not an "Own Motion" provision, as I will refer to issues arising from my Annual Reports elsewhere in this paper, I think it worthwhile mentioning the enabling provision here. Power to prepare and publish in the

public interest a report of any activity carried out by the Commissioner is provided for in section 40(2).

1.2 Views on usefulness of such powers:

I will now outline my views on the usefulness of the powers I've just described. My views at this point are presented in general terms as I will go into more detail on what I see as the benefits of those powers later in this paper.

I, and my predecessor, have found the investigative and commentary provisions to be most useful tools in providing my Office with a variety of opportunities to comment on FOI matters of concern. I have found my Annual Reports to be an excellent vehicle in raising issues, with the inclusion of (currently) 21 statistical tables allowing for quantifiable analysis of trends over time. Indeed, it was statistical analysis of the pattern of requests received over time by public bodies that provided me with hard evidence that the reduction of over 50% in requests (over 75% for non-personal requests) from January 2002 to March 2004 was a direct result of the introduction of access fees in the 2003 Amendment Act.

While the mandatory production of the compliance report under section 36(2) is not an "Own Motion" provision, nevertheless it provided an opportunity for my predecessor to make evidence based comments on the compliance of public bodies with FOI generally. Of course, the rest of the investigative and commentary powers set out in sections 36 and 39 provide me with more flexibility in addressing systemic FOI problems. As well as providing evidential conclusions on the activities of public bodies in various areas, each of the reports published under those provisions have made recommendations that can be used as an empirical basis for measuring subsequent performance of those bodies.

The next section of this paper considers why I have the powers just described.

2. WHY I HAVE THESE POWERS

The powers I've just described in sections 36, 39, and 40 of the Act were conferred on my Office by Government in the process of enacting the legislation. At this point I think it's worth summarising what the main intention of each of those 3 provisions was.

Section 36:

Apart form undertaking a key role as the main independent appeals system under the Act, the Commissioner is also the guardian of the mandate of the legislation and custodian of effective implementation of its provisions by public bodies. To bring this about, section 36 established a wide-ranging and influential brief for the Commissioner, enabling me to investigate and report on the practices and procedures adopted by public bodies in complying with the Act.

Section 39:

This provision enables me to prepare and publish commentaries on the practical application and operation of the Act, including but not confined to commentaries based on my experience of conducting reviews. As I outline elsewhere in this paper, my Office has found this provision of particular use in clearly describing the FOI landscape both before and after the 2003 Amendment Act, thereby placing the spotlight firmly on the resulting increase in restrictions and sharp decline in use of the Act.

Section 40:

This is a standard provision requiring office holders to produce Annual Reports on their activities and to present them to Parliament. However, the provision in subsection 40(2) is wide ranging and much more discretionary, and does not require me to consult with Government or public bodies, or to submit any report to a Minister, prior to publication.

In the next section I will deal with the practicalities of undertaking investigations and reporting on their outcome.

3. HOW THE STATUTORY POWERS HAVE BEEN USED

3.1 Picking the Right Issue:

The experience of my Office thus far has been that it is important to choose a subject for investigation that firstly, is a matter of considerable public interest and, secondly, lends itself to the production of a succinct and readable report. In my view, there is little to be gained from committing the limited resources of my Office to the resource intensive task of producing a report on an investigation unless that report contains conclusions that will both reach, and be considered by, its target audience. I hope that, in addition to providing information on the workings of FOI to the general public, the particular target audiences for the investigations my Office has undertaken to date were reached and

given the opportunity, at least, to engage with the comments or conclusions in the reports. The target audiences for each report are listed in the Appendix to this paper.

3.2 Picking the Right Method:

As well as choosing a worthwhile issue, experience has also shown that the method of investigation, and subsequent reporting, is of importance. In this regard, as I will also mention in the section on the benefits of investigative reporting, my Office has found that involving the public bodies that are the subject of an

investigation in the conduct of that investigation and production of the subsequent report to be a most useful modus operandum. In practical terms, this has worked by asking the public bodies to provide the basic information:

- (i) for the sections 15 and 16 Report, separate questionnaires were sent to public bodies, applicants to my Office, and to a number of interest and key user groups;
- (ii) for the Compliance Report, the FOI officers in the public bodies selected for investigation were interviewed and asked to comment on issues arising from the sample of public bodies investigated; and
- (iii) in the Section 10 ("search" exemption) Report, where replies to a general short questionnaire to all public bodies were used as the basis for selecting the 12 bodies chosen for investigation, in which the FOI officers were required to complete a more detailed questionnaire.

My Office has found that soliciting information from public bodies by way of targeted questionnaire to be an efficient and effective means of undertaking the research that is necessary for the conclusions of any report on an investigation to withstand proper scrutiny. It has also secured buy-in from public bodies in the investigation process itself, making it in turn more likely that any conclusions or recommendations emerging from the investigation are more likely to be implemented.

3.3 In-House or Outsourcing?

Another practical issue to be considered when conducting an investigation is whether the production of the subsequent report should be undertaken within the Office or outsourced to a professional service provider. Given the detail of some issues that my Office has investigated, the two Amendment Act reports and the Suggested Amendments commentary being good examples of this, it would not be practicable to engage external expertise on report content issues. Publication is a different matter, however.

Experience has shown that the Annual Report is the publication most likely to lead to a demand for paper copies, so it is important that it is well presented visually as well as in content. My Office has taken a pragmatic approach to this point, and has now evolved a practice where the Annual Report, as the flagship publication of the Office, is internally written but professionally published, but other once-off investigative reports are both written and printed internally. As the investigative reports tend to be for more targeted audiences, the visual aspect of presentation is less important, making the issue of justifying expenditure of scarce resources on a visually pleasing but expensive product more relevant than in the case of

the Annual Report. Furthermore, with increasing access to publications taking place over the web, the requirement to produce large volumes of paper copies is diminishing over time.

4. WHY THE STATUTORY POWERS HAVE BEEN USED

I have noticed that it has been the practice of some of us Information Commissioners, and I certainly include myself among this number, to periodically comment publicly on matters of FOI concern. While useful as a mechanism to raise public awareness of particular issues, the effectiveness of such public commentary can, in my view, be enhanced when supplemented by empirical, research-based evidence. In this context, I have found the production of investigative reports and commentaries to be of great value generally, but in the following three categories in particular:

4.1 Awareness Raising:

My predecessor used his report on Application and Operation of Certain Provisions of the 2003 Amendment Act as an opportunity to raise public awareness of the possible erosion of access rights provided for in the draft legislation. While duly acknowledging the primacy of the legislature in the introduction of all legislation, my predecessor adopted the approach of demonstrating the differences the proposed changes to the Act would have had on his decisions on applications for review he had decided upon. The report was prepared in the context of my Office, in a departure from normal practice, not having been consulted on or even informed of the proposed legislation. My own commentary on Suggested Amendments to Improve the Operation of the FOI Acts can, I think, be seen as a continuation of that approach where practical difficulties in aspects of operation of our legislation were highlighted, with suggestions as to how such difficulties

could be addressed in order to reinforce the core access rights so enshrined in the philosophy of FOI.

4.2 Quantifying Existing Problems:

The obvious example of this is the reduction in request rates following the introduction of access fees in the 2003 Amendment Act, as already mentioned above. Another example is the over-reliance of public bodies on exemptions relating to Government papers, the decision making process and the performance of functions of public bodies, as set out in sections 19, 20 and 21 of the Irish Act and reported upon in the 2001 Compliance by Public Bodies report. Analysis of decisions made by different public bodies using these exemptions allowed for the conclusion to be drawn that public bodies were adopting a blanket approach in using the exemptions to withhold records that could easily and harmlessly been released outside of FOI.

4.3 Testing Anecdotal Hypotheses:

Another reason for using my powers to publish investigative reports and commentaries is to establish the extent to which commonly held assumptions about FOI can be tested for validity. As this could also be described as a benefit of the use of those powers, I will go into more detail on the point in the next section of the paper. This brings me on to the third and final main theme of my paper, where I will discuss the main benefits as I see it of use of "Own Motion" reporting.

5. BENEFITS OF "OWN MOTION" REPORTING AND COMMENTARY

5.1 To Report Inclusively on Areas of Concern:

As I've already mentioned, a major benefit of production of investigative reports and commentaries is the production of evidence to supplement concerns expressed about operation of certain aspects of FOI. It has been the practice of my Office to give any public bodies subject to investigation or scrutiny an opportunity to provide input for the eventual final report, and to consider any comments the public bodies might have on the conclusions of the reports in advance of publication. I have found that this practice has benefited the effectiveness and enhanced the credibility of my reports by ensuring "buy-in" from the relevant public bodies at production stage, and providing a basis for follow-up on any issues of ongoing concern that may have been identified.

5.2 To Probe Issues Arising During Case Reviews:

"Own Motion" investigations and commentaries provide opportunities for my Office to further delve into areas of concern that become apparent during consideration of applications for review of decisions of public bodies. To this end, in practical terms the production of statistics for my Annual Report is a most useful exercise as the statistics provide a valuable source of evidence of the emergence or continuation of measurable trends of FOI activity. For example, in my Report for this year (which I plan to publish by May of 2008), the number and source of instances where public bodies failed to adhere to the statutory timeframes in responding to requests, both an initial decision and internal review stages, will be published for the first time. Depending on what emerges from the figures, my Office may have an opportunity to focus attention, and possibly investigate, sectors on particular bodies where the scale of such failures are a cause for concern.

5.3 To Test Anecdotal Hypotheses:

One of the criticisms voiced on commencement of FOI was that existence of the new access regime would lead to material not being recorded and decisions being made in corridors. A number of FOI liaison officers interviewed for the Compliance Report reported their belief that less records were being created since commencement of FOI. However, my Office's scrutiny of records undertaken in the context of that Report did not uncover any evidence that this was the case. On the contrary, there was some evidence that more care was being taken in recording the minutes of management meetings than had been the case before FOI. Another anecdotal concern expressed to my staff by applicants is that public bodies may sometimes hide behind the "search" exemption to falsely claim that requested records do not exist. In my Review of the Operation of the "search" exemption (published February last), while there was evidence of poor records management by some of the surveyed public bodies, there was no evidence of any deliberate attempt to conceal the existence of records in order to avoid having to release them under FOI.

The outcomes from these cases again show, in my view, the value of research based evidence in drawing conclusions on various aspects of the operation of FOI.

CONCLUSION:

By way of conclusion, the experience of my Office has been that "Own Motion" investigations and commentaries are hugely useful tools in a number of different ways,

in particular to highlight areas of concern; to quantify the extent of issues giving rise to such concern; to provide an evidential basis for informed comment and conclusions following examination of such issues; and to provide recommendations as to how such areas of concern could be best addressed. I have used the powers provided for my function in order to further enhance the effectiveness of that function, and intend to continue to do so.

Thank you for your attention.

APPENDIX.

Summary of reports produced by the Office of the Information Commissioner for Ireland

- **1. Title:** Study of Section 15 and 16 Manuals published by public bodies (report published September 2000).
- 1.1 Subject: This report examined the extent to which public bodies had complied with their statutory obligations to publish two reference books prescribed and described under sections 15 and 16 of the Irish FOI Act. The section 15 manual contains a general description of the organisation, its functions, powers and duties and the classes of records held by the public body. The section 16 manual requires the publication of the rules, practices, guidelines and interpretations used by the body, including an index of any precedents kept by the body, for the purposes of decisions made under any enactment or scheme which affects members of the public.
- **1.2 Target audience:** The general public, public bodies, the political system.

1.3 Summary of conclusions/recommendations:

At time of survey, 94% of bodies had published a section 15 manual, 88% for section 16. All publications in paper format, with some in additional formats (on web or on computer disk/CD ROM).

85% of published section 15 and 16 manuals respectively available for public inspection. Over 60% of respondents to FOI user survey, and 4 of 13 responding user bodies, were not aware of existence of the manuals.

Of those FOI user respondents aware of the manuals, 54% had consulted them for guidance on request submission. Of this grouping, 79% found the manuals useful. 7 of the responding user bodies had consulted the manuals and found them useful.

- **2. Title:** The Freedom of Information Act Compliance by Public Bodies (published July 2001).
- **2.1 Subject:** This reported on an investigation by my Office into the general practices and procedures adopted by public bodies for the purposes of compliance with the provisions of the FOI Act in the 3 years following commencement of the Act.
- **2.2 Target audience:** The general public, public bodies, the political system.

2.3 Summary of conclusions/recommendations:

Procedures for processing requests largely satisfactory with most decisions made within statutory timeframes.

Widespread failure to properly explain refusals of requests.

Records management practices often not to standard required to meet requirements of the FOI Act.

Public bodies resorting unnecessarily to exemptions on Government meetings (section 19), the deliberative process (section 20), and information received in confidence (section 26).

More information could be released administratively by public bodies without requiring requesters to seek access through FOI.

There have been major gains in openness and transparency but still a high rate of refusal of requests.

- **3. Title:** The Application and Operation of Certain Provisions of the Freedom of Information Act, 1997 (published March 2003).
- **3.1 Subject:** This report considered the practical impact that proposed changes to the FOI Act would have on decisions on records, based on the effect such proposed changes would have had on decisions made by my Office.
- **3.2 Target audience:** Government, Oireachtas, the general public, public bodies.

3.3 Summary of conclusions/recommendations:

Commentary of specific proposed changes to the 1997 Act, how these changes would impact on decisions of the Information Commissioner, and a list of suggested changes to improve operation of the Act.

- **4. Title:** Review of the Operation of the Freedom of Information (Amendment) Act 2003 (published June 2004).
- **4.1 Subject:** This reported on an investigation by my Office into the effects of the Amendment Act and the introduction of fees for access requests.
- **4.2 Target audience:** Government, the Oireachtas, the general public, public bodies.

4.3 Summary of conclusions/recommendations:

Use of Act fell by over 50% (75% for non-personal requests)

Use of Act by media fell by over 83%, decrease of 28% in business use.

No evidence that introduction of application fees changed general fair and balanced approach of public bodies.

Use of application fees should be reconsidered at the next available opportunity.

Central administration bodies should provide guidance on operation of fee provisions and be consistent in their approach to charging application and search fees. Fees should be refunded where public body decisions have been reversed. Parliamentarians should be exempt from fees.

UK/Scottish approach to fees, charging fees to the media and parliamentarians, lowering of threshold required for waiver of fees on matters of national importance, should all be reconsidered at the next available opportunity.

- **5. Title:** Review of the Operation of Section 10(1)(a) of the Freedom of Information Acts, 1997 and 2003 (published February 2007).
- **5.1 Subject:** This reported on an investigation by my Office into the use by public bodies of Section 10(1)(a), the provision under which public bodies can refuse requests on the basis that requested records do not exist or cannot be found.
- **5.2 Target audience:** The general public, public bodies.

5.3 Summary of conclusions/recommendations:

Public bodies should draw up and implement a comprehensive records management policy as a priority.

There should be consistency in searches for records undertaken by public bodies, with a checklist to be used for this purpose.

Decision letters should always set out the requester's right of appeal and include details of searches undertaken.

- **6. Title:** Suggested amendments to improve the operation of the Freedom of Information Acts, 1997 and 2003 (published March 2007).
- **6.1 Subject:** This reported on an analysis by my Office of the current FOI Acts and, in particular, what specific changes could be made to improve how they operate.
- **6.2 Target audience:** Government, the Oireachtas, the general public, public bodies.

6.3 Summary of conclusions/recommendations:

Fees for internal review should be removed or substantially reduced.

Fees should be refunded where public body decisions have been reversed.

Some amendments to the 2003 Act should be removed, particularly those relating to Government records.

The Act should be re-examined to ensure there is not an unqualified right of access by spouse, partner or next-of-kin of a deceased personThat the removal of records relating to the enforcement function of the Health & Safety Authority from the scope of the FOI Act be reversed.

"Own Motion" Investigations into systemic FOI problems - The Irish Experience

Emily O'Reilly
Information Commissioner for Ireland
November 2007



Main parts of the presentation

- the powers I have as Commissioner in this area, and my view on their usefulness;
- why the FOI Act grants these powers to the Commissioner;
- how I have used the powers;
- why I have used them; and
- what benefits have accrued from such use.



List of published Reports and Commentaries

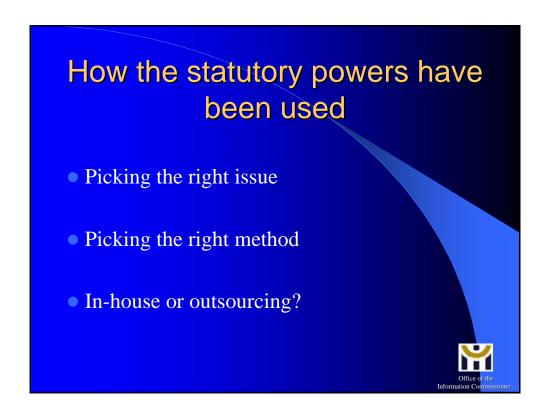
- Study of Section 15 and 16 Manuals published by public bodies.
- The FOI Act Compliance by Public Bodies.
- The Application and Operation of Certain Provisions of the FOI Act, 1997.
- Review of the Operation of the FOI (Amendment) Act 2003.
- Review of the Operation of Section 10(1)(a) of the FOI Acts, 1997 and 2003.
- Suggested amendments to improve the operation of the FOI Acts, 1997 and 2003.

Statutory powers

- Summary of statutory powers: sections 36, 39 and 40.
- Views on usefulness of such powers.



Why I have these powers Section 36 Section 39 section 40



Why the statutory powers have been used

- Awareness raising
- Quantifying existing problems
- Testing anecdotal hypotheses



Benefits of "Own Motion" reporting and commentary

- To report inclusively on areas of concern
- To probe issues arising during case reviews
- To test anecdotal hypotheses



Appendix - Summary of "Own Motion" reports presented by:

- Title
- Subject
- Target audience
- Summary of conclusions/recommendations



"Own Motion" Investigationsinto systemic FOI problemsThe Irish Experience

Emily O'Reilly
Information Commissioner for Ireland
November 2007













Andrea Neill

Assistant Commissioner, Complaints Resolution and Compliance Office of the Information Commissioner of Canada

 $\label{eq:Paper delivered} \textbf{Paper delivered at the} \\ \textbf{5}^{\text{th}} \textbf{International Conference of Information Commissioners}$

The Canadian Federal Experience With Commissioner-Initiated Complaints

THE CANADIAN CONTEXT

Canada has public sector freedom of information (FOI) laws in all of its 14 jurisdictions. All of these statutes provide a right of complaint to be lodged by the person who made an FOI request to a public body or the person who is aggrieved by some other matter relating to requesting or obtaining access to information.

These laws also provide for an independent third-party review mechanism of FOI decisions made by public bodies, although the review model and powers may vary from one jurisdiction to another. The independent reviewer may be a commissioner, ombudsman, official or commission appointed by the legislative or executive authorities. Depending on the specific jurisdiction, the reviewer may have powers and duties to investigate, mediate or adjudicate the matter. In making a finding under the access statute, the reviewer may have advisory powers, i.e. powers to recommend that a public body take certain action, and/or order-making powers. In addition, all the Canadian statutes provide for review before the courts, either as a second or alternative level of review.

At the federal level, the Office of the Information Commissioner of Canada (OIC), an ombudsman, is the first level of review with the possibility of going to the Federal Court

of Canada, then the Federal Court of Appeal and then the Supreme Court of Canada for denials of access.

The above describes the situation in Canada for FOI reviews that are triggered by individuals who believe that their rights of access have been denied. In two jurisdictions, namely Manitoba¹ and the federal level, the FOI statute also allows the independent reviewer to initiate a complaint and conduct an "own-motion" investigation. This paper focuses on the federal experience with Commissioner-initiated complaints.

Legal Authority for Commissioner-Initiated Complaints

The Information Commissioner of Canada ("Commissioner") derives his legal authority to initiate a complaint and investigate on his own motion under the *Access to Information Act* (ATIA). Subsection 30(3) ATIA provides, "[w]here the Information Commissioner is satisfied that there are reasonable grounds to investigate a matter relating to requesting or obtaining access to records under this Act, the Commissioner may initiate a complaint in respect thereof."

The ATIA gives no guidance, other than the bare-bone words quoted above, as to the circumstances under which the Commissioner can or should initiate a complaint, nor as to Parliament's intention in giving the Information Commissioner this power. As the Commissioner is the master of his own procedures in investigating a complaint under the ATIA², he has the discretion and flexibility to determine what procedures will be followed in a particular review.

Taking a pragmatic approach of its role and functions, the Office of the Information Commissioner (OIC) has, in the 24 years of its existence, exercised its power to initiate complaints in a variety of circumstances. This power has become an important tool in the complaint resolution system to identify systemic issues or major deficiencies with ATIA compliance, make appropriate recommendations to government to resolve them, and bring them to the attention of Parliament and the public.

² Section 34 *Access to Information Act*, R.S.C. 1985, c. A-1, provides that "Subject to this Act, the Information Commissioner may determine the procedure to be followed in the performance of any duty or function of the Commissioner."

¹ Subsection 59(5) of Manitoba's *Freedom of Information and Protection of Privacy Act*, S.M. 1997, c. 50, provides that "The Ombudsman may initiate a complaint respecting any matter about which the Ombudsman is satisfied there are reasonable grounds to investigate under this Act."

Under What Circumstances Would the Commissioner Initiate a Complaint?

The Commissioner would initiate his own complaint in, basically, two sets of circumstances. In the first, the Commissioner will decide, in the course of investigating one or several complaints of the same nature, that the issues are serious enough to warrant a review going beyond the narrow scope of the individual complaints. An individual who complains that a record has been destroyed or altered is one such example. There may also be situations in which the Commissioner sees merit (e.g. fairness) in investigating a particular issue that has come to his attention but the individual has lost his or her right to complain because the statutory timeline has expired.

In the second circumstance, the Commissioner, based on a body of evidence derived from his work in investigating complaints, identifies a systemic problem in one institution or several institutions that merit an in-depth examination. Chronically late responses, a large backlog of unanswered requests are such examples. One of the more prominent of this second circumstance is the annual "Report Card" reviews of federal institutions' performance in complying with the ATIA, specifically deemed refusals under the Act.

Departmental Report Cards

By 1993, it had become increasingly apparent that, despite being pointed out and discussed in virtually all previous annual reports of the Information Commissioner, the problem of delays by federal institutions in responding to access requests had not been solved, but, in fact, had become an epidemic. In that year, the Commissioner self-initiated a complaint into the "practices and procedures" of access to information request processing of Transport Canada. The results of this review were published along with recommendations. This was quickly followed by similar reviews in 1994 of two more federal institutions, and another in 1996. Despite these initial usages of Commissioner-initiated complaints, the problem continued to worsen government-wide. Delay complaints made to the Commissioner had risen yearly and, by fiscal year 1997-98, delays accounted for almost 50% of all complaints. Out of this was born the more permanent form of own-motion complaints now known as "The Report Cards." The first of these was issued in March 1999 as part of the 1998-1999 Annual Report.

The Grading Approach

Parliament made it clear in the access law that timeliness of responses was as important as the responses themselves. Subsection 10(3) of the ATIA deems a late response to be a refusal to give access. Consequently, the Information Commissioner adopted, as the measure of performance, the percentage of access requests that have become "deemed refusals" under subsection 10(3). The grading scheme adopted was:

% of requests in deemed refusal

0-5 Full compliance A

5-10 Substantial compliance B

10-15 Borderline compliance C

15-20 Below standard compliance D

20+ Red alert F

That first year, six federal institutions were subject to this review. The results showed that the "best" institution had 34.9% of their requests in deemed refusal and the "worst" institution had fully 85.6% of their requests in deemed refusal.

Since the first Report Cards were issued in 1999, this type of review has been done annually with new federal institutions being selected for review along with a continuing review and follow-up of those institutions that received failing grades. This last fiscal year, 17 institutions were reviewed.

To What Extent do Report Cards Work?

At an administrative level, Report Cards have had a variety of benefits. With their introduction, the Commissioner initially observed a dramatic reduction in the number of delay complaints: from a high of 49.5% in 1998-99 to a low of 14.5% in 2003-04.

However, in recent years, the number has begun to rise again. This last fiscal year, they accounted for 23.7% of the complaints from the public, down slightly from 24.1% in 2005-06, but still far above the low-point achieved in 2003-04.

Also, despite the failing grades that some institutions have received over the years, they have, at least at the staff level, welcomed the scrutiny. Why would this be the case? As a result of the well-publicized Report Cards, many institutional access offices received a

much-needed boost in funding and personnel, allowing them for the first time to be better resourced and staffed to deal with access requests within the statutory time-limits.

Further, because the OIC posts the individual Report Cards on its website and reports the results to Parliament in its annual reports, the newly-created Standing Committee on Access to Information, Privacy and Ethics became interested in the problem of delays. The Committee began summoning Deputy Ministers and other senior officials to appear before it to explain the reasons for their institution's getting an "F" in their Report Card. This had the effect of getting senior-level commitment from five institutions to monitor and improve performance, including a promise to put more resources into place in both the institution's access office and in the operational areas where searches and initial reviews are undertaken.

The Report Cards also demonstrated to institutions that improvement in response times to access requests requires careful attention so as to:

- 1) minimize the action/decision points in the system,
- 2) educate everyone involved in processing requests as to what is expected of them and how much time is available to them for the purpose, and
- 3) generate statistical reports to enable managers to monitor performance, identify bottlenecks and take corrective action before complaints are made to the commissioner.

The Report Cards were also instrumental in uncovering one of the most common reasons for delayed and inadequate answers to access requests - the poor state of records management in many departments. Departmental access coordinators tell the Commissioner that central records registries are unreliable and that electronic records are rarely included in the departmental records systems or properly conserved even in the operational units where they are created. Searches for records in response to access requests are time consuming as a result, and there can be little certainty that the searches have located all relevant records. This deficiency undermines the right of timely access to records.

On a less positive note, the benefits initially derived from the introduction of the Report Cards seem to be less marked as the percentage of delay complaints is on the rise again. Since the inception of the Report Card reviews, the number of complaints of delay received by the Commissioner has dropped from in excess of 50% of the office's workload in 1997 to a low of 14.5% in 2003-2004. In the last fiscal year, however, some 23% of complaints related to delay. The OIC has also noticed an interesting development: institutions are invoking extensions more often and for longer periods to avoid falling into a deemed refusal situation and the risk of a bad grade.

At a more managerial level, there are several reasons why Report Cards have proven to be a very useful tool:

- 1. they help the Commissioner evaluate an important component of an institution's performance under the ATIA;
- 2. they serve to encourage federal institutions to put access to information performance higher on their list of priorities. Ministers and Deputy Ministers do not like to receive grades that reflect poorly on their leadership;
- 3. Report Cards help create and disseminate a wealth of information across government about "best practices" in administering the access to information program as they are focused on encouraging federal institutions to achieve success through sound administrative processes, training, and work tools, as well as sufficient staff; and
- 4. Report Cards assist Parliament in playing a targeted and focused oversight role, as noted above with the Standing Committee on Access to Information, Privacy and Ethics calling senior officials from the institutions which received failing grades to explain their poor performance and their plans to improve performance under the ATIA.

Finally, the Report Cards have caused some departmental officials to ask the Information Commissioner to expand the benchmarks used to grade the performance of departments. At present, Report Card grades depend entirely on the percentage of access requests which were not answered on time. Officials have indicated that other benchmarks might be helpful in assisting institutions and the Commissioner to get a multi-dimensional appreciation of an institution's performance. Some of the other performance indicators that have been suggested are: number of pages of records disclosed; percentage of requested information that was exempted; and the amount of information disclosed

informally or proactively disseminated. The Commissioner is now reviewing how the Report Cards could be more effective in assessing institutional performance under the ATIA. This is timely as the Treasury Board Secretariat starts collecting government-wide statistics on an annual basis for the purpose of assessing compliance with the ATIA.³

Over the years, the Commissioner has initiated a number of other reviews as a result of identifying a systemic issue involving one or several federal institutions. The following are examples.

Chronically Late Responses and Large Backlogs of Unanswered Requests

During fiscal year 2005-06, the Information Commissioner initiated 760 complaints against federal institutions. This was an unprecedented number of Commissioner-initiated complaints. Many wondered if it indicated a shift in the Commissioner's approach to oversight.

The 760 complaints were made against three federal institutions: Royal Canadian Mounted Police (481), Privy Council Office (126), and the Department of Foreign Affairs and International Trade (153). The following year, another 393 such complaints were initiated against the Canadian Border Services Agency. All the complaints concerned delay. Indeed, in each case, the initiated complaints covered all access requests to these three institutions that had not been answered, despite the lapse of statutory deadlines (i.e. all requests in "deemed-refusal" status). When some requestor-initiated complaints of delay were filed against these institutions, the investigators, upon questioning the departmental officials, were told that the institutions were unable to make any commitment dates for completion of those particular requests because they were behind in all of their requests. Upon further questioning, it appeared to be true. The complaints filed were just the tip of a huge iceberg of unanswered requests. However, there were other factors that contributed to the Commissioner's decision to initiate complaints vis-à-vis all of these unanswered requests.

The first reason was a long-term inability by these institutions to respect statutory response deadlines. The second reason was the apparent failure of these institutions to act on recommendations for improvement that the Commissioner had made to these

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³ See new section 70(1) (c.1) ATIA.

institutions in previous Report Cards. The third reason, perhaps the most important, was a concern that a "squeaky-wheel-gets-the-grease" approach (i.e. awaiting the receipt of individual complaints of delay against these institutions) was unfair to the many requesters whose answers were late but who did not choose to make complaints to the Information Commissioner.

The Commissioner will review the effectiveness of this type of review undertaken outside of the Report Card process, given the recent trend upward in the number of delay complaints, and the fact that, even after this extensive investigation, only the Canadian Border Services Agency has improved its processing abilities.

Destruction or Alteration of Records

In 1996, two incidents involving allegations of document destruction or alteration, when faced with access requests, occurred. The first instance involved a senior manager of Transport Canada who had ordered her officials to destroy all copies of an audit report into a refurbishing project. The order was given to ensure that the report (critical of senior managers) was suppressed. After investigation, the Commissioner concluded that the circumstances indicated that the senior manager knew an access to information request

had been made or was imminent and had ordered the records destroyed in order to deny a right of access under the Act. Despite efforts to make the report disappear, the Commissioner's investigator found a copy of the report in the hands of a manager who believed the order to destroy it to be wrong. It was eventually disclosed to the requester.

The second case, which received wide media attention, involved National Defence. A journalist, alleging that records had been altered before being released to him under the access law, asked the Commissioner to investigate. The investigation demonstrated that the journalist's allegations were true. Not only had the records been altered before release, orders were subsequently given to destroy the originals. The wrong-doing might never have come to light but for a few courageous employees who delayed in obeying certain orders and reported the misconduct to superiors.

In 1997 another Commissioner-initiated investigation was begun which eventually had a major effect on the Act. Canada had a major scandal involving tainted blood being given to people during the 1980s. During the proceedings of the Commission of Inquiry into Canada's Blood Supply, evidence was given that recordings (and transcripts) of meetings

of the Canadian Blood Committee had been destroyed in the late 1980's. There were allegations that the destruction had been ordered to prevent interested persons (such as journalists and those who had been infected with HIV from contaminated blood products) from obtaining the records under the *Access to Information Act*.

The Commissioner, after consultation with Mr. Justice Krever and Health Canada (whose officials welcomed the investigation), initiated a complaint on his own motion against the department for the purpose of finding out what really happened. After attempts to halt the Commissioner's investigation by challenging his jurisdiction before the Federal Court failed, the Commissioner completed the investigation and issued his report. He concluded that the destruction was ordered and carried out so that the records could not become subject to the right of access. The Commissioner concluded that the decision to destroy the records was motivated by concern about potential litigation and liability issues associated with tainted blood products. Most serious to the Commissioner was his finding that the then Executive Director of the Canadian Blood Services, who had custody and control of the records, knew, or ought to have known, that there was a pending access to information request for the records and, hence, that destruction was improper.

This latter incident lead eventually to the passage of a Private Member's Bill, a rare occurrence, making it illegal to destroy, mutilate, falsify or make a false record, conceal or alter a record and to direct, propose, counsel or cause any person to do any of the previous acts. Stiff fines and/or imprisonment are the penalties.⁴

Claims of Cabinet Confidence

In the federal access to information regime, information contained in records that qualifies as Cabinet confidence information is excluded from the Act. As such, the Commissioner has no right to obtain and examine these records. In considering whether to exclude Cabinet confidences in an access request, the federal institution that has control of the records at issue will submit them as well as a schedule to the Privy Council Office. The Privy Council Office then reviews the information, makes a determination and issues a certificate to the effect that the records are indeed excluded from the operation of the Act and, therefore, not accessible to the requestor.

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⁴ See section 67.1 ATIA.

Because of the unusual nature of complaints involving Cabinet confidences – one federal institution having the records and making the initial determination of exclusion, and a second institution, the Privy Council Office, making the final decision – the Information Commissioner decided some years ago to initiate a separate complaint against the Privy Council Office whenever he receives a requestor-initiated complaint related to that first institution's refusal to disclose Cabinet confidence information. In this way, the Commissioner can deal directly with the true decision-maker, the Privy Council Office, for this special category of records so as to be able to properly and thoroughly investigate all aspects of the refusal.

CONCLUSION

In conclusion, it is clear that Commissioner-initiated complaints have a valid and vital role to play in any review mechanism to resolve complaints regarding requests for access to government records. They provide a way to get the big picture of what is happening within the system, as well as providing a method of drawing together all of the many threads which could go unresolved if a review mechanism relied solely on complaints from requestors. They help draw attention to key elements of the access to information process that federal institutions need to improve in order to provide requestors with timely access to the information to which they are entitled under the ATIA. Indeed, the destruction of records review led very quickly to the strengthening of the legal framework. These in-depth reviews provide the Commissioner with the body of evidence and facts needed to provide government from time to time with recommendations for improvements to the access to information legislation.

On the other hand, such reviews have their limitations. Their benefits tend to be short-lived between reports, and if used too often, can lose their effectiveness. And although it is proper for the Commissioner to resort to this investigative tool to keep major issues alive in both the eyes of the public and Parliament, it is up to the Government to implement the Commissioner's recommendations and other sustainable solutions that will improve institutions' performance, and hence compliance under the ATIA.

Commissioner-initiated complaints have traditionally focused on specific systemic issues or major deficiencies experienced in one or more federal institutions in administering the access to information program. The challenge for the Commissioner is to find new and

different approaches that will provide for early detection and resolution of issues and difficulties that will assist requestors and be useful to federal institutions, such as the promotion of best practices for the administration of access requests as well as ways to achieve success through training, work tools for employees and adequate resources.



OWN-MOTION INVESTIGATIONS INTO FOI PROBLEMS: THE CANADIAN EXPERIENCE

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5th International Conference of Information Commissioners Wellington, New Zealand November 28, 2007

Presentation Outline

- The Canadian Context
- Legal Authority for Commissioner-Initiated Complaints
- Initiating an Own-Motion Investigation
- Departmental Report Cards
- Late Responses and Large Backlogs
- Destruction or Alteration of Records
- Claim of Cabinet Confidence
- Conclusion

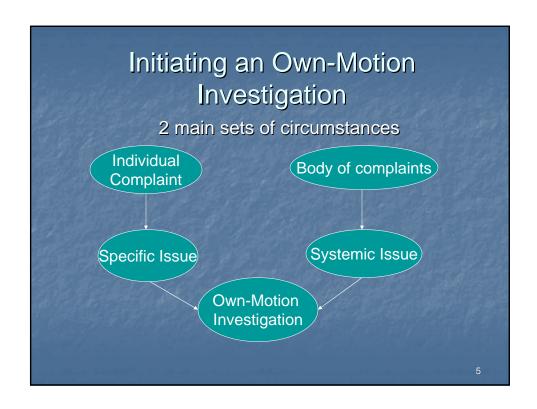
The Canadian Context

- FOI laws with right to complain in all 14 jurisdictions
- Laws provide for an independent reviewer: commissioner, ombudsman, official or commission
- Powers and duties vary
- Federal level: Information Commissioner of Canada is ombudsman, first level of review; Federal Court of Canada is second level
- In Manitoba and federal level, FOI ombudsman may conduct an "own-motion investigation"

3

Legal Authority

- Subsection 30(3) of Access to Information Act (ATIA)
- No guidance as to circumstances:
 Commissioner has discretion and flexibility to determine procedures to be followed in a particular review



Departmental Report Cards

- · Way of translating a systemic investigation
- First issued in 1999 to evaluate government performance in ATIA compliance
- Initially focused on timely processing of access requests – systemic issue of delay complaints – late response "deemed" to be refusal under ATIA

In more recent years, expanded to:

- encourage federal institutions to give higher priority to ATIA performance
- create/disseminate 'best practices' across government
- assist Parliament in playing a more targeted and focused oversight role

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Departmental Report Cards (cont.)

- Detailed review done annually with 3 selected institutions, and follow-up reviews (up to 12)
- Institutions chosen have a track record of underperformance
- Review 3 areas:
 - access process
 - leadership framework
 - information management framework

- Institutions are graded from "A" to "F"
- Individual Report Cards and status reports posted and publicized in our annual reports (www.infocom.gc.ca)

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Departmental Report Cards (cont.)

Their impact:

- Initially at least, dramatic reduction in number of delay complaints
- Many access offices received a much-needed boost in funding and personnel – role of the ETHI Standing Committee
- Demonstrated ways to improve administrative processes to reduce delays

- Helped uncover poor state of records management in many departments
- On the other hand, % of delay complaints on the rise again
- Institutions invoking longer extensions, and more often, to avoid deemed refusal situations

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Departmental Report Cards (cont.)

Useful tool at a managerial level:

- Assist Commissioner in evaluating an important component of an institution's performance
- Serve to put FOI higher on institutions' list of priorities
- Help create and disseminate "best practices" across government

- Assist Parliament in playing a targeted and focused oversight role
- Commissioner will renew approach and increase impact of Report Cards on institutions' performance so that:
 - all contextual elements affecting overall performance are considered, and
 - responses from institutions are published simultaneously

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Late Responses and Large Backlogs

Systemic issue: Huge amount of unanswered requests in 4 institutions leading to delays.

Context:

- long-term inability to respect deadlines
- failure to act on recommendations
- concern over fairness to requestors not making complaints
- Only 1 institution has improved its performance

Destruction / Alteration of Records

- 1. Destruction of an Audit Report
- 2. Alteration of records released to a journalist
- Destruction of recordings and transcripts of meetings – led to passage of a Private Member's Bill making such activities illegal

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Claims of Cabinet Confidence

- Information contained in record that qualifies as Cabinet document excluded from the Act
- Requests to a federal institution that include such information are reviewed by the Privy Council Office (PCO) which decides on exclusion
- Commissioner initiates a complaint against PCO for each complaint relating to requests of this nature – allows Commissioner to deal with the true decision-maker



Conclusion

On the one hand, own-motion investigations play a vital role in our review mechanism:

- Way to get big picture of what's happening within system
- Draw attention to key elements of the process that need improvements
- Provide Commissioner with facts and figures on which to base his recommendations to improve ATIA

Conclusion (cont.)

On the other hand:

- Benefits tend to be short-lived between reports, and if used too often, reviews can lose their effectiveness
- Ultimately, up to the Government to implement the Commissioner's recommendations and other sustainable solutions that will improve institutions' performance

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Our Challenge

- Commissioner-initiated complaints have traditionally focused on specific systemic issues or major deficiencies in the administration of the access to information program
- Challenge is to find new and different approaches that will provide for early detection and resolution of issues that will assist requestors and be useful to federal institutions

ICIC Conference Wellington 28.11.07



Maurice Frankel Campaign for Freedom of Information

Policy advice exemptions

- Govt 'thinking space' vs accountability
- Blanket approach?
- Public interest test
- Veto
- Exclusions
 - eg factual information, expert scientific advice, consultant's report
- Vanguard
 - Queensland
 - **▶** NZ
- Rearguard
 - Australia Commonwealth
 - Canada Federal

Formulation of government policy, etc.

- 35. (1) Information held by a government department or by the National Assembly for Wales is exempt information if it relates to-
 - (a) the formulation or development of government policy,
 - (b) Ministerial communications,
 - (c) the provision of advice by any of the Law Officers or any request for the provision of such advice, or
 - (d) the operation of any Ministerial private office.
- right of access nevertheless applies unless -
- (b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
- If equal, must disclose

Campaign for Freedom of Information

If an agency, after identifying and weighing these competing interests, finds them to be evenly balanced then the information at issue should be withheld.

NZ Ombudsmen, Practice Guideline No 5

School funding crisis (1)

- Request for Dept for Education & Skills board minutes on 2003 school funding crisis
- IC ordered full disclosure DfES appealed
- Former Cabinet Secretary: "Disclosure of minutes...as close to ministers as those...not been foreseen and would strike at the heart of civil service confidentiality"
- Regardless of age or content of info:

Loss frankness - government by 'Cabal' - impact on record-keeping - exacerbate difficult decision making - damage relations between ministers & officials - alienate officials from succeeding govt

Campaign for Freedom of Information

School funding crisis (2)

- Lord Falconer: info "sufficiently sensitive...to warrant a class exemption as its disclosure would almost always entail harm to the formulation of government policy"
- DfES: PI in disclosure 'weak or non-existent', further undermined by 'generous disclosure' of related info
- Tribunal: "We reject the inherent damage argument"
 - "the wider...a provision as s.35(1)(a) is drawn...the more unreal such a contention becomes"
 - DfES willingness to release related info "demonstrates... hypothetical nature of...argument"
 - Lord F wrong to say: "Info of this nature should be disclosed only where it is in the PI to do so"

School funding crisis (3)

- Tribunal: Falling within class simply means must examine PI balance
 - "Often...examination will be very brief because disclosure poses no possible threat to good govt"
 - "weighing exercise begins with both pans empty and therefore level..."
 - "If the scales are level, it must disclose".
 - "may not be a purely theoretical...many cases where the apparent interests in disclosure and in maintaining the exemption are equally slight".

Campaign for Freedom of Information

School funding crisis (4)

- "disclosure of discussions of policy options, whilst policy is in the process of formulation, is highly unlikely to be in the public interest..."
- "Ministers and officials are entitled to time and space, in some instances to considerable time and space, to hammer out policy by exploring safe and radical options alike, without the threat of lurid headlines depicting that which has been merely broached as agreed policy..."

School funding crisis (5)

- "the purpose of confidentiality...is the protection from compromise or unjust public opprobrium of civil servants, not ministers."
- "Despite impressive evidence against this view, we were unable to discern the unfairness in exposing an elected politician, after the event, to challenge for having rejected a possible policy option in favour of a policy which is alleged to have failed"

Campaign for Freedom of Information

School funding crisis (6)

"we do not regard publication of other information relating to the same topic ...as a significant factor in a decision as to disclosure"

School funding crisis (7)

- "we are entitled to expect of them [officials] the courage and independence that has been the hallmark of our civil servants since the Northcote-Trevelyan reforms.
- "proceed on the assumption that ministers will behave reasonably and fairly towards officials who...are believed to have promoted policies which the new incumbent rejects"
- "decisions should not assume the worst of the public. The answer to ill-informed criticism of the perceived views of civil servants is to inform and educate the critic, however hard that task may be, not to deny information"

EA/2006/0006, DfES & IC & Evening Standard

The DfES Minutes

- highlights disclosure after internal DfES review on 15th April 2005
- highlights further disclosure on 22nd November 2006 provided in the course of preparation for the tribunal hearing.
 - All items not highlighted comprise protected target material

WEEKLY KIT MEETING of the SCHOOLS DIRECTORATE MANAGEMENT GROUP held 14 July 2003

Funding

The group discussed the latest situation on school budgets and funding.

WEEKLY KIT MEETING of the SCHOOLS DIRECTORATE MANAGEMENT GROUP held 2 September 2002

[Helen Williams] - Last month of consultation period on SSA reform options. Ministers will need to decide early October. Is currently rethinking schools capital priorities with David Miliband.

May 2003 Board Meeting

(Item 4) School Funding

Stephen Crowne summarised the position on school funding, how we got here and what the future might hold.

Key points in discussion were:

- Local Authorities had not consciously sought to divert funds and the public debate was unfortunate.
- It was crucial to balance our response and maintain our room to manoeuvre for both this and next year.
- It was very difficult to get meaningful figures as there was such a mix of different factors in their individual positions.
- The process on reaching decisions next year should be brought forward by 2 to 3 months, if possible.
- There was some risk of a similar row with the FE Sector.

David Normington expressed thanks for the update. The difficulties rose from lack of action rather than anything deliberate. Part of our strategy should be to lead those authorities who genuinely did have the money to ease school difficulties to make a rapid decision.

Campaign for Freedom of Information

BBC Governors (1)

BBC: refused minutes of Governors' meeting, accepting resignations, following Jan 04 Hutton Report

Information...is exempt information if, in the reasonable opinion of a qualified person, disclosure...would, or would be likely to, inhibit (i) the free and frank provision of advice, or (ii) the free and frank exchange of views for the purposes of deliberation

FOI Act (UK) section 36(2)(b)

IC: "those attending...would either not have said some of what they said, or would have expressed their views in a more guarded manner...confidentiality was essential"

BBC Governors (2)

- IC: "considered whether... the public interest in this matter is sufficiently strong to justify him overriding confidentiality...come to the conclusion that it is not"
- "for information to be released...the arguments in favour of disclosing the information must outweigh those in favour of withholding it"
- Tribunal: "That indicates that... his starting point was one of non-disclosure...the reversal of the test coloured the Commissioner's approach and hence affected his judgment of the balance of public interest."

Campaign for Freedom of Information

BBC Governors (3)

Evidence of ex DG:

"In my experience they [Governors] are not the type of individuals who would be inhibited from expressing their views by fear that those views might be made public in the future."

Tribunal: "He was the only witness...who had practical experience of how the Governors worked."

BBC Governors (4)

- Tribunal: "Importance and sensitivity are not the same"
 - BBC took legal advice before finalising written with "possibility of disclosure in mind"
 - Within hours of meeting outcome was known
 - ▶ Request made more than year later
- PI case for exemption in these highly unusual circumstances "not particularly strong" and "did not outweigh the public interest in disclosing"

EA/2006/0011 and 0013, Guardian/H. Brooke & IC & BBC

Campaign for Freedom of Information

- In resigning, Gavyn had made Greg's position unsustainable. Gavyn had
 effectively accepted responsibility for the failure of governance, yet Lord
 Hutton was more critical of BBC management's processes and decisions.
 Ergo it followed that a like action was required at the top of BBC
 management.
- The Press would hound the organisation were Greg to stay, and his confidence would be sapped. Gavyn did not want to be hounded out of the BBC, nor should Greg.
- The authority of the Board had been weakened by the Chairman's sudden resignation and would be undermined still further if Greg were to stay, Gavyn having gone.
- The arguments for Greg staying were almost wholly internal and those for him leaving were essentially external. The current external handicaps faced by the organisation in respect of Charter Review would be greatly relieved in the wake of Greg's departure.
- Greg did not have a long lifetime in the BBC, and he has previously indicated a desire for a gear change.
- By staying, Greg would be a lame duck, inviting a new Chairman to replace him. The new Chairman might not thank the rest of his Board for leaving him or her this task.
- In Mark Byford, the BBC has someone with whom it could make a clean break with Hutton.
- The BBC will look severely weakened if Greg goes, and this might imperil
 the BBC's independence.
- A double resignation of this magnitude would send a terrible signal to the outside world, and to the BBC's staff.

Sakhalin oil project (1)

- Request: internal communications from govt depts on offshore oil development project
- Environmental Information Regs "presumption in favour of disclosure"
- Request 2 years after documents created
 - no final decision 4 years later
 - 'in principle' decision to support, subject to conditions, in March 2004
- Risks (a) nearly extinct Western Gray Whales (only 100 left) (b) oil spills (c) resettlement of indigenous people

Campaign for Freedom of Information

Sakhalin oil project (2)

- IC:
 - PI in understanding, contributing to & challenging decision
 - Outweighed by PI in maintaining collective responsibility
 - ▶ PI met by volume of existing information
- Tribunal:
 - Accepts importance of collective responsibility, ministerial accountability & need for 'safe space'
 - ► Tribunal refers to these "conventions" term itself not in UK legislation

Campaign for Freedom of Information

Sakhalin oil project (3)

- Tribunal:"...refutes any suggestion that those notions, either singly or together represent some form of trump card in favour of maintaining the...exception."
- "Too much...can be made of the alleged virtues of candour and frankness. Factors such as...size of...project and... expense...may often be significant... though by no means determinative...touchstone is & remains at all times the public interest"
- collective responsibility "merely...a means to an end, the end being good government"

Campaign for Freedom of Information

Sakhalin oil project (4)

- ECGD arguments made "only in the broadest of terms", "of a generic nature only", if accepted would "amount to a blanket exception"
- No evidence of "real, as distinct from an imagined, harm or prejudice"
- "simply not willing to accept" harm to candour in absence of specific evidence
- "weighty" PI in knowing participants' views on environmental and social issues
- Tribunal's decision appealed to High Court

 EA/2006/0073, Friends of the Earth & IC & ECGD

Towerblock permission (1)

- Minister gave planning permission for new tower block contrary to inspector's report
- Advice to minister requested
- IC: disclose submissions minus advice/opinions
- Tribunal: all advice published at LA level none when minister decides arguably case greater
- Access not limited to material needed to improve comprehension
- Even if it were, official account might give explanation which "in fact avoids mentioning some of the background reasoning, which...the advice to the Minister would have revealed."

Campaign for Freedom of Information

Towerblock permission (2)

- "one reason for having a FOI regime is to protect Ministers and their advisers from suspicion or innuendo to the effect that the public is not given a complete and accurate explanation of decisions; that the outcome is in some way 'spun' (to adopt the term whose very invention illustrates this tendency towards cynicism and mistrust)."
- "Disclosure...is not...predicated by a need to bring to light any§ wrongdoing of this kind. Rather, by making the whole picture available...enable the public to satisfy itself that it need have no concerns"

EA/2006/0043, Lord Baker & IC & DCLG

"the proportion of affordable housing by this measure would be reduced from the 40% on which Ministers previously insisted, to only 24%....

"We do not agree that the affordable housing provision is adequate..."

- "...we do not consider that the proposed tower would bring material benefits in terms of regeneration above those of the existing permission or be acceptable in terms of impact on its surroundings and agree with the Inspector that, despite the support of the Mayor of London, the proposal does not accord with the London Plan."
- "...we believe that the harm caused outweighs the benefits and that the appeal should be dismissed. You are therefore invited to agree that the appeal be dismissed and planning permission refused."

Campaign for Freedom of Information

Budget submission (1)

- Request: documents about 1999 budget decision to cut tax rate by 1p
- IC: required full disclosure of budget submissions Treasury appealed
- Later released most
- Still disputed: comments on other tax options, some not implemented

Campaign for Freedom of Information

You asked for advice on the practicalities of bringing in a 10p rate band from 6 April 1999, with or without a cut in the basic rate at the same time.

Timing: Urgent. If you are minded to do this, the consequential changes to legislation are complex and numerous and we need to get to work on them.

This note looks at:

cutting the basic rate in 1999/2000.

....the key points are:

- For non-savings income, a 10/23/40% structure from 6 April is feasible.
- A 10/22/40% structure for non-savings income could also be done, although we see clear advantages in not moving to that structure until 2000-2001; and
- There would be complex consequential for taxation of savings income and capital gains, in particular. We would need to know urgently what you want to do and we think some options would be very difficult for 1999/2000.

Campaign for Freedom of Information

Budget submission (2)

In favour of disclosure

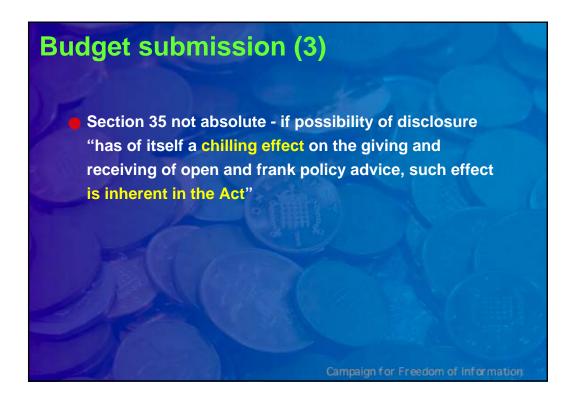
- scrutiny incentive to sound arguments
- public can "lobby in favour of options not taken up"
- allows public to compare volunteered with FOI info
 - "is, or should be, conducive to public confidence"
- greater understanding but modest as little info involved

In favour of exemption

- existence of exemption indicates need for caution
- need for 'safe space'
 "Weighty reasons" peeded to risk conf

"Weighty reasons" needed to risk confidence in budget tax process being "invaded"

Campaign for Freedom of Information



Rejected arguments that: age of information irrelevant because continuous reassessment ('at most intermittent') revealing rejected options lead to pressure to rule them out ("ministers...adept at keeping options open") may lead to false assumptions about ministers' thinking ('long track record') assume officials' arguments represent minister's reasons (minister able to explain) so much published that little PI in disclosing rest (timing & content controlled by govt)

Budget submission (5)

- damage investment by sending wrong signals (not mentioned after 7 months, 'afterthought...fanciful')
- if advice routinely used to criticise Ministers, wary of asking for it. (No one suggests routine)
- Conclusion: PI favours disclosure except for 1 element:
 - "significant risk of damage to the policy process" reasons in confidential annex
 - "might encourage Ministers to seek advice on only restricted range of options...reducing the quality of the policy formulation process"
- 1st case where Tribunal allows withholding advice EA/2007/0001, HM Treasury & ICampaign for Freedom of Information

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Paper delivered at the 5th International Conference of Information Commissioners

Access to Policy Advice Held by Government Agencies Using FOI Legislation.

(What New Zealand has Learned From its 25 Years Experience)

Requests seeking access to policy advice held by government agencies or Ministers is and has always been the most difficult area of operation for New Zealand's Official Information Act (OIA). In a free democratic society where the opposition parties are active in challenging government policies and decisions and the media and interest groups are active in asking what government is doing and why, that is only to be expected. How contentious such requests are perceived to be will vary depending on your perspective as a requester or holder of such information.

New Zealand's experience after 25 years is that the fundamental principles and methodology of the OIA has not undermined the ability to develop and implement good policy. Indeed, a number of the economic and social policy reforms in New Zealand over the last 20 years have been seen as world-leading and a model for other countries. They have all been able to be developed and implemented in an OIA environment. If the OIA has caused a greater degree of effort in developing policies that are ultimately seen to be exemplary who is going to seriously argue that the extra effort was wasted. Indeed, commentators such as former Cabinet Secretary, Marie Shroff have observed that in their view the OIA has resulted in better quality policy advice.

In New Zealand, the lifetime of the OIA has seen major changes in the structure of the public sector, our system of government and indeed our society in general. Based on the Ombudsmen's perspective from investigation of complaints under the OIA (including its local government equivalent LGOIMA) and OA, there is no obvious evidence that the OIA has not been able to cope.

Certainly there have been new challenges and this will continue. Approaches under the OIA that were considered satisfactory in the past have needed to be modified as necessary over time. However, there must always be a willingness to keep an open mind on whether things could be done better. Encouraging agencies to do things better is an outcome that Ombudsmen the world over are always looking to achieve.

The focus of this paper is access to policy advice held by government agencies. The question I endeavour to answer is what New Zealand has learned from its 25 years experience. I address this question under 4 broad headings:

- 1. The current position
- 2. Are there any rules of thumb that apply generally
- 3. How did we develop these "rules of general application" which provide guidance for future action"
- 4. What suggestions do we have for other Ombudsmen or Information Commissioners who are in earlier stages of undertaking an FOI complaints jurisdiction

In doing so, I make reference to the outcomes of several pivotal investigations and also to comments by individual officials and requesters and "interested parties" that help illustrate the attitudes we have encountered along the way.

Current Position

In simple terms, the current position in New Zealand after 25 years can be described with due acknowledgement to Abraham Lincoln

"You can withhold all of the information some of the time and some of the information all of the time but you can't withhold all of the information all of the time"

There is no blanket protection for policy advice under the OIA as a special exempt class or category of information. Each case in considered on its merits. The simple methodology is to ask:

- 1. What is the harm if the policy advice is released?
- 2. Does that predicted harm come within one of the reasons for refusal under the OIA?
- 3. If the reason for refusal is one of those set out in section 9 of the OIA, is the need to withhold outweighed by a countervailing public interest in disclosure?

The experience of the New Zealand Ombudsmen in applying this simple methodology over 25 years can be summarised as follows:

- The general underlying public interest consideration is that in order to make the best possible decisions government needs to receive the best possible advice. If disclosure of specific information would undermine the ability of executive government to receive and consider the policy advice it needs to make good policy decisions then that is not in the public interest.
- ♦ However, there will be occasions where notwithstanding a detrimental effect on the generation or consideration of policy advice there are compelling arguments for disclosure anyway to promote accountability or more effective participation.
- The withholding provisions essentially turn on an assessment of likely harm to either the generation of policy advice or the ability of government to consider policy advice in an orderly and effective manner before it decides how to proceed.

♦ Whether such harm will arise in a particular case will depend on a number of factors including:

Nature and content of the information

What does the information comprise?

In our experience, information covered by a request for policy advice can comprise:

- historical factual background to a matter much of which may be available from open sources;
- options for future action;
- opinion as to action on some or all of those options.

Not all such information needs to be withheld in all cases. Some of it, such as historical background information compiled from open sources is unlikely to ever require protection.

Context

What were the circumstances in which the information was generated or was or is to be considered?

What was the understanding or reasonable expectation of the generator or recipient of the policy advice as to whether it would be held in confidence?

Is the advice generated to assist a decision or to lay the foundation for or provide input into another wider ongoing policy process?

Timing

At what stage of the policy process has the policy advice at issue been prepared?

What is going to happen next - a final decision, public consultation, or another stage in the policy formulation process?

- Whether there is a countervailing public interest will depend on similar factors. However, our experience over 25 years is that the countervailing public interest can also turn on the purpose for which the requester requires the information requested. Why do people request policy advice? Quite apart from the obvious reason to find out what advice was given, reasons will also include to find out:
 - whether policy advice was generated but not tendered to government;
 - whether policy advice was tendered but ignored or otherwise not followed;
 - who was consulted;
 - when were they consulted;
 - what were they consulted about.
- ◆ However, sometimes the reasons for request will be less focussed along the lines of either:
 - I want to find out what is happening and why; or
 - I am against what is being proposed and want to find any information that may suggest that the policy proposal has risks or weaknesses.

In assessing these factors the New Zealand Ombudsmen have found that it is important to maintain a flexible approach. Rigid rules tend to lead to predetermined positions on withholding or disclosure that are mechanical rather than intelligent and take no notice of the circumstances of particular cases. The end result would be the withholding of information for no real reason at all.

Are There Any Rules of Thumb That Apply Generally?

It has been said that the case by case approach under the OIA does not allow development of principles or rules of general application which give greater certainty to officials processing requests. However, as the Ombudsmen noted in their last Annual Report, "rules of general application" have developed over the years in respect of certain issues which for all practical purposes should afford adequate certainty for agencies.

An example is the position of requests for draft briefings of the Treasury to an incoming government. In our 2006 Annual Report we reported on the outcome of an investigation of the Treasury's decision to withhold draft copies of its 2005 Briefing to the incoming government. During the course of that investigation, there was an opportunity to consider the issue of requests for draft documents generally and requests for draft briefings to incoming Ministers specifically. For ease of reference I repeat the text of the Annual Report excerpt as Appendix A. The rule of general application that can be taken from this case is that draft post-election briefings will be protected under the OIA unless there is something about the briefing that would give rise to a public interest in disclosure, for instance if the drafts revealed some impropriety in process or practice.

While the draft briefing was withheld, the actual briefing was disclosed on request. Indeed, the practice now is that all briefings to incoming Ministers by their Departments are freely available on request. That was not always the case. When first requested under the OIA in the late 1980s, Departmental briefings to Ministers were often withheld in whole or in part. Following several cases that resulted in the Ombudsmen forming the views that such briefings should be made available, the rule of general application was accepted that they should be available on request. For the most part, such briefings are now prepared with public disclosure in mind.

How Did We Develop These "rules of general application" Which Provide Guidance for Future Action"?

The rules of general application have emerged out of the operation of the case by case approach over time. The case by case approach does not mean that we must "reinvent the wheel" each time. Once a significant body of investigations have been completed, it is possible to develop Practice Guidelines that have precedent value for approaches to be followed rather than specific outcomes. In New Zealand, the Ombudsmen waited nearly 10 years before publishing Practice Guidelines setting out their general approach to the interpretation of the OIA. While publications of compendia of case notes allowed OIA users to see how the OIA had been applied in particular fact situations, we have found that officials were more in need of a best practice manual that set out precedents for approach rather than outcome. The Practice Guidelines have been reviewed and updated on a regular basis and we have tried to make them as freely accessible as possible.

Quite apart from the Practice Guidelines which reflect the cumulative effect of individual cases, New Zealand Ombudsmen also took the opportunity when circumstances allowed to recommend different proactive approaches to release of information where accountability, transparency and participation required an organised and orderly release of information to the public that did not turn on single requests under the OIA that could get stymied because of political sensitivities. The clearest example of this was the case considered in 1990 by the late Sir John Robertson concerning information requested from the Prime Minister by the then leader of the Opposition about the financial state of the Bank of New Zealand just before the general election. This background to the case and the outcome are set out in Appendix B.

What is of interest following issues raised earlier in this conference by Professor Alasdair Roberts is that this was an example of an Ombudsman applying a case by case methodology but recommending that a class of information should always be proactively released at least 6 months before any general election in the public interest. What is not recorded in Sir John's report to Parliament is what eventuated. The Minister of Finance of the time told Sir John that she didn't think his suggestion would gain traction. However, within 2 years the Minister introduced the Fiscal Responsibility Bill which was passed in 1994 (now incorporated into the Public Finance Act). Although Sir John's recommendation was not acknowledged, it is clear on reading the recommendation and the Bill that the catalyst for the much heralded "opening of the books" legislation was the outcome of the BNZ case under the OIA. Not only was the ultimate outcome of Sir John's report an acceptance that this type of information should be released on a regular basis without the need for request under the OIA but the obligation to make it available was embodied in legislation.

What Suggestions Do We Have for Other Ombudsmen or Information Commissioners Who Are In Earlier Stages of Undertaking an FOI Complaints Jurisdiction?

It is always a difficult exercise to identify what may be of value to other countries. While some issues and challenges that arise in applying FOI legislation are universal the particular attitudes of requesters and officials often vary from country to country. However, in a general sense New Zealand's experience suggests that the following may be helpful to some of you at least.

Attitude

First and foremost Ombudsmen and Commissioners and their staff need to promote and encourage a positive attitude to FOI laws and not be put off by the negative attitudes we will encounter. While our experience suggests the silliest arguments for withholding (and sometimes release) are put forward early in the life of an FOI Act they keep coming back. There will always be game playing in FOI matters, particularly in respect of requests for policy advice or politically sensitive information. It will never be eradicated but it can be discouraged and minimised where a positive attitude to FOI laws and their benefits takes hold. I set out below a selection of quotes from various officials and users of the OIA we have encountered over the last 25 years which give a reasonable illustration of the difficulties that negative attitudes can cause:

"What does the Chief Ombudsman think he'll achieve by recommending release of this information? The public wouldn't recognise Transpower if they tripped over it. All that will happen if this information is released is that the public will put pressure on Ministers and Ministers will stop listening to officials"

Senior official late 1980s

"Don't worry about all the other complaints - that's just us playing political games. This is a complaint that really matters; this information should be made public"

Opposition party researcher late 1990s

"I agree it is probably unreasonable but I thought the OIA let me make them do it anyway"

opposition party researcher 2004

"If I shake the tree and something falls off that shouldn't have that's my good luck. After this I'll shake the tree as much as I can"

opposition MP late 1990s

"If it was just about training we would have done it. It's not about training. We just don't want to do it. Its too hard and if we can avoid it we probably will."

middle level departmental official 2005

"The political adviser said he was taking the file requested and we wouldn't get it back until after the Election. What can we do?"

senior departmental official 2005

More haste less speed

Concern about delays in our own investigative processes can sometimes lead to a focus on completing investigations as quickly as possible rather than, in appropriate cases, taking extra time now to settle issues of general application or principle that may save time in subsequent investigations. Timeliness is important to the credibility of FOI review bodies but not as important as getting it right and establishing settled principles that can guide future action.

Give yourself time to build up your own case experience

Best practice develops over time. Our experience is that several approaches we took in the early years needed to be modified significantly over time as new fact situations were encountered. Consistent application of principle doesn't necessarily result in uniform outcomes. Trying to establish guidelines based on patterns emerging from completed cases is dangerous until there have been a sufficient number of cases completed which have drawn out all the relevant issues and arguments.

Maintain a flexible attitude

We would never have coped with the major public sector restructuring of the late 1980s or the change to MMP if the Ombudsmen had not adopted a flexible approach at the outset. Things do change and we have to be prepared to be receptive to changes as they come along.

Encourage and where possible facilitate "How to" training within agencies

Most officials crave certainty and would prefer an "outcome" based approach that would allow them to apply a simple "in" or "out" checklist approach to types of information that can always be withheld or should always be released. Every effort should be made

to demystify the application of FOI laws and encourage the value of intelligent rather than mechanical application of them. In particular, it is important to facilitate more intelligent use of mechanisms and guidelines to encourage officials and requesters to target and communicate more precisely what they want and what they are concerned about.

Encourage proactive release of information

For many officials dealing with FOI requests the problem is not so much the judgment to be made about whether information should be withheld or released but rather the perceived administrative burden of processing requests for large volumes of information. Proactive release of information to clear the decks can make it easier to focus on the information that raises more difficult issues. Ultimately, however, what needs to be encouraged is a coordinated whole of government approach to proactive release. Adhoc and inconsistent approaches to proactive release by individual agencies are confusing to requesters.

In respect of the last two points the following quote is apt:

"Amateurs talk strategy, experts talk logistics"

Napoleon

Many of the future challenges to the OIA in New Zealand (and FOI world wide) relating to large requests and electronic information are often problems of logistics rather than grounds to reconsider the basic principles and methodology of FOI laws. Concerns about the administrative burden of responding to OIA requests should not be ignored. However, we need to be careful that they are not arguments of administrative convenience in disguise. New Zealand's experience is that many available options for working sensibly with requesters to reduce unnecessary administrative burden are either not known or not properly understood or are simply ignored by officials and requesters alike. Many of the logistical difficulties are self-inflicted.

Finally, we need to keep looking for ways of making the legislation we are responsible for work better. It is not enough to think that we are on the right track and that is enough. The sheer volume of requests and complaints can crush any Ombudsmen or Information Commissioner's Office if we neglect the value of training, raising of

positive attitudes towards FOI and smarter administrative practice to process large amounts of information. In the words of Will Rogers;

"Even if you are on the right track you'll get run over if you just sit there"



ACCESS TO POLICY ADVICE HELD BY GOVERNMENT AGENCIES USING FOI LEGISLATION

(What New Zealand has learned from its 25 years experience)

LEO DONNELLY DEPUTY OMBUDSMAN



"You can withhold all of the information some of the time and some of the information all of the time but you can't withhold all of the information all of the time"

 What Abraham Lincoln may have said if he was around today and reflecting on the operation of the OIA and FOI in general



Does the policy advice need to be protected?

- Nature and content
- Context
- Timing



"What does the Chief Ombudsman think he'll achieve by recommending release of this information? The public wouldn't recognise Transpower if they tripped over it. All that will happen if this information is released is that the public will put pressure on Ministers and Ministers will stop listening to officials"

Senior official late 1980s



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- Middle level departmental official 2005



"The political adviser said he was taking the file requested and we wouldn't get it back until after the Election. What can we do?"

- Senior departmental official 2005



What we have learned

- Attitude
- More haste less speed
- Give yourself time to build up your own case experience
- Maintain a flexible attitude
- Encourage and where possible facilitate "How to" training within agencies
- Encourage proactive release of information



"Amateurs talk strategy, experts talk logistics"

- Napoleon



"Even if you are on the right track you'll get run over if you just sit there"

- Will Rogers



Bryn Gandy

Associate Deputy Chief Executive – Corporate and Governance Ministry of Social Development

Paper delivered at the 5th International Conference of Information Commissioners

New Zealand's Official Information Act: Public Policy, Accountability and Participation

THIS PAPER

This paper makes some observations in respect of New Zealand's Official Information Act (OIA) from the perspective of having to apply it within a New Zealand Public Service Department.

It makes some comment regarding the context for the OIA and changing practice in respect of how information is made available. It also discusses some issues that arise in its application to "sensitive requests" in particular.

Lastly, this is applied to a practical example of the arrangements one New Zealand Government Department has introduced to manage OIA requests.

INTRODUCTION

The Official Information Act is one of several pieces of legislation that provides for New Zealand's approach to "open government". It was the first of several laws passed in the 1980s and 1990s to make access to information of various kinds more free.

The OIA replaced the Official Secrets Act (OSA), which operated as its name implied – public officials applying the OSA started from the presumption that the State should keep information secret. The OIA states that "information shall be made available unless there is good reason for withholding it". Its provisions set out a clear regime that often works in requestors' favour:

- requests are to be responded to within twenty working days, with the opportunity to extend the time allowed once (and once only)
- access to information is almost always at no cost to the requestor
- the OIA expects public officials to ensure that requests reach the right part of Government (within ten working days at most)
- the OIA does not provide for "classes" of information any information can be requested, including that stored in people's heads
- it sets out subjective criteria on which access decisions are made; a "public interest" is usually weighed against the harms that might result from the release of information
- there is a free process of review by a body that is independent of both public officials and the Executive (the Ombudsman).

The Official Information Act: Primus Inter Pares

The Ombudsman and the Courts have both described the Official Information Act as a statute of constitutional importance¹, saying "the permeating importance of the Act is such that it is entitled to be ranked as a constitutional measure".²

The OIA walks, talks and looks like a constitutional measure. It sets out constitutional or political ethics³; it relates these to the principle of the Executive Government's

¹ Ombudsmen's own-motion investigation of Department of Corrections in relation to the detention and treatment of prisoners, 2005, http://ombudsmen.govt.nz/cms/imagelibrary/100169.doc

² Commissioner of Police v Ombudsman 1 NZLR [1988] 385, p.391

³ Dicey, Introduction to the Law of the Constitution, 10th edition, Macmillan & Co Ltd, New York, 1962, p.417

responsibility to Parliament; it is pervasive and influences almost all Government activities.

The OIA is also just one of several features of the New Zealand system of Government that promotes transparency and accountability. Others have been added or enhanced since the OIA was passed in 1982:

- an overhauling of New Zealand's parliamentary Select Committees in 1985 expanded their roles to enable fuller consideration of Government policies and expenditure
- in 1987 the Local Government Official Information and Meetings Act was passed, making more available the information held by local authorities
- in 1988 the State Sector Act and in 1989 the Public Finance Act were passed which are, along with the Official Information Act, generally seen as the three legs of transparent and accountable practice in New Zealand Government
- these two Acts were passed alongside extensive public sector management reforms in the 1980s and 1990s that established "policy" departments, "delivery" departments, and gave some departments "monitoring" roles in respect of others
- the Privacy Act, passed in 1993, limits the use of personal information by the Government and provides individuals with rights of access to information held about them
- the Fiscal Responsibility Act, passed in 1994, sets out measures to provide transparency in the management of the Crown accounts
- the establishment and enhancement of independent parliamentary authorities, some with extensive powers of review, such as the Privacy Commissioner, Ombudsmen, the Office of the Controller and Auditor-General, and the Health and Disability Commissioner.

THE OIA, PUBLIC OFFICIALS, AND CHANGING PRACTICE

While the work of public servants is open to scrutiny from a variety of sources, the Official Information Act is the most pervasive. "Official information" means *any* information held by any Minister of the Crown in his or her official capacity, or by a Department, or by an Organisation listed in the Schedule to the Act. There are no "class exemptions" for particular kinds of information, or for documents with particular classifications.

The OIA has had a considerable impact on the way public officials work. Some changes may in part reflect that New Zealand's public policy process has developed in the OIA's presence; policy is a recognised discipline today in a way that it was not in 1982, and many departments did not then have "policy" functions. "Public policy" has developed in the presence of requirements that public officials operate in a transparent and accountable manner.

A former head of the Cabinet Office has observed that one impact of the OIA has been an improvement in the quality of advice. There is simple cause and effect at work in this. Public officials' advice can be an important part of the decision-making process, and saying that a document "does not say what was meant" is not a reason to withhold it. Such documents are released and scrutinised, and this provides an additional incentive for officials to take care to say what they mean, and to avoid giving apparently subjective advice.

In the presence of scrutiny, the public policy process in New Zealand has also sought ways to be proactively open. Government has increasingly chosen to publicly consult on various proposals and policies, with this becoming much more prevalent during the 1990s. While consultation is not governed by any single set of Government requirements, the Courts have required that consultation should be "the statement of a proposal not yet finally decided upon, listening to what others have to say, considering their responses and then deciding what will be done." ⁴

⁴ West Coast United Council v Prebble (1988) 12 NZTPA 399

This has increased accountability and participation. Where Government chooses to consult it is required, before it finally takes decisions, to explain what options it has considered and why it favours the course of action it does. Though in some cases, so much consultation has at times been underway in individual communities that the term "consultation fatigue" has been coined to describe the difficulty the communities have had in keeping up with multiple, simultaneous efforts by public officials to engage with them.

"Sensitive" Information: A Reducing Category?

Over the past decade in particular there have been major and permanent changes to the availability of information and the ways people can make use of it. These changes are still in progress. Many citizens now have the means in their homes or on their desks to engage with the democratic process. New technology enables them to ask for information, get it, and to share their views with as many others as their views interest.

With so much information available without the need to even request it, it is less of an event for holders of official information to release more. Information is released into the presence of a growing quantity of other related information. It is more likely to be looked at in context, and less likely to cause harm.

The increasing availability of information is consistent with the OIA's principles. One of its two main purposes starts

"to increase progressively the availability of official information ...".

There has been a considerable change since the OIA was passed in what information, of various kinds, is made available. For example, while Cabinet Papers⁵ are commonly made available today, this availability has evolved over time since the Act was passed in 1982.

decisions.

⁵ The Cabinet Office describes Cabinet as "the central decision making body of executive government. It reconciles Ministers' individual responsibilities with their collective responsibility and is the ultimate arbiter of all government policy". Cabinet papers are provided to the Cabinet to provide advice and seek

Public Officials and Ministers alike have argued that papers to Cabinet and, sometimes, Ministers required a degree of frankness that could not withstand the prospect of release to the public.⁶

Each release has moved the "accepted practice" on slightly and made future arguments to withhold other information harder. Sometimes papers have been made pro-actively and widely available rather than being released in response to individual requests. Increased ease of distribution of information has enabled this to happen more.

For example, in 2001, the Government undertook a major review of regulation of the Gaming Sector. Numerous Cabinet papers had been considered and these were published together on the department's website at the request of the Minister of Internal Affairs. These papers enabled any person to participate, in an informed way, in the Select Committee process. The same approach was taken in respect of major reform to the social welfare system in 2004. Advice provided to Ministers and Cabinet throughout the review and policy process was made available to requestors on a CD-ROM.

These releases (which are often termed either "pro-active" or "managed" releases) may relate to various processes and include a variety of information, and are not made under the terms of the Official Information Act. Some are packages of documents that respond to large hypothetical requests. While these releases may be prepared on the same basis as OIA responses, they are not covered by the provisions of the OIA. There is no requestor, and there is therefore no one to (for example) consult with over what information the (hypothetical) request covers, what drafts should be included, or to explain deletions to.

While pro-active releases may not be covered by the same requirements as information released under the OIA, they can be made at the same time as events or announcements occur, enabling public officials and Ministers of the Crown to be held to account without the delay that would be required to process requests. These releases can also be tested once the same information is provided in response to actual OIA requests.

⁶ The OIA provides for information to be withheld on these terms, particularly where the release of information would prevent similarly frank advice from being provided in future.

MANAGING WHAT'S LEFT: "SENSITIVE" OIA REQUESTS

The overwhelming majority of OIA requests are dealt with without difficulty. There is

comprehensive guidance for decision-makers. That material includes: the Ombudsmen's

guidance, which reflects the results of years of iterative application of the Act, the report

"Towards Open Government" based on which the OIA was drafted, and a review of the

OIA that was undertaken by New Zealand's Law Commission in 19978. The Office of

the Ombudsmen is also readily available to provide advice.

Even given this assistance, a small percentage of requests raise issues for decision-

makers. These requests may for example raise compelling reasons both to make available

what has been requested, and to withhold it because of harm that might be caused by

release, with no clear "right decision". Often, requestors feel strongly that the

information should be released.

There are a number of factors that can require consideration in these requests, but I will

look at three here, as they are relevant to how public service departments manage OIA

requests, which is what is discussed last:

1. the Official Information Act itself

2. the policy process, Ministers, and Public Servants

3. the OIA's Principle of Availability.

The Official Information Act and "Sensitive Requests"

There are many things that can make a request "sensitive". But it should be

acknowledged that it is the OIA itself that plays the greatest part in making them so.

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⁷ Towards Open Government" (Danks Report), Committee on Official Information, 1980, http://ombudsmen.govt.nz/cms/imagelibrary/100166.pdf

⁸ "Review of the Official Information Act 1982", NZ Law Commission, 1997,

http://www.lawcom.govt.nz/ProjectReport.aspx?ProjectID=42

As New Zealand's Chief Ombudsman has said, the OIA is not "open-and-shut" legislation⁹. Information is not released in response to a clear set of objective rules. Instead, decision-makers must weigh up to the best of their ability competing and subjective considerations. The Chief Ombudsman adds that this is not a bad thing - the pursuit of absolute simplicity in applying the Act "risks undermining one of the unique features of the New Zealand legislation, namely that each case should be considered on its merits, particularly where there are competing public interest considerations favouring both withholding and disclosure in the circumstances of a particular case".

Nevertheless, the consideration of a request may require a series of decisions that each require subjective judgements to be made:

- what information is covered and should be considered for release
- whether the information relates most closely to the work of the department, and whether other parties covered by the OIA may also hold relevant information
- whether others should be consulted on its release
- what is the public interest in releasing the information
- what harm might be caused by its release, and how this balances against the public interest
- whether there are alternatives to withholding the information if a harm might be caused.

For simple requests, these considerations may be easily made. But for some requests, these judgements can be difficult. Terminology may be understood differently by the requestor and the department, opinions may differ on the consequences of releasing particular information, the evidence for and potential severity of a harm may be unevenly balanced, or the information requested may have been poorly kept (something which

⁹ Open and Shut Legislation? The Official Information Act: Address to LexisNexis Information Law Conference, 21 July 2006, John Belgrave, Chief Ombudsman, paper can be found at www.ombudsmen.govt.nz

should not be allowed to disadvantage a requestor). An unusual but genuine example is provided below.

EXAMPLE

A requestor lodges an OIA request with the Minister who is responsible for a significant review. The Minister releases, on advice from the department, a set of documents that they are are advised match the request. The total pool of documents considered has been significant.

The requestor replies, saying that they believe there are some relevant documents that may not have been considered for release. Officials believe they have managed the request appropriately, and a senior manager asks that an auditor review the request. The auditor's findings are that indeed some relevant documents were not considered.

The staff responsible for managing the OIA request, on reading the audit results, disagree with the auditor's interpretation of the wording of the original request. The Manager responsible for commissioning the audit report also disagrees with the interpretation. A response is sent to the requestor, advising them that all the relevant material has been considered.

The requestor complains to the Ombudsman, who investigates the management of the request. Few records have been kept of how staff managed the request, and initially the Ombudsman has only the subjective view of departmental staff to rely on. The best documented approach to the request is that offered by the audit report, with which the Ombudsman agrees.

In this example it is a very simple part of the process of responding to an OIA that has been mis-judged. But in respect of requests that are complex or "sensitive" for some reason, as in any subjective process, the wrong judgement is sometimes made.

This becomes a particular problem where there is no clear record of how decisions were made, and the reasons for decisions can be called into question. The decisions may be investigated by the Ombudsman, whose approach is not necessarily to say whether a department has arrived at the most correct possible answer under the OIA. Their focus is often on determining whether decision-makers had a reasonable basis to make the decisions they did, i.e. whether a reasonable and thorough process was followed.

Their questions may include: Was there sufficient investigation into what information was available? Did the decision start from a clear view of what was sought, with consultation of the requestor to clear up doubt? Were any harms based on a reasonable assessment of the facts, or were they merely asserted? What options were considered other than simply withholding the information requested?

It is at least as important in these circumstances for a good process to have been followed, and preferably documented, as it is for a "right" decision to have been made. Particularly when sensitive or controversial requests are being managed, if a department has made a poor decision, the inability to explain *why* may render a requestor less likely to readily accept the simplest and most honest explanation (i.e. with the best of intentions, we got it wrong).

The Policy Process, Ministers and Public Servants

There are particular judgements to make in respect of requests relating to the policy-making process. The process and OIA requests made about it can span the activities of Ministers of the Crown and public servants.

In New Zealand, the public service and the Executive operate separately. Public servants are politically neutral. The "Public Service Code of Conduct", published by the State Services Commission, describes the convention of political neutrality in the following way:

"Public servants are required to serve the Government of the day. They must act to ensure not only that their department maintains the confidence of its Ministers, but also to ensure that it is able to establish the same professional and impartial relationship with future Ministers.

This convention of political neutrality is designed to ensure the Public Service can provide strong support for the good government of New Zealand over the long term.

Public servants have a long-established role in assisting with development as well as implementation of policy. This role may be performed in different ways and at different levels from department to department. Public servants are responsible for providing honest, impartial, and comprehensive advice to Ministers, and for alerting Ministers to the possible consequences of following particular policies, whether or not such advice accords with Ministers' views."

It is both inevitable and proper that Ministers and public officials will see different reasons under the OIA to consider withholding or releasing material. The OIA regards Chief Executives and Ministers as separate entities, i.e. they respond to OIA requests separately.

There are two provisions of the OIA that are particularly relevant to Cabinet and policy-making information. The first is s9(2)(f), which allows information to be withheld, subject to the public interest test, "if, and only if, it is "necessary" to withhold the information requested in order to:

"Maintain the constitutional conventions for the time being which protect –

- (i) The confidentiality of communications by or between or with the Sovereign or her representative;
- (ii) Collective and individual ministerial responsibility;
- (iii) The political neutrality of officials;
- (iv) The confidentiality of advice tendered by Ministers of the Crown and officials."

The OIA does not set out what a constitutional convention is or how one should be identified, though it acknowledges the evolutionary nature of the convention with the use of the words "for the time being", which implies that the requirement for confidentiality may change over time.¹⁰ In practice, and due in part to that practice having been well documented by successive Ombudsmen, there is now a good understanding of how this applies to common situations.

The second provision is s9(2)(g), which allows information to be withheld (again, subject to the public interest test) "where necessary to maintain the effective conduct of public affairs through

- (i) the free and frank expression of opinions by or between or to Ministers of the Crown ... or officers and employees of any Department ... in the course of their duty, or
- (ii) the protection of such Ministers, ... officers and employees from improper pressure or harassment".

This provision recognises the need for some aspects of the policy making process to have some protection, at least while they are in progress. The Act provides for the avoidance of pressure that might curtail decisions being made in a considered way, including through things such as "the offering of blunt advice or effective consultation and arguments".¹¹

These provisions are considered carefully by the Ombudsman, and there is no "blanket protection" for any advice between public servants and Ministers. For example, requests may include in their scope documents that record that Ministers and public servants have taken a different view on a particular issue. The OIA provides no special protection in these cases, and the position of the Ombudsman has long been that the release of such

¹¹ Towards Open Government" (Danks Report), Committee on Official Information, 1980, page 19 http://ombudsmen.govt.nz/cms/imagelibrary/100166.pdf

¹⁰ Cabinet, Policy Documents and Freedom of Information: The New Zealand Experience, Lecture by Robert Buchanan, given on 11 October 1990

information can reinforce confidence in the public service's neutrality. In these cases Ministers may not even be consulted on a request; they may simply be advised of what is to be released.

In practice, there are many possible circumstances that impact the application of both the provisions set out above. Three among them are:

First, the stage the policy process has reached. If advice is still being generated, there may be an interest in a requestor knowing what that advice is about. If the advice has been tendered, there may be an interest in knowing how and when decisions may be taken. Once decisions have been taken and announced, information will often need to be released. If a policy process has stalled, then the protection offered by the OIA's provisions may reduce – there may at least be an interest in knowing what broad options or issues were last considered.

Secondly, the planned *later* stages of a policy or other process are relevant to the level of public interest in releasing information. If there will be no further opportunity for requestors to comment on a proposal, then it may be sufficiently in the public interest for information to be released that some harms are outweighed.

Thirdly, these requests may span across the respective responsibilities of Ministers and public servants. The workings of this have recently changed in New Zealand, with the move to a proportional representation electoral (Mixed Member Proportional, or MMP) system. The first election under this system took place in 1996.

In these cases, information may relate to an issue that is the subject of a political process between the Government and the political parties that may support it. This part of the decision-making process can be legitimately protected by the OIA.

Considerations in deciding how to respond include whether a political process may be in train that the OIA might apply to, and the nature of the information held. It may be appropriate simply to advise the Minister of a release because the information does not relate to their responsibilities, or to consult them because they are an affected party. All

or part of the request may appropriately be transferred if the information held relates more closely to the functions of the Minister than the department.¹² While often these distinctions are clear, sometimes they can be argued and require careful consideration.

It is a credit to the OIA that is principles apply equally well, without amendment, to a proportional system. But coalition governments can make for more complex decision-making processes and a greater variety of them. The few requests that pose challenges are important to make well.

The points made in this section are not intended to be exhaustive, and they do not pose difficulty in respect of a great number of requests. In some respects they reflect that the OIA is a product of New Zealand's system of government; both are based on broad principles and work where these are applied well. In respect of the practical application of the OIA they do reflect an important lesson – that there are cases where making good decisions in respect of OIA requests require a genuine understanding of *both* sets of principles (those underpinning both the OIA and the workings of government itself) and the ability to reason across them.

The OIA's Principle of Availability

After everything has been considered, there may be little to separate the public interest in releasing information from the potential harms that could arise from doing so. To release the information may seem as compelling a decision as withholding it.

In considering these requests, there are several ways to make your way through the Official Information Act and identify a third important practical consideration beyond

¹² Section 14(b) of the Act provides that a request should be transferred where the information to which the request relates:

[&]quot;(i) Is not held by the Department or Minister of the Crown or organisation but is believed by the person dealing with the request to be held by another Department or Minister of the Crown or organisation, or by a local authority; or

⁽ii) Is believed by the person dealing with the request to be more closely connected with the functions of another Department or Minister of the Crown or organisation, or of a local authority..."

(1) the harms caused by release and (2) the public interest. Section 2 of the OIA sets out that "information" is a separate consideration from "documents". So decision-makers should consider release of the substance of a document even if the document itself cannot be released.

There is also the Principle of Availability, which underpins the whole Official Information Act. It is set out in section 5 of the Act:

"Principle of availability – The question whether any official information is to be made available, where that question arises under this Act, shall be determined, except where this Act otherwise expressly requires, in accordance with the purposes of this Act and the principle that the information shall be made available unless there is good reason for withholding it."

Because one of the purposes of the Act is to make information more freely available, the Principle of Availability can also ask decision-makers to look beyond binary decisions that either (a) the public interest outweighs any particular harms, or (b) the harms outweigh the public interest.

Both sections of the OIA suggest that decision-makers should look at options for potential compromise.

EXAMPLE

A Parliamentary Select Committee has invited submissions on a matter of public interest, and a requestor wishes to make a submission. A Government Department is preparing a research report that is relevant to the content of their submission but it will be published several days after the closing date for submissions.

The requestor lodges a request with the department for the report, which is declined as the report is still undergoing changes prior to its publication. The requestor lodges an appeal with the Ombudsman, who seeks to broker a compromise option between the department and the requestor.

The report is released to the requestor, on the condition that it be used only for the purposes of the submission, which will remain confidential within the Select Committee process until it has been considered - long after the publication of the report the requestor asked for.

There are long-standing options, such as inviting requestors to view large collections of information that are too large to copy, and providing summaries of information that cannot be released in detail (or where deletions would be impractical, for example rendering a document incomprehensible).

Another approach is to provide more information to requestors than they have sought. A request that seeks information on the audit of a particular programme, for example, might be responded to with that and other information, such as whether all the audit's recommendations have been implemented, whether further reviews of the programme have been undertaken, and how it compares to other programmes. The total package of material released may be less likely to create the harms that individual pieces of information might.

These are all good examples of the way the OIA asks decision-makers not simply to look at whether a particular document should be released, but *how it can be made available*. Where requests are "sensitive", finding ways to do this not only makes for good administration of the OIA – it finds a way through what otherwise can seem a 'stalemate' of the public interest and one or more harms.

APPROACHES TO THE MANAGEMENT OF OIA REQUESTS

Different departments have different ways of managing OIA requests, often reflecting very different needs. Approaches generally fall into one of three categories:

- 1. Departments may refer all OIA requests to their legal team.
- 2. A manual or other guidance may be issued to staff on how to apply the Act, with requests managed entirely by subject matter experts. A "postbox" function may exist within the organisation to monitor timeliness and provide some basic quality assurance.
- 3. The department may have a centralised function with expertise in applying the OIA. This is often co-located with other related functions, such as providing responses to Written Parliamentary Questions, replying to requests made under the Privacy Act, and drafting responses to Ministerial Correspondence.

Different approaches meet the needs of different departments. Some small departments receive only a small number of requests, and receive fewer still that provide challenges in applying the OIA appropriately. For them, very basic processes may be entirely satisfactory - particularly given the very good guidance that is available from the Ombudsman.

For larger departments, which may have significant traffic in requests, and where some requests raise difficult questions, the requirements are different. Based on the above, these requirements could include:

- staff who understand the OIA and can reason with reference to its principles
- a culture of systematic decision-making and of keeping a good record of how decisions are made (i.e. a 'professional' culture)

• strong connection to senior management, who among other things are most likely to understand the likely consequences of the release of particular information.

One Department's Approach

The Ministry of Social Development (MSD) is a good example of a department that manages some "sensitive requests". It manages 600+ OIA requests per year. Some of these relate to matters of significant public interest. For example MSD plays a key role in the protection of children and provides advice on matters such as how and in what circumstances the State should contribute to peoples' income.

In 2004 MSD started from first principles in looking at how it managed OIA requests, to better meet requirements such as those set out above. It established a "Ministerial and Executive Services Team" (MAES), the role of which includes responsibility for managing OIA requests. MAES' approach is to:

- take on people who have an interest in the democratic process
- make decisions on requests transparent, and keep good records of what decisions are based on\
- make sure that what is done is led from the top.

Getting the Right People

Staff managing OIA requests are recruited to have an interest in the democratic process. The OIA requires that decisions are argued in these terms, and this understanding can be helpful to be able to assist requestors even with requests that are straightforward, i.e. to consider what information might be helpful if this is broader than that requested.

These staff have good access to senior management, and they gain an understanding of the context in which the organisation works. It was also hoped that these roles would provide opportunities to develop people who could take a broad-based view of the workings of government into their careers as public servants.

Transparent Decision-Making

A set of tools has been developed that helps staff to make decisions, and record their reasoning. Instead of trying to make inherently subjective considerations rules-based or otherwise objectively made, there is a written record for each request of how various potential harms were weighed against the public interest, how the material sought by a request was identified, and who was consulted.

Questions asked include:

- Has the requestor asked for an urgent response?
- Can the information be identified, and can it be found? What do you think the requestor is asking for?
- Will answering the request require substantial collation and research?
- What is the particular public interest in release?
- What are any countervailing harms?
- How do these weigh up?
- Are there any ways to help the requestor without causing these harms?

A culture exists of file-noting discussions with key parties, keeping all emails and correspondence relating to the management of a request, and using this to provide clear, plain english advice.

Led From The Top

The organisation's commitment to being open to scrutiny is led by the Chief Executive (CE), who expects senior managers to engage with the OIA process. Decisions on individual requests are taken by the CE or the Deputy Chief Executives (DCEs) that head up each division of MSD. Their decisions are taken based on their and their staffs' view of what consequences a release might have.

MAES "owns" the process of ensuring the material is properly collated, getting subject matter experts' and senior managers' views on the potential consequences of release, and considering these alongside the OIA's provisions.

In some cases, responses are commissioned by the CE or DCEs directly; within a few days of a complex or sensitive request arriving, they provide a view to MAES staff on where they believe there may be harms in releasing information, who may need to be consulted, and may discuss how a response may approach these. This discussion is finished once information has been collated and assessed.

Results

The clearest quantitative result of moving to a different approach was a more than halving of complaints made to the Ombudsman about MSD's handling of OIA requests.

Other, less quantifiable, results were also evident:

- 1. The relationship with some requestors improved. Staff were engaging with them more to ensure they understood what had been requested, and offering to provide other information that might also be helpful. It turned out that not every requestor always knew exactly what they wanted, and that help was often appreciated.
- 2. "Sensitive" requests were managed better. By the time a decision was made, staff were able to explain why, in terms of the OIA's provisions, they had reached the view they had. Decisions were better communicated to requestors, and staff were more likely to look for compromises like

providing summaries of information, other related information, or giving a commitment to make the information available when they could.

- 3. As a consequence of 1 and 2 above, more information was made available, consistent with the purposes of the Act.
- 4. Within the organisation, understanding of the OIA started to improve. People were being engaged in a structured process that had clear decision-making principles. Talking about "harms from release" couched the OIA in terms they could better engage with.

MAES has continued to develop its approach since it was established, and has been the subject of interest by other departments. The group has also expanded beyond an initial focus of training MSD staff in how the OIA works, to improving staff familiarity with the parliamentary and democratic process.

CONCLUSION

The OIA is a simple but pervasive piece of legislation that works alongside other measures to enable scrutiny of the activities of government. It requires decision-makers to think about requests, and has helped encourage them to make information available more generally and outside the OIA's terms.

The overwhelming majority of requests made under the OIA are easily managed. But some are "sensitive" - the "answer" to the OIA's provisions is not clear and there may be a significant interest in the information that is sought.

Particularly where sensitive requests are received, the best way to make decisions is to be able to engage with the OIA on its own terms, i.e. to weigh up practical harms against the democratic principles the Act sets out. Some potential problems are solved when withholding the information sought is not looked at as the only way to mitigate potential harms from release.

The ease of application of the OIA should not be overshadowed by the few cases in which it can be challenging to apply. These cases are not a "problem" with the OIA. They arise because both the OIA and democracy itself are about the careful balancing of competing considerations. It is in the nature of both that some decisions *should* require careful and principled consideration.

22

Public Servants and the Official Information Act

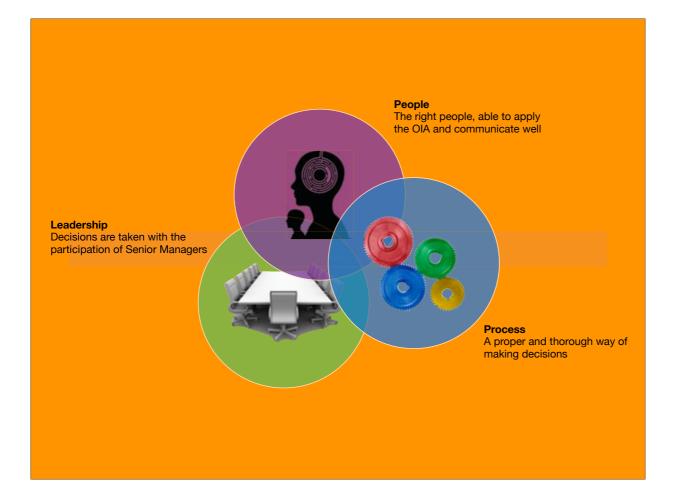


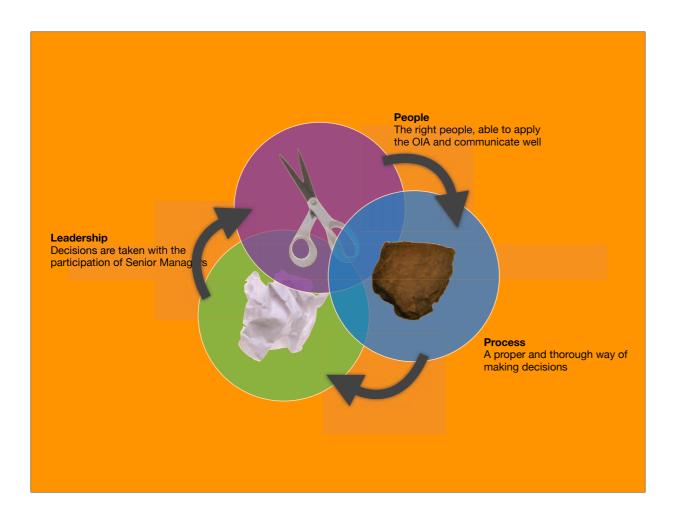


Principle of Availability

The Policy Process, Ministers, Public Servant

The Official Information Act Itself







Bowen State Building, Rowen Street, PO Box 12 136, Voltington • Telephone: 0-4-916 3300 • Facsardle: 0-4-938 0099

PARLIAMENT BUILDINGS

Dear

OFFICAL INFORMATION ACT REQUEST

On 1 September 2003 you wrote to me requesting, under the Official Information Act 1982:

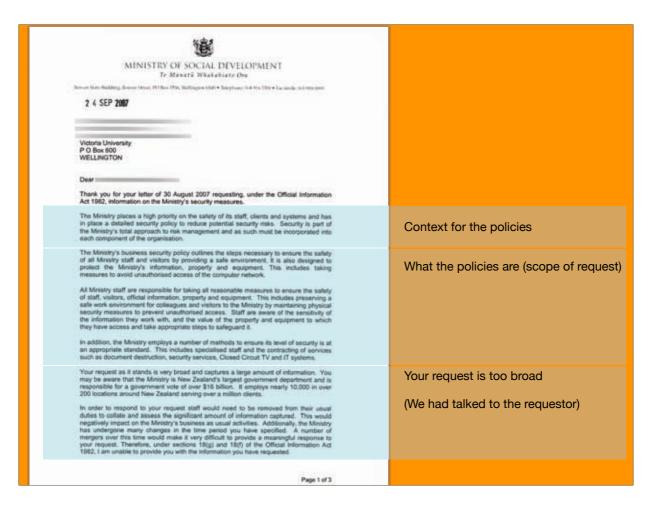
"a copy of the Minutes of the most recent meeting of the Beneficiary Advocates and the Ministry of Social Development."

The most recent notes are those of the meetings of 27 and 28 August 2003. The notes have yet to be discussed and confirmed with the advocates. This will not occur until the next meeting. I am therefore declining your request under sections $\theta(2)(f)(iv)$ and $\theta(2)(g)(i)$ of the Official Information Act.

You have the right under section 28(3) of the Official Information Act to ask an Ombudsman to review my decision to decline your request.

Peter Hughes Chief Executive





have considered whether the Ministry would be able to respond to your request given extra lims, or the ability to charge for the information requested. I have concluded that, is other case, the Ministry's ability to undertake its work would be prejuded.

I understand however, that the Ministry's security specialists will meet with you to discuss the steps the Ministry takes to protect itself. If you would like to take up this opportunity please contact Elisabeth Hewitt, Manager Official and Parliamentary information on (04) 916 3862 or email <u>Elisabeth Hewitt018tmsd.cov/.nz</u> to arrange a suitable time.

In the interim, I am able to provide you with some information that you may find useful. Below, I have outlined some of the steps currently taken across different areas of the Ministry to safeguard itself.

Information Technology

in an organisation, IT security may be centralised in a single IT security unit or de-centralised with the responsibilities for IT security distributed throughout the organisation. Most organisations operate a hybrid model with some IT security functions centralised and others distributed. The Ministry operates a hybrid model, with a centralised IT Security unit with four full time employees. Additionally, approximately nine full time employees perform IT security functions distributed across the Ministry.

Frontline Security

The Ministry recognises that, given the frontline role of many staff and the nature of their work, there is an increased risk of emotional and violent people approaching staff. Abuse or threatening behaviour towards staff is treated very seriously and staff are encouraged to report all incidents to management and where appropriate refer to the Police for investigation. The Ministry also provides follow-up advice and counseling for any staff involved in such incidents.

All Work and Income service centres have permanent security guards deployed and CCTV. Intruder and duress alarms have been installed and all staff have received relevant security training. Additionally, Child, Youth and Family is particularly concerned with social workers' security when out in the field. Sites regularly consult with the Police regarding safety concerns and, where appropriate, can request the Police to accompany a social worker when uplifting a child. These measures overall help to create a safe environment for both staff and clients.

The Ministry takes benefit fraud very seriously, and as part of the Integrity Services group (which includes Benefit Control, the National Data Match Centre and Debt Management), Benefit Control has strategies and plans to ensure the integrity of the benefit system by preventing, detecting and deterring benefit abuse and fraud.

How the section of the OIA was applied

Offer to meet to discuss

Will provide some helpful information

This work includes:

- ensuring clients receive their correct entitlements
 helping clients to be aware of and voluntarily comply with their obligations
 detecting and preventing fraud early, to mitigate client debt escalation and
 consequential barriers to their social and economic independence, and
 investigating irregularities and sanctioning fraud to deter the recurrence of
 offending and to signal to others the seriousness and consequences of benefit
 abuse and fraud.

These activities provide assurance that the integrity of the benefit system is protected.

Staff Fraud

One of the key corporate functions of the Ministry is to detect, investigate and report on all internal staff fraud. In 2002 the Ministry introduced a 'zero tolerance policy' in relation to staff fraud. In every case where a staff member is caught defrauding the system they are damissed, the matter is referred to the Police for prosecution, and full restitution is sought.

Recent analysis carried out indicates that over the last four years the average value of staff fraud has decreased over time, the average duration of offending has decreased and the time taken to identify that disses has reduced over the past three years. A recent IEPMC report noted that the Ministry's practices in detecting and preventing staff fraud were equal to or better than best practice measures. In practice, this means that offenders are being identified earlier, getting away with less fraudulent money and committing fraud for a shorter period of time.

The government requires that official information receives appropriate protection, in some situations, unauthorised disclosure would damage national security, prejudice the interests of the New Zealand government, endanger the safety of New Zealand citzens, obstruct the maintenance of law and order, impode the effective conduct of government in New Zealand or affect adversely the privacy of New Zealanders. The manual Socurity in the Government Sector, issued by the Department of Prime Minister and Cabinal sets out protective security policies, principles and procedures. You can access a copy of the manual at www.zecurity.govi.nz/sigs/sigs.pdf.

I hope you find the Vernice of the Control of the Control

I hope you find this information useful. You have the right to seek an investigation and review of my decision by the Ombudsman, whose address for contact purposes is:

The Ombudsman Office of the Ombu P O Box 10 152 WELLINGTON

Coloraporo

Whole of Government Context and information

How to appeal



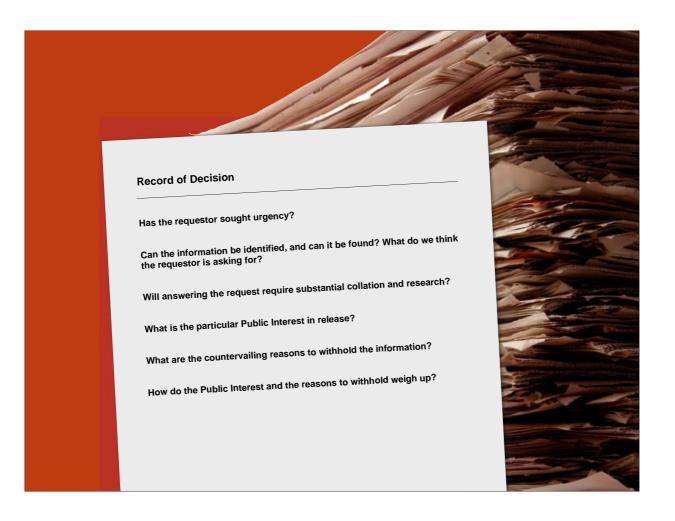
Clear, well recorded decision-making

A culture of professionalism

Well recorded process

Clear, plain english advice

Clear goals





Led from the top

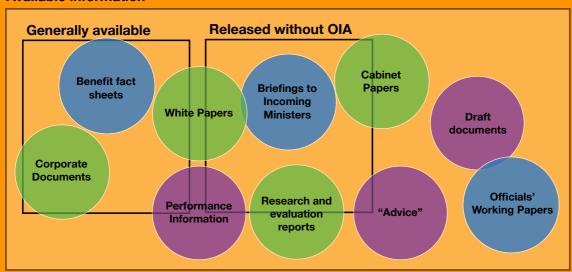
Specialist staff "own" each request

Senior Managers judge harm

Engagement on "how information will be released", not just the OIA



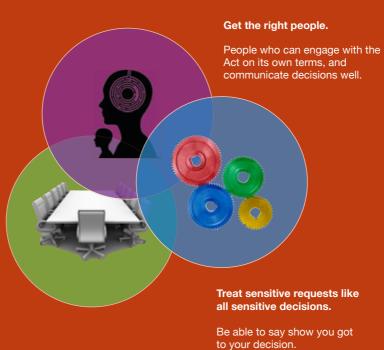
Available information



Lessons

Make "The Release of Information" a responsbility for Senior Managers.

It encourages options beyond the OIA, and bases decisions in "real" harms.



Regime (Un)Change(d)

Richard Thomas

UK Information Commissioner

28 November 2007 ICIC, Wellington, New Zealand





Almost three years on....

- Steep learning curve for all
- Generally positive response from public authorities
- Strong public appetite / high volumes:
 - at least 200,000 requests to public authorities
 - c.7000 complaints to ICO
 - c.6000 cases closed by ICO
 - 740 formal Decision Notices
- Very limited resources for ICO £4.7m total
- Wide respect for ICO Decisions many complex and controversial
- Role of Information Tribunal





Examples of ICO decisions

- Toxic waste
- location of speed cameras
- local authority hedge fund pension investments
- Attorney General's advice on Iraq invasion
- reviews of ID cards
- 1911 Census
- possible location of prostitution zones
- advice to ministers on angling
- implications of dividend taxation for pension funds





ICO Public Survey 2007*

Benefits of being able to access information held by public authorities

Prompted	2004	2005	2006	2007
Increases knowledge of what public authorities do	54%	62%	76%	86%
Promotes accountability and transparency	53%	58%	74%	81%
Increases confidence in public authorities	51%	55%	72%	81%
Increases trust in public authorities	51%	57%	69%	72%

International Conference
th of Information Commissioners
26-29 November 2007 | Wellington | New Zealand



'2007 Annual track research: individuals

Summary of recent events

- Changes to fees regulations proposed and withdrawn
- exclusion of MPs proposed and failed
- Prime Minister's speech
 - symbolic support
 - extension of Act
- ICO funding a continuing saga





Fees Regulations

- No fee for most requests
- Section 12 exemption where cost of complying would exceed £600 / £450
- Regulations fix time at £25 per hour
- includes time locating and retrieving information
- excludes reading, consulting and "consideration" time





1st MoJ Consultation Document

- December 2006 after Frontier Economics report
- total cost of Fol = £35million
- small percentage of requests placing disproportionate costs on public bodies
- proposed inclusion of "consideration" time
- proposed aggregation and likely exclusion of multiple requests from same source





2nd MoJ Consultation Document

- Following widespread negative reaction to proposals....
-MoJ consulted on basic principle of whether any change needed
- 29 March 21 June 2007
- 25 October proposals withdrawn





Members of Parliament

- Included in Act
- ICO rulings on expenses
 - travel
 - housing, office and other allowances
- Tribunal decisions; withdrawal of appeal to High Court
- concerns about disclosures of MPs' correspondence





Freedom of Information (Amendment) Bill 2007

- To exclude information held by Parliament
- support from some MPs of all main parties
- fast-tracked and unnoticed 2nd Reading debate; government "neutral"
- growing controversy at Committee stage
- strong resistance and negative publicity by Report Stage
- eventually passed by House of Commons
- no support or progress in House of Lords





ICO Role

- Independent statutory status
- adjudicatory and enforcement duties and powers
- efficient and effective fulfilment of functions
- "promote good practice"
- limited democratic credentials
- focus on "practicalities"
- aim to be "robust and responsible" expert, authoritative, well-informed and credible





ICO Role - Fees

- ICO written and oral evidence to Select Committee
 20 March 2007
 - status quo working well simple and clear
 - little use of exclusion for vexatiousness
 - proposals "unworkable"
 - estimating time = "uncertain, subjective and open to exaggeration, if not abuse". Time sheets needed.
 - more internal reviews and ICO cases
 - probable deterrent effect
- ICO guidance on vexatious requests
- Responsible Requesters Charter





Select Committee report – 24 June 2007

- "No evidence that the new regime would be sufficiently transparent and subject to adequate review"
- "...could result in PAs avoiding answers to embarrassing, contentious or high-profile cases"
- "..no objective evidence that any change is necessary"





ICO Role - MPs

- Media briefing
- ICO Guidance on MPs' correspondence
- on-going casework and appeals
- public interested in disclosures





Prime Minister on "Liberty" – 25 October 2007

- "A landmark piece of legislation"
- "...inconvenient, at times frustrating and indeed embarrassing for governments. But Fol is the right course because government belongs to the people."
- "There is more we can do to change the culture and workings of government to make it more open."
- "We should have the freest possible flow of information between government and the people."
- "Public information does not belong to government. It belongs to the public on whose behalf government is conducted. Wherever possible that should be the guiding principle behind the implementation of our Freedom of Information Act."





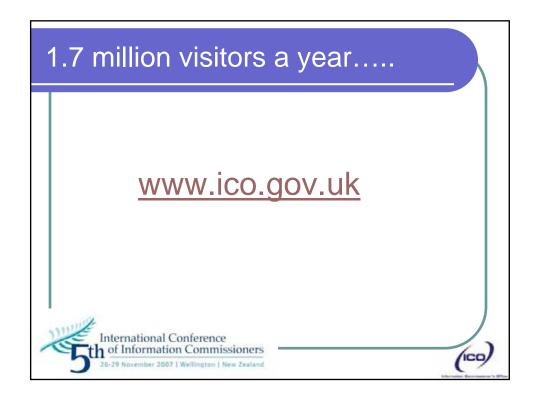
Prime Minister on "Liberty" – 25 October 2007

- "We will not tighten the Fol fees regulations...because of the risk of placing unacceptable barriers between the people and public information."
- Consultation on extending FoIA to private companies carrying out public functions
- more proactive disclosures and review of 30 Year Rule
- "[The PM] learnt from that bruising episode [pensions taxation] that concealment can be more damaging than disclosure" (Observer 28.10.07)
- But.....more resources for ICO??
- Will High Court challenges match rhetoric?











Emily O'Reilly

Information Commissioner Ireland

${\bf Paper\ delivered\ at\ the}$ ${\bf 5}^{\rm th}$ International Conference of Information Commissioners

FOI "Regime Change": Should Information Commissioners Play a Role?

The question posed in this afternoon's session is whether Information Commissioners should seek to influence the shape and scope of the FOI legislation under which they work. Should they, in particular, become involved where there are proposals to change FOI law in a way which will render FOI less useful in terms of openness and transparency? And if the answer to these questions is "YES", the related question is how precisely should Information Commissioners involve themselves: by way of quiet, behind the scenes contacts? By way of direct advice to Parliament? By way of active lobbying (including use of the media and public forums)? Or by way of some combination of these approaches?

Of course, each Information Commissioner is the creature of the legislation which created the office as well as being constrained by the wider legal system of his or her country. This may mean that, for some Information Commissioners, the role appears to be purely adjudicatory and the FOI legislation does not confer any function in the area of promotion of standards of good practice or in supporting and promoting the principles of openness and transparency in government. But, where this seems to be the case, I would ask this question: where the term "Information Commissioner" is used (or its equivalent in the particular country's language), does it by definition include certain implicit attributes? Is it implicit that an Information Commissioner's functions include the promotion of transparency and openness in government? That an Information Commissioner will necessarily engage in public debate, and engage with Parliament,

whenever these matters arise? Or, where there is no debate on openness and transparency in government, is it not implicit that an Information Commissioner is mandated to encourage such a debate? Issues of personal style are also relevant: some Commissioners will be natural activists and lobbyists; some will be cautious and careful, by instinct or experience, or both; and many (perhaps the majority) will fall somewhere in between. While the matter of personal style may be relevant to a Commissioner's approach to adjudication in individual appeal cases, even more so is it a factor in a Commissioner's approach to lobbying and influencing.

A Commissioner's personal style, and I include in that personal beliefs, philosophies, ideologies also comes into play in the decision making process as well, specifically at that point when a public interest override emerges for consideration in a case. In many instances the resolution will be obvious but in other cases highly subjective views as to what constitutes the public interest may emerge, the same views that come into play when the wider issue that we are discussing today is at stake.

At this early stage in my contribution, I would offer these tentative answers to the questions posed in this session:

YES - an Information Commissioner should seek to influence the shape and scope of the FOI legislation under which he or she works.

YES - an Information Commissioner should become involved where there are proposals to change FOI law in a way which will render FOI less useful in terms of openness and transparency.

YES - an Information Commissioner should be involved in public debate on all issues to do with transparency and openness in government.

I recognise that, in acting in this fashion, an Information Commissioner is inevitably drawn into politics. This should not be surprising; nor should it be an excuse for refusing to engage in public on issues of openness and transparency in government. Freedom of Information, after all, is quintessentially political. Politics should be the concern of all of us in public life and, while there is a particular role for elected political representatives, politics is not the preserve of elected politicians.

Freedom of Information is now part of the political fabric of very many countries and, not surprisingly, frequently it becomes a political football: used as a tool to embarrass government by the Opposition and disliked by government which often tries to restrict its use by amending the FOI law (even though, while in opposition themselves, government parties will have been ardent advocates of stronger FOI laws).

I recognise that for many people, that may be a challenging view. Some might question our objectivity our neutrality, in interpreting our respective FOI legislation if they sense that in our view the legislation is too restrictive. Is there a legitimate concern that we might over stretch the boundaries in our zeal to do our bit to promote what WE consider to be the appropriate levels of openness and transparency. I imagine however, that if that were the case, the checks and balances within the system - generally in the form of court appeals - would soon root out the pure ideologues from our ranks.

While it can be difficult to keep up to date with FOI developments internationally, it is clear from even a brief survey that, in many countries, FOI is struggling to maintain its position and/or struggling to achieve real relevance. The United Kingdom, as I understand it, has recently had a "near miss" in terms of FOI restrictions. The UK Act became operative in January 2005; but by early 2007 it became clear that the government intended to change the legislation to limit its use, principally by amending the charging regime in a way that would, in effect, exclude many requests. Recently, the new UK Prime Minister announced that his government would not proceed with these proposals and, instead, committed itself to strengthening the FOI Act. I'm sure Richard Thomas will be able to tell how us how this turn-about was achieved and the role he played in it. We will all be taking careful notes.

Also, from what I read at least, the FOI world of Australia is not very happy with what it perceives as government hostility to Freedom of Information. A recent audit of freedom of speech, produced for the Australian Right to Know campaign, concluded that the intention of FOI law is often frustrated both by the broad nature of some of the exemption provisions and by the willingness of government to exploit these provisions. This audit was prepared by Irene Moss, a former NSW ombudsman, who is reported to have observed:

"Claims that FOI is achieving its intended purpose, including opening government activities to scrutiny and criticism, are not substantiated by the evidence".

In Canada, again as I understand it, the former federal Information Commissioner, John Reid, had been at odds with government for several years over (as he saw it) the failure to support his Office, the failure to reform the FOI legislation and, perhaps most importantly, the failure to encourage public servants to set aside the culture of secrecy. Last year, a Commission of Inquiry into a sponsorship scandal delivered a very strong report on the need for radical reform of Canada's Access to Information Act; the Inquiry, headed by a Superior Court judge, castigated an overemphasis on secrecy within government and found in favour of the principle of release of information with very strict limits on the grounds for refusing information requests. From what I have read, it appears that the position in Canada has remained unchanged. In his first Annual Report (2006-2007), the new Canadian Information Commissioner appears to paint a picture similar to that painted by John Reid. Commissioner Marleau makes this comment in his first Report:

"Despite much progress since 1983, there remain impediments to the full realisation of Parliament's intent as expressed in the Act. Too often, responses to access requests are late, incomplete, or overly-censored. Too often, access is denied to hide wrongdoing, or to protect officials or governments from embarrassment, rather than to serve a legitimate confidentiality requirement. Year after year, in the pages of these reports, Information Commissioners recount what is going wrong and offer views on how to make it right."

I was also taken with this comment from the new Canadian Commissioner in his first Annual Report, and I think its validity is something many of us can testify to:

"History has shown that the care and nurturing of the Act falls largely to Senators and MPs who are not in Cabinet. That is understandable. Governments of all political stripes find it a challenge to wield power (and keep power) without keeping secrets - or, at least, without maintaining control over the timing and "spin" of information disclosures."

My purpose in referring to the UK, Australia and Canada - and I hope I have represented their situations reasonably accurately - is to suggest that, for many Information Commissioners, their working environment is challenging and, furthermore, these challenges are normal and to be expected. Because such challenges are inevitable, and because there is typically a political dimension to them, I think it is important that Information Commissioners should be clear as to how they will respond to these challenges.

I think I would be quite unwise to prescribe one single strategy for dealing with these challenges. Essentially, it comes down to a view as to which strategy is most likely to work. However, it is the business of Information Commissioners to promote openness and transparency in government and we should be guided by this imperative. Furthermore, most Information Commissioners are independent of government and this independence is something we should be prepared to invoke, where necessary.

IRELAND'S EXPERIENCE

Having set the scene, as it were, you may be interested to hear a little of our experience in Ireland in recent years.

Ireland's FOI Act was enacted in April 1997 and came into effect one year later, in April 1998. Our FOI Act was preceded by a lengthy and quite comprehensive consultation process which involved all of the interested parties, including politicians, media, academics and civil society groups.

The Act itself was based on FOI legislation in a number of Common Law jurisdictions, with particular debts owed to Queensland, the Commonwealth of Australia, New Zealand and some Canadian provincial FOI laws. Ireland's FOI Act of 1997 was widely regarded as a very good example of what a modern FOI Act should be and, indeed, served as a model for some other countries. In the first few years of its operation, perhaps predictably enough, there were some decisions which ruffled feathers or at least caused some unease in official quarters. Everyone knew that at some stage it would be necessary to review the Act - both from a technical/procedural point of view and also from a substantive or policy point of view.

In August 2002 my predecessor, Kevin Murphy, initiated his own "in-house" review of the Act in order to be in a position to contribute to a wider FOI Act review - whenever that might be. What he did not know then was that the recently re-elected Government had already initiated its own "in-house" review of the FOI Act and that this review would lead to substantial amendments to the Act of 1997.

In June 2002 the Government appointed a High Level Review Group to look at the working of the FOI Act; the group consisted of five Secretaries General chaired by the Secretary General to the Government. This Group did not engage in consultation with any parties outside of government; as its report puts it, members of the Group "drew upon their own experiences and experiences of others of which they were aware, including that of their respective Ministers". Indeed, the Group's existence remained effectively a secret until February 2003 - six weeks after the completion of the review. Given that Ireland is a relatively small country, and not always noted for its capacity to keep a secret, this was some achievement.

On 12 February 2003, mind you in response to parliamentary questioning, the Irish Taoiseach or Prime Minister acknowledged that a Bill was being prepared to amend the FOI Act of 1997. That Bill was published on 28 February and the resultant Act came into effect precisely six weeks later, on 11 April 2003. During that six week period, the proposed amendments became a matter of major controversy in Ireland. The proposals—which I will outline shortly—were very vociferously opposed not just by the Opposition parties but by the media (both media owners and journalists), by trade unions (including, interestingly, some public service unions as well as the Irish Congress of Trade Unions) and by the leading civil liberties organisation. There were lengthy (though sometimes guillotined) debates in the two Houses of Parliament and there was a number of days consideration by a Joint Committee of the two Houses of Parliament. Matters took a rather bizarre turn when, at the height of the parliamentary debate, the Minister sponsoring the FOI Bill (the Minister for Finance), and his Junior Minister both chose to take some days off to attend the annual Cheltenham Race Meeting!

In the event, the Bill as published was enacted with only minor changes. While she was asked by the Opposition parties and by many in the media to refer the Bill to the Supreme Court to have its constitutionality tested, the President signed the Bill into law. Looked at dispassionately, it is hard not to admire the political acumen of the then

Minister for Finance in ensuring the success of his project to amend the FOI Act. Whether his methods - which the Blair/Brown government in the UK must surely envy - are to be admired, well, that's another day's work!

So what, then, were these FOI changes which caused such a furore? They may be summarised under the following headings:

Government Business:

the potential right of access to records of Government was pushed back from five to 10 years;

all Government records, less than 10 years old, became mandatorily exempt (shall be refused rather than may be refused);

communications between Ministers relating to a matter before Government became mandatorily exempt;

where appropriate, a committee of officials can now be deemed to be the Government for the purposes of the Act.

Deliberative Process:

The Secretary General of a Department of State was given the effective power to terminate a FOI request - with no right of appeal - by certifying that records form part of the deliberative process of any Department of State; the public interest test was recast; previously, the "deliberative process" exemption applied only where release of the records sought was contrary to the public interest; following the Amendment Act, the "deliberative process" exemption does not apply where, on balance, the public interest is better served by release than by withholding the records.

Security/Defence/International Relations:

The Bill provided for a mandatory class exemption for records which concern security, defence or international relations of the State or matters relating to Northern Ireland; this eliminates the need for a public body to identify a specific harm caused by release of the particular record. For example, a record containing a communication between a Minister and a diplomatic or consular post will now be refused without reference to the effect of its particular contents on international relations.

Fees:

One of the changes with most repercussions for the average user of the FOI Act and, indeed, for public bodies processing requests, was the provision enabling the Minister for Finance to prescribe fees (a) for the making of a request for access to non-personal record, (b) for an application for internal review and (c) for review by my Office. Under the Regulations introduced in July 2003 a range of fees now apply:

15 Euro for a request

75 Euro for an internal review application, and

150 Euro for an application to my Office to review the decision of the public body.

A discount on these amounts applies to certain people on low incomes.

INFORMATION COMMISSIONER'S RESPONSE TO BILL

At this point I will outline how my predecessor as Information Commissioner, Kevin Murphy, responded to the publication of the Bill to amend the FOI Act. [As it happens, Kevin was due to retire within a few months - in June 2003.] He declined to become involved in the debate in the media though, I understand, there was a clamour for him to make known his views. The fact that he had not been informed of the review of the Act, and had not been invited to participate or at least to put forward his views, might have been expected to rankle. The then Commissioner took the view that the office is politically neutral and that it would be ill advised of him to intervene in a manner that might be perceived as being politically motivated. For this reason, he felt he should avoid becoming involved in a debate about the merits or demerits of the Bill's provisions. Significantly, he described these restrictions on his involvement in the debate as "self imposed", and commented that while he was not restricted in what he could say, he had chosen to restrict himself in his comments in the long-term interests of the Office.

At the same time, the then Commissioner had regard to his statutory reporting relationship with Parliament which, as he saw it, included making his FOI expertise available to members of Parliament to assist them in their consideration of the Bill.

In the event, the then Commissioner contributed to the debate on the Bill by way of a detailed, written commentary on the implications for FOI should the Bill's provisions be enacted. This commentary was completed within two weeks of the Bill's publication,

submitted to Parliament and then published generally. In effect, the then Commissioner took the key provisions of the Bill and subjected them to scrutiny in terms of what would be the effect should the provision be enacted. He did this by applying the proposed new provisions to the circumstances of previous cases, already decided under the then existing legislation, and showing what would be the outcome under the proposed provision. This was a technical commentary which, as he noted at the time, was not intended for the general reader but intended as an aid to those involved in an analysis of the Bill.

Inevitably, the Commissioner's commentary identified significant difficulties with some of the Bill's provisions. In particular, he drew attention to two provisions which, in his view, "could create serious legal and other problems in the future and which have the potential to result in costly litigation possibly involving [the Commissioner's]

Office." The first of these provisions had to do with protecting the work of a "committee of officials" set up to assist the Government directly in relation to a specific matter; and the mechanism chosen to achieve this objective was a re-definition of the term "Government" to include a committee of officials even where not one of the committee members was a member of the "real" Government. The then Commissioner described this new definition of "Government" as "constitutionally unrecognisable".

The second provision singled out by the then Commissioner concerned the proposal whereby a Secretary General of a Department could issue a certificate that a record contains matter relating to the deliberative processes of a Department of State and this certificate would cause the FOI process to be halted. Where such a certificate is issued, there is no right of appeal either to the Information Commissioner or to the High Court. Given the wording of the provision - which is now part of our FOI Act - it could give rise to bizarre outcomes, including a requirement that a Minister would be required to comply with a certificate issued by a Secretary General - and not necessarily the Minister's own Secretary General. For example, as Kevin Murphy noted, the Minister for Finance could be required "to refuse to grant a request for access to a record which was certified by the Secretary General of the Department of Justice [...] to relate to the deliberative processes of the Department of Agriculture & Food."

Perhaps equally inevitably, the Commissioner's intervention drew down the wrath of some in the government parties who interpreted his commentary as an unwarranted intrusion into politics. For example, the then Minister for Justice accused Kevin Murphy of having "strayed across his self-imposed line" and asserted that section 39 of the FOI Act (under which the Commissioner produced his Commentary) "does not entitle him to comment on Bills". When the then Commissioner appeared before a Joint Committee of Parliament, he encountered a certain level of hostility from some of the Committee's members. One senator, in effect, accused the Commissioner of having timed the release of his Commentary to embarrass the Government and to provide ammunition for the Opposition. The same senator suggested, very helpfully, that the Commissioner should not have commented at all until the Bill had been passed; after that it would be quite all right for the Commissioner to say whatever he liked about the new law.

As regards the suggested amendments arising from the Commissioner's own "in-house" review, very few of them were acted upon. This was because, according to the Department of Finance, there was enough time to process them into legislative language once the Bill had already been published.

IMPACT OF FOI AMENDMENT ACT

There is no doubt but that the 2003 amendments have had some negative consequences for the operation of FOI in Ireland. The most obvious consequence has been a marked decline in the use of FOI as a direct reaction to the imposition of fees. There has also been a marked decline in the level of appeals being made to my Office and again this is a function of the high fee which must be paid to make such an appeal. A related factor is that, arising from the controversial amendments of 2003, a general perception developed that FOI was no longer open for business.

For example, in 2006 (last year for which figures available) the number of FOI requests made across the public sector was 32% lower than the figure for 2002. And if one looks solely at requests involving "official" or "policy" information - as opposed to personal information where, generally, fees do not apply - between 2002 and 2006 such requests dropped by 55% (from 7,936 in 2002 to 3,499 in 2006). And this despite the fact that a substantial number of additional bodies were subject to FOI in 2006 as against 2002.

However, all is not doom and gloom and FOI continues to be an essential element in the conduct of public life in Ireland. The worst case scenario, predicted by many following

the 2003 amendments, has not come about. Up to the end of 2006, there has not been any instance in which a committee of officials has been certified as being "the Government" for FOI purposes. And in relation to the provision enabling the Secretary General of a Department to certify that a record is part of a deliberative process (thus putting the record beyond the reach of FOI), there has been only one such certificate issued in the period 2003 - 2006. Whether the reluctance to use these provisions has anything to do with the controversy they generated in 2003, is something to think about. I would be reasonably certain that, in the light of the intense controversy generated by these provisions when they were before Parliament at Bill stage, there is a marked reluctance on the part of Secretaries General to invoke these provisions. However, it would be wide of the mark were I to suggest that Ministers and their Secretaries General are now positive enthusiasts where FOI is concerned.

For my own part, in my Reports to Parliament, in my appearances before Committees of Parliament, and in many of my speaking engagements, I continue to draw attention to the need for a full re-assessment of the FOI Act and of the amendments made in 2003. The issue of FOI remains politically contentious with the Opposition parties continuing to argue that the 2003 Act should be repealed.

MAIN QUESTION

To return, now, to the issues raised at the outset. It seems to me that there are two broad conclusions to be drawn from what I've been saying. The first conclusion is that an Information Commissioner must be an advocate for openness and transparency in government and that this is a necessary element of the job - whether or not it is reflected in whatever statutory or other instrument establishes the office. It seems to me that the use of the term "Information Commissioner" necessarily implies an advocacy role in support of openness and transparency. In this sense, the use of the term "Information Commissioner" carries the openness and transparency baggage with it just as much as the use of the term "Judge" carries with it a necessary commitment to seeing that justice is done.

The second conclusion is that there can be no single prescription as to how an Information Commissioner will fulfil his or her advocacy role in support of openness and transparency. What is most likely to work in the particular circumstances is what counts.

However, what is of importance is that Information Commissioners should act with a sense of purpose and with that independence which (in most cases) is central to their office.

To return to a point I made at the start, party politics is not our business, but we are all political actors in the wider sense and should not shy from that. A recent, highly controversial Book, published in the UK by the British political journalist Peter Oborne, highlights the extent to which, in his view, the so-called Political Class has cannibalised areas of civic, judicial and public life that is has no business interfering in. He points out that the politicians are but one set of actors on the stage, not the entire company and calls for the reclaiming of that territory they have stuck their flag poles in. Freedom of Information is not the private water supply of a government, to be adjusted only in reference to their needs. It is a public supply, for the benefit of all, and while it may be uncomfortable for some to have to remind them that that is the case, it is no less than our public duty to do so.

Thank you.





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 ${\bf Paper\ delivered\ at\ the}$ ${\bf 5}^{\rm th}$ International Conference of Information Commissioners

"FOI and Countries in Transition - Off the shelf software or custom built? The Asian Experience" – a work in progress

Abstract

The rapid spread of countries adopting FOI, especially in the last decade, raises the question of whether there are any country conditions (economical, political, size, cultural or infrastructure) which limit or ought to limit the adoption of FOI? The international pressures (both from NGOs and multilateral organizations) and domestic pressures for further adoption of FOI remain strong. Within the Asian region several countries (Cambodia, Indonesia, Malaysia, Philippines, Sri Lanka) are at various stages of developing FOI laws.

The political systems, information environments and records management capacity of these countries may pose serious or insurmountable difficulties for the effective adoption of FOI regimes. The marketing of Best Practice Standards and the pressures to match model laws may lead countries to adopt FOI systems that are more dysfunctional, disruptive and likely to under perform than adopting more tailored systems.

The author uses this paper to reflect upon his experiences of the FOI reform process in Asia, in particular 10 weeks of secondment to Cambodia, and developing research that

focuses on the relationship between FOI and information management and the wider political environment.

Author's note

This paper was first developed as a talk at the 5th International Information Commissioner's Conference in Wellington New Zealand 26th-29th November 2007. It started life simply as a reflection on my first 7 week consultancy earlier that year in Cambodia. By the time I got to the conference my thinking had further progressed and I had arrived straight from a 2 week return visit to Cambodia having discovered that the drafting of policy on FOI had entered a strange twilight zone of inaction. The next 4 days of the conference triggered more thoughts and reactions as well as discussions/debates with Toby Mendel who was presenting on the same panel. By the time I stood up to talk my paper was in need of a significant update.

Since that time I have been fortunate enough to give a series of presentations at various US law schools and at a seminar at the World Bank (a copy of the notes to that talk at the end of this paper). So it is still a work in progress.

Introduction

We are witnessing one of the most rapid and extensive periods of adoption of law reform in history. In the late 1980s FOI was perceived to be a reform limited to only a few countries in a subset of liberal western democratic countries. Prospects for expansion within this natural territory seemed limited and its spread to countries like the UK, Ireland, Germany etc was seen as unlikely or at the least highly problematic. The preconditions for FOI reform seemed to require a strong parliamentary system and governments willing and able to surrender, or at least share, a significant political advantage – control over or access to government information – with opposition parties, citizens and the press. Furthermore these systems had strong and extensive networks of information intermediaries who were able to filter, refine and transmit the raw information caught by relatively random FOI requests. A prediction, at the time, that within 20 years countries like Mexico, Thailand, India, South Africa, Nepal and China would have FOI laws and that serious moves to introduce such laws into Cambodia, Indonesia, Kenya and South Pacific countries would be occurring would have been dismissed as unrealistic fantasy.

Like a wildfire FOI has jumped these assumed containment barriers, raised serious questions about whether any preconditions are needed for such laws and indeed seems to be viewed, and often used, as a tool or catalyst towards transforming weak or even undemocratic systems. FOI has gone from being a desirable but optional luxury benefit for a mature democracy to being an essential element of economic, political and social development in all countries.¹

Mendel² and Roberts³ convincingly argue that the right to information is both an underpinning right for other rights and is a right in itself and therefore has or ought to have a universal applicability. The purpose of this paper is not to contest that claim but to

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This is shown in the text and sentiment of the Atlanta Declaration made at International Conference on the Right to Public Information The Carter Center Feb. 27-29, 2008. See http://www.cartercenter.org/peace/americas/ati conference/right to public information conf.html [accessed 21 April 2008]

Mendel, T"FOI and Countries in Transition: Off the Shelf Software or Custom Built? From Policy to Practice" presented at 5th International Conference of Information Commissioners 26-29 November 2007, Wellington, New Zealand.

Roberts, A., "<u>Structural pluralism and the right to information</u>." University of Toronto Law Journal, 51.3 (July 2001), pp. 243-271

speculate whether the tools, methods and approaches we have seen with the first 70 countries can or should be replicated in all of the next 100 countries.

Furthermore we need to develop further research into FOI. For a long period we have been moving rapidly through unknown territory with little time for reflection, critical evaluation of progress and achievement or the necessity to reconsider our future trajectory.

In particular Professor Roberts challenged the attendees at the 5th International Information Commissioners Conference to think about a number of research questions including:

- What has happened so far in those 70 countries that have FOI?
- Is there anything we can learn especially in the area of implementation especially the amount, type and length of that implementation process?
- Has the nature of state, public and private power and activity required a change to how we draft, implement and review our access legislation?

We have an 'information deficit' about what the outcomes will be after the 'honeymoon periods' of relatively recent legislation (ie post 2000). Most established FOI systems have experienced governments that, over time, have undermined FOI laws by legislation, tolerance of undesirable administrative practices or failed to maintain funding at a sufficient level.

That does not mean that civil society, institutional bodies like the World Bank and governments (via agencies like USAID and AUSAID) should stop their activities in developing and pushing for FOI. Nor that the inspirational example of India should not be used to stimulate the demand for a right to information in countries which I would label extreme or harsh environments. Simply we need to be as successful in our research and evaluation as we have been in our advocacy and adoption efforts.

As Colin Bruce, from the World Bank, indicated at the Wellington Conference studies are needed to persuade decisionmakers, funders and governments of the need for or desirability of FOI – and advocates should be able to show verified or at least better demonstrated benefits/gains..

This paper was sparked by a conversation with Professor Alasdair Roberts in June 2006 when we accidentally met at an intersection in Ottawa. At dinner that night we reflected on our involvement or experiences in introducing FOI in countries that have since taken up the concept – South Africa, India, Jamaica and countries which are still somewhere short of that objective despite significant efforts – Indonesia, Philippines, Bermuda, Fiji, Malaysia and Ethiopia. We then reflected on our other work which has been a serious questioning of the level and type of compliance with both the letter and spirit of FOI laws in the older regimes like Australia, Canada and New Zealand. We speculated whether one size, type or form of FOI was indeed suitable for every country. This paper does not definitively answer that speculation but will hopefully help develop this conversation further.

The Problem for FOI in the New Territories

In his abstract, for the Wellington Conference, Toby Mendel argued that his comments are not directed towards different legal systems using different mechanisms or where the basic principles of the rule of law were not in play. Yet these are many of the very systems which have not embraced this progressive legislation and may need a far more context-tailored approach precisely to avoid an official backlash. It is a question of how we can best achieve the main objectives of FOI in less than ideal environments where there are heightened and more active levels of corruption and vested interests that will be disrupted by FOI. Indeed, where there are more profound issues of civil service capacity, competence and independence. Where the tolerance for political opposition, investigative journalism and simple questioning of competency is not only low or non-existent but is often reacted to with a heavy hand or with cold, calculating and lethal violence.

This paper is an initial attempt to ask the question whether there are any country conditions (economical, political, size, cultural or infrastructure) which limit or ought to limit the adoption of FOI? The focus is on how FOI will or might operate in extreme environments. These extreme or harsh environments can be found in a range of largely Asian and African countries but also a number of Middle Eastern states. Extreme environment whether due to:

- High levels of corruption
- Absence of or significant weaknesses in the rule of law

- Political Space being small or almost non-existent⁴
- Absence or serious deficiencies in the factors seen as vital in Megan Carter's presentation at the Wellington Conference:
 - Accountability framework
 - Legislative component
 - Administrative support (especially recordkeeping)
 - Effective training
 - Public education

These challenges or difficulties are compounded by the problem faced by microstates especially in the Pacific –

- Tyranny of distance
- Disparity in resources
- Smallness and weakness of civil society
- Political instability
- Language and cultural issues including the requirements of customary laws and traditions
- Poor or slow law adoption and implementation

Therefore the policy issue confronting reformers is whether to aim for best practice or model laws for those countries faced with an extreme environment. Secondly should reformers plan with the expectation that implementation will be limited, restricted and the chances of failure high? Certainly there appears to be a strong case to roll out FOI with other measures, effective support and a long term plan, and adequate resourcing for implementation. A position recognisied by those developing the integrity of government approach to accountability.⁵

Asia offers a good case study area for both the global phenomenon of countries taking up FOI and the new cohort of countries grappling with whether to adopt the concept and what type of model. The paper examines developments in Cambodia, in some detail to explore some of the issues posed for FOI planners, reformers and implementers.

See Brown AJ, "Putting Administrative Law Back Into Integrity and Putting Integrity Back Into Administrative Law" AIAL Forum No.53, 32-56

⁴ A point made in Kevin Dunion's presentation at the Wellington Conference.

The spread of FOI through Asia has been comparatively slow after an initial surge in the late 1990s (Thailand, Japan and South Korea) but shows some signs of accelerating (China and Nepal passing laws in 2007). To date most of the Asian countries adopting FOI have done so with a minimum of external involvement and often initially starting at the provincial level. A pattern that has been repeated by China. There are serious efforts at FOI reform underway in Indonesia Philippines, Malaysia, Sri Lanka and Cambodia

As Nicola White has observed many overlook the function of FOI as one of the mechanisms, albeit very significant, to improve the relationship between governments and citizens where each gain a mutual advantage in communication and co-operation. Often FOI is agitated for and promoted as an end in itself. Attention is devoted to the mechanism rather than concentrating on systems and processes. Organisations such as Article 19 evaluate new countries efforts at drafting FOI laws on how closely they come to a mandated set of guiding principles or how far they depart from a model law. Their monitoring is not directed to the nature, quality and strength of information flows after the adoption of legislation.

Yet the lessons we can derive from many countries that have a long experience with FOI raise concerns about how FOI will operate in unreasonable or tough environments – high corruption, heightened political sensitivity or where the priority is to channel all surplus resources to basic lifesaving or development issues (provision of clean water or other basic infrastructure).

There is strong evidence of the difficulty that FOI operates under "in contentious and politically charged circumstances". Indeed the research of Roberts, Snell, the Australian Law Reform Commission, the Canadian Access to Information Review Taskforce, Alhadeff and White establish that FOI schemes face serious non-compliance issues when a significant number of requests are lodged within what White describes as the "political zone". In this area the "Act operates very weakly and is easily manipulated or ignored to achieve political outcomes."

Nicola White, Free and Frank: Making the New Zealand Official Information Act 1982 Work Better, institute of Policy Studies 2007, 32.

White see Note 6 at 6.

White see Note 6 at 3.

White see Note 6 at 9.

Reformers of FOI need to take into account both the overt and latent hostility that FOI can generate. FOI intrudes into the most sensitive areas of policy development, government information management and areas of intense political sensitivity or volatility. There will be a wide spectrum of users but many will be employing FOI for mainly political purposes (opposition members of parliament and lobby groups) or to fuel, or create, public debate and interest (journalists). Australian FOI was once described as political dynamite. ¹⁰ In reality few FOI requests have this capacity yet those charged with its administration never know which request will turn out to be the exception to the rule and therefore as a precaution treat every non-personal affairs request as potentially damaging to the government.

Governments will always approach FOI with caution and will be inclined to utilise fees, time delays, exemption provisions and litigation to minimise or manage the potential threat(s) of FOI. Therefore any FOI legislation needs to have provisions and controls that moderate or at least partially offset the inevitable attempts at political and/or bureaucratic control and manipulation.

When we look at how any FOI Act would operate in countries like Cambodia or Indonesia then this "political zone" is going to be far more extensive, more sensitive and far more likely to produce more manipulation or non-compliance than similar requests in the first wave FOI countries or even second or third wave countries.

Therefore in countries like Cambodia do we strive, and hold out, for best practice or world class standard legislation or do we in Toby Mendel's words produce a more context-tailored approach? Should that context-tailored approach only be in specific areas like appeal mechanisms or can all elements be custom designed or phased in? Is the key objective to get best practice legislation onto the statute books or can we work on a process that is more evolutionary and incremental?

There are already a number of examples of phased in approaches;

• Some schemes have delayed the introduction of the Act – UK (5 years) and Tasmania (2 years) to allow the civil service to prepare.

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Hughes C,"Commentaries" Federal Law Review Vol14 No. 1, 1983 at 31.

- Roll out the legislation over time to various agencies from core to outer agencies (Ireland hospitals, police, universities, Tasmania local government)
- Initially limit appeals the Northern Territory in Australia prevented appeals to an Information Commissioner in the first year of operation.
- In some countries would it be better to commence with a test agency within which expertise and capacity could be developed which could be progressively extended to other agencies?

Fitting FOI into Harsher Environments

Within the countries that now have FOI there is a vast variety in terms of country types, political, economic, social characteristics and stories related to the adoption of the legislation. Yet we are entering new and very different territory with the countries that are taking initial and often slow steps, and more so where there is little activity by governments or civil society, towards adopting the legislation. In general these countries rank significantly higher in indices of corruption, poverty, restrictions on press and other freedoms. These countries are likely to be located in Africa, Asia or the Pacific. They are more likely to be one party states or heavily dominated by the ruling party. Their civil services are more likely to be seen as weak or dysfunctional and major weaknesses in developing their countries. They are more likely to be governments struggling with overwhelming problems of trying to achieve even the most minimal goals of economic development. The rule of law is weaker or indeed largely non-existent.

Finally the countries are less likely to have any experience with judicial or non-judicial institutions that act independent of the government of the day. Asia offers a good case study area for both the global phenomenon of countries taking up FOI and the new cohort of countries grappling with whether to adopt the concept and if so how. This paper will examine developments in Cambodia, in some detail, and Indonesia in brief, to explore some of the issues posed for FOI planners, reformers and implementers.

Cambodia – the current state of access

Cambodia represents an example of one of the future possible patterns of FOI reform. Cambodia is a country of approximately 14 million people that ranks consistently high on corruption indexes (130/158 in 2005) is a perennial low performer on a number of World Bank development indicators and has a civil service widely recognisied as being underpaid, understaffed and severely lacking capacity and bedevilled by corruption. Many officials not only use their offices for profit but they often have purchased those offices to allow them the very opportunity to seek rents from that position – from the lowest levels of the civil service to Ministerial level. Indeed new laws are often quickly exploited as new ways to earn or extract money. Access to government information is low, uncertain and normally requires under the table payments for access to occur or to be achieved quickly. Over 80% of Cambodians do not have reliable or accurate birth registration details and therefore find simply acquiring identification papers a difficult and uncertain process.

Adler completed a case study on the problems of simply accessing legal information in Cambodia.¹¹ These problems included:

- A diversity of law making bodies
- Publication of laws intermittent, incomplete and un-indexed
- Court judgments and other important legal documents are not made public

A 2003 survey by STREAM of information access in the area of fisheries can be applied generally throughout Cambodia. ¹² The survey concluded:

"It is difficult for staff from all levels of the Department of Fisheries (DOF) to access information on aquatic resources management issues from outside and within the DOF, unless supported by an external party. Low budgets, low salaries, low motivation, a lack of resources, and a highly bureaucratic and formal working environment are all contributing factors. As is the case

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Daniel Adler, 'Access to Legal Information in Cambodia: Initial Steps, Future Possibilities', 2005

(2) The Journal of Information, Law and Technology (JILT).

http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2005_2/adler/

Mee et al, Information Access Survey Cambodia March 2003.

throughout Cambodian society, informal contacts with colleagues and friends within the government hierarchy are important sources of information."¹³

The legal framework in Cambodia

Cambodia presents a fascinating study for those interested in comparative law. First and foremost Cambodia's legal system has been described as an amalgam – or more precisely a constantly changing composite - of customary and Buddhist elements, pre-1975 statutes modelled on French law, a period of no rules and indeed the dismantling and demolition of the legal system, 'communist-era legislation dating from 1979-1991, statutes put in place by the United Nations Transitional Authority in Cambodia (UNTAC) during 1991-93, and legislation passed by the government since 1993.' The post 1993 legislation is a further mixture of legislation transplanted from, or designed by experts from, or trained in, the United States, Japan, Russia, France, Australia and Denmark. A first reading of the material seems to offer no evidence of any co-ordination or analysis to guide this ad hoc experimentation in law reform. Furthermore significant areas of government either do not have supporting legislation or where there has often been significant periods of time often 5-10 years – where no legislation existed.

In addition the Cambodian legal system seems to default towards mediation rather than adversarial conflict and adjudication, and compromise solutions are often preferred even when the law favors one party in a dispute. There are several factors that favour seeking alternative solutions to a problem than recourse to the courts. Namely the perception of the courts and judges that they lack institutional capacity, reputation, integrity and the widespread belief that a legal outcome is only determined by the highest bidder or most politically well connected.

Hammer and Urs place the development of the Cambodian legal system over the last 40 years against a wider political and international context:

¹³ Mee et al, at 8.

GMS Business Forum & Directory "Cambodia - Legal and Regulatory Framework" at http://www.gmsbizforum.com/index.php?option=com_content&task=view&id=20&Itemid=27 [accessed 30th July 2007]

The difficulties of pursuing justice in Cambodia are legion. Before the Khmer Rouge takeover, Cambodia was devastated by civil war and foreign bombing, caught in the maelstrom of the U.S.-Vietnam conflict. The specific horrors of the Khmer Rouge are almost unimaginable – the systematic destruction of every significant social institution and the imposition of a pre-industrial, agrarian autarky, controlled by fear, oppression and brutality. The 1978 Vietnamese invasion ended the Khmer Rouge rein of terror, but it ushered in a decade of further isolation, civil conflict and stagnation. While the 1991 Paris Peace Accords planted the seeds of new civic life, these seeds were sown on dry, rocky soil. As such, questions of Khmer Rouge accountability in the 1990s had to be addressed against the backdrop of national reconstruction, reconciliation and intense political infighting.¹⁵

In addition to the problems caused by the patchwork development of the legal system, the need for more trained personnel, the problems of under resourcing, low pay and corruption there are other problems. Hammer argues:

The real tension underlying Cambodian politics is that the country is still controlled by the same forces that ran the country in the 1980s as a single-party communist state. The only difference is that this government is now forced to wear the often uncomfortable and ill-fitting garb of a liberal democracy. What form of government will eventually emerge from this difficult birthing process is still uncertain. In the interim, one is often faced with strong cognitive dissonance between stated political ideals and actual political realities. ¹⁶

While the Cambodian constitution proclaims the existence of an independent judiciary, the actual court system is lacking in independence, professionalism and competence. Part of the problem is an unavoidable result of the country's tragic history. It will take one if not two generations of concerted effort to make up for the unspeakable losses inflicted by the Khmer Rouge. Other aspects of the judiciary's problems are systemic. There are very few efforts to

Hammer PJ, and Urs T, "The Elusive Face of Cambodian Justice,".

Peter J. Hammer "Competition Law in Cambodia" www.cuts-international.org/res02.doc [date accessed 30 July 2007.

identify, recruit, reward or promote judges on the basis of quality and independence (let alone pay judges a living wage). Rather, the judiciary still consists largely of the same persons who functioned as judges in the communist, single-party state that ruled Cambodia in the 1980s. These are persons who had little or no formal legal training. More problematically, these are people who were trained and acculturated specifically to take orders and not to think independently. Formally, the judiciary in the old regime was simply a subordinate appendage of the Ministry of Justice, answerable directly to the Minister.¹⁷

There should be no underestimation of the impact of the Khmer Rouge period. Before the Khmer Rouge entered Phnom Penh in 1975 there were about 700 legally trained (mostly French educated) lawyers, judges and other legal workers. In 1979 when the Vietnamese occupied the country there were less than 10 lawyers left in the country. The rebirth of the legal system had to begin with no knowledge, expertise, traditions or personnel in empty and wrecked court rooms under the auspices of an occupying socialist army. People, but only Party faithful, were literally dragged off the streets and made judicial officials. Many of them are still judges in 2008.

Another complicating aspect of the Cambodian legal system is not just there are layers but that so many parts of the system do not – at first glance – seem compatible or functional. The problem with function could be because the legislation was designed for another era (French colonial) or a different justice system (Soviet style communism) or is a Japanese designed import being applied by a Cambodian lawyer with minimal training and a judge trained in the Soviet Union in the 1980s. Or simply the legislation has been imported to fix a problem – like a registration system for property law – but not supported by any of the other components of a property system – for example accredited real estate agents, secure banking and a reliable records system.

"Cambodia's laws are a hodgepodge," says Mr. Lasky, an American lawyer who runs a community legal-education program at Pannasastra University of Cambodia. The old laws adopted under the French colonial government are antiquated, and many of the socialist laws

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Hammer at 13.

written by the Vietnamese when they ruled there in the 1980s violate the Constitution, which was written after their departure. Meanwhile, hundreds of draft laws have waited for a decade for parliamentary approval. "No one knows what law applies when," he says." ¹⁸

Many sectors of the Cambodian economy are governed by draft laws, that are still waiting final parliamentary approval after several years. In some cases the draft laws are applied and enforced as if they have been passed yet in other cases the draft laws are not applied or enforced because they have not been approved. Kafka would feel comfortable in Phnom Penh. Quite often it is the level of the "unofficial licence fee" or "fast service fee" that determines whether a draft law is in operation on any given occasion.

The actual passage of laws is more often than not accompanied by a boom in new revenue for unscrupulous officials. Recently new traffic laws were passed. Within 3 months stories were appearing in the press about how the level of corruption amongst driving instructors and testers had soared.

The first law graduates trained in Cambodia, since 1975, did not graduate until the mid 1990s after only a few months of training. The number of graduates, and the length and quality of their training has steadily increased over the last decade. Yet untrained Judges, appointed by political parties or who purchased their position (as a rent-seeking opportunity), combined with poor pay compound the problems within the legal system. As Neilson argued "with no security of tenure, and inadequate income, judges were susceptible to both financial and political, influence." ¹⁹

Development of FOI in Cambodia – 2003 to 2006

The process of FOI development in Cambodia has been a combination of active promotion by a small number of local NGOs, support by larger external NGOs, multilateral institutions and donor countries and a classical and very effective page from

Overland M A, "In Cambodia Crafting Law Amid Chaos," The Chronicle of Higher Education April 15, 2005 http://www.childjustice.org/html/issue504_pr.htm [date accessed 4 February 2008]

Neilson K E, "They Killed All the Lawyers Rebuilding the Judicial System in Cambodia" Occasional Paper #13 October 1996 Centre for Asia-Pacific Initiatives located at the University of Victoria, in Victoria, British Columbia, Canada. At 3.

the playbook of Article 19 – awareness raising workshops, resolutions and the promotion of best practice principles and a model law. The government has been drawn into the mix by a combination of its own aim to improve development by adopting greater transparency and by the significant persuasion of Donor countries and multilateral organizations.

In 2000, the Royal Government of Cambodia signed the United Nations Millennium Declaration and committed to achieving the Millennium Development Goals. This included a commitment to good governance and transparency. In 2001 a commitment to increase the overall transparency of the Royal Government of Cambodia was a key feature of the Governance Action Plan.

In 2004, the Royal Government of Cambodia, strongly encouraged by its Donor Countries, acknowledged the need for a freedom of information law (or an Access to Information law) in Cambodia in order to create transparent government, reduce corruption and promote confidence in the government by the citizens of Cambodia.

From 2004 the Royal Government of Cambodia agreed with its Development Partners to set a target to develop a law on access to information by 2006. This target failed to be achieved and in June 2007 was converted to the achievement of a clear Policy Framework on Access to Information as part of Target 17 of the Joint Monitoring Indicators.

An example, possibly more rhetorical than actual, of the reach of this move towards transparency was the Ministry of National Defense's White Paper "Defending the Kingdom of Cambodia 2006: Security, Development and International Cooperation" [87-88] which argued greater transparency was needed to help it combat problems with:

- Ghost Soldiers
- Check and control promotions
- Avoiding nepotism
- Pension Law implementation

In addition to the efforts of the Royal Government of Cambodia, Parliament and civil society have also been active in promoting and encouraging greater transparency. In late 2002 the 5th Commission of the Senate initiated a bill on Freedom of Information.

In 2003 local and international NGOs began to advocate for a national Freedom of Information Law. In January 2005 an informal Freedom of Information Working Group was formed. Other activities have included:

- 2004 Workshop on Freedom of Information 23 June 2004 Phnom Penh90 participants from 58 organisations.
- 2005 Workshop on International Best Practices and Standards of Freedom of Information. 6-7 June 2004
 Phnom Penh
 112 participants.
- 2005 Seminar on Access to Information 14-16 September 2005 Sihanouk Ville 38 participants
- 2006 Seminar "New Trends on Freedom of Information and Access to Information in Cambodia" 4-5 April 2006 Phnom Penh
- 2006 Seminar "Public Access to Information in Cambodia" 24 November MoNASRI Phnom Penh
- 2007 4 workshops associated with the development of a draft Access to Information Policy 3 held by civil society and a government held workshop on 25th July with 135 participants. A further 2 day workshop was held in November 2007.

FOI in Cambodia - 2007 and 2008

In 2007 the Royal Government of Cambodia committed itself to producing a draft policy paper on access to information. In June 2007 an inter ministry drafting team was organisied by the Minister of National Assembly and Senate Relations and Inspections that included representatives from the Ministries of Defense, Interior, Information and Justice.²⁰ A series of consultations and workshops were held between June and August to provide input from the civil service and civil society into the drafting process.

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I was a member of this drafting team funded by USAID and PACT Cambodia.

A key ingredient in this drafting process was the availability of Article 19's Guiding Principles and Model Law in Khmer. The drafting process was completed by the drafting team in late August. There has been no news about the progress of the policy since August 2007. On my return to Cambodia in November 2007, just prior to the Wellington Conference, and since no further information has been forthcoming from the co-ordinating Ministry MoNASRI. There have been a public 2 day workshop and a briefing for the 5th Commission National Assembly held in November 2007 and a 1 day Workshop held at the National Parliament in February 2008.

Indonesia - A Brief Overview

FOI has been on the agenda of civil society groups in Indonesia since the late 1990s. I was asked to prepare a paper on FOI for an environmental law workshop in Jakarta in early 1999. In April 2002 a large conference with 5 international speakers was opened by President Megawati. This was followed by an Article 19 sponsored workshop in March 2003. Subsequently legislation was introduced into the Indonesian parliament. For the past 3 years there has been limited progress in passing the legislation caused in part by trying to reconcile it with a State Secrets Bill, concern over a number of its current provisions and possibly very strong opposition to the potential exposing of historical corruption and misdeeds. A recent workshop Workshop on Access to Information and Good Governance, was held by the World Bank Institute in Jakarta on 22-23 May 2007.

Some Commonalities in FOI between Cambodia and Indonesia

There are a number of factors affecting FOI that are shared between Cambodia and Indonesia:

- Political control is closely related to the capacity of the ruling party to maintain a
 massive network of patronage, economic and political advantage.
- Loose coalitions of civil society groups that have a high commitment to and awareness of FOI but little detailed knowledge or expertise.
- Governments that publicly commit to FOI but in reality allocate a very low or no priority on their legislative agenda.

- A civil service that lacks significant capacity in the areas of records management and experience of providing access to information.
- Significant questions about the willingness of key institutions, especially the armed forces, to releasing information about their wider involvement in the economy.
- An uncertainty within government as to how public interest tests will affect their ability to claim exemptions from release.
- The capacity or willingness to create new institutions independent of the direct control of the Government and/or ruling party.

A Few Thoughts That Need Further Development

Freedom of Information should be treated as a development and human rights priority even in countries with harsh political environments. However it needs to be combined with developing a national integrity system and must be part of a much wider transparency system (covering state and private entities). The push for FOI in Cambodia has been largely funded and monitored as part of the anti-corruption effort. To date few of the other national integrity of government measures or institutions in place.

As Messick argues this type of legislation needs to be tailored for local conditions without abandoning important general principles.²¹ There needs to be a slow build up in capacity both on the supply and demand sides. There needs to be mechanisms or processes that allow for the adaptation or modification of the FOI process with changes in technology, public service practices and government practices.

The primary concentration on getting FOI in place should be redistributed so that there is an equal focus on the early implementation stages and post-implementation stages. The major global players also need to focus beyond simply the short term objective of

Messick, Richard. "Regulating Conflict of Interest: International Experience with Asset Declaration and Disclosure," in Managing Conflict of Interest to Prevent Corruption: Frameworks, Tools, and Instruments to Detect, Avoid, and Manage Conflict of Interest in Asia-Pacific. ADB/OECD Anti-Corruption Initiative for Asia and the Pacific. Manila, Philippines. 2007.

signing countries up to FOI. The Atlanta Declaration in February 2008 is a welcome development in this area.

There needs to be a change in attitude that treats civil service incapacity and deficient records management infrastructure and resourcing as a problem or hurdle that can be cleared post an FOI Act. These two areas need to be seen as key features to be incorporated in the design and delivery of FOI.



Toby Mendel Law/Asia Programmes Director

 $\label{eq:Paper delivered} \textbf{Paper delivered at the} \\ \textbf{5}^{\text{th}} \textbf{International Conference of Information Commissioners}$

FOI AND COUNTRIES IN TRANSITION: OFF THE SHELF OR CUSTOM BUILT? FROM PRINCIPLE TO PRACTICE

Introduction

Recent years have witnessed a veritable revolution in the number of right to information laws which have been adopted in countries around the world. From a base of thirteen laws in 1990, there are now more than 70 national access to information globally, and analogous information disclosure policies have also been adopted by a growing number of inter-governmental organisations (like the EU and UNDP), and international financial institutions (like the World Bank and regional development banks). These are supplemented by numerous policy statements supporting the idea that the right to access information held by public bodies, often referred to as freedom of information or the right to information, is a fundamental human right, guaranteed under international law, as well as an essential underpinning of democracy and sound development.

As part of this revolution, various so-called 'model' right to information laws have been adopted including by ARTICLE 19¹ (of which I am the author), and the

¹ A Model Freedom of Information Law (London: July 2001). Available at http://www.article19.org/pdfs/standards/foi-model-law-russian-.pdf.

Commonwealth.² There are also a number of comparative publications and resources on the right to information, looking legislative developments in different parts of the world.³ A veritable industry of right to information experts has grown up, many of whom advise governments and others on legislative approaches in other countries.

For the most part, the model laws and experts do not explicitly promote an 'off-the-shelf' or one-size-fits-all approach to right to information legislation. The Introduction to the ARTICLE 19 Model Law, for example, states:

In this context, the term 'model' is not used to suggest that all countries should take this as a fixed template for their own legislation. Every country has different informational needs and different structures, and laws must be adapted accordingly. Rather, the term 'model' is used to signify that it is through a law incorporating the types of provisions set out here that maximum effect is given to practical disclosure of information, in accordance with the best standards on the right to know.

At the same time, a quick survey of actual developments demonstrates some willingness to borrow legislative approaches from other countries. For example, a Draft Right to Information Bill for Bangladesh, published in September 2006 by a Law Core Group with the facilitation of the Manusher Jonno Foundation, draws very heavily on the Indian Right to Information Act 2005.⁴ The Ugandan Access to Information Act, 2005,⁵ similarly draws heavily on the ARTICLE 19 Model Law.

It is thus very relevant to probe the question of the extent to which standard approaches to right to information legislation are appropriate. This paper explores that issue with particular reference to Asia, and through the particular lense of whether standard

 $\frac{http://www.humanrightsinitiative.org/programs/ai/rti/international/cw_standards/Cth\%20model\%20law\%20-20FOI\%20Act.pdf.$

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² Freedom of Information Act. Available at:

³ See, for example, Banisar, D., *Freedom of Information Around the World 2006: A Global Survey of Access to Government Information Laws* (Privacy International, 2006), p. 47. Available at: http://www.privacyinternational.org/foi/foisurvey2006.pdf and Mendel, T., *Freedom of Information: A Comparative Legal Survey* (2003, New Delhi, UNESCO). Available at: http://unesdoc.unesco.org/images/0013/001341/134191E.pdf. A second edition of this is due to come out shortly.

⁴ The former is available at: http://www.manusher.org/rti_ta_draft.htm. The Indian law is available at: http://persmin.nic.in/RTI/WelcomeRTI.htm.

⁵ Available at: http://www.freedominfo.org/documents/uganda ati act 2005.pdf.

approaches to legislation are likely to give best effect to the right to information. I argue that as a fundamental human right, the basic principles which underpin the right to information, like all human rights, are universal and applicable to all countries.

I also argue that, with a few important exceptions, it is appropriate to adopt a pretty standardised approach to implementation of these basic principles in legislative form. Although a range of political considerations may affect both the adoption and the implementation of right to information legislation, I argue that, at least in most cases, civil society campaigners should press for best practice approaches.

The Universality of Principles

As noted above, I argue that access to information held by public bodies is a fundamental human right, included in general guarantees of the right to freedom of expression. It is beyond the scope of this paper to delve into this issue in detail, and it has been addressed elsewhere, but some of the leading statements on this are outlined below. In December 2004, the (then) three special mandates on freedom of expression – the UN Special Rapporteur on Freedom of Opinion and Expression, the Representative on Freedom of the Media of the Organisation for Security and Cooperation in Europe and the Special Rapporteur on Freedom of Expression of the Organisation of American States – issued a Joint Declaration which included the following statement:

The right to access information held by public authorities is a fundamental human right which should be given effect at the national level through comprehensive legislation (for example Freedom of Information Acts) based on the principle of maximum disclosure, establishing a presumption that all information is accessible subject only to a narrow system of exceptions.⁷

The right to information has also been explicitly recognised in all three regional systems for the protection of human rights. The strongest form of recognition was a 19 September 2006 judgment of the Inter-American Court of Human Rights, which confirmed

⁷ 6 December 2004. The Declaration is available at:

http://www.cidh.org/Relatoria/showarticle.asp?artID=319&IID=1.

⁶ See, for example, the publications referenced in note 3.

unequivocally that a right to access publicly-held information is included in the right to freedom of expression under the American Convention on Human Rights:

77. In respect of the facts of the present case, the Court considers that article 13 of the Convention, in guaranteeing expressly the rights to "seek" and "receive" "information", protects the right of every person to request access to the information under the control of the State, with the exceptions recognised under the regime of restrictions in the Convention. Consequently, the said article encompasses the right of individuals to receive the said information and the positive obligation of the State to provide it, in such form that the person can have access in order to know the information or receive a motivated answer when for a reason recognised by the Convention, the State may limit the access to it in the particular case.⁸

The *Inter-American Declaration of Principles on Freedom of Expression*, adopted in October 2000, also explicitly recognise the right to information, including the right to access information held by the State, as an aspect of freedom of expression and a fundamental right.⁹

Within Africa, the African Commission on Human and Peoples' Rights adopted the *Declaration of Principles on Freedom of Expression in Africa* in 2003, Principle IV of which states, in part:

Public bodies hold information not for themselves but as custodians
of the public good and everyone has a right to access this
information, subject only to clearly defined rules established by
law.¹⁰

⁸ Claude Reyes and Others v. Chile, 19 September 2006, Series C No. 151, para. 77 (Inter-American Court of Human Rights). Unofficial translation from the Spanish judgement.

⁹ Adopted at the 108th Regular Session, 19 October 2000. See Principle 4.

¹⁰ Adopted at the 32nd Session, 17-23 October 2002.

The Committee of Ministers of the Council of Europe adopted a fully-fledged Recommendation on Access to Official Documents in 2002.¹¹ Principle III provides generally:

Member states should guarantee the right of everyone to have access, on request, to official documents held by public authorities. This principle should apply without discrimination on any ground, including that of national origin.

The Council of Europe's Group of Specialists on Access to Official Documents is currently developing a binding treaty on the right to information.

If we accept that the right to information is a fundamental and universal human right, then all States are bound to respect it,¹² albeit with some latitude as to the manner in which this is achieved in domestic law and practice. Certain general principles regarding the right to information, based on authoritative international statements about the scope of the right, as well as comparative national practice, may be formulated. I submit that the following principles are central to the right to information:

- 1. National law should establish a presumption in favour of public access to all information held by public bodies, which should be defined broadly (in respect of who benefits from the right, as well as the scope of information and public bodies covered), subject only to the regime of exceptions (see principle 4 below).
- 2. Public bodies should be under an obligation to publish on a proactive or routine basis a range of information of key public importance, for example concerning their own operations, the information they hold and how to access it, opportunities for public consultation and so on.

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¹¹ Recommendation No. R(2002)2, adopted 21 February 2002.

¹² I submit that the general right to freedom of expression, as guaranteed by the *Universal Declaration of Human Rights*, is binding on all States as a matter of customary international law. For judicial opinions on human rights guarantees in customary international law, see, for example, *Barcelona Traction, Light and Power Company Limited Case (Belgium v. Spain) (Second Phase)*, ICJ Rep. 1970 3 (International Court of Justice); *Namibia Opinion*, ICJ Rep. 1971 16, Separate Opinion, Judge Ammoun (International Court of Justice); and *Filartiga v. Pena-Irala*, 630 F. 2d 876 (1980) (US Circuit Court of Appeals, 2nd Circuit). Generally, see M.S.McDougal, H.D.Lasswell, L.C.Chen, *Human Rights and World Public Order*, Yale University Press (1980), pp. 273-74, 325-27.

- 3. Individuals should have a right to request access to any information held by public bodies, and clear procedural rules should be in place for the processing of such requests, which should ensure that they are dealt with rapidly, fairly and at minimum cost to those applying for information.
- 4. Exceptions to the right of access to protect overriding public and private interests should be set out clearly and narrowly in law, and should be harm-based (in the sense that they apply only where disclosure of the information would pose a risk of harm to the protected interest) and recognise a public interest override (so that they do not apply where disclosure of the information is in the overall public interest).
- 5. Anyone whose request for information has been refused, or who believes that their request was not dealt with in accordance with the applicable procedures, should have an effective right to appeal against this to an independent body and, in accordance with the presumption of openness, the burden of proof in such an appeal should lie on the public body to justify any refusal to disclose information.

As one delves into more detail beyond these fairly general principles, which are not very controversial, the human rights claim becomes more difficult to justify. I would argue, for example, that impecunious applicants should not have to pay to access information. While this might by supported by human rights arguments, this area of international law remains relatively undeveloped and so it is largely a matter of trying to extrapolate detail from general human rights (and more specific freedom of expression) principles. It is, however, possible to make fairly detailed claims about the sorts of principles that best give effect to the right to information. To continue the example, few would disagree that relieving the poor from any obligation to pay for information is one such principle.

From Principle to Practice

Reaching agreement on a core of principles that are inherent to the right to information is a relatively simple task compared to the key question addressed in this paper, which is

¹³ In *Steel and Morris v. the United Kingdom*, 22 December 2005, Application No. 54968/00, for example, the European Court of Human Rights held that the failure of the State to provide legal aid in the context of a defamation case violated the rights of the defendants. Although clearly not on all fours with the issue of paying for information, analogies can be drawn.

how best to translate those principles into practice. A number of factors come into play regarding implementation of right to information principles through legislation.

Different legal systems often use different mechanisms to achieve the same thing. In common law systems, for example, binding legal effect is often given to the decisions of administrative bodies through the rather particular vehicle of making a failure to abide by them a contempt of court, whereas this is dealt with in very different ways in civil law systems. Although this clearly needs to be taken into account when designing legislation, it is at root a formal/technical difference, which this paper does not address.

A vast array of differences between countries may have a bearing on the best approach to right to information legislation. Although any attempt to package these is somewhat artificial and therefore open to criticism, for purposes of this paper I would like to separate out what I will term 'political' issues – including the challenges of getting a good right to information law passed and then implemented – from the question of what sort of right to information rules are appropriate given underlying differences in culture, wealth, administrative capacity and so on. This paper focuses first on the question of whether these differences render standardised legislative approaches impractical or less than optimum from a right to information perspective. It then makes a few observations about the question of political challenges to effective right to information systems.

A threshold question is the extent to which the rule of law applies in a country, although this may also be characterised as a (serious) political issue. Where basic rule of law principles do not apply, it will not be possible to implement right to information legislation properly. Indeed, this sort of legislation is particularly sensitive to rule of law problems, given that it is inherently about changing relations between the people and their government, and that proper implementation requires active and positive official engagement. Where the rule of law is flouted, legislation is more of a political than legal phenomenon and it is difficult to make generalisations.

Appropriate legislative approaches

I submit that, for most of the matters addressed in right to information laws, an essentially off-the-shelf or standardised approach is both practical and appropriate. The actual differences that may be observed among national laws result, for the most part, from different levels of political will vis-à-vis public transparency, or from genuinely different views on the most effective manner to achieve an agreed end, rather than from

adaptation of legislation to particular local realities. There will, of course, always be different views on how best to approach right to information challenges. This is, however, perfectly compatible with the idea of a standardised approach to right to information legislation.

A standard approach, for example, makes sense in respect of the scope of the legislation – in terms of who benefits from the right, as well as the scope of information and public bodies covered – albeit taking some account of local variations. The right should apply to everyone, rather than be restricted, for example, on the basis of nationality. Some countries argue that they cannot afford the costs associated with providing non-citizens with information or that doing so may constitute a national security risk. The latter is founded on the mistaken idea that national security risks come from outside the country or that citizens may be trusted with information that is not safe in the hands of foreigners. As regards the former, these costs are likely to be minimal and the benefits – for example in terms of new research or external investor confidence – are likely to outweigh or at least largely offset them.

The same is true of the scope of information, which should basically cover everything held by or accessible to a public body which is capable of communicating meaning. In practice, the range of forms in which information is held does not vary much from country to country. Some minor variations reflecting local priorities are found in the legislation from different countries. In India, for example, one may request samples of building materials. However, this is more a question of progressive development of best practices than of underlying difference (i.e. all laws should allow for the taking of samples).

The same is essentially true for public bodies. There are certainly differences among laws as to the scope of bodies covered, but these bear little relation to underlying local circumstances and, instead, reflect different levels of political commitment to openness. It is, of course, the case that different countries have different political and administrative arrangements – for example, some have monarchies whereas most do not – but standard formulations of categories of public bodies will capture the vast majority of these, although some minor variations may be needed. A minority of countries do not include a definition of public bodies is their legislation, instead providing a specific list of the

bodies covered.¹⁴ The relative merits of these two approaches may be debated, but this is not dependent on underlying local circumstances, although political considerations may be relevant.¹⁵

The same standardised approach is essentially appropriate in relation to procedural rules. Progressive rules are in practice pretty standard across different laws, which provide for submission of requests in a range of forms, including electronically and orally; that no reasons need to be given when submitting a request; for assistance to those who need it, including on grounds of illiteracy; for clear timelines regarding the processing of requests; for clear rules on transfer of requests and third party notice; for notice to be given of any refusal to provide information, stating clear reasons for the refusal, along with information on how to lodge an appeal; for applicants to be able to select the form in which they would like to receive information; and for rules on what charges may be levied that keep fees low so as to minimise this as a barrier to making requests in the first place.

Once again, differences between laws may largely be characterised in terms of how progressive the law is rather than particular adaptation to local circumstances. Countries with more efficient record management systems should probably be able to locate information and process requests more quickly, although it is not the case that these countries, by and large, set shorter timelines for responding to information requests. Various costing and financial differences between countries – such as public sector labour costs, the cost of copying documents and the ability of the public to pay for access – may warrant some differences in fee structures but, once again, it is hard to discern any trends in the actual laws. ¹⁶

A more contentious assertion, which I consider, however, to be legitimate, is that a pretty standardised approach to the regime of exceptions, at least in terms of the text of the legislation, is also appropriate. There is considerable variance among even relatively progressive right to information laws regarding exceptions but I think that the vast

¹⁵ A list has the advantage of certainty, which may be desirable in certain political contexts.

¹⁴ This is the case, for example, with the UK Freedom of Information Act 2000.

¹⁶ As a broad generalisation, it may be noted that poorer countries are less likely to allow applicants to be charged for the staff costs involved in locating information and assessing whether or not it should be disclosed.

majority of this variance can be attributed to political will, or a greater variety of approaches, rather than adaptation to the particular circumstances of each country.

A key structural issue in relation to exceptions is the relationship between the right to information law and pre-existing secrecy rules. In some countries, the right to information legislation overrides secrecy laws, to the extent of any conflict, while in others, secrecy laws are left in place. In Sweden, the right to information legislation recognises only secrecy rules in one other special piece of (secrecy) legislation (in practice, the Secrecy Act). In principle, it makes little difference which piece, or pieces, of legislation contain the exceptions. In practice, however, secrecy laws very rarely respect the principled standards for exceptions noted above. As a result, it is always preferable to include a comprehensive regime of exceptions in the right to information legislation and then, technical legal issues aside, have that legislation override other laws.

Regardless of where they are located, exceptions should always be harm-based and be subject to a public interest override. In some countries, the latter takes the form of an exclusive list of overriding public interests – such as the environment, health and safety, corruption and other wrongdoing, human rights abuse and so on – on the basis that this promotes legal certainty and will lead to better practice. A non-exclusive list has these attributes and yet avoids the obvious limitations of an exclusive list, and so is to be preferred. Other standard structural features which should be included in all right to information laws are rules on severability – so that where part of a record is confidential, the rest shall still be disclosed – and historical time limits – so that all information is presumptively open after a certain period of time.

Significant variance may also be observed in relation to the specific interests protected by exceptions, as well as the degree of protection – or requisite standard of harm – they receive. Again, I would argue that this is largely a matter of how progressive the law is rather than a matter of tailoring the law to accommodate underlying differences. It is perhaps possible that institutional systems or other reasons mean that certain interests need to be protected in some countries and not in others, although it is normally difficult to discern why actual non-conforming exceptions found in different laws should be necessary. In South Africa, for example, there is a specific exception relating to the enforcement of tax legislation, not found in other right to information laws. In other

countries, the exception in favour of the administration of justice is deemed sufficient for purposes of enforcing tax laws, and it is unclear whether this special exception really does serve a special need in the South African context or is just overkill.

It is of course true that specific circumstances vary from country to country. Thus countries in a state of internal or international armed conflict may assess disclosure of particular security information differently than those at peace. This, however, is not so much a question of needing different legislative rules as of interpreting them in light of all of the circumstances. Thus the formulation of the relevant exception in the Thai law the disclosure thereof will jeopardise the national security¹⁷ – or in the Japanese law likely to cause harm to national security - will work as well in peaceful Costa Rica as in conflict-ridden Sri Lanka or even Afghanistan. In some cases underlying cultural values may have a bearing on the exceptions. Values regarding personal privacy, for example, vary considerably from country to country, although this may be the only exception for which cultural differences are relevant. Again, this is probably best resolved through interpretation, rather than at the level of legislative drafting.

The matter is very different, however, when it comes to the appeals mechanism. In most countries, one may ultimately appeal to the courts against a breach of the right to information law, including due to a refusal to disclose information. The legislation in most countries also provides for some sort of appeal to an administrative body, and this has proven to be extremely important for the proper implementation of the law, as such a body is far more accessible to ordinary people than the courts for various reasons, including that appeals are far less costly and are normally decided far more rapidly.

Unlike the issues described above, the establishment of an independent administrative body needs to be rooted in the social and institutional reality of the country. A particular challenge is promoting the independence of such bodies, a challenge that has not been met in many counties. Central to this is the manner of appointment of members of the body. Certain relatively standard rules – setting clear timelines for tenure and protecting the tenure of members, and prohibiting certain individuals, for example those with strong

¹⁷ Official Information Act, B.E. 2540 (1997), s. 15(1). Available at: http://www.oic.go.th/content_eng/act.htm.

¹⁸ Law Concerning Access to Information Held by Administrative Organs, 1999, as amended in 2004, Article 5(3). The amended version is available at: http://www.cas.go.jp/jp/seisaku/hourei/data/AAIHAO.pdf.

political connections, from being appointed – may be advocated. Otherwise, however, a multiplicity of approaches have been adopted in different countries, and these have been more or less successful depending on a host of different factors.

It is extremely difficult to provide even general standards for this exercise. In Fiji, for example, I once suggested that a shortlist of candidates should be published in advance, to allow the public to comment on them, only to be advised that this would never work in such a small society and that no one respectable would consider exposing themselves to such a process, especially for so little gain. In some countries, the parliament works well as an appointments body, while in others the parliament is too politicised and fractious to perform this role well. In some countries, civil society can interact well with processes which are formally overseen by officials, while in others civil society will be excluded unless the legislation formally recognises a role for them. The extent to which a culture of public service has been entrenched is important, and much depends on the individuals who end up being appointed. In short, while the general principle that the oversight body should be independent is uncontroversial, achieving this is something that must be tailored carefully to the particular circumstances of the country.

Less highly context dependent, but still sensitive to local variation, is the matter of proactive publication. The trend in the more recent right to information laws – reflected, for example, in the 2005 Indian legislation, ¹⁹ the 2002 Peruvian law²⁰ and the 2007 Kyrgyz law²¹ – has been to require ever greater amounts of information to be published proactively, suggesting that this is not necessarily a function of wealth or right to information vintage. Even the new Chinese Ordinance on Openness of Government Information has quite progressive proactive publication rules.²² In some cases, for example that of India, the law explicitly recognises the relationship between proactive publication and requests, calling on public bodies to make it a 'constant endeavour' to provide as much information proactively as possible, so as to minimise the need for the public to have recourse to requests to obtain information.²³ In due course, this should

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¹⁹ Note 4, s. 4.

²⁰ Law of Transparency and Access to Public Information, Law No. 27.806, Articles 5-6 and Title IV. Available as amended in 2003 at: http://www.justiceinitiative.org/db/resource2/fs/?file_id=15210.

²¹ Law on Guarantees and Freedom of Access to Information, Chapters III-V. Available at: http://www.legislationline.org/upload/legislations/0b/b3/71bdeda3cd18a208b73f34711206.pdf.

State Council Decree 492, adopted 17 January 2007, comes into effect 1 May 2008, Articles 9-12. Available at: http://www.freedominfo.org/documents/China_FOI_Reg_2007.pdf.

²³ Section 4(2).

also prove efficient, since modern technologies mean that it is far less costly to provide information proactively than to process individual requests for information.

At the same time, the particular types of information that are deemed to be proactive publication priorities may well vary from country to country and context to context. Furthermore, the appropriate means of disseminating information proactively will vary considerably, in particular depending on the extent of Internet access but also depending on factors like local languages, development projects and so on.

Political considerations

Whereas right to information principles do not vary from country-to-country, and I have argued that the appropriate implementation of those principles in practice also varies relatively little, apart from in relation to an independent administrative appeals body, political considerations do vary very considerably. They also have a profound impact on both what it is possible to achieve in terms of adopting right to information legislation and also the extent to which implementation of that legislation is successful. As a result, it is difficult to come up with generalisations on this topic. It is, however, possible to identify a few key issues which those campaigning for progressive right to information should take into consideration.

First is the question of actually getting a law passed. Only seven Asian countries²⁴ have so far achieved this milestone, namely China (2007), India (2005), Japan (1999), Nepal (2007), Pakistan (2002), South Korea (1996) and Thailand (1997).²⁵ Longstanding campaigns in countries like Indonesia (active since at least 1999), the Philippines (active since at least 2001) and Cambodia (active since around 2003) have yet to meet with success, although there have been official developments in all three countries, including draft laws tabled in Indonesia and the Philippines.

In terms of standardisation, civil society activists have often debated the relative merits of pushing for best practice legislation, even if this takes longer, and compromising on standards to get legislation introduced, with a view to introducing amendments later on. My own view is that it is generally better to push for more progressive legislation, since

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²⁴ I am not including here Oceania, the Middle East or Central Asia.

²⁵ Two of these are not formally laws, namely the Chinese rule, which is a regulation, and Pakistan's Freedom of Information Ordinance.

other players, often including the government, will exert pressure in the other direction. Furthermore, I cannot think of a case where civil society pushing for a more progressive law can clearly be linked to delay in passing legislation.

A different set of arguments applies to the relationship between progressive legislation and implementation. Certain weaknesses have been responsible for serious implementation problems. The absence of clear timelines, for example, has been blamed for poor implementation in Thailand and is also a problem in the United States. Campaigners have often stressed the importance of the availability of sanctions for officials who obstruct access to information, although these have rarely been applied in most countries with longer-standing laws. Unduly broad regimes of exceptions are a clear Achilles heel in many laws, for fairly obvious reasons. The same is true of exceptions which are worded in highly discretionary or vague terms. The lack of an independent oversight mechanism has been identified as a key problem in some countries, such as South Africa, where most requests are met by a 'mute refusal' or simply no answer.²⁶

On the other hand, some campaigners have argued that unduly progressive legislation, even if adopted, may be met with a bureaucratic backlash, thereby actually undermining implementation. It is certainly true that the bureaucracy has, even in the context of progressive right to information legislation, significant power to undermine proper implementation of the law, and this has been the experience in a number of established democracies with long-standing right to information laws.²⁷ Unlike some laws, implementation of right to information legislation requires positive action from civil servants, and it is difficult to force such action in the face of concerted opposition. At the same time, there may be many reasons for such a backlash, and progressive legislation hardly seems the most prominent one (as opposed, for example, to an entrenched culture of secrecy). Rather, weak legislation seems more likely to provide ammunition with which those opposed to openness may undermine it.

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²⁶ One study suggests that 62% of requests in South Africa are met with silence. See *Transparency and Silence: A Survey of Access to Information Laws and Practices in Fourteen Countries* (Open Society Justice Initiative, 2006), p. 43. Available at:

 $[\]underline{\underline{http://www.soros.org/resources/articles_publications/publications/transparency_20060928}.$

Conclusion

It is rarely popular to call for standardisation across countries, regardless of the subject matter. It is, rather, in vogue these days to celebrate local differences and to reject cookie cutter approaches. Despite this, I submit that, for most of the issues they address, a fairly standardised approach to right to information legislation is warranted, taking as the starting point the goal of promoting maximum openness, subject to political constraints. Issues such as the appropriate scope of the law, procedural matters and even exceptions can, albeit with a few local adaptations, be dealt with in a fairly consistent manner in different countries. On the other hand, certain issues and, in particular, guaranteeing the independence of oversight bodies, must be carefully tailored to local circumstances.

It is hard to assess these claims within the Asian context. Of the seven Asian countries with right to information legislation, the laws are too recent to assess in two (Nepal and China, where the regulation has not even come into force yet), and in two others the law has largely been a failure (Thailand and Pakistan). India probably has the most successful right to information regime in Asia and the Indian law is, by any standard, one of the most progressive to be found anywhere. The Indian Right to Information Act has certainly broken some new ground in setting positive right to information standards. At the same time, it is otherwise fair to describe it, with the exception of it approach to oversight bodies, as an essentially standardised model. Where it has broken new ground, this should be followed in other countries rather than dismissed as responding to a particular Indian need. The same is true of the Japanese legislation, which has also achieved relative success in implementation. In other words, albeit on a small sample, it may be concluded that the more successful examples of right to information legislation in Asia basically adopt a highly standardised approach.

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Paper delivered at the

 $\mathbf{5}^{\text{th}}$ International Conference of Information Commissioners

新西兰惠灵顿·第五届国际信息专员大会发言要点

第四天会议-并行会议-2A,11-29-9:00 a.m, TBC

本专题:处于转型期国家的信息公开——已建立起的软件或制度?亚洲经验

让权力在阳光下运行——中国大陆的政府信息公开法制创新实践

Moving toward a more transparent government——

The creation of a legal system for government information disclosure in

mainland China

大家早上好!谢谢主持人!谢谢大会主办方!

大家知道,再过8个月,250多天,举世瞩目的夏季奥林匹克运动会将在中国北京举行,欢迎大家去北京欣赏,顺便游览文化深厚的千年古都北京。这是一个广告!我主持的课题组在美国律师协会、中国人民大学等机构的支持下,目前正开展行政公开法制推动工作专题研究,希望能对中国的阳光政府建设起到促进作用。在此,我从三个方面发表看法供参考、分享,希望大家感兴趣。

As you know, in 8 months and 280 days, China will host the 2008 Olympic Games, and we welcome all foreign friends to come to Beijing and enjoy the games and our city with its thousands of years of history. This is an advertisement!

I direct a research team that is implementing a project to promote the enforcement of China's recently passed Provisions on the Disclosure of Government Information," with the support of the American Bar Association Rule of Law Initiative and Renmin University of China. I hope this work can contribute to the construction of a "sunshine government" in China. Let me put forward some thoughts from three aspects of this issue for everyone's consideration, that I hope will be of interest to you.

一、 信息自由理念在中国的引入与推行及其原因

1. The introduction and implementation of the concept of free information in China, and reasons for this development

中国是处于转型期、发展速度快、最大的发展中国家。它有13亿人口,年均GDP增长10%以上,外汇储备世界第一。面临新的重要发展机遇,同时在经济发展和行政管理、公共治理领域也面临许多挑战,发展很不平衡。

China is currently the largest developing country with rapid growth. We are in a period of significant transition. We have a population of 1.3 billion, annual GDP growth of over 10%, and the largest foreign exchange reserve in the world. China is facing many new and important development opportunities, and at the same time facing many challenges in

economic growth, administrative management and public administration, and significantly uneven development in different parts of China.

个人信息自由和政府信息公开的理念,在中国 1978 年实行改革开放前后,情况有很大的差别:在改革开放之前,中国大陆实行计划经济体制,坚持国家权力本位观,忽视个人权利,奉行行政集权主义和行政神秘主义,主要依靠政策行政;1978 年实行改革开放以来,开始注重个人权利和国家权力的平衡,通过不断的体制、机制和方法创新,逐步建立和发展现代市场经济,逐步推动行政民主和行政公开,正在全面推进依法行政。这样的转变,大大推动了中国经济和社会的健康快速发展。

The context for the concepts of freedom of private information and government information disclosure have been very different before and after China's reform and opening in 1978. Before reform and opening, China operated under a planned economy, with an emphasis on the power and central role of the state, administrative centralism, a culture of secrecy and governance through issuance of government policies, and a practice of ignoring individual rights. Reform and opening brought a greater emphasis on the balance between individual rights and state power. China now operates under a gradually improving market economy; administrative democracy and public administration are moving forward step by step, and administration according to law is being promoted throughout China. These changes are important factors behind healthy and rapid development of the Chinese economy and society.

上述变化从根本上说,是由于现代市场经济是一种民主经济形态,多数人的权利、利益和愿望会得到充分表达,同时尊重少数人的选择和权利,这有利于形成和谐的政府与民众的关系,有利于构建和谐社会;因此,与经济与社会发展密切相关的行政管理和公共服务体系,也须要积极进行改革和完善,发挥出有效引导和保障经济与社会健康快速发展的功能。从这个意义上说,行政公开是政治民主化和行政民主化的要求,是中国履行加入WTO对透明度原则予以承诺的要求,是中国改革开放的一种内在要求。中国的行政机关提高行政透明度、打造阳光政府的制度创新举措,就成为新时期中国建设法治政府、法治国家、法治社会的努力方向.

The development of a market economy, which facilitates democracy, is central to these changes. The rights, interests and wishes of the majority can be expressed fully; at the same time, the choices and rights of the few can be respected. This is favorable for the formation of a harmonious relationship between government and the people, and for the construction of a harmonious society. As the economy and society change, systems for

administrative management and public service must also undergo corresponding reforms and improvements towards becoming more democratic. These kinds of reforms will allow administrative and management systems to play their full role in promoting and guiding healthy and rapid economic and societal development. In this sense, open administration of government is an important requirement for political and administrative democratization, and for China to meet its WTO commitments to transparency. The increase of transparency and creation of a "sunshine government" at various levels and parts of the government are the direction of our efforts to build a government, country and society under the rule of law.

二、 政府信息公开实践与相关立法建制的创新经验

2. Government information disclosure practice and related experience of creating legislation

最近十多年来,中国许多地方和部门积极进行政府信息公开、行政程序公开、公 众参与管理、完善监督救济等方面的探索创新,成效显著。这可从两个方面来看:

In the last 10 years, many local governments and government organs have been exploring new methods of government information disclosure, administrative procedure disclosure, public participation and management, and improvement of supervision. Some of these efforts have been very effective. These can be seen from the following two aspects:

- 1. 总体情况。2006 年的一项政务公开专题调研成果表明,在今年四月《政府信息公开条例》出台前,全国 31 个省、自治区、直辖市政府都已建立不同形式、程度的政务公开制度,有些省的规模很大,人口达到 1 亿左右,GDP 达到世界排位的第 20 -50 位,建立信息公开制度很不容易。中央有 36 个部委(占大多数)制定了政务公开的规范性文件。广州、上海等地出台了政府信息公开的专门地方立法,北京、湖南、南京等地出台了行政公开考核办法,广东、重庆、沈阳等地建立了行政公开责任追究制度,行政公开基本制度建设成绩显著。这些制度创新,明确了行政公开的工作目标、基本原则,对行政公开的内容、程序、形式、主体、豁免范围、监督、考核作出了规定,保障了行政公开的健康发展,为《政府信息公开条例》的制定和施行创造了条件。
- 1. Overall situation. According to one research report, by the end of 2006, 31 provinces, autonomous regions and cities throughout China had established different forms of government affairs disclosure. Some of these provinces are quite large, with populations of over 100 million and GDP ranked between 20-50 in the world. For these provinces, it has been very difficult to construct effective information disclosure systems. In addition, the report indicated that 36 central government ministries and commissions had

enacted rules on government affairs disclosure. Cities and provinces that had formulated local legislation on government information disclosure included Guangzhou and Shanghai. In addition, Beijing, Hunan, and Nanjing were among the cities and provinces that had enacted an evaluation system for government information disclosure work. Guangdong, Chongqing, and Shenyang had established responsibility systems for government information disclosure work. These system innovations clarified the objectives and fundamental principles of administrative disclosure; and stipulated its content, procedure, forms, supervision and evaluation procedures. These system innovations created the conditions for the formulation and implementation of the "Provisions of the People's Republic of China on Disclosure of Government Information" promulgated by the State Council in April of this year.

- 2. 典型经验。以河北省邯郸市的做法为例: 邯郸近年来开展行政权力公开透明运行试点,将行政机关和行政首长的职权逐一清理,使其权力边界更清晰,并将清理结果予以公示;公共权力边界明晰并加以公开后就受到更有效的监督约束,因而收到显著的改革成效,其经验受到中纪委、监察部等领导机关和社会各方面的高度评价。
- 2. Typical experience. In recent years, the government of Handan City reviewed and clearly defined the scope of the official powers of the city's administrative organs and senior officials, and published the results. This has made the boundaries of these official powers more clear and open, and also allowed more effective supervision and restriction of these powers. This initiative has received high praise from the CPC Central Committee for Discipline Inspection, the Ministry of Supervision and society at large.

行政公开对于实现民主行政和法治行政具有重要作用,行政公开的立法和制度创新已成为行政管理和行政法制革新的基本要求。我本人有机会参加了一系列与行政公开有关的立法和行政立法工作(例如《全面推进依法行政实施纲要》、《政府信息公开条例》、《突发事件应对法》,以及列入立法规划的《行政程序法》),深感这些立法非常不易,实施更加不易。我想强调,中国于 2007 年 4 月出台了《政府信息公开条例》,5 章 38 条的这个法律文件由中央人民政府颁布,实施准备期为 13 个月,将于明年 5 月 1 日起施行,现在正进行各项准备工作,例如确立主管部门和工作机构、开展行政公务人员的专门教育培训、清理法律规范和政策规定、制定公开指南和公开目录、调整和完善各项制度,已经初见成效。例如我们近期专程进行实地考察的天津市、四川省成都市、江苏省扬州市,就有很好的做法、经验和成效。

Transparent administration can play an important role in realizing democratic governance and administration under the rule of law. I have been involved and continued to be involved in legislative work related to administration disclosure, including the "Outline for Promoting Comprehensive Law-based Administration", the "Provisions on the Disclosure of Government Information", the "Emergency Response Law of China" and the "Administrative Procedure Law". This last law has been listed in the current legislative plan. The drafting of these laws was very difficult, and the enforcement of these laws will be even more difficult.

The "Provisions on the Disclosure of Government Information," comprised of 5 sections and 38 articles, were adopted at the meeting of the State Council on January 17th, 2007, were formally promulgated on April 5th, and will go into effect on May 1st, 2008. In total, there is 13 months of preparation time, and the government is currently engaged in this preparation work. For example, many local governments are designating the responsible department and work unit; reviewing laws, regulations and policies; creating open information guides and information catalogues; and adjusting and improving related systems. This preparatory work is showing results. Our project team members have conducted on-site research in Tianjin City, Chengdu City in Sichuan Province, and Yangzhou City in Jiangsu Province, and we have found some excellent methods, experiences and results.

三、政府信息公开法制发展的困难、条件和前景

3. The difficulties of and prospects for the development of legal systems for government information disclosure in mainland China.

从行政神秘主义转向阳光政府理念,这是一场深刻的行政管理革命和法律文化革新,不可能一帆风顺,上述行政模式转型也受到许多因素的阻碍,发展还不平衡。行政公开的认识误区、行动差距、制度矛盾、硬件不足的问题还广泛存在,亟需认真研究解决,不容太乐观。

The transition from a culture of secrecy to transparent government is a profound revolution in administrative management and legal culture, and may encounter obstacles in many aspects. These include misunderstandings about transparent government, the gap between requirements and actual operations, conflicting systems and insufficient hardware. These problems may be extensive and will need serious research to understand the nature of the problems and to formulate solutions. We can't be overly optimistic.

刚刚结束的中共十七大的政治报告对行政公开提出了新要求,也即:加快行政管理体制改革,减少和规范行政审批,让权力在阳光下运行,保障人民的知情权、参与权、表达权、监督权。这为人们在新形势下进一步提升行政透明度、加快建设阳光政府的步伐,提供了重要的思想指导,创造了更好的外部条件。因此,已列入下一届全国人大立法规划的《政务公开法》、《个人信息保护法》等法律有望出台。

The "Report to the 17th Party Congress of the Communist Party of China" on October 15, 2007 contains new requirements for acceleration of reforms of the administrative system and reduction of government intervention in microeconomic operations. Power must be exercised in the sunshine and the government should guarantee the people's rights to be informed, to participate, to be heard and to monitor. These new requirements provide important guidelines and create better external conditions for the people to accelerate the construction of a transparent government. Furthermore, there is hope that related laws that are already part of next term's legislative plan will be passed. These include the Government Affairs Disclosure Law and the Individual Information Protection Law.

中国正在深化改革开放,虽然前进道路上还会有许多困难和曲折,但人们对于提升行政透明度、建设服务型政府和法治政府,应当抱持坚定信心,共同作出不懈努力。这是坚持依法行政、推动政治民主、促进科学发展、实现社会和谐的必然要求=因此,在政府信息公开领域的中国经验、亚洲经验需要总结、需要交流,值得分享,更需要得到世界各国的帮助,让我们共同努力建设阳光世界、和谐世界!日益开放的中国非常欢迎大家多去游览、交流、指导,一定会有令人欣喜难忘的新鲜感受和美好印象!这是我的再一个广告,希望大家喜欢。

Although there will be many difficulties and twists and turns on the way forward, people should have confidence in the construction of a more transparent government, more service-oriented government and a government ruled by law, and should make tireless efforts. This is the inevitable demand of carrying out government administration in accordance with the law, improving democratization, applying the scientific outlook on development and realizing social harmony. Therefore, we need to summarize and to communicate about Chinese and Asian experience, and we need to draw in assistance from other countries outside of the Asia region. Let's construct more sunny and harmonious world through our joint efforts.

An increasingly open China welcomes you to visit us to travel, and to engage in exchanges of ideas and experience. I believe that your time in China will be exciting and unforgettable, and will leave you with many fresh and beautiful impressions. This is another advertisement that I hope you enjoyed.

谢谢主持人!谢谢大家!

Finally, my sincere thanks to the moderator and to everyone here today.

Moving toward a more transparent government——

The creation of a legal system for government information disclosure in mainland China

Mo Yuchuan

Executive Director, Renmin University
Constitutionalism and Administrative Law Research Center,
China

- 1. The introduction and implementation of the concept of free information in China, and reasons for this development.
- 2. Government information disclosure practice and related experience of creating legislation.
- 3. The difficulties of and prospects for the development of legal systems for government information disclosure in mainland China.

The introduction and implementation of the concept of free information in China, and reasons for this development

- 1. The differences before and after China's reform and opening.
- 2. A key factor leading to this change is the establishment and development of a modern market economy.
- 3. Open administration of government is an important requirement of political and administrative democratization, and of China meeting its WTO commitments to transparency.

Government information disclosure practice and related experience of creating legislation

- 1. Overall situation
- Prior to the promulgation of the "Provisions of the People's Republic of China on the Disclosure of Government Information", there were 31 provinces, autonomous regions and cities that had established different forms of government affairs disclosure.
- There were 36 central government ministries and commissions that had enacted rules on government affairs disclosure.
- 2. Typical experience: Handan City of Hebei Province of China

Government information disclosure practice and related experience of creating legislation

- The "Provisions on the Disclosure of Government Information," comprised of 5 sections and 38 articles, was adopted at the meeting of the State Council on January 17th, 2007, and will go into effect as of May 1st, 2008.
- In total, there are 13 months of preparation time, and the government is currently engaged in this preparation work.
- This preparation work includes designating the responsible department and work unit; reviewing laws, regulations and policies; creating open information guides and information catalogues; and adjusting and improving related systems.

The difficulties of and prospects for the development of legal systems for government information disclosure in mainland China

- Misunderstandings about government transparency
- The gap between requirements and actual operations
- · Conflicting systems and insufficient hardware
- The "Report to the 17th Party Congress of the Communist Party of China" on October 15, 2007 contains new requirements for acceleration of reforms of the administrative system and reduction of government intervention in microeconomic operations.
- Related laws that are already part of the next term's legislative plan include:
 - Government Affairs Disclosure Law
 - Individual Information Protection Law

The difficulties of and prospects for the development of legal systems for government information disclosure in mainland China

- We need to summarize and to communicate about Chinese experience and Asian experience more generally
- We need to draw in assistance from other countries outside of the Asia region.



Nataša Pirc Musar Information Commissioner, Republic of Slovenia

Paper delivered at the 5th International Conference of Information Commissioners

Access to Court Records and FOIA as a Legal Basis – The Experience of Slovenia

Introduction

Access to information of public character is regulated in Republic of Slovenia by Act on the Access to Information of Public Character (FOIA)¹, which has introduced since 2003 the principle of openness and transparency to all the three branches of authorities: executive, legislative and judiciary. Republic of Slovenia therefore has a uniform regulation of access to public information which is exposing to public scrutiny the judiciary in whole not just its administration or so called court management. The exceptions to freely accessible public information are therefore regulated accordingly and exhaustively listed in FOIA². According to regulation such an exception is for example the information which was acquired or assembled for the purposes of criminal prosecution or in relation to it or for the purpose of violation procedure and the disclosure of which could impair their execution. Equally the regulated exceptions are the information which were acquired or assembled for the purposes of administrative procedure and the disclosure of which could impair its execution; and the information which were acquired or assembled for the purposes of civil procedure, non-contentious proceeding or other judicial proceeding and the disclosure of which could impair their execution.

² All the exceptions are indicated in the First Paragraph of Article 6 of FOIA.

¹ Official Gazette RS; No. 51/06 – official consolidated text and No. 105/06 – ZUS-1, hereinafter FOIA.

Short comparative overview of legal regulations is presented in the table below.

Table: EXCEPTIONS CONCERNING JUDICIAL PROCEEDINGS WITH REGARD TO ACCESS TO INFORMATION OF PUBLIC CHARACTER (IPC)

COUNTRY	COURTS EXCLUDED FROM ACCESS TO IPC	JUDICIAL PROC. ARE REL. EXCEPTION	JUDICIAL PROC. ARE ABS. EXCEPTION	PRE-CRIMINAL PROCEEDINGS AS EXCEPTION
1. Austria	No	Yes	No	No
2. Belgium	No	No	No	Yes, REL
3. Czech Republic	No	Yes	No	Yes, REL
4. Denmark	No, criminal part only	Yes	No	Yes, REL
5. Estonia	No	Yes	No	Yes, ABS
6. Finland	No	Yes	No	Yes, REL
7. France	No	Yes	No	Yes, REL
8. Germany	Yes	Yes	No	Yes, ABS
9. Greece	No	Yes	Yes	Yes, REL
10. Hungary	No	No	Yes	Yes, ABS
11. Ireland	No, court records are excluded – court administration is included	No	Yes	Yes, ABS
12. Italy	Yes	No	No	Yes, ABS
13. Latvia	Yes	No	No	Yes, ABS
14. Lithuania	No	No	No	Yes, REL
15. Malta	Yes	/	/	/
16. Netherlands	Yes	No	No	Yes, REL
17. Poland	No	Yes	No	Yes, REL
18. Portugal	Yes ("secrecy of justice are protected under special legislation")	Yes ("postponed until the decision has been taken")	No	Yes (regulated by regulations outside the IPC system)

COUNTRY	COURTS EXCLUDED FROM ACCESS TO IPC	JUDICIAL PROC. ARE REL. EXCEPTION	JUDICIAL PROC. ARE ABS. EXCEPTION	PRE-CRIMINAL PROCEEDINGS AS EXCEPTION
19. Slovak Republic	Yes, court administration is included but not the 'decision making' process)	No	Yes	Yes, ABS
20. Slovenia	No	Yes	No	Yes, REL
21. Spain	Yes	/	/	/
22. Sweden	No	No	Some (taxes, e. g.)	Yes, REL
23. Great Britain	No	No	Yes (court records are an absolute exception)	Yes, ABS (court records are an absolute exception)
24. EU	Yes	/	/	/

It becomes evident prima facie from the comparative analysis of legal regulations that these are divided to those where the courts as public bodies are excluded from the system of access to public information (Spain, Slovak Republic, Portugal, Netherlands, Malta, Latvia, Italy, Germany, European union) and those where the courts are included in the system as are other bodies of the public sector (Great Britain, Sweden, Austria, Belgium, Czech Republic, Denmark, Estonia, Finland, France, Greece, Hungary, Ireland, Lithuania, Poland ...). The existing arrangement in Republic of Slovenia follows the second approach to regulation of access to public information which currently prevails globally. This arrangement comparatively prevails in the European legal area since the goal of modern regulation of the access to information of public character is integrated and systematic transparency of all the three branches of authorities: legislative, executive and judiciary. The courts as representatives of the judiciary are in regulations of this type included among the bodies liable to provide access to public information and can be further divided to two groups of regulations: those where the courts are included in whole and those where some or specific court actions are either excluded from this system (Great Britain, Slovak Republic) or regulated in other laws outside the area of access to information of public character.

The subject of protected exemption referring to criminal prosecution or individual court proceedings is the protection of public interest. Each exemption to free access to public information, including the previously mentioned can be either relative or absolute in nature. It is absolute when access should always be refused; and relative when the access should only be refused if the public interest protected by it is greater then the interest of

the public to disclosure. In most of these systems also when the exemption is of absolute nature the harm test should be met to estimate the damage which would incur to the protected legal entitlement by disclosure of specific information. In case of the relative exemptions the test of prevailing interest of the public exists by which the danger of menacing serious damage to protected legal entitlement and the public interest for disclosure of specific information are balanced.

Comparative legal analysis shows that almost all the systems which include courts as liable bodies in the context of access to public information, protect execution of proceedings related to detection of criminal acts and proceedings of criminal prosecution as special exemptions to free access to public information thus protecting public interest to detection of perpetrators of criminal acts³. The Recommendation (2002) No. 2 of the Council of Europe needs to be mentioned here which specifically defines »the prevention, investigation and prosecution of criminal activities« as legitimate reasons for limiting access. Also the Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents which excludes the courts from this system defines that access to documents whose disclosure would hamper the purpose of inspective, investigative or accounting activities should be refused. It is important to note here that the EU bodies do not deal with the criminal prosecution in the same way as individual member states. Finally we need to mention the fact that the draft proposal of the Convention on access to public information which is being drafted by the Council of Europe, does not envisage inclusion of the judiciary as a whole but only its administrative part – court management, while the inclusion of the whole judiciary in the draft remains only one of the possible options⁴.

Regulation in Slovenia

It is worth noting that the exceptions which protect the criminal prosecution and judicial and administrative proceedings cumulatively define two conditions which should be fulfilled for the exception to be effective:

- 1. The proceeding must be in progress,
- 2. The disclosure of information would hamper the execution of the proceeding.

The legislator in passing FOIA, where the term criminal prosecution is used, allowed the possibility to include under protection all the information from all phases of the criminal prosecution. This exception is in part covered also by another exception, namely FOIA

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³ Those systems which exclude courts from free access to public information regulate the publicity of their work in special regulations as the pre-trial proceeding should not be totally excluded from the context of access to public information. This proceeding is primarily in the domain of investigation bodies, namely the prosecution and police. As these are repressive bodies, their work needs to be included in access to public information in a systematic way representing also one of the forms of control (in the sense of scrutinizing function of the right of free access to public information), while at the same time the possibilities for their effective work need to be continuously ensured.

⁴ We are referring to the draft text of the convention, which is being prepared by the group of experts from 15 European countries; Republic of Slovenia as one of the members of the Council of Europe and a member of the group of experts has strongly opposed to such regulation of the scope of liable bodies in relation to access to public information.

protects from disclosure also the information acquired or assembled for the purposes of civil, non-contentious or other judicial proceeding, thus also criminal. The use of one or the other exception depends on the estimation of the liable body from which the information is being requested and on the phase in which the criminal proceeding is.

Exceptions whose purpose is protection of judicial proceedings require the use of so called harm test, according to which the body deciding against the disclosure of the document has to prove that the disclosure would affect the protected legal entitlement or that specific damage would occur in execution of the judicial proceeding. The threat has to be real not just hypothetic. The liable body is therefore entitled to refuse the access if the disclosure would jeopardize the execution of specific actions in the proceeding in such extent that they would become impossible or their execution would become harder or disproportionately more expensive or difficult. The body should for example prove the likelihood of the fact that the disclosure of documents in specific court case would endanger specific judicial proceeding. The harm test must be met in each individual case by the body which has to prove in concreto the occurrence of damage. It is often noted by the courts that the transmission of a judgment which is not yet final could have an affect on the decision of the court of appeal however they do not concretely specify what sort of damage would consequently occur. This hypothetic assertion of occurring damage without concrete implementation of the harm test does not meet the required proof of existence of the exception. As the court hearings are public, the journalists attend and comment or report especially from the hearings of greater interest to the media. Freedom of information and developed public opinion are extremely important in preventing abuses and in democratic implementation of state authority thereby also of judiciary. Accordingly these subjects are discussed also outside the courts in public opinion which should not affect the expert work of the judges and their independence and impartiality. On the contrary this threat should not be a reason for limitation of the access to information. If the court would not be able to ensure objective, professional and impartial trails in cases of different pressures in particular with the cases which get more media attention, this could lead to violation of Art. 23 of the Constitution of the Republic of Slovenia which guarantees to everyone to have an independent and impartial court constituted by the law without undue delay deciding on his rights, duties and allegations brought against him. Many other public officials or functionaries are exposed to such pressures and it is (reasonably) expected from them to provide expert, independent and impartial exercise of their duties. Refusal of access to judgments which are not yet final solely because this could affect the decision of the court of Appeal does not meet the requirement of serious legal assessment.

It is important to note here that the documents contained in specific pre-criminal or court records include information which are also subject to other exceptions to freely accessible information the most frequent one being the exception of protected personal data in accordance with the Personal data protection Act⁵. Concrete record might therefore contain also other exceptions which are intertwined with the freely accessible information. In evaluating the accessibility of individual documents the starting point should therefore be the principle of ensuring the highest possible level of accessibility to

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⁵ Official Gazette RS; No. 86/2004,113/2005, 51/07 – ZUstS-A and 67/07, hereinafter ZVOP-1.

information while the main principle of FOIA is the principle of openness and thus the aim of the law to ensure the public to be informed in the best possible way. Through provisions providing for partial access in accordance with Article 7 of FOIA access to that information should be granted which could be extracted from the document without affecting its confidentiality and taking into account the reasonableness, reasonable time requirements on necessary input of administrative work and standards developed by the European court of Justice in Luxemburg. These are the arguments that prove the fear from exceeding disclosure of personal data or information in relation to the protection of judicial proceedings as ungrounded.

From the practice of the Information Commissioner

According to FOIA, each piece of information originating from work sphere of the body is considered as information resulting from performance of public law tasks or in relation to activity of the body. Information of public character must have been formed in the course of the activities of the body or procedures that fall within the competence of the body. If the first condition is fulfilled, the information of public character can relate to any content of any area of activity of the liable body and can be related to its policy, activity and decisions that fall under the sphere of activities or responsibility of the respective body.

The exercise of the authority of the judiciary which includes trials in specific civil affairs also represents a part of the public law tasks of the body and therefore falls under the sphere of activities of the body. Should it be ascertained in the appeal procedure that the requested document exists, that the body is in possession of the document and that the requested information derives from the work sphere of the body, the basic criterions for existence of information of public character are fulfilled. For that reason, individual documents from court records, such as transcripts of public hearing, orders, decisions and judgments, fulfil all the requirements for existence of information of public character.

In practice the distinction developed between the right of access to court records under the procedural law and right of access to information of public character under FOIA. Courts as liable bodies have frequently rejected requests for assess on account of procedural law provisions, under which the parties have the right to examine and transcript separate records in which they act as parties. Other persons may be allowed to examine and transcript separate records, but only if they can demonstrate legitimate benefit. In this manner the courts weigh, whether the applicant has legal interest to obtain specific information and the requests for access to information of public character get regularly rejected, despite the fact that FOIA specifically enshrines the principle of free access to information of public character.

Such interpretation of FOIA is according to the Information Commissioner's practice considered inappropriate. Provisions of procedural laws that regulate the right of access and transcription of records are not in relation *lex specialis derogat legi generali*, since they do not regulate the same right. Provisions of procedural laws relate to right of clients in a judicial procedure, i.e. the right of a person who has demonstrated legitimate

benefit, to access and transcript of records in a specific court case, whereas FOIA regulates the right of anyone to access different documents - information of public character, that are at the disposal of the bodies. It is about different legal grounds and regulation of two different rights – on one hand the right of access to information of public character, under Para. (2) of Article 39 of the Constitution of the Republic of Slovenia, and on the other hand, the right of clients and other beneficiaries to access and transcript records, which is – enacted under the right to equal procedural guarantees – guaranteed by Article 22 of the Constitution. Right of access and transcription is concretisation of constitutional provision on equal protection of rights, which obligates the legislator to regulate specific judiciary and other proceedings in such manner that everyone is equal in his rights in equivalent situations in a specific proceeding or in other words that the same standards of legal protection are guaranteed. Opposing parties should therefore have equal possibilities to assert their rights (i.e. adversarial principle), and therefore also equal possibilities to access and transcript of court records, which enables the clients to get familiar with the facts and evidence put forward by the other party or in possession of the court. The above means that the right of access and transcript of records guarantees the adversarial principle in a judicial proceeding and not the principle of publicity.

When adopting its decisions in cases on access to information from court records, the Information Commissioner has taken the standpoint, that access to information of public character is a constitutional right and that the body should deal with the request according to the law regulating the exercise of this right, i.e. FOIA. The procedure of access to information of public character is a procedure in which it is being decided about an administrative issue and is therefore not a judicial procedure. The object of protection or right, regulated by such procedure, is completely different. In the procedure of deciding on the request official of the body, responsible for access to public information, is required to act in accordance with the provisions of FOIA, which stipulates that if FOIA does not regulate a specific question provisions of general administration act are applicable, and not the provisions of a procedural law (such as criminal or civil procedural law). The procedure of deciding upon access to information of public character is a procedure of administrative nature. The objects of protection are two different constitutional rights, which do not exclude one another.

The question of access to public information must be assessed in each individual case separately on a case by case basis and in doing so it is not necessary that each piece of information of public character is also publicly available. It should be noted that the law managing the conduct of courts specifically regulates that the notice board of the court is *inter alia* used for publication of hearings and sessions of which the parties in proceedings have to be notified and in which the public is not excluded either by law or following the decision of the court. All information from the notice board of the court may be published also in electronic form in such manner that provides for public access (e.g. on the internet). These data contain the reference number of the case, case type, date and hour of the hearing or session, data on location and room where the hearing or session will be held of which parties are to be informed, name of the judge or senate president judging in the case and personal name of the parties in proceeding. Other writings may be published as well if this is provided for by the law.

This provision is also applicable in cases, when the complaining party does not notify the court of the change of his address and the court rules that all the following notifications should be carried out by publishing them on the notice board of the court. Such circumstances may arise as soon as the action is filed when the court, provided that the action is incomplete, calls upon the complaining party, to correct the action. If notification at the address of the complaining party is not successful, the court may order that all further notifications are notified by publications on the notice board of the court. The decision to correct the action as well as the decision rejecting the action that follows the first decision if the complaining party does not correct the action in the set time period may thus be published on the notice board of the court. Each decision contains in the introduction several of the pieces of information that are asked for by the applicant: the address of the court, the names and surnames of the president and members of the senate, the name and surname and address of the party and a short declaration on the disputed subject of the case. All decisions of the court must be equipped with the reference number of the case in the upper right hand corner of the decision so that each decision that is attached to the notice board of the court clearly identifies the reference number of the case. All this data may be published by attaching them on the notice board of the court before the summoning of the hearing and their publication is not tied to a certain phase of the procedure and therefore they do not represent protected personal data.

Conclusion

The right of individuals to have access to the records and the right of access to public information are not rights which would be in collision or which would exclude each other. However for implementation of these two rights two different proceedings exist thus the public official of the body responsible for deciding in a matter of request for access to public information is deciding according to FOIA as this is an administrative matter. The question of access to public information should be decided separately in each concrete case and for each document. The position taken in the judgments of Administrative court of Republic of Slovenia⁶ are to be understood in light of this, namely FOIA as general law and sector specific laws regulating access to public information are equal. These positions should however in no way be understood as an additional condition regulated in procedural laws neither is it possible to request additional proof of justifiable interest or benefit for granting of access to information from court records.

It is important to mention that not all the information from court records are necessarily subject to free access and third parties who are not parties to the judicial proceeding might be more likely to get access to court records and documentation then parties to the proceeding who have to prove their legal interest to be granted access. The right of the parties to have access to the court records namely refers to the *entire court record in concrete case*, however in a proceeding regarding a request for access to public

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⁶ Sodbe opr. št. U 1676/2003 z dne 23.3.2005 in U 965/2004 z dne 30.3.2005.

information which would be referring to entire court record, each document from the record would have to be evaluated separately. The right of a third party who would file a request for access to public information referring to all the documents from specific court record could under no condition be "equal" or stronger then the right of a party in the proceeding to examine specific court record. Each court record includes at least personal data of the parties or accused, of person suffering damage, of witnesses and potential other participants, the disclosure of which would be in violation of personal data protection standards as regulated by the act governing the protection of personal data. This would be also a ground for exception to free access to public information, based on which the body would refuse access to requested information to the applicant. This means that a third party who is not a party in judicial proceeding can be given only specific, therefore partial, parts of the court record by implementing the right of free access to public information therefore he is in his right not equal to someone who has proven his legal interest to be granted access to entire court record and all the documents in it.

In refusing access to information it is often argued by the courts that granting access to information lies outside the legal regulations and principles. Some state that this is an inappropriate mechanism representing extra-procedural public control by in-expert public. This argument seems purposeless from the point of view of access to public information and shows a lack of understanding of the meaning and importance of the judiciary. Judiciary namely represents through jurisprudence a kind of counter-balance to legislative and executive branches of authorities therefore the courts would have to proactively ensure transparency and openness and thus contribute also to effective implementation of all the other human rights, among them of the right to judicial protection.

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Date: 04.12.2006

Title: Ropac Iva, journalist for the Delo newspaper, vs. Ljubljana District court

Ref. no.: 021-89/2006/7

Category: Personal data, other judicial proceedings

Status: Granted

Date: 04.12.06

Ref. no.: 021-89/2006/7

The Information Commissioner (hereinafter Commissioner) by Nataša Pirc Musar issues, pursuant to Article 2 of the Information Commissioner Act (Official Gazette of RS, No. 113/2005, hereinafter ZInfP), Par. 3 and 4 of Article 27 of Access to Public Information Act (Official Gazette of RS, No. 51/06 – Official consolidated text, hereinafter ZDIJZ), and Par. 1, Article 252 of the General Administrative Procedures Act (Official Gazette of RS No. 24/06 – Official consolidated text, hereinafter: ZUP), upon the appeal of Ropac Iva, journalist for the Delo newspaper, Dunajska 5, 1509 Ljubljana (hereinafter applicant) against the decision, no. Su. 1-8/2006-3 from 18 November 2006 of the Ljubljana District court, Tavčarjeva 9, 1000 Ljubljana (hereinafter body) for granting the reuse of public information, the following

DECISION:

- 1. The appeal is hereby granted and the contested decision is annulled.
- 2. The Body shall within 3 (three) days after this decision becomes final, provide the applicant with a judgement of the Ljubljana District court, no. III P 1839/5 from 10 March 2006 whereupon it shall delete from the judgement the following data on the claimant: Name, family name and place of residence.

GROUNDS:

The appeal is founded.

1. General aspects of access to public information

ZDIJZ defines in detail the constitutional right of individuals of access to public information, as in accordance with Par. 1, Article 1, every person is ensured free access to public information in the possession of government bodies, bodies of local municipalities, public agencies, public institutions, and other legal persons of public law, public powers holders and public service contractors. ZDIJZ undoubtedly projects important influence to the public sector's functioning, not only in part where it encompasses a broad range of public sector bodies liable to comply with statutory provisions on the I. level, but also as regards the definition of public information itself. Both are in the interest of ensuring transparency of the entire public sector, therefore also of courts as government bodies, not merely of other state government bodies. The aim of ZDIJZ, originating from Article 2, is to ensure that the work of the bodies is public and open, and to enable natural and legal persons to exercise their rights to



acquire information held by public authorities, whereupon the bodies shall endeavour to inform the public of their work to the greatest extent possible.

In accordance to the provision of Par. 1 of Article 4 public information shall be deemed to be information originating from the field of work of the bodies and occurring in the form of a document, a case, a dossier, a register, a record or other documentary material (hereinafter referred to as "the document") drawn up by the body, by the body in cooperation with other body, or acquired from other persons.

Pursuant to ZDIJZ public information is therefore information originating from the body's field of work, in relation to it performing its public duties or in relation to its activities. The body should compile public information within the scope of its activities and, according to general regulations, during executing its competency. Upon fulfilling the first condition, public information shall relate to any content, in all fields of activity of the liable body, and may be connected with its policy, activities and decisions falling within the scope of the individual body's obligations (see doctoral Dissertation of Urška Prepeluh "The right of access to public information", Ljubljana 2004, p. 149).

The Courts Act (Official Gazette of RS, no. 100/2005 – official consolidated text, hereinafter ZS-UPB2) states in Par. 1 of Article 1 that the judicial power in Slovenia is executed through judges, in courts of law established pursuant to this or other Act. The stated shows that the execution of judicial powers (adjudication on individual cases being one of such powers) represents a part of the body's statutory public duties and therefore falls within its field of work.

The Commissioner herewith established that the requested document does exist, that it is furthermore in the body's possession and that the information requested originates from its field of work; it is therefore clear that the judgement passed by the Ljubljana District court, ref. no. III P 1839/05 meets all conditions for the existence of public information.

2. The right to review a civil litigation case-file under the Civil Procedure Act and the right of access to public information

The body based its refusal, among other, on Article 150 of the Civil Procedure Act (Official Gazette of RS, no. 36/2004, hereinafter ZPP), stating that the parties to the procedure have the right to review and transcribe case-files in which they participate. Other persons may be granted equal right to review and transcribe a case-file, but only under condition that they demonstrate legal interest. According to the body, the applicant failed to demonstrate such legal interest.

The Commissioner initially established that the quoted provision of Article 150 of ZPP and ZDIJZ are not connected as *lex specialis derogat legi generali* as they regulate different rights. The above stated provision of ZPP pertains to the right of parties or persons, succeeding in demonstrating their legal interest in judicial proceedings to review and transcribe a case-file of an individual case, whereas ZDIJZ on the other hand regulates everyone's right to access various documents – public information in possession of the body. These are two different legal bases to regulate two different rights – on the one side, the right of access to public information, originating in Par. 2 of Article 39 of the Slovenian Constitution, and on the other, the right of parties or other rightful claimants to review and transcribe case-files, originating from the right to equal procedural protection ensured by Article 22 of the Constitution. Article 150 of ZPP defines in more detail the constitutional provision on equal protection of rights, which requires that the lawgiver regulates individual judicial and other legal proceedings in such a way, that all parties to the proceeding enjoy equal rights and are given equal standard of legal protection (OdlUS V, 201, Up-88/94 from 31 May 1996). Parties to the dispute shall have equal possibilities to enforce their rights (principle of parties' contradiction), and therefore also



equal opportunity to review and transcribe the case-file, allowing the parties to acquaint themselves with facts and evidence, proposed by the other party or those, in the court's possession (see more: Commentary to the Constitution of the Republic of Slovenia, Šturm L., editor, Faculty for postgraduate state and European studies, Ljubljana, 2002, p. 238 – 251). The stated shows that Article 150 of ZPP protects the principle of the parties' contradiction in a civil litigation, but does however not protect the principle of publicity.

Regarding the stated, the Commissioner underscores that the access to public information represents one of the constitutional rights, and that the body most adjudicate on the matter at issue in accordance with ZDIJZ as the Act, governing the procedure to fulfil the stated right. The access to public information procedure represents a procedure of deciding on an administrative matter, whereas a civil litigation represents a judicial procedure, the two therefore representing two separate fields of law. As is evident from the above stated explanation, the difference can also be observed in the subject of protection, that is, the statutorily protected right, which demands the proceeding at issue. The Official competent to transmit public information shall be, within the adjudication proceeding obliged to use the provisions laid down in ZDIJZ, and shall in addition, in accordance with Article 15 of ZDIJZ for questions concerning the procedure, which are not governed by this Act, use the provisions laid down in the Act governing general administrative procedure, and not the provisions of a procedural Act, ZPP in this case. The access to public information procedure namely represents the adjudication on an administrative matter. The subjects of legal protection are therefore two mutually non-exclusive constitutional rights. The question of access to public information should therefore be decided on individual case basis, it is however not mandatory that every information should indeed be publicly accessible. ZDIJZ namely stipulates in Par. 1 of Article 6 the cases in which the body may refuse access to public information.

Based on the stated, the Commissioner concludes that the body should, regarding the request for public information resort to ZDIJZ, whereupon it should in individual cases evaluate whether any of the exceptions laid down in Par. 1 of Article 6 of ZDIJZ apply.

3. Principle of free access according to ZDIJZ

The applicant in its complaint stated that she is employed as a professional journalist, and that journalists as such, are entitled to access to judgements of the courts. The performance of the journalist profession, the primary mission of which is informing the public, could otherwise be severely impaired or even rendered impossible. Due to the stated, the Commissioner explains that access to public information is governed by the principle of free access (Article 5 of ZDIJZ). According to this provision, public information shall be freely accessible to applicants, which may acquire information from the body by acquiring it for consulting on the spot, or by acquiring a transcript, a copy or an electronic record of such information. ZDIJZ therefore requires, as a rule, equal and uniform application of the Act's provisions, signifying also that there shall be no distinction between individual applicants as to their status and therefore no categories of privileged applicants shall exist. The applicant's identity is thus completely irrelevant, it is only important whether the requested constitutes public information and whether it may be publicly disclosed. principle at the same time means that everyone may access all public information in possession of any liable body. The stated principle is elaborated in greater detail in Par. 3 of Article 17 of ZDIJZ, according to which the applicant is not required to give the legal grounds for the request or expressly characterize it as a request for the access to public information. That is, if it is evident from the request's nature that the latter concerns access to public information under ZDIJZ, the body shall consider the request pursuant to this Act. The applicant's intent pursued through the requested



information is for the purposes of deciding on the case irrelevant. The Commissioner shall be obliged, pursuant to ZDIJZ in substance only to decide whether the information requested, fulfils all criteria for public information and if so, it shall be, due to this fact, accessible to everyone (*lat. erga omnes*). The applicant's interest and legal benefit are, for the purposes of deciding on the case, irrelevant.

The Commissioner should at that bring to notice also the Media Act (Official gazette of RS, no. 110/2006—official consolidated text, hereinafter ZMed), stipulating in its Article 45 the media access to public information. Based on the above mentioned decision, the access to public information as regards the needs of journalists and media is in fact broader, as according to ZMed the government bodies are obliged to answer the journalists' questions, an obligation not present under ZDIJZ. In addition also the reply times are shorter. The bodies must provide the journalists with answers to their questions, submitted in written form at the latest in seven working days from the receipt.

4. Exceptions based on Par. 1 of Article 6 of ZDIJZ

The body may refuse access to the requested information in case of one of the statutory exceptions laid down in Par. 1 of Article 6 of ZDIJZ. The body based its challenged decision on the exception, laid down in Point 8 of Par. 1 of Article 6 of ZDIJZ, based on which the body may refuse the applicant access to the requested information, in case the request concerns data, acquired or compiled due to civil, non-contentious or other judicial proceeding, and if such disclosure would harm the proceeding's execution.

4.1 Exception based on point 8, Par. 1, Article 6 of ZDIJZ

To enact the exception, envisaged in point 8, Par. 1 of Article 6 of ZDIJZ, two conditions should cumulatively be fulfilled. The (judicial) proceeding shall not be concluded and in addition to this, the disclosure of such information would prejudice the implementation of such procedures. The stated condition however entails the execution of the so-called harm test, which must prove that through such a disclosure, a legal benefit could be jeopardised, or specific harm could ensue in the execution of civil-litigation at issue. The identified threat should be real and specific and not merely hypothetical and abstract. Access can in such a case be refused only when disclosure of data would jeopardise the execution of certain procedural acts in so much as to render impossible their execution, or to cause their execution, due to disclosure, to be impaired or associated with disproportional costs and difficulties (see also Commentary to Access to Public Information Act, Institute for public management at the Ljubljana Law School, 2005, p. 128).

The body should in each case perform the so-called harm test by way of proving that the real damage could indeed occur. In the case at hand, the body stated in the disputed decision, that the transmitting of a non-final judgement could influence the appellate court's decision, but however omitted to state the actual ensuing damage. Such damage, claimed only hypothetically without the performance of a proper harm test, however, fails to demonstrate that the asserted exception is indeed given. As court trials are in general public, they are often, in the more publicized cases, attended by professional journalists, and thus subjected to critical commentary and media reporting. The rights to being informed and to a well-developed public opinion remain crucial to prevent abuse and propagate democratic execution of powers of state, among them in particular the power of judiciary. The stated signifies that a public debate on the former can indeed take place also outside of the courtroom as part of the general public opinion, but which shall at the same time have no effect on a justice's professional conduct, his independence and impartiality. On the contrary, such a threat should not present a reason to limit access to information. If due to such pressure, the court would not be able to deliver a fair, competent and impartial trial, particularly in the more publicized cases; such conduct would constitute a breach of the right, embodied in Article 23 of the Slovenian Constitution, ensuring



everyone the right to have any decision regarding his rights, duties and any charges brought against him made without undue delay by an independent, impartial court constituted by law. After all, such pressures are common also among many other public servants and officials, expected, in spite of their public exposure, to perform their tasks competently, independently and with impartiality. The Commissioner sees no reason for the case at issue to be any different. Based on the stated the Commissioner held that refusing access to a non-final judgement, by claiming that such disclosure would influence the appellate court's decision, fails to meet serious legal evaluation. The exception laid down in point 8 of Par. 1, Article 6 is therefore not given.

4.2. Exception based on point 8, Par. 1, Article 6 of ZDIJZ

Based on provision of Par. 2, Article 247 of ZUP, requiring that in deciding on appeal against a decision, the body shall by official duty establish whether a material statute has been breached, the Commissioner was required to establish whether the requested information constitutes some other exception. In the case at issue, the Commissioner had to evaluate as to the existence of the exception pursuant to point 3 of Par. 1, Article 6 of ZDIJZ, stating as one of the exceptions to public information, any personal data the disclosure of which would constitute an infringement of the protection of personal data in accordance with the Act governing the protection of personal data, thus pointing to the use of Personal Data Protection Act (Official Gazette of RS, no. 86/04 and 113/05, hereinafter ZVOP-1).

The key purpose of ZVOP-1 is the prevention of unconstitutional, illegal and unjustified intrusions to privacy and dignity of individuals (Article 1 of ZVOP-1). According to the provision of point 1, Par. 1, Article 6 of ZVOP-1, personal data shall be any data relating to an individual, irrespective of the form in which it is expressed. Correspondingly, the individual shall be an identified or identifiable natural person to whom personal data relates; an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity, where the method of identification does not incur large costs or disproportionate effort or require a large amount of time.

The Commissioner reviewed the Ljubljana District Court's judgement, ref. no. III P 1839/05 and established that it contains numerous personal data. The civil-litigation proceeding has namely been instituted through a private lawsuit for payment of damages. The basis for liability is regulated in the Slovenian Obligations Code (Official Gazette of RS, no. 83/01, 32/2004, 28/2006, hereinafter OZ), stipulating in Par. 1 of Article 131 that any person, which inflicts damage on another shall be obliged to reimburse it, unless it is proved that the damage was incurred without the culpability of the former. This in turn means that if the person responsible for inflicting the damage fails to reimburse it, the injured party's only recourse shall be to request reimbursement through litigation. However the individual shall due to this fact not be required to waive his right to privacy and protection of personal data, in other words, the court shall be obliged to protect his personal data. Although the Slovenian Constitution does portend the open court principle, that is the need for court trials to be public, that judgements shall be announced in open court, as well as that any exceptions should specifically be regulated by law (Article 24 of the Slovenian Constitution), this right is however, according to the Commissioner's opinion, primarily intended for parties to individual cases where the need to ensure fair trial exists (Commentary of the Slovenian Constitution, Šturm L., editor, p. 270-273). Thus if the stated right is intended primarily for the parties to individual proceedings, which can demand payment for damages only by evoking a constitutionally recognized right, such a right should therefore not be allowed to limit another constitutionally recognized right, the right to protection of personal data and to protection of privacy, also within the frame of a judicial proceeding. The injured party or the plaintiff shall in the lawsuit for damages provide evidence as to the damages incurred, the facts stating



that such damage originates from the harmful action and that a chain of causation exists between the resulting damage and the inadmissible action. On the contrary, the defendant shall be required to exculpate himself from liability for damages. As the damage in the question at issue, is of an immaterial type, the stated therefore means that data contained in the disputed non-final judgement relates to the plaintiff's medical condition, and thus falls under sensitive personal data in accordance with point 19, Article 6 of ZVOP-1. These represent a special category of personal data, which deeply influence the individual's privacy. The intrusion into such data at the same time constitutes an intrusion into the individual's privacy. Sensitive personal data represent one of the most subtle categories of personal data, defined in point 19, Article 6 of ZVOP-1, and listed exhaustively, not declaratively. As such, these data require, due to their particular sensitivity, special safeguarding, protection and limitations to admissibility of processing, the eight points of Article 13 of ZVOP-1 exhaustively specify eight legal bases for processing of sensitive personal data. Sensitive personal data can therefore only be processed in eight specifically and exhaustively defined cases. According to point 7 of Article 13 of ZVOP-1 the processing of sensitive personal data shall only be admissible if this is necessary to fulfil or contradict a litigation claim. However the court shall be obliged, whenever adjudicating on a particular case of executing or contradicting a litigation claim, upon dealing, among other, with sensitive data, to ensure appropriate protection of such data. The duty to protect sensitive data shall also bind the defendant and all parties present at the court trial, as the mere fact that these parties acquired the data during judicial proceedings, in no way alters their inherent nature. These data are classified per se, as such. (for more see Access to Public Information Act with Commentary, Pirc Musar N., editor, Ljubljana 2006, commentary to Article 13 of ZVOP-1)

Based on the stated the Commissioner established that the Ljubljana District court judgement, ref. no. III P 1839/05 together with name, family name and address of the plaintiff contains sensitive personal data, which constitute an exception pursuant to point 3 of Par. 1, Article 6 of ZVOP-1.

5. Principle of partial access and importance of confidentiality under Article 7 of ZDIJZ

With regard to establishing the existence of personal data, contained in the requested document, the Commissioner subsequently considered whether the applicant could be granted partial access to the document.

The principle of partial access is stipulated in Article 7 of ZDIJZ, which states that if a document or a part of a document contains only a part of the information referred to in Article 6 (such as personal data), which may be excluded from the document without jeopardizing its confidentiality, an authorized person of the body shall exclude such information from the document and refer the contents or enable the re-use of the rest of the document to the applicant. The stated in connection with the principle of openness of public bodies, defined in Article 2 of ZDIJZ, signifies a body's duty to always resort to the principle of partial access, unless when pursuant to the criteria set out in Article 21 of Decree on transmitting and the re-use of public information (Official Gazette of RS, no. 76/2005) this shall not be possible, or when (and if) such partial disclosure would threaten the confidentiality of the protected information. Article 16 of the Decree stipulates that when a document or its part contains information from Article 6 of ZDIJZ only partially, it shall be deemed that such information may be eliminated from the document without endangering its confidentiality, if it can be physically removed, crossed out, permanently covered or made inaccessible in some other way, if the document is in hard copy, deleted, encoded, blocked, restricted or made inaccessible in some other way, if the document is in electronic form (paragraph 1). Notwithstanding the preceding paragraph, it shall be deemed that information cannot be removed from a document if the removed information can be deduced from other information in the document (paragraph 2).



The case at hand effected a situation when fundamental human rights: the right to privacy, the right to protection of personal data, the right to legal protection and the right to freedom of expression, collided. In addition, it is inherent to fundamental human rights that they are equal and none can or may prevail over the other.

The Commissioner estimates that in the case at hand, all constitutional rights can be satisfied, without having to limit one of them. By deleting the plaintiff's name, family name and address, identity and the possibility to identify the individual are thus removed, consequently removing also all possibility of contact. The sensitive data, contained in the judgement's grounds become anonymous, which in turn means that any identification of the individual becomes impossible. Through anonymisation the individual can thus no longer be located or recognized, and as a consequence the sensitive personal data lose their subtleness (see Personal Data Protection Act with Commentary, Pirc Musar, N., editor, Ljubljana 2006, commentary to Article 13 of ZVOP-1). The Commissioner therefore again underlines (expounded already in point 4.2 of this decision) that the act of anonymisation in such a way as to protect the sensitive personal data, bounds all persons, present at the court trial. The same manner is also applied in the publication of the supreme and higher courts' judgements, posted on the judiciary web portal (www.sodnapraksa.si), operated by the Supreme court, and on the IUS INFO web portal, to which judgements are delivered in anonymised form by the Supreme court of the Republic of Slovenia, as well as in the Supreme court's judgements in written form, the editors of which are supreme court justices.

The substantiation of the requested judgement contains names and family names of doctors and nurses, examined as witnesses within the judicial proceeding. Some were employed with the plaintiff, which is a legal person incorporated as a public institution, while others were sworn in as medical experts. In both cases however, their names and family names represent public information. In the first from the point of view of civil servants, as the doctors and nurses are employed in a public institution in accordance with Article 1 of Civil Servants Act (Official Gazette of RS, no. 56/02, hereinafter ZJU); consequently the information on their names and family names in relation to execution of their duties, constitutes pursuant to Par. 3, Article 6 of ZVOP-1 public information. That is to say, their examination within the procedure was connected with their employment as civil servants. On the other hand, the information on medical experts is publicly available in the Court experts register on the web page of Ministry of Justice (http://www2.gov.si/mp/tol.nsf/(WebIzvedenci)?OpenView).

Based on the stated facts the Commissioner concludes that the I. level body incorrectly applied the material law, the Commissioner therefore granted the applicant's appeal and, pursuant to Par. I, Article 252 of ZUP, annulled the body's decision and adjudicated on the matter as proceeds from the decision's operative part. The Body shall grant the applicant access to the requested public information, so as to provide her with the judgement of the Ljubljana District court, no. III P 1839/5 from 10 March 2006, as proceeds from point 2 of the decision's operative part, whereupon it shall delete from the judgement the following data on the claimant: name, family name and place of residence. The body shall do this within three days after this decision becomes finally binding, that is at the point in time when it can no longer be challenged in an administrative procedure pursuant to Par. 1, Article 225 of ZUP (the 30-day time limit to file a lawsuit in administrative procedures).

The second paragraph of Article 5 of ZDIJZ stipulates that every applicant shall have, at his request, the right to acquire information from the body by acquiring such information for consulting it on the spot, or by acquiring a transcript, a copy or an electronic record of such information. The second point of Article 17 of ZDIJZ stipulates that the applicant must specify the way in which he wishes to get acquainted with the contents of the requested information (consultation on the spot, a transcript, a copy, an electronic record).



The stated shows that it is the applicant's right to decide as to how she wants to obtain the requested information. The body must therefore provide the applicant with the document in electronic form as requested.

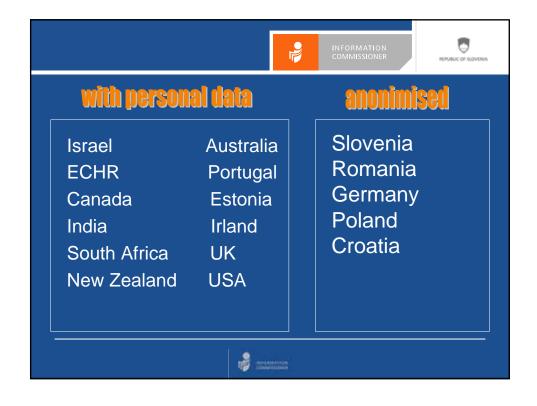
Instruction on legal remedy:

This decision cannot be appealed, but a lawsuit can be filed within the Administrative Court Tržaška 68/a, Ljubljana, within 30 days after receiving this Decision, in writing directly with the above mentioned court, or sent by registered mail, or orally in minutes. In case the lawsuit is filed by registered mail, the day of submitting the lawsuit to court shall correspond to it being filed with the mail office. The lawsuit with any appendices shall be filed in three copies. In attachment, the lawsuit shall also contain this Decision in original, or a copy thereof.

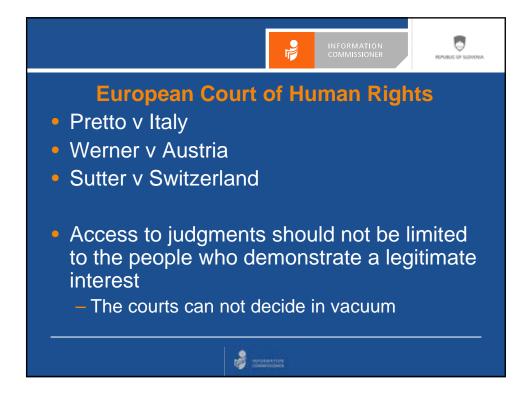
Information Commissioner: Nataša Pirc Musar, LL.M., Commissioner



















Access to judgments in Slovenia

- History (2002):
 - Closed system IUS INFO, payable, nothing on the internet
 - to get the judgment you had to know the lawyer of one of the parties
- Today (after 2003):
 - All high courts and supreme court judgments are available via Supreme Court internet site, not payable
 - Dates of the hearings with the names of the parties, court room number, name of the judge, docket number – on the internet but...







FOIA, 2003

- FOIA covers all three branches of authorities;
- FOIA covers the judiciary branch in whole, not only court administration and management;
- Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents excludes the courts.



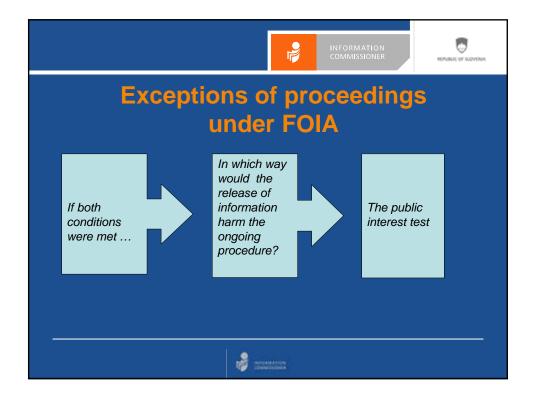




Exceptions under FOIA

- Exceptions under FOIA concerning court proceedings:
- 1. protection of criminal prosecution,
- 2. protection of judicial proceedings.
- Two conditions:
- a. the proceeding must be in progress,
- **b.** the disclosure of information would have to hamper the execution of the proceeding (harm test).









The relationship between FOI and procedure acts

- The right of the parties to have access to the court records refers to the *entire court record in concrete case*.
- The right for access to public information does not refer to the entire court record:
 - each document from the record is to be evaluated separately!







DECISIONS OF IC

If the proceeding is finished, access to court judgements can be denied:

- to protect the personal data of the parties, victims ...,
- not to protect the identity of the judge, court administration, attorneys of parties, court experts ...





DECISIONS OF IC

Access to court judgments should be granted:

- even if the judgment is not final!
- especially if there is great public interest in the outcome of the proceeding!







In refusing access to information it is often argued by the courts that granting access to information lies outside the legal regulations and principles. Some state that this is an inappropriate mechanism representing extraprocedural public control by in-expert public. This argument seems purposeless from the point of view of access to public information and shows a lack of understanding of the meaning and importance of the judiciary.





Judiciary namely represents through jurisprudence a kind of counter-balance to legislative and executive branches of authorities therefore the courts would have to proactively ensure transparency and openness and thus contribute also to effective implementation of all the other human rights, among them of the right to judicial protection.







Freedom of Information and Parliament

Kevin Dunion, Scottish Information Commissioner

5th Information Commissioners International Conference
Wellington, New Zealand November 2007

www.itspublicknowledge.info

Scottish Parliament and FOIno room for doubt?







Scottish Parliament

 Scottish Parliamentary Corporate Body

FOI v Parliamentary Procedures



Does a written Parliamentary question tabled by a Member of the Scottish Parliament to Government Ministers constitute a valid FOI request?



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Information about constituency work



- Who holds the information?
- Are individual Members of Parliament within the scope of the Act?



Types of FOI requests



- Information of the scrutiny of the Local Government Bill
- © Correspondence with the Chinese Embassy over the visit of the Dalai Lama
- Thefts at the Scottish Parliament
- MSPs and staff who have used the smoking cessation service
- Details of the Parliament's art collection
- Staff absenteeism rate

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MSPs expenses



- Cost of overseas travel
- Number of flights taken in the UK by MSPs
- Annual subsidy of Members' restaurant
- Copies of leases for MSPs constituency offices
- Individual Edinburgh overnight accommodation allowance claims
- Individual claims for travel

Parliamentary expenses



- Personal information?
- ① Threat to safety?
- © Every item of expenditure now published on Parliament website



www.itspublicknowledge.info

Volume of requests



- Disclosure Log
- **@** 2005 183
- **@ 2006 328**
- 2007 485 (to October)
- @ Total 996
- © Cases determined on appeal to Commissioner 05-07
- @ Total 14

ACCESS TO COURT RECORDS

Presentation by Frances Joychild, Barrister and former Law Commissioner

New Zealand Law Commission Report 93, June 2006, www.lawcom.govt.nz

International Conference of Information Commissioners

29 November 2007

Current access to court records

- Current rules are drawn from many sources and differ depending on types and level of court,
- Inconsistent, confusing for public and media
- Inaccessible difficult to locate
- Gaps where there are no rules at all

New Access rules needed.

- A 'Court Information Act' should be enacted with rules made under it.
- Aim to create consistent access principles and rules across all courts in New Zealand and facilitate access
- The Act must take account of the particular characteristics of litigation and litigants

Guiding principle of Administration of Justice – Open Justice

- Fundamental underpinning of New Zealand legal system
- Enhances judicial accountability and maintains public confidence in administration of justice
- Public should have access to information the courts use in coming to decisions
- Nothing should be done to discourage fair and accurate reporting

Presumption of accessibility

- This should be the guiding principle of Court Information Act
- Aligns with open justice principle
- Aligns with Official Information Act framework and principle of availability
- Official Information Act is 'tried and true' in New Zealand. Part of the culture.

Overarching framework

- All court information is presumptively accessible
- Exceptions
 - Conclusive reasons for withholding
 - Good reasons which may be outweighed by the public interest in disclosure

Conclusive reasons for withholding

- Prejudice to maintenance of the law including prevention, investigation and detection of offences
- Compromise the right to a fair hearing
- Endanger any person
- Prejudice the proper administration of justice
- Endanger security or defence of New Zealand

Good Reasons for withholding

- Information discloses a trade secret or unreasonably prejudices a commercial position
- Withholding is necessary to protect privacy of natural persons (eg names, addresses, DOB)
- Allowing access would be contrary to court order

Good Reasons for withholding contd...

- Necessary to protect an obligation of confidence
- Case file relates to specific proceeding such as defamation or
- Case file relates to proceedings under specific statute such as
 - Mental health
 - Family and youth matters

Other reasons for withholding

• If contrary to another enactment such as Criminal Records (Clean Slate) Act 2004.

What is the Court Record

- Court records include all court information,
 - Case file used by court
 - Scheduling and other information on case management systems
 - Administrative information
- Court Records do not include
 - Judge's notes
 - Draft judgments

Temporal guidelines for rules

- Period 1: Pre-hearing (from commencement of proceedings until commencement of substantive hearing)
- Period 2: During hearing (from commencement of hearing until 28 days after end of proceeding (i.e. after disposition of all appeals)
- Period 3: 28 days from end of proceeding until transfer to Archives
- Period 4: After court records are transferred to Archives

Temporal issues

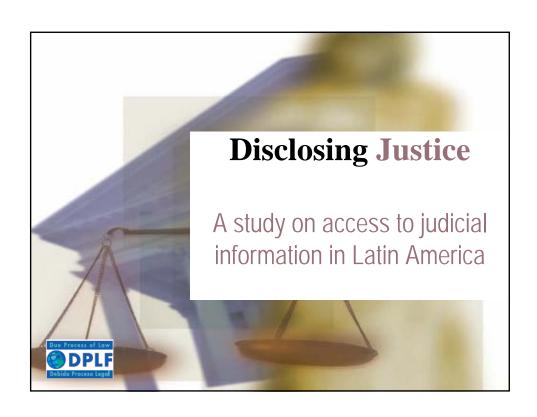
- As of right access (calendars, indexes, case management scheduling information)
- With leave access (to be decided further to presumption and weighing of other interests such as privacy, public interest which differ in weight depending upon time period)

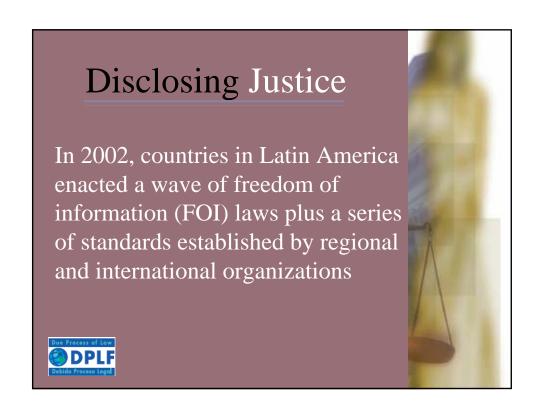
Temporal principles

- Period 1 Fair Trial interest is paramount.
- Period 2 Public access interest strongest
- Period 3 Public access interest weakens and privacy interests strengthen
- Period 4 Chief Judge of each court determines whether open or closed for Archives.

Other features

- Fees same as for Official Information Act
- Media no special statutory provision allowing access over and above ordinary citizen – but improve liaison.
- Researchers Act should provide for consideration of all research proposals





Importance of the decision of the Inter-American Court of Human Rights, *Claude Reyes v. Chile*





Disclosing Justice

The impact of these laws on accessibility to judicial information has been quite varied





Our report is a review of the legal frameworks for access to judicial information in 10 Latin American countries





Disclosing Justice

Countries:

- Argentina
- Chile
- Colombia
- Dominican Republic
- Ecuador

- Honduras
- Mexico
- Panama
- Peru
- Uruguay





Key topics on the regulation of access to judicial information in Latin America:

- a. Access to information from judicial proceedings
- b. Access to judicial information of an administrative nature



Disclosing Justice

Access to information from judicial proceedings may present conflicts between rights





In contrast, conflicts are not present in information related to the administration and management of the judicial system





Disclosing Justice

How is judicial information regulated in Latin American FOI laws?





Three groups:

- 1) Provisions fully apply to the judiciary
- 2) Judicial system has autonomy in regulation
- 3) Limited application of FOI provisions to a particular set of information



Disclosing Justice

Group 1

Full application of FOI provisions to the judicial branch: Panama, Honduras, Ecuador, and Peru

The restrictions on access to judicial information tend to be more detailed, particularly in relation to criminal prosecutions





Group 2

Autonomy of regulation of the judicial system: Mexico

Leaving the judiciary with the obligation to enact its own regulations in accordance with an FOI law may also be problematic



Disclosing Justice

Group 3

Limited application to specific judicial information: Dominican Republic

FOI law applies fully to information related to administrative matters of the judiciary, but it does not apply to information from judicial proceedings





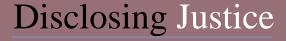
Countries with no FOI laws:

Chile Argentina

Colombia Uruguay

These countries have norms requiring transparency from public institutions, but most of the time these norms do not apply to the judicial system





Difference between countries with FOI laws and countries without those laws:

FOI laws provide a reference point around which a legal framework on access to judicial information may be constructed

However, the fact that a country has FOI laws by no means ensures that they are free of concerns and challenges





This research has been commissioned by the Open Society Justice Initiative as part of its project on *Access to Information: Best Law & Practice*(forthcoming 2008)

See www.justiceinitiave.org



Disclosing Justice

http://www.dplf.org info@dplf.org

DPLF is a non-governmental organization based in Washington, D.C., that promotes the reform and modernization of national justice systems in the Western Hemisphere to ensure that the rule of law becomes the hallmark of these justice systems.







Managing backlogs and caseloads

Richard Thomas
UK Information Commissioner
29 November 2007
ICIC, Wellington, New Zealand



UK Legislation

- FoIA 2000 and Environmental Information Regulations came fully into force 1 January 2005
- section 50 entitlement to apply to the Commissioner for a decision
- retrospective
- 'Big Bang' across 115,000 public authorities

By November 2007:

- at least 200,000 requests to public authorities
- c.7000 complaints to ICO
- c.6000 cases closed by ICO
- 740 formal Decision Notices





Information Commissioner's Office (ICO)

- 21 years as data protection regulator for UK experienced in DPA complaint handling
- Commissioner's role extended under FOIA & EIRs
- risk of "smothering" by DP work
- established dedicated team to progress FOIA implementation internally
- rapid expansion of office
- implementation work for complaint handling ran in parallel with duty to educate and promote good practice externally





2005 - early months

- Complaint volumes as anticipated
- early case handling very challenging
- public authorities inexperience and nervousness
- complexity and sensitivity of cases
- ongoing cases FOIA another 'bite at the cherry' for long standing complaints with public bodies
- high expectations
- significant external scrutiny
- ICO inexperience



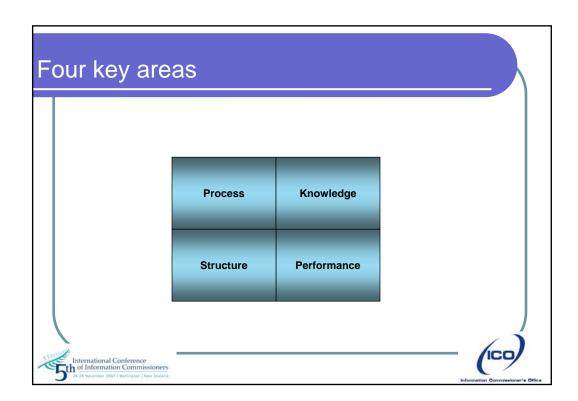


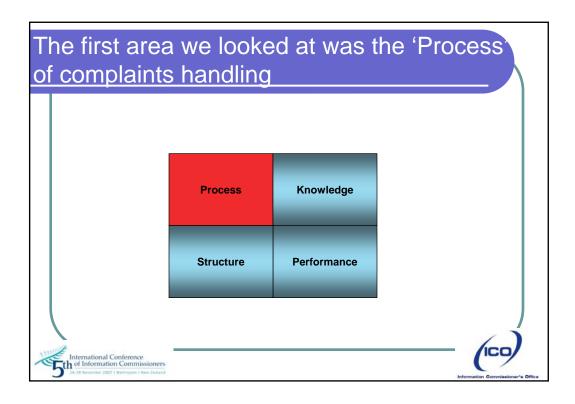
FOIA Complaints

- Backlog building by mid 2005
- media attention by autumn 2005
- initial view was that office was under resourced
- developed bid for additional funds for 2006/07
- at the same time decided to review <u>all</u> aspects of complaint handling – i.e. not just staffing levels
- reviewed whole FOI operation by staff and consultants
- identified four key areas for improvement



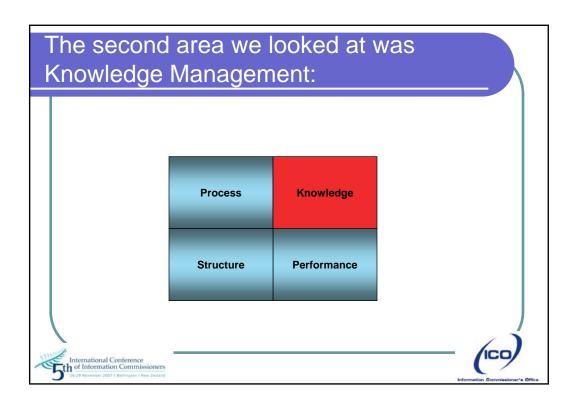






Process improvements

- Robust Case Handling policy introduced January 2006
- Case Reception Unit introduced November 2005 : early 'triage' for new complaints provides advice, resolves straightforward complaints. Now closes 50% of all new cases
- Case plans prepared on all eligible cases at when opened for investigation
- standard letters to 'open' cases
- agreed 'service levels' for in-house legal advice, 'surgeries' with DPA colleagues
- streamlined final sign off for decision notices (had become a bottleneck)

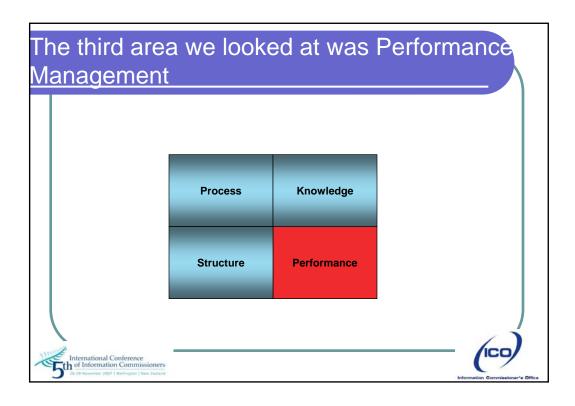


Knowledge management improvements

- Clear responsibilities for knowledge capture new Policy team
- "Lines to Take" data-base captured emerging lines from DNs and Information Tribunal – immediate success and constantly evolving
- in-house training programme
- review of guidance issued prior to full enactment of the legislation
- expert secondee to write up internal casework procedures





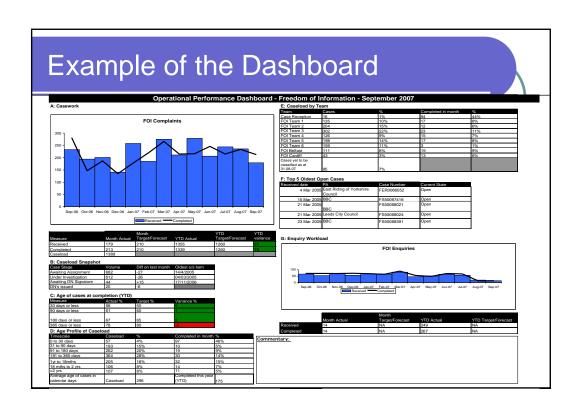


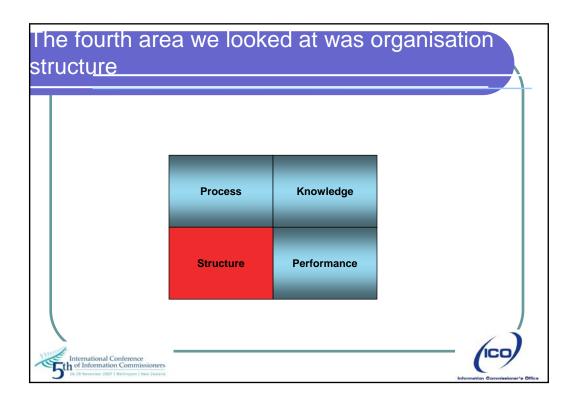
Performance management improvements

- Initially there was one performance measure in place
 - 50% of cases to be closed within 60 working days In January 2006 57.69% closed within target
- introduced range of published performance targets now a regular feature in Corporate Plan
- regular reports of performance against targets
- internally, introduced team closure targets
- introduced a monthly 'dashboard' of performance single sheet with all performance information
- two 'levels' of reports Complaints Division and individual teams









Structural improvements

- Teams organised by sector (previously organised in accordance with legislation)
- new job roles across all FOI teams staff preference exercise to fill new roles
- small Policy team established for QA and consistency
- Good Practice & Enforcement team established
- previously single queue of cases distributed to each sector team (ownership & competition)
- strengthened operational management alongside technical expertise





Performance against targets – 2006/7

Received 2,592

Closed 2,601 (incl. 339 DNs)

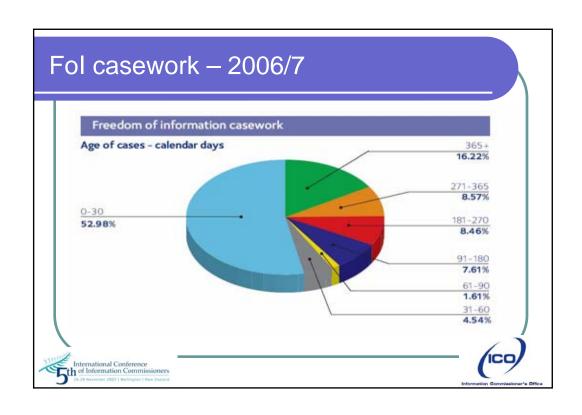
Work in progress 1,371

Performance against targets

Time to close cases	Target	Actual	
30 days or less	35%	52.98%	
90 days or less	40%	59.13%	
180 days or less	50%	66.74%	
365 days or less	80%	83.78%	







2006/7 - "A good year"

- £850k additional funding used locum lawyers, agency staff, outsource specialists, civil service secondees
- implemented the process, knowledge management, performance information and structural improvements and achieved results
- would have achieved estimated reduction in backlog if intake had not continued to rise (almost 25% above estimated receipts)





2007/8 - "A challenging year"

- Baseline reduced to £4.7million
- moved resources from Guidance and Enforcement to casework
- re-allocated Fol Communications budget
- heavy dependence upon temporary workers
- tougher approach to PAs:
 - "one strike" message
 - use of Information Notices
- cost of tribunal/court cases additional £350k
- closing more cases than received each quarter
- delays in allocating cases = ongoing backlog





Moving forward

- ICO now able to claim with confidence we have made <u>all</u> improvements possible with current level of funding
- currently seeking to increase baseline funding – now a straightforward requirement for more people to handle higher volumes
- bid made for significant increase for 2008-9 to allow "steady state" operations.





Problems of annual funding cycle separation of DP revenues alternative sources of funding? less "gold-plating" of casework less "legalistic" approach international bench-marking



Melanie Ann Pustay

Director, Policy and Litigation
Office of Information and Privacy
United States Department of Justice

Paper delivered at the 5th International Conference of Information Commissioners

Managing Responses To Freedom Of Information Act Requests

INTRODUCTION

The United States Supreme Court declared that the basic purpose of the Freedom of Information Act (FOIA)¹ is "to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed."² At the same time the FOIA recognizes the importance of other societal goals, such as protecting national security, personal privacy, and sensitive business information, among others.³ Thus, in responding to requests agencies must balance these interests while striving to make "the fullest responsible disclosure."⁴

In the United States, where the FOIA has been in place for over forty years, the Act continues to be utilized by an extraordinary number of requesters. During Fiscal Year 2006, the federal government received nearly three million requests.⁵ It also devoted over five thousand employee work-years to the administration of the FOIA.

¹ 5 U.S.C. § 552(b) (2000 & Supp. IV 2004).

² NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978).

³ See Attorney General's Memorandum for Heads of All Federal Departments and Agencies Regarding the Freedom of Information Act (Oct. 12, 2001), <u>reprinted in</u>, *FOIA Post* (posted 10/15/01) <u>available at http://www.usdoj.gov/oip/foiapost/2001foiapost/9.htm.</u>

⁴ S. Rep. No. 89-813, at 3 (1965).

⁵ This figure excludes first-party requests directed to the Social Security Administration, which received over eighteen million requests.

Accordingly, a key aspect of the administration of the FOIA in the United States is the challenge of managing this large volume of requests. Complicating that challenge is the reality that for many requests extensive searches may be required, voluminous records may need to be reviewed, consultations with other agencies may need to occur, all in addition to the line by line review required to determine the applicability of any of the FOIA's nine statutory exemptions from disclosure. These realities often work against the important countervailing interest in promptly responding to requesters.

All three branches of the United States government, Congress, the Courts, and the President, have addressed this issue and tried to create a proper balance between disclosing information to the public in a timely fashion and allowing the agencies the necessary time to process requests. In the FOIA, Congress set forth a time limit for agencies to respond to FOIA requests. Simultaneously, it extended those deadlines in certain circumstances. Similarly, while the Courts have enforced statutory requirements regarding the time to respond to requests, they have also granted agencies additional time to process requests. Finally, the President has recently directed agencies to develop plans to improve their management of responses to FOIA requests, notably by directing them to take steps toward reducing their backlogs (i.e., requests pending beyond the statutory time period). These efforts have helped agencies to achieve measurable progress in the ways they respond to requests. Despite the constraints that agencies face, they can take a number of steps to improve their management of responses to FOIA requests. By properly managing responses to FOIA requests, and working closely with requesters, agencies are able to further the statute's important goals.

STATUTORY REQUIREMENTS

Congress addressed the amount of time an agency has to respond to a request for information in the FOIA itself. An agency typically has twenty working days to make a determination on a request from the date of receipt.⁶ Where an agency does not comply with the applicable time limit, a requester will be deemed to have exhausted his administrative remedies,⁷ thus satisfying a necessary prerequisite to obtaining a remedy

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⁶ 5 U.S.C. § 552(a)(6)(A).

⁷ See id. § 552(a)(6)(C)(i).

in the courts.⁸ Despite the twenty day time limit generally placed on agencies, however, the FOIA allows an agency to extend the time limit where there are either unusual or exceptional circumstances.⁹

Administrative Exhaustion

Before a FOIA requester may file a lawsuit in an attempt to obtain a court order compelling an agency to disclose the requested records, the requester must exhaust his administrative remedies. Actual exhaustion occurs when the plaintiff pursues any available administrative appeal from a denial of his request prior to seeking judicial review. The purpose of this requirement is to present an agency with an opportunity to exercise its expertise on the matter and to make a factual record to support its decision. Further, the exhaustion requirement also allows an agency the opportunity to correct mistakes made at lower levels, thereby preventing the need for unnecessary judicial review. Provided the second to support the need for unnecessary judicial review.

Constructive Exhaustion

Agencies sometimes have difficulties in responding to FOIA requests within the twenty day working period because of the practical constraints they face. Where an agency fails to meet this deadline, the FOIA provides that requesters will be deemed to have exhausted their administrative remedies. Because the requester does not actually engage in the process of filing an administrative appeal of an agency's original decision, the process has come to be known as "constructive exhaustion." An important caveat in this doctrine is that a requester can no longer gain immediate judicial review where an agency responds to a request at any time before a FOIA lawsuit is actually filed, regardless of whether the requisite time limit has passed. 15

⁸ <u>See, e.g., Oglesby v. U.S. Dep't of the Army</u>, 920 F.2d 57, 61-62 (D.C. Cir. 1990) ("Courts have consistently confirmed that the FOIA requires exhaustion of this appeal process before an individual may seek relief in the courts.")

⁹ <u>See</u> 5 U.S.C. § 552(a)(6)(B) (discussing unusual circumstances); <u>see also</u> § 552(a)(6)(C) (discussing exceptional circumstances).

¹⁰ Spannaus v. U.S. Dep't of Justice, 824 F.2d 52, 58 (D.C. Cir. 1987).

¹¹ Oglesby, 920 F.2d at 61.

¹² Id

¹³ 5 U.S.C. § 552(a)(6)(C)(i).

¹⁴ <u>See, e.g., Spannaus</u>, 824 F.2d at 58 ("By deem[ing] exhaustion to occur on expiration of the relevant time limits, the statute provides for constructive exhaustion, which permits early "accrual" of a cause of action in the interests of timely disclosure." (internal quotations omitted)).

¹⁵ Oglesby, 920 F.2d at 63.

Further, the twenty day time limit is not always mandatory, as Congress recognized the necessity of including mechanisms within the FOIA by which agencies could extend the time limit in certain circumstances.

Unusual Circumstances

The FOIA provides that where unusual circumstances exist, the time limits may be extended by ten days if the agency provides written notice to the requester setting forth the unusual circumstances and the date on which a determination is expected to be dispatched.¹⁶ Unusual circumstances may only exist to the extent reasonably necessary for the proper processing of the particular requests and include three categories of requests: (1) where there is a need to search for and collect the requested records from establishments that are separate from the office processing the request; (2) where there is a need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records that are demanded in a single request; or (3) where there is a need for consultation with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject matter interest therein.¹⁷ Additionally, an agency may extend the time limit beyond the ten additional days allowed by statute where unusual circumstances exist if the requester agrees to such an extension.¹⁸

Exceptional Circumstances

Congress also established in the FOIA a "safety valve" for agencies that are inundated with a high volume of requests, by providing a mechanism for a stay of proceedings in "exceptional circumstances" when an agency has been sued by a requester for failing to meet the statutory time limits. Under this statutory provision, if the government is able to show that exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may allow the agency additional time to complete its review of the records, even if it otherwise failed to comply with applicable time limits.¹⁹ In the Electronic Freedom of Information Act Amendments of 1996, Congress specifically excluded delays resulting from a predictable agency workload of

¹⁶ 5 U.S.C. § 552(a)(6)(B)(i).
¹⁷ <u>Id.</u> § 552(a)(6)(B)(iii).
¹⁸ <u>Id.</u> § 552(a)(6)(B)(ii).
¹⁹ <u>Id.</u> § 552(a)(6)(C)(i).

requests from constituting exceptional circumstances *unless* an agency is able to demonstrate reasonable progress in reducing its backlog of pending requests.²⁰ By linking a Court's ability to find exceptional circumstances with an agency's ability to reduce its backlog, Congress placed a renewed focus on improving the timeliness of responses to requests. Indeed, Congress believed that backlogs should not give agencies an "automatic excuse to ignore the time limits, since this provides a disincentive for agencies to clear up those backlogs."²¹

Congress also determined that courts should weigh a number of other factors when considering whether exceptional circumstances exist. Although "unusual circumstances" in and of themselves are not sufficient for a court to find "exceptional circumstances," Congress did state that a requester's refusal to reasonably modify the request or arrange an alternative time frame where unusual circumstances exist shall be considered as a factor in determining whether exceptional circumstances exist.²² Other factors that Congress thought important to consider in determining whether exceptional circumstances exist include: (1) an agency's efforts to reduce the number of pending requests; (2) the amount of classified material involved; (3) the size and complexity of other requests processed by the agency; (4) the resources being devoted to the declassification of classified material of public interest; or (5) the number of requests for records by courts or administrative tribunals.²³

JUDICIAL REQUIREMENTS

Courts have played an important role in interpreting when the "exceptional circumstances" provided for in the statute, exist. As mentioned above, under the FOIA, courts may grant a stay of proceedings where exceptional circumstances exist and the agency is exercising due diligence in responding to the request. Open America v. Watergate Special Prosecution Force, despite being decided prior to the 1996 FOIA Amendments that partially altered the application of the exceptional circumstances

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²⁰ <u>Id.</u> § 552(a)(6)(C)(ii).

²¹ H.R. Rep. No. 104-795, at 24, reprinted in 1996 U.S.C.C.A.N. 3448, 3467 (1996).

²² 5 U.S.C. § 552(a)(6)(B)(ii).

²³ H.R. Rep. No. 104-795, at 24-25, <u>reprinted in 1996 U.S.C.C.A.N. 3448, 3467-68 (1996)</u>; <u>see Wilderness Soc'y v. Dep't of the Interior</u>, No. 04-0650, 2005 U.S. Dist. LEXIS 20042, at *21 (D.D.C. Sept. 12, 2005). ²⁴ 5 U.S.C § 552(a)(6)(C)(i-iii).

provision, is the leading case construing the provision.²⁵ In <u>Open America</u>, the Court held that exceptional circumstances may exist when an agency can show that it "is deluged with a volume of requests for information vastly in excess of that anticipated by Congress [and] when the existing resources are inadequate to deal with the volume of such requests within the time limits of subsection (6)(A)."²⁶ The Court also found that the "due diligence" provision may be satisfied by an agency's good faith processing of all requests on a "first-in/first-out" basis and that a requester's right to have his request processed out of turn requires a particularized showing of exceptional need or urgency.²⁷ Stays of proceedings issued by courts after finding exceptional circumstances are called "Open America stays."²⁸

While the precedent set forth in <u>Open America</u> has not been overturned, it has been partially altered. In the 1996 FOIA Amendments, Congress excluded any delay resulting from a predictable agency workload from consideration under the exceptional circumstances provision unless the agency demonstrates reasonable progress in reducing its backlog.²⁹ Thus, a court may not find that exceptional circumstances exist merely because an agency has a large number of pending requests.³⁰ Instead, where an agency is attempting to show exceptional circumstances on the basis of its predictable workload, it must also show reasonable progress in reducing its backlog.³¹ Where this requirement has been met, courts have been willing to find that exceptional circumstances exist.³² Further, where an agency's request for an <u>Open America</u> stay of proceedings is not based on a predictable agency workload, a stay may be justified notwithstanding the lack of a reduction in the backlog.³³

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²⁵ 547 F.2d 605 (D.C. Cir. 1976).

²⁶ <u>Id.</u> at 616.

²⁷ Id.

²⁸ See, e.g., Elec. Frontier Found. v. Dep't of Justice, No. 06-1708, 2007 WL 1334973, at *1 (D.D.C. May 7, 2007); Wilderness Soc'y, 2005 U.S. Dist. LEXIS 20042, at *19.

²⁹ 5 U.S.C. § 552(a)(6)(C)(ii).

³⁰ <u>Leadership Conference on Civil Rights v. Gonzales</u>, 404 F. Supp. 2d 246, 259 n.4 (D.D.C. 2005) ("An agency must show more than a great number of requests to establish[] exceptional circumstance under the FOIA.").

³¹ 5 U.S.C. § 552(a)(6)(C)(ii).

³² See, e.g., Ctr. for Biological Diversity v. Gutierrez, 451 F. Supp. 2d 57, 70 (D.D.C. 2006).

³³ See, e.g., Ctr. for Pub. Integrity v. U.S. Dep't of State, No. 05-2313, 2006 U.S. Dist. LEXIS 22281, at *14 (D.D.C. Apr. 24, 2006).

Courts look to factors other than backlog reduction in determining whether exceptional circumstances exist. Where requesters have refused to reasonably modify the scope of a request or arrange for an alternative time period for processing, courts have deemed it a relevant consideration.³⁴ Additionally, courts have also considered unpredictable increases in FOIA requests,³⁵ unforeseen increases in other information access duties,³⁶ and the adequacy of resources.³⁷ It is important to note, however, that agency motions for an Open America stay of proceedings are unsuccessful when agencies have failed to set forth sufficient facts to demonstrate the necessity of such a stay.³⁸

EXECUTIVE ORDER 13,392

The President has also affected the way in which agencies respond to FOIA requests. On December 14, 2005, President Bush issued Executive Order 13,392, entitled "Improving Agency Disclosure of Information." The Executive Order begins with the premise that "[t]he effective functioning of our constitutional democracy depends upon the participation in public life of a citizenry that is well informed," and proceeds with more specific steps as to how to improve the pursuit of this overarching goal. In particular, the Executive Order addresses the issue of backlog reduction and directs agencies to work to develop ways to improve in this area. Executive Order 13,392 has had a measurable positive impact on improving agencies' responses to FOIA requests and advancing the goal of maintaining a well-informed citizenry.

Renewed Focus on Backlog Reduction

Executive Order 13,392 renewed the focus on backlog reduction and specifically directed agencies to address the problem. First, the Executive Order required each

³⁷ See Elec. Frontier Found., 2007 WL 1334973, at *6.

³⁴ <u>See, e.g., Peltier v. FBI</u>, No. 02-4328, slip op. at 8 (D. Minn. Aug. 15, 2003) ("[T]he fact that plaintiff refuses to modify the scope of his request supports a finding of exceptional circumstances.").

³⁵ See Ctr. for Pub. Integrity, 2006 U.S. Dist. LEXIS 22281, at *14.

 $[\]frac{5}{\text{See}} \frac{1}{\text{id.}}$

³⁸ See, e.g., Wilderness Soc'y, 2005 U.S. Dist. LEXIS 20042, at *33 (finding that agency provided "no analysis, statistics, affidavits, declarations or other sworn statements from agency personnel to support [the existence of exceptional circumstances]")

³⁹ Exec. Order No. 13,392, 70 Fed. Reg. 75,373 (Dec. 14, 2005).

⁴⁰ <u>Id.</u> at Sec. 1(a).

⁴¹ See, e.g., id. at Sec. 3(b)(ii).

agency's Chief FOIA Officer to evaluate the extent of an agency's backlog, if any. ⁴² Next, it required the Chief FOIA Officer to identify ways to reduce or eliminate his agencies' backlog, consistent with the availability of resources and taking into consideration the volume and complexity of pending FOIA requests. ⁴³ Finally, Executive Order 13,392 mandated that agencies create a plan that included, among several other items, specific activities that the agency would implement to eliminate or reduce the agency's FOIA backlog. ⁴⁴ Agencies were also encouraged to include in their plan any changes that would make processing requests more streamlined and effective. ⁴⁵

The Department of Justice offered agencies guidance on how to compose their individual FOIA Improvement Plans. Initially, the Department of Justice held several government-wide conferences for Chief FOIA Officers and key FOIA personnel. Further, it provided written guidance to agencies on their implementation of Executive Order 13,392. This guidance discussed many potential improvement areas as well as a standard template for the uniform development and presentation of plans, and addressed questions and guidance points to help implement the executive order.

Executive Order 13,392 compelled agencies to take various steps where they failed to meet any milestones or goals in their plans, which helped to ensure agency accountability. Where an agency was deficient in meeting a milestone, the head of the agency was required to: (1) identify the deficiency in its annual report to the Attorney General; (2) explain the reasons for the failure; (3) outline steps that the agency has already taken and will be taking in the future to address the matter; and (4) report the deficiency to the President's Management Council.⁴⁹

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⁴² <u>Id.</u> at Sec. 3(a)(i).

 $[\]frac{43}{\text{Id.}}$ at Sec. 3(a)(v).

 $[\]frac{1}{1}$ at Sec. 3(b)(ii).

⁴⁵ Id.

⁴⁶ See Implementing FOIA [Freedom of Information Act] – Assessing Agency Efforts to meet FOIA Requirements: Hearing Before the Subcomm. on Information Policy, Census, and National Archives of the Comm. on Oversight and Government Reform, 110th Cong. (2007) (statement of Melanie Ann Pustay, Acting Director, Office of Information and Privacy), available at http://www.usdoj.gov/oip/foia30.pdf (discussing extensive Department of Justice executive order coordination efforts).

⁴⁷ See id.

⁴⁸ <u>See</u> *FOIA Post*, "Executive Order 13,392 Implementation Guidance" (posted 4/27/06) (containing potential improvement areas for possible inclusion in FOIA Improvement Plans) <u>available at http://www.usdoj.gov/oip/foiapost/2006foiapost6.htm.</u>

⁴⁹ Exec. Order No. 13,392, Sec. 3(c)(iii).

Agencies' Progress in Reducing Backlogs

Executive Order 13,392 has had a positive impact on reducing agencies' backlogs. During the initial phases of implementation, federal agencies made diligent and measurable progress in meeting their goals.⁵⁰ Forty-one agencies reported a decrease in the number of requests pending at the end of the fiscal year; an improvement that was made after only three months of Executive Order implementation activity.⁵¹ While agencies have not finished implementing all aspects of their plans, some have already significantly reduced their backlogs.⁵² Moreover, agencies processed a record number of FOIA requests during Fiscal Year 2006. There continue to be constraints on agencies over which they have no control, such as the number of requests that they receive.⁵³ It is clear, however, that progress already made by agencies has been steady and promising.⁵⁴

Backlog Reduction Goals for Next Three Fiscal Years

Although agencies have made considerable strides in the area of backlog reduction, many agencies continue to have backlogs. These agencies are taking further steps to resolve the issue. Each agency that has a backlog of FOIA requests or appeals at the end of fiscal year 2007 will formally establish backlog reduction goals for the next three years.⁵⁵ These goals should set forth the numbers of requests or appeals that the agency plans to process during each fiscal year as well as the number of requests or appeals that the agency estimates will be pending at the end of each fiscal year.⁵⁶ Maintaining clear goals will help agencies stay on course in their efforts to reduce their backlogs.

CONCLUSION

Recognizing the importance of the goals advanced by the FOIA and the balance involved, Congress, the Courts, and the President, have each addressed issues affecting

⁵⁰ Attorney General's Report to the President Pursuant to Executive Order 13,392, Entitled "Improving Agency Disclosure of Information," 3 (June 1, 2007),

available at http://www.usdoj.gov/oip/ag_report_to_president06012007.pdf.

⁵¹ <u>Id.</u> at 7.

⁵² See, e.g., id. at 8 (noting that the Department of Education had exceeded its backlog reduction goal for the time period and had cut its backlog by nearly fifty percent).

⁵³ <u>See, e.g., id.</u> at 7 (noting that the Department of Veterans Affairs had received 23,811 more requests in 2006 than in 2005).

⁵⁴ <u>Id.</u> at 20.

 $[\]frac{1}{10}$ at 18.

⁵⁶ Id.

the management of responding to requests. The FOIA places time limits on agencies, but Congress allowed for certain exceptions. Courts have interpreted where these exceptions may apply. The President has acted to improve the efficiency of the FOIA's administration through Executive Order 13,392, particularly regarding backlog reduction. Agencies have taken many steps to improve their management of responses to requests, thus helping to ensure that the overall goals of the FOIA are achieved.⁵⁷

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⁵⁷ This paper was prepared with the invaluable assistance of OIP law clerk Patrick Deklotz, whose contribution is much appreciated.



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 ${\bf Paper\ delivered\ at\ the}$ ${\bf 5}^{\rm th}$ International Conference of Information Commissioners

Sweden 240 Years On

Alive and Well or Death by Thousand Cuts?

1. Historical Background

Sweden's first Freedom of the Press Act was introduced in 1766 and became fundamental law in its entirety. The Act contained far more than mere general principles referring to the right to produce and disseminate printed matter and other information without prior censorship or other obstacles and the right to have claims related to freedom of expression offences examined before a court of law and it included inter alia the rule on the public nature of official documents and the exceptions associated therewith.

At that time there was probably no other country in the word that could offer its citizens anything like such a far- reaching right to take stock of what government agencies were doing and with it the possibility of monitoring the way in which they exercised their powers. Since then the principle of public access – apart from a few brief periods of recidivism to more traditionally secretive approaches – has applied in Sweden.

These fundamental provisions have always formed part of the Freedom of the Press Act, which is one element in the Swedish constitution.

The reasons for these regulations, which must be described as being well ahead of their time, are to be found in Sweden's political system, which was then very different from its prevailing European counterparts.

In the new constitution 1809 the basic principles relating to the Freedom of the Press Act are laid down in a key article of the Instrument of Government. A new Freedom of the Press Act was adopted in 1812. This Act remained in force with numerous amendments up to and including 1949.

2. Fundamental Liberties And Rights

The second chapter of the 1974 Instrument of Government contains a specification of fundamental liberties and rights. The two rights that are mentioned first are freedom of expression and freedom of information. The wording of the first paragraph begins as follows:

All citizens are guaranteed the following in their relations with the public administration

- 1. Freedom of expression: the freedom to communicate information and to express ideas, opinions and emotions,
- 2. Freedom of information: the freedom to obtain and receive information and otherwise acquaint themselves with the utterances of others

More detailed constitutional provisions about freedom of expression and information can today be found in the 1949 Freedom of the Press Act and the 1991 Fundamental Law on Freedom of Expression. The Freedom of the Press Act stipulates that all laws concerning professional or official secrecy are to be promulgated in one specific act. This act is called the Secrecy Act. In other words, in principle this is to contain an exhaustive catalogue of all the exceptions to the main rules, which say that public employees have freedom of expression about matters relating to the professional duties

and every individual has the right of access to information which is kept at a public authority.

3. The Principle of Individual Responsibility

The principle of individual responsibility made an early appearance in the Freedom of the Press Act. This was o particular significance in the case of the daily press and other periodical publications, where in many cases several different contributors were involved. A *single* individual was registered as responsible editor and was liable for any offences. Other persons – journalist's technical staff, outside contributors and sources, were immune from liability and could therefore remain anonymous. A professional press ethic developed whereby a paper's staff respected a desire for anonymity. By this means evolved a right to anonymity, codified in the 1949 Freedom of the Press Act from its inception.

4. Sound Radio and TV

In the case of sound radio, which started up in the mid-1920s and later TV there was at first no special regulation in law. The various provisions of the Penal Code applied, in accordance with general principles to all who took part; there were no rules of law about immunity from liability for sources or a right to remain anonymous. There was no general right to transmit programmes; instead such activities presupposed a license. In practical terms there was a monopoly.

Special laws for sound radio and TV were introduced in 1966. These were not fundamental laws. The licensing requirement was retained. The monopoly situation was balanced by an obligation on the part of broadcasting corporation to observe objectivity and partiality, an obligation which had no equivalent in the Freedom of the Press Act. The rules were otherwise largely based on the same principles as the Freedom of the Press Act.

The question of rules of fundamental law for media other than print media was looked into on several occasions started in 1970 The focus initially was on radio and television, but attention was later directed also towards other technical apparatus. One much

debated question was whether the Freedom of the Press Act should be reworked to embrace also these other media, or whether they should be regulated in a special fundamental law, to apply alongside the Freedom of the Press Act. This latter view prevailed and a new fundamental law, the Fundamental Law on Freedom of Expression, was adopted in 1991.

5. The Freedom to Produce and Disseminate Information

Under both the Freedom of the Press Act and the Fundamental Law on Freedom of Expression, constitutional protection means that the public institutions are debarred from intervening against abuses of freedom of expression or complicity therein other than in those cases and in the manner laid down in these two fundamental Laws. Each of these fundamental laws applies exclusivity within its own field. The Parliament may not by means of ordinary law restrict the freedom for the press or the freedom of expression arising out any of these fundamental laws.

Some demarcation difficulties arise in this connection. The basic rule is that the fundamental laws regulate only such use of words or pictures as falls within the freedom of expression field.

The long-running debate on child pornography produced the result that this kind of crime, which consists primarily of the portrayal of children in pornographic pictures and was dealt with in both the Freedom of the Press act and the Fundamental Law on Freedom of Expression, was removed from fundamental law with effect from 1 January 1999. This crime is now regulated only under the Penal Code. The very possession of such pictures has now been criminalised.

6. Ban on Censorship

An express ban on censorship – the central feature of legislation on the freedom of expression – will be found in both the Freedom of the Press Act and the Fundamental Law on Freedom of Expression. The ban is directed at public authorities and other public bodies. This is set out explicitly in the text of the Fundamental Law on Freedom of Expression but is regarded as applying also under the Freedom of the Press Act. The

fundamental laws do not in general preclude the person liable for the publication of an item from inviting a public authority, for example to scrutinise the item prior to publication. The only exception to the ban on censorship under the laws is that provisions may be issued concerning the scrutiny and approval of moving pictures in films and video recording and in other technical recordings intended for public showing.

7. Official Documents

A document is an object that contains information of some kind, it conveys information. In the Freedom of the Press Act a document is defined as a representation in writing, any pictorial representation or any record that can be read, listened to or otherwise comprehended only by means of technical aids. This can, for instance, be a printed pamphlet, a handwritten letter, a drawing, a photograph, a sound or video cassette, a CD-disc, an e-mail or information stored electronically in a database.

A document is defined as a *public document* if it

- 1) is in the keeping of a public authority
- 2) can be regarded as having been received by or drawn up at the public authority.

Documents are regarded as being in the keeping of a public authority if they are quite simply in premises belonging to the authority and also in certain other cases when they are available to the authority or an appropriate official at the authority. Where electronically registered documents are concerned, it is the availability that is decisive. Relatively detailed regulations have been laid down to determine which electronic documents are to be considered available to and therefore in the keeping of a public authority.

Deciding whether a document sent to an authority is to be considered as having been received there and is therefore a public document is usually quite simple. A document is regarded as having been received from the moment it arrives at the premises of the authority or is available to the appropriate official. If, therefore, a document dealing with the activities of a public authority is sent to a private address, it becomes a public document once it has reached the hands of the appropriate official, who must then ensure that it reaches the authority without delay and where it must be treated like any

other document submitted. The rule that applies to the majority of public documents is that they must be registered as soon as they have been received or drawn up. However, registration has no determinative function in itself: if an authority desires for some reason to avoid a document becoming public or to delay the moment at which this takes place, it cannot achieve this end by failing to register it correctly.

The regulations are more complicated on the subject of when a document produced within an authority is considered to have been completed and therefore a public document. If a document is to be dispatched, or, in other words, sent to an individual or individuals outside the authority, it is considered to have been drawn up at the moment it is dispatched. Documents that are not intended for dispatch generally become public on their completion. These regulations are intended to provide the authorities and their officials with the time needed for their work in preparing a case and drawing up the documents. Drafts, written presentations and other working papers never become public documents, unless they are filed on termination of the case. Documents of this kind have to be filed if they contain factual information, otherwise they can be discarded. Registers and journals in which information is noted progressively and continuously are public documents from the moment they are prepared so that information can be recorded.

8. Exceptions

Exceptions from the principle of the public nature of official document that is, cases in which official documents shall be kept secret must be scrupulously identified in a special act of law –the Secrecy Act. The Freedom o the Press Act lists the interests governing secrecy. Secrecy is not permitted other than in accordance with these principles. The secrecy must be required to fulfil specific objectives specified in the Constitution. These objectives are:

- the security of the realm or its relationship to another state or an international organisation
- Sweden's central financial, monetary or foreign exchange policy
- the activities of authorities involving inspection, monitoring or some other form of supervision

- the prevention or prosecution of criminal activities
- public economic interests
- the integrity of the personal or financial circumstances of an individual
- the protection of a species of animal or plant

9. The Secrecy Act

The Secrecy Act is arranged so that separate chapters are devoted to the secrecy regulation required to fulfil each of the seven different objectives just meant.

10. Considering Whether an Official Document May be Disclosed

The matter is considered in the first instance by the official responsible for the care of the document, for example, a registrar or a person reporting on a matter. In doubtful cases, the official should refer the matter to the authority if this would not delay determination of the matter. Further, if the official refuses to provide the document or supplies it subject to a reservation the matter must be referred to the authority on the request of the applicant. The applicant shall be advised that he may make such a request and that a decision by the authority must be made in order for it to be possible to appeal against a decision. 'The

Authority' can be a more senior official or, for example, the authority's board.

If an authority has rejected a request to obtain a document or if it has supplied an official document subject to a reservation, the applicant is generally entitled to appeal against the decision. Appeals are usually presented to an administrative court of appeal. A decision of such a court may be appealed against to the Supreme Administrative Court. If the party whose application has been rejected is a state authority, the appeal is presented to the Government instead of to an administrative court of appeal

11. Freedom of Expression and Public Employees

The Instrument of Government guarantees freedom of expression for all citizens in their relationships with the public administration. Freedom of expression and the right to publish information may only be restricted by legislation and on grounds relating to the

security of the realm, national self-sufficiency, public order and security, the reputation of individuals, the sanctity of private life and the prevention and prosecution of crime.

Individuals employed by the state or in local government enjoy the same freedom of expression as any other citizen. Their employers are one aspect of "the public administration" and therefore prohibited from limiting their freedom of expression to any greater degree than the restrictions imposed by law on grounds listed in the Instrument of Government. The most significant statutory restriction of the freedom of expression of public officials is the professional secrecy to which they are enjoined with regard to information that is subject to secrecy according to the Secrecy Act.

In other words, public employers, such as the Director General of an authority, are not entitled to 'gag' their employees with regard to information or conditions within the authority about which its administration is uncomfortable and which it does not want to see spread any further.

12. The Legal Right of Public Employees to Publish Information

The freedom enshrined in the Freedom of the Press Act to communicate information and intelligence for publication in print goes even further than freedom of expression in general. In fact the act grants a great degree of impunity to breaches of professional secrecy if they take the form of providing someone who can be considered to be the author or publisher of printed material with information intended for publication. Only a limited number of cases of breach of professional secrecy, of which an exhaustive list is provided in the act, are regarded as being so serious that those who commit them intentionally may be punished, even if this was for the purpose of publication in contact with a journalist or someone else who can be considered to be the author or publisher of printed material. All other aspects of professional secrecy, or in other words those not listed in the act, are overridden by the right to publish information. Anyone who during contacts with a journalist or some other representative of the media discloses information subject to the secrecy laid down in such a provision, is not therefore in breach of professional secrecy if the information is provided for the purpose of publication. This far-reaching freedom to publish information is of great significance not least for those employed by the state or local government and also in enabling the media to acquire information concerning more sensitive areas of official administration.

The Freedom of the Press Act and the Fundamental Law on Freedom of Expression stipulate that no authority or any other public agency may seek to identify someone who has divulged information and wishes to remain anonymous. Heads of authorities who attempt to identify employees who leak information to the media are in other words committing a crime.

13. The Parliamentary Ombudsman and the Chancellor of Justice

A complaint to the JO (Justitieombudsmannen) - or to the Parliamentary Ombudsmen(Riksdagens ombudsmän) which is the official name of the Institution - can be made by anybody who feels that he or she or someone else has been treated wrongly or unjustly by a public authority or an official employed by the civil service or local government.

An Ombudsman is an individual elected by the Riksdag to ensure that courts of law and other agencies as well as the public officials they employ comply with laws and statutes and fulfil their obligations in all other respects. Many of the complaints to the Ombudsman deal with questions related to the access to document and the freedom of expression.

The Chancellor of Justice is a non-political civil servant appointed by the Government. One of his duties is to ensure that the limits of the freedom of the press and other media are not transgressed and to act as the only public prosecutor in cases regarding offences against the freedom of the press and other media.

CURRENT DEVELOPMENTS AND TENDENCIES IN SWEDISH FOI LEGISLATION AND PRACTICE

14. Is the FOI Threatened by a Thousand Cuts?

The exceptions from the constitutional principle on right to access public documents are numerous. Thus the Secrecy Act is comprehensive, detailed and difficult to survey. Furthermore, there are new exceptions, added to the list very often. When Parliament decides an amendment to the Secrecy Act, it is usually asserted that the new curtailment of the FOI is necessary to protect a very important interest, e.g. the integrity of

individuals or the security of the country. It has proved rather easy to gain support among MP:s for amendments of this kind. The development has been criticized by defenders of the culture of openness, among them representatives of the media, who sometimes argue that there are not counter powers within the political system strong enough to guard the general interest of an extensive freedom of information. Although every single extension of secrecy may cause only a limited damage, what will be the total effect of several such extensions, and do the legislators pay regard to this total effect? Is secrecy continuously increasing and in the long run undermining right to access public information?

Lately, two studies have been accomplished to investigate what effects the many changes in the Secrecy Act have had to the extent of secrecy. One of the studies was carried through by the Swedish Union of Journalists and the other one by a committee of politicians and experts, whose task it was to draft a new secrecy act.

The Union of Journalists scrutinized all changes of the Secrecy Act between July 1, 1992 and July 1 2002, totally 194 changes. According to the scientific method of this study, 112 changes were defined as neutral, 74 as resulting in increasing secrecy and 8 as resulting in decreasing secrecy, thus more of openness. The conclusion of the report was that the system of regulations giving the Swedish principle of access to public information concrete shape is continuously undermined and weakened. The effect of the provisions of openness diminishes and those provisions run the risk of being transformed into beautiful but fairly meaningless phrases in the Freedom of the Press Act. The most important single factor causing this change is, according to the report, the new attitude to protection of personal data, which has developed in the 1990:s and resulted in the creation of the Personal Data Act.

The Committee for drafting a new secrecy act scrutinized the changes of the Secrecy Act between July 1, 1998 and July 1, 2002, totally 89 changes. The scientific method differed to some extent from the method exercised in the study of the Union of Journalists. In the report of the committee, 61 of the changes were defined as neutral, 17 as resulting in increased secrecy, 5 as resulting in decreased secrecy and 6 as amendments to the list of non public bodies which have to apply, to some extent, the legislation on access to public documents. The committee, unlike the Union of Journalists, did not conclude that the total effect of the changes is an obvious development in direction of less openness and

more secrecy. The committee after discussing its own report and the one of the Union of Journalists, summarized:

The studies reveal that the Secrecy Act is continually being changed. Apart from the purely editorial changes, new enterprises that require new secrecy regulations are arising all the time. The law itself is thus becoming more extensive. As new enterprises arise, there is an increase in the areas where the Secrecy Act is applicable. In that sense it can be said that there is an increase in secrecy. However, this is not the same thing as saying that we are moving towards a more closed society. When new enterprises arise, there is also an increase in the public sphere. After all, secrecy in a particular area of endeavour is rarely applicable in general, but only concerns certain information or the circumstances of that enterprise. Any information apart from this is available to the public.

However, our investigation did reveal changes that we considered to be clear extensions of secrecy. By an "extension of secrecy" we mean that existing transparency has been limited in some way, either by applying secrecy to an enterprise that was previously entirely public, or by tightening up the secrecy already applied to a particular enterprise. Those changes that we deem to be tightening up of secrecy have been implemented after problems have arisen in these enterprises due to information being in the public domain.

At the same time that secrecy is increased in certain areas, new enterprises continually arise to which the principle of public access to official records is applicable. Apart from few relaxations of secrecy that benefit all citizens, relaxations of secrecy have occurred in some cases for parties, or their equivalent, to entitle them to access to information that is necessary for them to be able to exercise their rights.

The Secrecy Act is very much a living statute that is continually changed. It is not always so easy to see what a change will entail for openness and transparency. The link between the constitution and the Secrecy Act is designed to function so that the legislator carefully weighs the interests of transparency against the interest of secrecy in every situation.

In our opinion this legislative model is the one that is the most effective in order to prevent us from departing too far from the principle of access to official records. At the same time it is naturally important that developments in this area are closely monitored.

15. The Encounter With a Different Culture and Tradition in the European Union.

Since Sweden joined the European Union (EU) in 1995, the country has worked for more of openness in the work of the EU, to some extent in cooperation with other countries in Northern Europe such as Finland and the Netherlands. In 2001, when Sweden chaired the Council of Ministers, the EU decided an act concerning access to documents kept by the institutions of the union. Although there are many limitations and exceptions in the regulation, it meant a considerable step forward for FOI in the Union. An evaluation process is going on. A green paper was published by a committee of experts in April this year, and national authorities, NGO:s and concerned individuals were given the opportunity to comment on the statements and suggestions of the committee during a period of three months. In several comments and opinions the committee has been criticized for tending to move the balance between right to access to the records of the EU institutions and secrecy due to protection of personal data towards more of secrecy.

As a member of the EU, Sweden has had to implement in its domestic legislation EG regulations with a stronger protection of privacy, especially personal data, than has earlier been part of Swedish law. One of the main concerns in Sweden, when a membership of the EU was publicly discussed, was that the country would be obliged to give up its high level of openness in order to strengthen the rights promoting personal integrity, foremost protection of personal data. When negotiating its membership agreement, Sweden declared its right to continue to apply and to defend its constitutional regulation on FOI. This was not questioned by the EU and in Sweden that was interpreted as some sort of guaranty. This "guaranty" was regarded important in the debate before the referendum in 1994, which resulted in a rather narrow majority in favour of joining the EU.

When the European directive on protection of personal data was implemented in Sweden by means of a law, which came into force in 1998, the law included a provision that disclosure of personal data is not prohibited if disclosure is necessary to fulfil the constitutional regulation on right to access to public records. There have been, however, in practice a number of cases where the interests of openness and privacy have collided, and as I mentioned earlier, the Secrecy Act has been amended some times in direction of strengthening the protection of personal data.

There is an interesting case just now which illustrates the problems. The EU Commission has initiated legal proceedings against Sweden, accusing the country for breach of secrecy. According to a judgment of the Supreme Administrative Court and applying domestic constitutional regulation, the Swedish National Agency for Agriculture disclosed documents upon request of Greenpeace. The documents contained information about corn with modified genes. The documents had been transferred by the EU Commission, who had received them from a Dutch authority. The documents were classified as secret by the Authority in the Netherlands. The Commission had transferred them for opinions to some national authorities in member states under condition they were kept secret according to art. 25 of the EG Directive about organisms with modified genes. The directive says that a decision to classify an application for approval of new crops with modified genes as secret in the member state that has received the application should be respected in other member states who receive the application from the Commission in order to be able to take part in the process and decision of approval. We are waiting for the final outcome of this case with great interest.

16. The Rapid Development of Information Technology

Over the latest decades, the development of information technology has meant a tough challenge for the legislator to adapt, currently, the FOI regulation to new realities in the media landscape. The technical development is extremely rapid and more than once it has happened that the legislator has had difficulties to make the necessary amendments in due time.

Especially, to change the definition of the conception of "public document" has been of significant importance. Gradually, recordings of information on different kinds of electronic and magnetic media have been included in the conception of public document,

under the condition that a public body has the right and the technical equipment necessary to read or to listen to the information. The same now applies to information in a database. For that situation a new conception is introduced, "potential document". An authority keeps a potential public document, if 1) the information asked for is in a database, 2) the authority is connected to the database and 3) the authority disposes a computer programme which makes it possible to get the information in readable form by simple and routine activities. When these conditions are met, an authority has to disclose, upon request for a public document, information in a database which should not be kept secret.

17. The Ambition to Simplify the Secrecy Act

The Secrecy Act came into force in 1981. Already then, it was comprehensive and very detailed. Over the passed 27 years, it has been changed and amended more than 200 times. It is frequently criticized for being complicated and difficult to grasp and to apply. The legislator makes efforts to solve these problems. Four years ago, a draft new secrecy act was presented by the committee of parliamentarians and experts which I mentioned earlier.

The committee has tried to create a secrecy act which is more simple and easy to apply. Among the means to reach that objective are a more modern language, more and shorter chapters, shorter sections, cross-references and a system of subheadings. One effect is that the total volume of the draft act exceeds that of the already extensive Secrecy Act.

The draft act contains an interesting piece of news. That is a provision on balancing the general interest of access to certain information against the interest of secrecy in the specific case. According to that provision it should be allowed to disclose secret information to individuals, if the general interest of access to the information obviously outweighs the interest that the secrecy is there to protect.

Some specific parts of the suggestions in the draft act have been realised through amendments to the existing law. It is still an open question to what extent the draft act will come into force and replace the Secrecy Act.

18. Does Extreme Openness to Some Extent Counteract its Own Purpose?

In the public debate it has been argued that, due to the very far going openness, many civil servants are reluctant to document sensitive information, as they know that the document may be disclosed and even published and in any case filed. Is there a danger that one consequence of very far going FOI will be that citizens, journalists and scientists certainly have the right to inspect the archives but will find not much of real interest there?

Some people have answered YES to this question, among them a former director general of the National Audit Board. She had comprehensive experiences of the standards of archives in different countries from different international audit projects, one of them on the EU level. In her opinion the Swedish archives, compared to those in many other countries, contain little of substantial information that can elucidate what really happened during e.g. a political process concerning a sensitive matter. The reason is that politicians and civil servants involved in such a process prefer contacts by word of mouth, summarily or not at all documented, to written memoranda and other detailed documents. The main reason for this attitude is said to be a feeling of discomfort caused by the awareness that the right to access to the documents in the public archives is very far going.

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 $\label{eq:paper delivered} \textbf{Paper delivered at the} \\ \textbf{5}^{\text{th}} \textbf{International Conference of Information Commissioners}$

Developing an Effective Disclosure Policy on Forest Sector Information in Indonesia





ABBREVIATIONS

AMDAL	Analisis Mengenai Dampak Lingkungan, Environmental Impact
	Assessment
ANDAL	Analisis Dampak Lingkungan Hidup, Environmental Impact
ANDAL	
	Report
BIN	Badan Inteligen Nasional, National Intelligence Bureau
CBD	Convention on Biological Diversity
DR	Dana Reboisasi, Reforestation Fund
EITI	Extractive Industries Transparency Initiative
IFC	International Financial Corporation
FIA	Freedom of Information Act
FLEG	Forest Law Enforcement and Governance
FLEGT	Forest Law Enforcement, Governance & Trade
FOMAS	Indonesia National Forest Monitoring and Assessment Program
FWI	Forest Watch Indonesia
GFW	Global Forest Watch
GIS	Geographic Information System
НРН	Industrial timber concession
HTI	Industrial timber plantation
ICRAF	World Agro-Forestry Center
IMF	International Monetary Fund
IPK	Land clearing permit to establish a timber plantation
KAIL	Konsortium Anti Illegal Logging, Anti Illegal Logging
	Consortium.
MOF	Indonesian Ministry of Forestry
NGO	Non Government Organization
PP	Peraturan Pemerintah, Government Regulation
PSDH	Provisi Sumber Daya Hutan, Forest Resource Royalty

PYWP	Publish What You Pay Campaign
RKHT	Annual industrial plantation work plan
RKPH	Annual industrial concession work plan
RKL	Rencana Karya Lima Tahun, Five year work plan
RKT	Rencana Karya Tahunan, Annual work plan
RPBBI	Rencana Pemenuhan Bahan Baku Industri, Raw Material
	Requirement Plan
SDSU	South Dakota State University
SKSHH	Timber transportation permit
TNI	Tentara Nasional Indonesia, Indonesian National Army
TRIP	Trade Related Aspects of Intellectual Property Rights
USAID	United States Agency for International Development
US	United States
UU	Undang-Undang, Law
WRI	World Resources Institute
WWF	World Wildlife Fund

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INTRODUCTION

Over the past few years, there has been growing recognition that governments and companies should be more transparent and accountable. There is growing consensus that the right to information is a crucial element of democratic, accountable and responsive government.

Laws opening government records and processes are now commonplace among democratic countries. Over 60 countries have adopted comprehensive laws to facilitate access and over thirty more are in the process. These laws are broadly similar, allowing for a general right by citizens, residents and often anyone else to demand information from government bodies.

Indonesia is gradually leaning towards transparent and accountable governance and is currently deliberating a draft Freedom of Information Act that will compel government agencies to disclose information to the general public, with a few exceptions. Adoption and implementation of this Act is hopefully inevitable, but likely to take some time. Meanwhile, demand for transparent forest sector information has increased in light of growing concerns about deforestation rates and forest governance problems that have resulted in rampant illegal logging, rent-seeking behavior and corruption.

In the absence of an overarching Freedom of Information Act, the Indonesian Ministry of Forestry is exploring the possibility of developing a disclosure policy specifically for forest sector information. This initiative is a core component of a forest sector and accountability project (known as FOMAS), which seeks to make relevant, reliable, accurate and up-to-date forest sector information continuously available to decision makers and the general public.

Aside from developing comprehensive guidelines on disclosing forest sector information to the general public, the Indonesian Ministry of Forestry is considering a number of challenging issues: what measures can be taken to ensure that a disclosure policy on forest sector information does not contradict the draft Freedom of Information Act being deliberated by the Indonesian Parliament? how can a

disclosure policy on forest sector information be legally binding?; how can appeals and complaints be handled without the installation of an Information Commission?; how can the costs of information disclosure be covered; and should penalties be handed down if government officials fail to comply with the disclosure policy?

This discussion paper is divided into four parts. Part I provides a general background on the significance and important of transparency for governments and citizens. It also reveals that transparency and information disclosure have been sweeping through the world in recent years and is being adopted by countless governments, companies and organizations throughout the world.

Part II of the paper briefly explains where Indonesia stands in terms of transparency and information disclosure and provides a general background to Indonesia's draft Freedom of Information law, which has languished in parliament since 2001; and the draft State Security Act that contradicts it.

Part III explains why information disclosure is of relevance and importance to Indonesia's forest sector and includes recent initiatives undertaken by the Ministry of Forestry to improve forest sector transparency. It also outlines progress with this initiative and raises some of the challenges it faces. Part IV concludes the paper and provides a summary of the key points.

PART I: TRANSPARENCY AND INFORMATION DISCLOSURE—A GLOBAL TREND

In 2001, George Akerlof, Michael Spence and Joseph Stiglitz won the Nobel Prize for determining that accurate and up-to-date information can lead to market efficiency and economic growth, while imperfect information can lead to market failure (Bellver & Kaufmann 2005). This is primarily because investors invariably tend to stay away from

Box 1: What is transparency and why is it important?

Transparency can be defined as the increased flow of timely and reliable economic, social and political information, which is accessible to all relevant stakeholders. The information provided should be accessible, relevant, of good quality and reliable. Transparency is important because it can increase efficient allocation of resources, improve governance, combat corruption and help to ensure that the benefits of resource exploitation are redistributed and not captured by an elite few. It can also be beneficial to governments themselves—openness and transparency in the decision making process can assist in developing citizen trust in government actions and maintaining a civil and

countries with high corruption levels and a lack of reliable information and prefer to invest in countries with established policies on information disclosure. This became clear after it was determined that poor transparency combined with new and deregulated financial markets was an underlying cause of recent financial crises in emerging economies across the globe—Mexico (1995), East Asia (1997), Russia (1998), Brazil (1998) and Turkey (2001)—where it led to unsustainable investment, debt and vulnerable financial institutions (Mehrez & Kaufmann 1999).

Transparency is important for economic growth because it can increase efficient allocation of resources, improve governance and help to ensure that the benefits of resource exploitation are redistributed and not captured by an elite few (Bellver & Kaufmann 2005). This has been qualified in a number of comprehensive studies. For instance, Islam (2003) has demonstrated that qualitative and quantitative information allows governments to govern better; and Mauro (2004) has shown that policies aimed at improving transparency, and more generally, disseminating information help to reduce corruption and foster economic growth. Access to government records and information provide an important guard against abuses, mismanagement and corruption. It can also be beneficial to governments themselves—openness and transparency in the decision making process can assist in developing citizen trust in government actions and maintaining a civil and democratic society (Bansier 2004).

Transparency is closely related to accountability. Transparency allows citizens, markets or organizations to hold government institutions accountable for their policies, practices, expenditures and performance. Public scrutiny of government performance drives government to improve their performance and to eliminate corruption and abuse of power. Increased transparency may also increase faith in government and enhance social cohesion (Bellver & Kaufmann 2005).

This research implies that transparency in Indonesia's forest sector could potentially increase revenues, attract investment and allow the Ministry of Forestry to govern Indonesia's forests better. Rightly implemented, it may also provide an important guard against corruption, mismanagement and abuse of power. Furthermore, increased transparency may promote accountability, allow citizens to participate in decision-making processes, and improve relations between government and civil society.

The Rapid Growth of Transparency and Information Disclosure in Other Countries and Sectors

Disclosure of information held by government agencies is already common place in a number of countries. Most of the time, disclosure of information is governed by Freedom of Information Acts, which provide guidelines on what information should be disclosed, how it should be disclosed, time limits for governments to respond to information requests, what information is exempt from disclosure, how refusals to disclose information should be handled, the costs of disclosure and many other matters. This legislation applies to all government agencies, with a few exemptions in some countries (Snell 2002).

Growing Global Adoption of Freedom of Information Acts

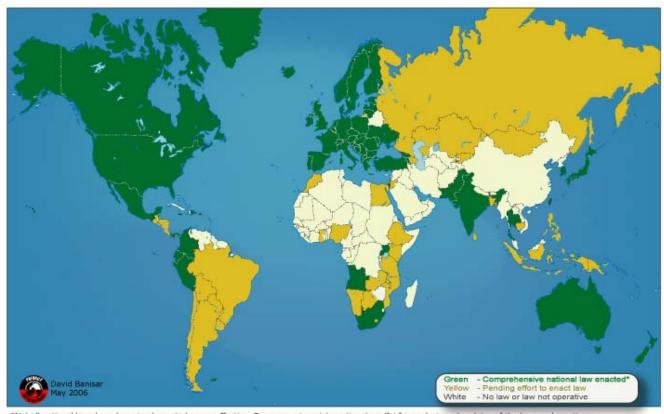
Over sixty countries—from Japan (1999) to Bulgaria, Ireland to South Africa, and Thailand and Great Britain—have enacted legislation giving their citizens access to government information in recent years (Figure 1). This is because transparency and information disclosure are increasingly being recognized as a means to achieve efficient administration, investment and accountability. All of these factors ultimately lead to economic and technological growth (Blanton 2003). Many countries are also

acknowledging the fact that technological innovations (such as free satellite images and the internet) have rendered efforts to suppress information and transparency useless. In many ways, transparency and accountability are becoming inevitable worldwide.

While the vast majority of countries that have adopted Freedom of Information laws are northern, much of the rest of the world is also moving in the same direction. The passage in 2002 of new FOI laws in India and Mexico garnered much attention, and some smaller, poorer countries, including most recently Angola, Antigua and Barbados (2004), the Dominican Republic (2004), Ecuador (2004), Uganda (2005), Montenegro (2005) and Honduras (2006) have recently enacted disclosure legislation.

In Asia, nearly a dozen countries have either adopted disclosure laws or are on the brink of doing so. In South and Central America and the Caribbean, half a dozen countries have adopted laws and nearly a dozen more are currently considering them. Openness is also starting to emerge in Africa. South Africa enacted a wide reaching law in 2001 and many countries in southern and central Africa, mostly members of the Commonwealth, are following its lead (Bellver & Kaufmann 2005; Bansier 2004). Efforts to win passage of FOI laws are underway in over 30 countries, including: Bangladesh, Ghana, Guyana, Kenya, Malawi, the Maldives, Nigeria, Sierra Leone, Sri Lanka and Zambia, and Indonesia (McIntosh 2006).

National Freedom of Information Laws 2006



*Not all national laws have been implemented or are effective. See www.privacyinternational.org/foi for analysis and updates of the laws and practices

Many of these initiatives have been driven by civil society demand for transparency and

accountability, transitions to democracy and political reform laws (Bellver & Kaufmann

2005; Snell 2002; Bansier 2004; McIntosh 2006). For instance, in post-apartheid South

Africa, the 1994 Constitution under which Nelson Mandela came to power included a

specific provision that guarantees citizens access to state held information, and South

Africa's implementation law, passed in 2002, is probably the strongest in the world

(Blanton 2003). Thailand's Official Information Act was the culmination of a political

reform process that began in 1992 with mass demonstrations against a military regime

and became even more urgent with Thailand's economic crisis in 1997. Political change

and economic crisis also sparked a Freedom of Information movement in Indonesia

around the same time.

International organizations, such as the Commonwealth, Council of Europe, the World

Bank and the International Monetary Fund, have also been influential in promoting

information disclosure; and scandals have been a catalyst for freedom of information

movements in countries such as Ireland, Canada, Japan, Thailand and the UK. Canada

passed its freedom of information statute in 1982 following scandals over police

surveillance and government regulation of industry. Public outcry over conditions in the

meat packaging industry and the administration of public blood banks prompted Ireland

to pass a similar law in 1997; and Japan's 1999 national access law followed two

decades of scandals, from the Lockheed bribery case in the 1970s to the bureaucracy's

cover-up of HIV contamination of the blood supply in the early 1990s (Blanton 2003).

Finally governments themselves have recognized the use of FOI to modernize. The

expansion of the internet into everyday usage has increased demand for more

information by the public, business and civil society groups. Inside governments, the

need to modernize record systems and the move towards e-government has created an

internal constituency that is promoting the dissemination of information as a goal in itself

(Bansier 2004).

Voluntary Information Disclosure

Voluntary information disclosure has also been growing worldwide as a result of social

demand. International organizations, such as the World Bank, Asian Development Bank,

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United Nations Development Program (UNDP) and the International Financial Corporation (IFC), and large-scale companies, particularly those involved in the oil and gas sector, have developed disclosure policies in recent years to meet growing demands for information disclosure and transparency.

One voluntary initiative that has been growing worldwide is the Extractive Industries Transparency Initiative (EITI). This is a multi-stakeholder initiative, involving multinational and state-owned extractive companies, host governments, home governments, business and industry associations, international finance institutions. investors and civil primarily groups. It is convened by the UK Department for International Development (DFID). The EITI initiative aims to increase



extractive revenue transparency by encouraging oil and gas companies to voluntarily disclose the payments (in the form of taxes, royalties, signature bonuses) they provide to governments to a wide audience in a publicly accessible, comprehensive and comprehensible manner. Ultimately, EITI aims to ensure that oil, gas and mining revenues contribute to sustainable development and poverty reduction. The EITI takes a voluntary, country-by-country approach whereby host governments are encouraged to adhere to the principles and objectives of the initiative and to implement the reporting guidelines. Voluntary disclosure of payments is believed to allow the citizens of resource rich countries to hold decision-makers accountable for the use of those revenues and to ensure that those revenues are re-distributed in an efficient and equitable way. Donors and international financial institutions provide capacity building and technical assistance to support countries willing to implement EITI.

A coalition of over 300 NGOs (including Global Witness, CAFOD, Oxfam, Save the Children, Transparency International and the Open Society Institute) have also grouped together to establish The Publish What You Pay (PWYP) campaign. This campaign

prompted the EITI initiative and aims to help citizens of resource-rich developing countries to hold their governments accountable for the management of revenues from oil, gas, and mining industries. It also successfully pushed the World Bank to introduce revenue transparency conditionality into its financing of extractive industry investments by its private sector arms, the IFC and MIGA. The coalition argues that transparency of oil and gas revenues should serve as a basis for poverty reduction, economic growth and development and calls for the mandatory disclosure of tax, fee and royalty payments made by oil, gas and mining companies' to host governments for the extraction of natural resources.

Both Publish What You Pay and the Extractive Industries Transparency Initiative have the support of the G8, international financial institutions (IMF, World Bank, EBRD), the European Union, the industry and its representative bodies, and many parliamentarians from across the world.

Some oil and gas companies (i.e. Talisman, Nexen and TransAtlantic) have already surpassed the EITI and Publish What You Pay calls for transparency and have chosen to systematically disclose royalties, taxes and bonuses paid to the governments of countries in which they operate. They have also developed disclosure policies that apply to all employees and directors to prevent the improper use or disclosure of material information; give guidance on dealing with other confidential information, ensure timely disclosure of information and ensure compliance with legal and regulatory requirements (Save the Children 2005).

Implementation Problems with Information Disclosure

The mere existence of disclosure initiatives does not, nevertheless, mean that information disclosure is being enacted and that public or private institutions are changing their internal cultures. In some countries, Freedom of Information laws lie dormant due to a failure to implement them properly or a lack of demand. For instance, in Bosnia, one of the best designed laws in the world is only used infrequently (Bansier 2004). In others, the exemptions are abused by governments to prevent their embarrassment, or governments resist releasing information, causing long delays (Snell 2002). New laws promoting secrecy in the global war on terror have also undercut access (Bansier 2004).

A study conducted by Save the Children, UK, also determined that despite substantive efforts being initiated by the EITI and PWYP initiatives, most citizens from host countries continue to be unable to find out what revenues their governments have received from extractive companies. Many countries reported a lack of co-ordination between different government departments about disclosure commitments in the extractive sector; and a number of accounting standard setters were not aware of their government's commitment to the EITI or the G8, or the implications it could have for accounting or securities regulations (Save the Children 2005).

Moreover, Bellver & Kaufmann (2005) have argued that disclosure policies and access laws will be largely ineffective if citizens and non-government organizations lack the capacity to exercise their right of access or the resources to pursue complex requests. Similarly, access laws will not be used if elements of civil society are unable to recognize the potential benefits of the disclosure, lack the capacity to analyze disclosed information, or are incapable of acting on it afterwards. There is no point in having a law that provides for the right to access information if there are no clear and effective mechanisms to enable citizens to use the law; and if the content and benefits of the law have not been communicated through a broad communication campaign.

To succeed, these restrictions must be resisted. Public institutions need to change their internal cultures. Civil society, the media and other political actors need to ensure that information is released. Courts and ombudsman should support information disclosure. Parliaments should step in and reverse changes and amend or replace inadequate laws. Perseverance of civil society is therefore crucial in ensuring that the law is actually implemented and effective (Bansier 2004).

PART II: TRANSPARENCY AND INFORMATION DISCLOSURE IN INDONESIA

Indonesia is currently considered to be among the least transparent countries in South-East Asia¹, although significant improvements have been made in recent years². In the past, Indonesia's bureaucracy tended to suppress information flows. Information was primarily governed by the powerful Ministry of Information, which maintained control over the domestic press and the distribution and publication of foreign publications. Both were subjected to censorship and indiscriminate bans (Kitley 2001).

NGO operations were also limited. This was because the former Indonesian government tended to suppress their activities and prevent them from voicing opposition to state policies (Eccleston & Potter 1996). Nevertheless, in the early 1980s, some NGOs, such as Yayasan Lembaga Bantuan Hukum Indonesia (Indonesia Legal Aid Foundation), had started to fight for the recognition of civil and political rights, including the right of public access to information. For years after that, the movement for public access to information as well as transparency became more active—although there were no NGOs that were concentrated specifically on that issue at that time.

Access to government information began to change in mid 1998 when a social reform movement, known as 'reformasi' emerged. This movement called for accountability, transparency and political reform and lobbied Indonesia's new government to lift restrictions on the press³ and the right to protest. The Ministry of Information later cancelled the requirement for press publication permits (SIUPP) and issued more than 1,200 new licenses (Kitley 2001). This allowed civil society groups and the media to use their new freedoms to raise the profile of Indonesia's forests and to reveal shortcomings that undermine sustainable management of forest resources and community rights to forest resources.

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¹ In 2001, a survey on the accessibility to the public of 43 government held records, rated Indonesia as the second least transparent country in South-East Asia. Philippines was ranked as the most transparent (59%), Thailand (56%), Cambodia (44%), Singapore 42%, Malaysia (33%), Indonesia 18%, Vietnam (18%) and Burma (5%) (Source: Philippine Center for Investigative Journalism and Southeast Asian Press Alliance).

² Transparency International has noted that Indonesia's score on the Corruption Perceptions Index recovered from a low point of 1.9 in 2002 (on a scale on which 10 indicates "clean") to 2.2 in 2005 and 2.4 in 2006.

³ Restrictions on the press were lifted after President Habibie ratified the new Liberal Press Act (UU 40/99) in September 1999. The new law banned censorship and guaranteed the right of the press to 'look for, acquire and to disseminate ideas and information'. The law also removed the requirement that publications seeks licenses before they can be printed. Much of the law also applied to television and radio.

The reform movement also allowed a number of civil society groups, such as the Indonesian Transparent Society (*Masyarakat Transparansi Indonesia*), Indonesian Corruption Watch, and Transparency Indonesia, to form and promote transparency. Several NGOs, such as *Yayasan Lembaga Konsumen Indonesia* (Indonesian Consumer Foundation) and the Indonesian Centre for Environmental Law (ICEL) also began to lobby for freedom of information and succeeded in gaining recognition of the right to public access to information in the Consumer Law and the Environmental Law.

Indonesia's Draft Freedom of Information Act

In 2000, a Coalition of around 18 NGOs was formed to lobby for a Freedom of Information Act in Indonesia. The coalition, consisting of more than 40 non-government organizations and various professional associations, drafted a Freedom of Information Act in 2000, lobbied the Indonesian parliament to adopt the act and encouraged the mass media and other public forums to educate Indonesia's citizens about their right to know (Nugroho 2003). A draft bill was submitted to parliament on February 9, 2001 where it has unfortunately languished until the current day.

The draft Freedom of Information Act includes many of the essential elements of an effective disclosure policy including:

- 1. A basic premise that all public information should be open to the public and that every person has the right to see, obtain or know about information;
- 2. A public interest provision that requires exemptions to be balanced against disclosure in the public interest;
- 3. Proactive information disclosure:
- 4. The public institution's obligation to document and to provide the information requested through a simple, inexpensive and immediate procedure;
- 5. Establishment of an independent Information Commission, which has a mandate to mediate and adjudicate complaints or appeals;
- 6. A requirement that public organizations undertake an up-to-date inventory of information it holds and to ensure that this information is regularly published;
- 7. Limited exemptions that employ a consequential harm test and a public interest balancing test on state secrets, commercial competition, personal privacy, official secrets and law enforcement information;

- 8. Procedures for submitting requests and appeals;
- 9. Criminal sanctions for government officials that destroy information or impede public access to information.

The civil movement to promote freedom of information has raised awareness among Indonesian citizens about their right to information held or generated by government agencies even though the Freedom of Information Act has not been approved by parliament. However, major obstacles to securing freedom of information still exist. For instance, defamation provisions that can result in criminal sanctions and punitive damages still exit. These provisions may prevent discussion or legitimate criticism and result in the imposition of excessively large damage awards and even imprisonment.

Media freedom is also impeded by a lack of pluralism and diversity. Media groups continue to be under the control of a handful of powerful members of the elite. Foreign media coverage is limited, and community radio, which can be a useful platform for the exchange of views, is largely controlled by influential figures. These aspects of the media in Indonesia can affect the independence and quality of reporting and stifle opportunities for the free flow of information.

Government officials, used to the status quo, also continue to be reluctant to disclose public information. This tendency is exacerbated by the absence of a freedom of information law and by a lack of awareness among the general public, including the media, of their right to know or how to secure such rights.

Indonesia's Draft State Security Act

Indonesia's draft Freedom of Information Act has also encountered problems because it is believed to contradict another bill currently being deliberated by parliament—the State Security Act⁴.

⁴ Resistance to openness got new momentum after the September 11 2001 attacks on the World Trade Centre and the Bali blast on October 12, 2002. The latter incident resulted in President Megawati signing the Anti-Terrorism Regulation proposed by the National Intelligence Agency (BIN). This is not only the case with Indonesia. Several countries reconsidered freedom of information legislation after the September 11 terrorism attack. For instance, Canada contemplated but then backed away from giving its justice minister the power to waive its long standing access law on an emergency, terrorism related basis. India passed the Prevention of Terrorism Ordinance, which threatened jail terms for journalists who didn't cooperate with law enforcement, but no such actions have yet occurred. Great Britain delayed implementing its new information access law until 2005, but said the delay had nothing to do with September 11 (Blanton 2003).

The draft State Security Act was drafted by Indonesia's defense ministry, who has maintained that the absence of clear regulation has led to government policies frequently being leaked to the public and failing to materialize, as they became targets of unending public scrutiny (Razak 2006).

Freedom of Information activists have raised concerns about the draft State Secrecy Act because it does not contain a clear definition of 'state secrets'. They have also argued that a separate law on state secrets is not needed because an exemption for this is already provided for in the draft freedom of information law (Jakarta Post, May 15, 2006). They fear that the draft bill will interfere with on-going democratization processes that promote transparent information disclosure.

Generally, the bill defines confidential information as anything that could jeopardize the state's sovereignty or safety if it fell into the wrong hands. Freedom of information activists are concerned that there will not be a clear mechanism to determine which information is considered classified and which is open to the public. The government has been strongly encouraged to clearly specify what kind of information would be protected by the bill, but has yet to do so (Jakarta Post, June 27, 2006). The latest draft of the bill proposes the establishment of a state secrets agency, which would have the privilege of declaring certain information classified. The agency would be led by the defense minister and would comprise the home minister, foreign minister, justice minister, information minister, attorney general, military chief, police chief, state intelligence agency chief and state coding agency chief. Jail sentences for leaking, sharing, copying, recording or publicizing classified information are also provided for in the draft law. These offenses carry a maximum sentence of life in prison, and even the death penalty during wartime.

Other Relevant Laws and Regulations

A number of other Indonesian Laws also posit problems for information disclosure in Indonesia. For example, there are 20 articles in the Penal Code that define what information can be classified as secret and therefore should not be disclosed. Article 112 of the Penal Code also states that:

Anyone who intentionally imparts letters, news or information that he/she knows should be kept secret for reasons of national interest, or who

intentionally informs or gives such items to a foreign country, is punishable by imprisonment for up to seven years.

Similar provisions can also be found in the Banking Act (UU 10/1998), the Commercial Secrecy Act (UU 30/2000), The Archive Act (UU 7/1971), the Telecommunication Act (UU 26/1999), Decree No.1/2002 on Combating Terrorism and the Documentation Act and Public Court Act. Such acts classify various kinds of information on State secrets, sometimes inconsistently, and impose severe penalties on people who are found to be in breach of them.

The secrecy provisions contained in the Penal Code protects all classified information, even though the classification may be unnecessary and protect no legitimate secret information. International standards note that restrictions should relate to a legitimate interest and that disclosure should only be prohibited where it would actually harm that interest. Furthermore, there should be a public interest override so that where the public interest in disclosure outweighs the harm the material should still be disclosed. The provisions relating to official secrets fail to take into account the fact that over time, information that may once have legitimately been classified as secret will over time become subject to disclosure. In each of these laws information that is secret is defined very broadly and can be open to subjective interpretation (Nugroho 2003).

Nevertheless, the public's right to information is legally acknowledged and guaranteed under Article 28F of the Constitution, and Articles 20 and 21 of MPR Decree No. XVII/MPR/1998 on Human Rights, which state that:

Article 20:

Everyone has the right to communicate and access information in order to develop him/herself and his/her social environment;

Article 21

Everyone has the right to seek, access, own, keep, process and impart information utilizing all kinds of channels available.

Rights to information are also mentioned in sectoral laws, such as Indonesia's Basic Forest Law (UU 41/99), however, these clauses are general and limited to recognizing

the public's right to information without outlining the responsibility of public institutions to provide such information. These laws also do not define the types of information that can be accessed by the public, the procedures and mechanisms that can be used to access information, and other important aspects of the implementation of freedom of information. Specific legislation on these issues is consequently needed.

PART III: THE MINISTRY OF FORESTRY'S TRANSPARENCY INITIATIVE

Indonesia's forests are among the most extensive, diverse and valuable in the world. These forests provide habitats for a wide range of flora and play a pivotal role in supporting economic development, the livelihoods of the rural poor and the provision of local environmental services. Forestry is Indonesia's third largest source of non-petroleum sector export earnings, bringing in an estimated US\$6 billion per annum and of significant importance to multiple stakeholders.

Indonesia's forests are threatened by a number of factors, including illegal logging, estate crop expansion, agricultural expansion, transmigration, rural settlements, road developments and large-scale logging. In 2000, the World Bank estimated that Indonesia had lost over 20 million ha of forests between 1985 and 1997, including 6.6 million ha in Sumatra and 8.4 million ha in Kalimantan. This means that Indonesia is losing close to 2 million ha, or over 2%, of forests annually. Lowland dipterocarp forests in Sumatra and Sulawesi have disappeared fastest; and it is feared that Kalimantan will lose its lowland forest within the next 10 years.

Efforts to support sustainable forest management and to curb unauthorized deforestation have been undermined by a lack of reliable, accurate and up-to-date information on Indonesia's forest resources, harvesting operations, deforestation and forest degradation, timber trade and law enforcement. In fact, the reliability of present day forest data may be worse than it was six years ago. This is because decentralization has made it more difficult for the Ministry of Forestry to collect and archive accurate information from district forest offices. District governments only haphazardly report to the Ministry of Forestry and only about half of Indonesia's wood processing mills submit annual reports (RPBBI) on realized annual consumption of timber (Brown 2002).

Ad hoc record keeping also impedes information access. Information tends to be scattered and not arranged in a systematic way. Considerable effort is consequently required to collect and archive accurate, reliable and up-to-date information on the harvesting, processing and transportation of timber in Indonesia.

Significant improvements in forest sector information disclosure have, nevertheless, been made in recent years. For instance, on 27 February 2006 in Jakarta, the Minister of

Forestry formally launched the National Dialogue on Forest Sector Transparency, the first effort of its kind in Indonesia, and issued a formal Ministerial Statement on transparency in the forestry sector. The Indonesian Ministry of Forestry has also dramatically improved its website (www.dephut.go.id) and added a plethora of information on deforestation, active logging concessions, statistics on the extent of Indonesia's forest functions (production forest, protection forest, conservation forest), bilateral and multi-lateral forestry projects and forest fires. A complete list of relevant laws and regulations are also readily accessible on the MoF website, including regulations issued in 2007.

The Ministry of Forestry website also features an announcement stating that citizens can lodge a complaint by emailing tp5000@dephut.cbn.net.id; or request information from the Ministry of Forestry's Information Centre (*Pusat Informasi Kehutanan*) by emailing karo.humas@dephut.cbn.net.id. A complete list of Echelon I emails is also provided allowing citizens to write emails to high level government officials, including the Minister of Forestry, M.S. Kaban. However, no information is currently provided about how long information requests will take and what procedures will be taken to fulfill information requests. Most of the statistical information contained on the MoF website is also out of date and only goes up to the year 2003; and most of the maps of forest concessions, protected forest areas, conservation areas, deforestation and the like are out of date and primarily only go up to the year 2000 or 2003 at the latest.

The relevance of transparent forest sector information

Up-to-date, accurate and reliable forest sector data is required to make informed policy decisions, monitor forest cover change and detect illegal logging, clearing and encroachment. Forest sector information disclosure is also considered necessary and important because it is expected to ultimately lead to better forest governance, increase revenues and investment, accountability and more equitable distribution of revenue generated from Indonesia's forest resources. Disclosure of forest sector information is also expected to be able to combat corruption and, ultimately, to alleviate poverty, especially among Indonesia's forest dependent poor (Figure 2). Special attention to this issue is therefore warranted and it has become a focus of donors and NGOs in recent years.

Figure 2: Why is transparency in Indonesia's forest sector important?



Governments and companies are not transparent and do not disclose information about forest exploitation, development plans and forest resources.



Corruption: corrupt elite mismanage forest resources for personal gain.

Poor forest governance:

governments poorly informed and unable to make sound policy decisions that support sustainable development.

Poor accountability: citizens lack information and are unable to protect their own interests or to hold the government to account.



Poverty: revenues obtained from forest exploitation are captured by a small elite and do not flow back to the rural poor.

Poor government services: revenues obtained from forest exploitation are not used to improve basic services, such as health and education.

Forest degradation and destruction: corruption and rent-seeking result in over-harvesting and unlawful forest clearing.



Governments and companies regularly disclose accurate, up-to-date and reliable information on forest exploitation, development plans and forest resources.



Less corruption: NGOs and the general public are able to scrutinize forest sector information and uncover corruption.

Good forest governance: governments are well informed and able to make sound policy decisions that support sustainable

development.

Accountability: NGOs and the general public are able to monitor government performance and to hold governments to account for poor forest management and the mis-appropriation of revenue generated from forest exploitation.



Prosperity: local people are well informed and able to negotiate more equitable deals.

Good government services:

Local people have the information they need to press their governments to improve basic services, such as health and education.

Sustainable forest management: governments and citizens can make informed decisions and utilize forest resources for the benefit of present and future generations.

FOMAS

As stated previously, in February 2006 the Ministry of Forestry made a commitment to improve forest sector information and to make this information available to the general public. Their efforts are being supported by a multi-stakeholder forest sector transparency and accountability initiative, known as FOMAS. FOMAS aims to establish the conditions for transparency in the forest sector by making relevant, reliable, accurate and up-to-date forest sector information continuously available to Ministry of Forestry decision makers and the general public. It also seeks to assist decision makers in better decision and policy making based on daily use of better-managed information.

The core components of FOMAS are:

- > An **information management process** that generates and archives reliable, accurate and up-to-date information on Indonesia's forest and timber resources.
- > A **comprehensive disclosure policy** that clearly articulates what information can be publicly disclosed.
- > Effective disclosure mechanisms that allow multiple stakeholders to access reliable, accurate and up-to-date information on Indonesia's timber and forest resources.
- > An **improved decision-making process** designed to use up-to-date and accurate forest sector information within daily operations in the Ministry of Forestry.

The third core component of FOMAS recognizes the importance of establishing a disclosure policy for forest sector information and the Ministry of Forestry has already began to ready itself for this important activity. Two multi-stakeholder workshops on disclosure of information have been held to get this process moving. In the first meeting, held on 16 March 2007, multiple stakeholders discussed the need to develop a disclosure policy and agreed that this was an important activity that should be prioritized by the Ministry of Forestry. Stakeholders at the meeting also proposed that a special Steering Committee should be established in the Ministry of Forestry to develop the disclosure policy and solicit inputs from multiple stakeholders on the draft.

In the second workshop, held on 23-24 April 2007, the disclosure policy concept was developed further and more buy-in was secured for its development. A Terms of Reference (ToR) for a disclosure policy Steering Committee was also developed during this meeting. The Terms of Reference directs the disclosure policy Steering Committee to: 1) develop a disclosure policy through a process of multi-stakeholder consultations; 2) develop a comprehensive inventory of forest sector information held by the Ministry of Forestry and its provincial and district offices; 3) determine what types of information the general public needs and wants so that their aspirations can be taken into account in decision making processes; 4) develop a user manual for information requests from the general public; 5) develop guidelines on disclosure of information for Ministry of Forestry staff; 6) train and inform government officials about their obligations to disclose information (capacity building); and 6) establish public information centers in Jakarta and a number of forest rich regions.

In 2008, the Ministry of Forestry's Disclosure Policy Steering Committee plan to develop a comprehensive disclosure policy for forest sector information held by the government. The disclosure policy will be developed in a consultative, transparent and participatory manner through a series of workshops, focus group discussions and meetings. The draft will be written the Ministry of Forestry's legal department and it will be widely distributed to allow multiple stakeholders to comment on it and provide inputs.

Disclosure policy guidelines

Guidelines for developing a disclosure policy for forest sector information were developed in early 2007 with assistance from the World Bank and these guidelines are likely to be used to guide the drafting of a disclosure policy for forest sector information. These guidelines drew upon the experiences of other countries and sectors with Freedom of Information Acts. The guidelines recommend that the Ministry of Forestry should endeavor to develop a disclosure policy that draws upon Indonesia's draft Freedom of Information Act and contains clear and concise articles on:

- ➤ The Ministry of Forestry's commitment and obligation to disclose forest sector information to the general public.
- Limited exemptions related to personal information, commercial information, law enforcement information, defense and national security, policy making and intellectual property rights.

- ➤ The public interest test, which requires government agencies to disclose exempt information if it is deemed to be in the public's best interests;
- > Costs of disclosure.
- > Complaint and appeal mechanisms.
- > Time limits for government officials to respond to information requests.
- ➤ How refusals to supply information should be handled.

The guidelines also recommend that the disclosure policy should be based on a presumption in favor of public disclosure of information held by the Ministry of Forestry. This implies that all information held by the Ministry of Forestry and its district and provincial forestry offices should be made available to all members of the general public, unless it is explicitly exempt from disclosure. This includes: satellite images; boundaries of forest concessions, industrial timber plantations and agricultural plantations; spatial plans; work plans and reports; permits and licenses; timber transportation documents; relevant laws and regulations; revenue data; environmental and social impact assessments; relevant demographic data and export, trade, production and consumption statistics.

It is, nevertheless, widely recognized that a few specific and narrow exemptions to information disclosure may need to be adopted. The guidelines recommend that exemptions may be applicable for:

- ➤ Personal information about government officials (particularly information about their general health or well-being, marital status, religion, personal beliefs or domicile address).
- ➤ **Commercial information,** particularly trade secrets or information that is likely to seriously prejudice the commercial or financial interests of the timber industry.
- Information that may pose a risk to national security or foreign relations, such as satellite maps of country borders (i.e. the border of PNG and Papua; or between Kalimantan and Malaysia); satellite maps of forests harboring terrorist activities; satellite maps of forests harboring guerilla groups; joint law enforcement operations carried out in collaboration with neighboring countries, such as Malaysia and PNG, or consuming countries, such as China.

- ➤ Information about the formulation and development of government policies. This exemption should only be applied to allow government officials to freely and frankly discuss policy issues, however considerable care will need to be taken to ensure that this exemption, if endorsed, does not discourage or prevent public participation in policy making.
- ➤ Information on the intellectual property rights of indigenous peoples. This exemption may be required to protect information which may belong to customary communities. Such information may include, maps of customary lands, information about medicinal plants used by customary people, indigenous knowledge about tree and seedling propagation, and indigenous knowledge about ecosystems, wildlife and resource management.
- ➤ Law enforcement information. This exemption is likely to be among the most relevant for the Ministry of Forestry because it will apply to law enforcement operations targeting illegal logging—an issue that has attracted widespread concern within Indonesia itself, and internationally. The guidelines recommend that the exemption should only be applied to information generated during on-going law enforcement investigations because disclosure of such information may jeopardize or undermine an investigation, allow suspects to flee the scene of a crime, prejudice investigative processes, wrongfully embarrass a suspect who is later cleared of any wrong-doing, or deny a suspect the right to a fair trial. However, it should not be applied to the majority of law enforcement information generated after an arrest has been made.

.As with other disclosure policies, the guidelines recommend that exemptions to disclosure of information should be subjected to a 'public interest test' that requires information withholdings to be balanced against disclosure in the public interest. This test is often used for the release of information that would reveal wrong-doing or corruption or to prevent harm to individuals or the environment.

Implementation Guidelines

In addition to the above, guidance has been provided to ensure that a disclosure policy on forest sector information can be effectively implemented. This guidance recommends that the Ministry of Forestry should endeavor to:

- 1. Develop a comprehensive inventory of forest sector information. A comprehensive inventory of forest sector information held by the Ministry of Forestry and provincial and district forest offices is needed to determine what information can potentially be made available to the general public. The inventory could include any information that may be exempt from disclosure unless this would in itself constitute disclosure of exempt information. Once the inventory has been completed, it should ideally be published on the Ministry of Forestry website to allow citizens to know what types of information is held by the Ministry of Forestry and up-dated at least bi-annually.
- 2. Update forest sector information. Up-to-date information on critical forest sector issues such as forest cover, deforestation rates, concession boundaries, community forest, mill consumption and capacity and revenue is needed to ensure that the Ministry of Forestry is able to supply such information to citizens if they request it. This information will need to be regularly updated to meet future information requests. The most recent information held by the Ministry of Forestry, which has been deemed appropriate for public disclosure, should be ideally be posted on the Ministry of Forestry website to allow citizens easy access to the information and to reduce the cost and burden of requests for generic forest sector information.
- 3. **Establish a systematic archival system**. This will allow government officials to quickly source information requested within a limited time frame. A systematic archival system will also reduce search time costs.
- 4. **Develop a user manual for information requests.** A clear and simple guide containing practical information on how citizens can request information from the Ministry of Forestry should be developed and disseminated widely in an accessible form. The guide should provide crucial information on how requesters can request information, what they should pay, how long requests will take, what appeal mechanisms exist and what information is exempt from disclosure.

- 5. Develop a user manual for Ministry of Forestry officials. A clear and simple guide on disclosure of information will need to be prepared for government officials so that they know what types of information they can disclose, how they should respond to requests for information, what fees they should charge for information requests and the time limits that they have in order to respond to information requests. Special training programs should also be provided to Ministry of Forestry officials to ensure that they understand the contents of the manual and their obligation to disclose information.
- 6. **Establish an information division**. A special information division may need to be established within the Ministry of Forestry and within provincial and district forestry offices. The division should ideally be given a clear mandate to carry out the following tasks:
 - Promote within the Ministry of Forestry the best possible practices in relation to record maintenance, archiving and disposal;
 - Develop a code of practice relating to the keeping, management and disposal of records;
 - Serve as a central contact within the Ministry of Forestry for receiving requests for information, for assisting individuals seeking to obtain information and for receiving individual complaints regarding the performance of the public body relating to information disclosure.
- 7. Train and inform government officials about their obligations to disclose information. Many government agencies in other countries (including Australia, Canada and Thailand) have experienced problems with the enactment of disclosure legislation because it was assumed that the simple passage of a well drafted and strongly worded legislation would produce automatic changes in the previous culture of official secrecy. Most countries have realized that public servants, accustomed to working in secrecy will need training to effectively implement a disclosure policy and will need to be regularly reminded of their obligations to make information transparent.
- **8. Establish a reporting system** that outlines progress with the implementation of forest sector transparency, highlights impediments to transparency and offers solutions to these impediments.

- **9. Allow for independent monitoring of disclosure compliance.** Independent monitoring of the Ministry of Forestry's performance with information disclosure may be required to build up trust with the general public and to ensure that government officials carry out their obligation to disclose information to the general public.
- 10. Create a constituency of supporters. The viability of disclosure requires an active constituency (made of government groups, the media, academics, public interest law firms & citizen groups). This constituency needs to ensure that forest sector information is disclosed, that citizens are aware of their right to request information, assist citizens to request and obtain information, and most importantly, ensure that citizens are able to use and understand the information they acquire.
- 11. Establish public information centers (infoshops). To ease public access to information, the Ministry of Forestry may consider establishing a public information centre inside the Ministry of Forestry and in provincial and district forest offices. The information centres could be modeled off various other information centers, including the World Bank infoshop. The World Bank infoshop is a public reading room with photocopying facilities. It acts as a comprehensive information and reference centre where information assistants answer specific questions or connect applicants to knowledge and information resources within the Bank. It provides computer workstations and high-speed printers for public use to browse the Bank's website and CD-ROMS, offers guidance on using bank information resources, provides bibliographic information and knowledge for specific needs. It also houses books and periodicals, project related documents released according to the Banks own disclosure policy, CD-ROMs of bank reports and videos and posters of the Banks work in developing countries.

Problematic Issues to Resolve and Contemplate

The Ministry of Forestry will endeavor to develop a disclosure policy on forest sector information as outlined above in a participatory manner. However, during consultation and discussion it will need to contemplate and attempt to resolve the following issues:

How can the Ministry of Forestry ensure that a disclosure policy focusing specifically on the release of forest sector information does not contradict Indonesia's draft Freedom of Information Act? Indonesia's draft Freedom of Information Act is still being deliberated by parliament and it is likely to be adopted sometime in the future, although this may still be many years away. To avoid contradictory articles, the Ministry of Forestry may need to base their disclosure policy on the draft Freedom of Information Act to avoid potential contradictions and follow developments and changes to the Act while it continues to be deliberated by parliament. It is, nevertheless, possible that the Ministry of Forestry's disclosure policy will need to be significantly revised once Indonesia's Freedom of Information Act is adopted.

What legal instrument should be used to endorse a Ministry of Forestry disclosure policy? Given that Indonesia's draft Freedom of Information Act has not been endorsed by Indonesia's parliament, decisions will need to be made about what legislation is most appropriate for a Ministry of Forestry disclosure policy. A law (UU), regulation (PP) or a Ministerial Decree (SK)? In Indonesia, a law (UU) would allow the legislation to include criminal sanctions but would need to be approved by the Indonesian parliament. The law making process in Indonesia can be very lengthy; so too is the parliamentary approval process. It is also possible that a sectoral specific law on disclosure of information would not be approved by Indonesia's parliament because the draft Freedom of Information law is still being deliberated. For now, the most appropriate legal instrument may be a Ministry of Forestry regulation which will not be able to contain criminal sanctions and be limited by the fact that it can only flesh out guidelines for disclosure of information that are based on an overriding law, such as Indonesia's Basic Forest Law. This law contains a few specific articles on disclosure of information and states that it should occur in principle, however these articles are somewhat vague and limited. A Ministerial Decree would only have fairly limited application and would probably not be able to give a sectoral disclosure policy much credence.

How can complaints and appeals be handled? Indonesia's draft Freedom of Information Act currently calls for the establishment of an independent Information Commission that can mediate and adjudicate complaints or appeals made by citizens requesting information from the Indonesian government. It also specifies that every person has the right to appeal a disclosure decision if their request is rejected, they don't obtain all of the information they requested; they receive the wrong information; the fee

charged for obtaining the information is considered too high, or the request is not dealt with in the time frame specified in the law. In the absence of this overarching law, how can complaints and appeals be handled? It is, for instance, possible that an independent review board could be formed to handle complaints and appeals. The board could be comprised of highly regarded individuals from NGOs or civil society, as well as government officials from other government departments that have a good knowledge about forests and forest sector information. The board would need to have a clear mandate to review appeals and complaints about information disclosure requests and adjudicate conflicts of interest. This board could allow citizens to have an appeal fairly reviewed. However, the Ministry of Forestry will need to consider what legal instrument can be used to create the independent board, and give it credence, legitimacy and weight.

How should the costs of information disclosure be covered? Information disclosure is bound to burden the Ministry of Forestry with extra expenses and costs. In other countries, government bodies charge fees for searching for information, duplicating or copying information and reviewing information request and the Ministry of Forestry may consider doing the same, although fees should ideally be kept to a minimum and cover the actual costs of providing information. The Ministry of Forestry may also need to solicit donor assistance to develop a comprehensive and systematic database of up-todate, reliable and accurate forest sector information so that it can promptly respond to information requests from the general public. Many donors are ready to support such an initiative and have already pledged support for the Ministry of Forestry's Forest Monitoring and Assessment System that seeks to establish such a database of up-to-date, reliable and accurate information. Finally, the Ministry of Forestry may need to allocate funding for the creation of a special information division, the creation of infoshops within the Ministry of Forestry and district forestry offices, the drafting and publication of disclosure guidelines and manuals, reproducing requested information, creating an efficient and effective archival system, training government officials on how to deal with information requests, informing the general public about their right to know and how they can access information from the Ministry of Forestry.

Should penalties be handed down if government officials fail to comply with the disclosure policy? Disclosure of information is likely to be met with some resistance in the Ministry of Forestry and penalties for failing to disclose information may need to be considered to give a disclosure policy weight.

Criminal sanctions or fines could potentially be handed down to government officials that intentionally destroy information, refuse to disclose information or release false information. However, without a Freedom of Information Law, this will be difficult. This is because criminal sanctions can only be included in a law, not a government regulation or a Ministerial Decree. Other legislation also restricts government officials from disclosing information and provides stiff criminal sanctions for disclosure. This means that criminal sanctions for failing to disclose information can only be stipulated in a overriding law, such as Indonesia's Basic Forest Law, or ideally, through a Freedom of Information Act that applies to all government officials.

Without criminal sanctions, the Ministry of Forestry may need to carry out extensive dialogue on disclosure of information to ensure that government officials are on-board about disclosure of information. This process may take time and should be enforced as much as possible through a well articulated, clear and concise disclosure policy.

PART IV: CONCLUSION

Ideally, Indonesia's Freedom of Information Act will be signed and enacted in the near future to provide a clear legal mandate for forest sector information disclosure, not only for the Ministry of Forestry and its provincial and district offices, but also for other government agencies that may hold forest sector information (i.e. Ministry of Trade, Ministry of Industry, National Police, Attorney General, District Courts, Supreme Court, Coordinating Ministry for Political and Security Affairs, Ministry of Environment etc). In reality, this is some time off. Recent deliberations in Parliament have not resulted in the law being enacted and a submission has been made to delay implementation of the law to 5 years after signature.

In the absence of a Freedom of Information Act, a disclosure policy designed by the Ministry of Forestry, would need to be enacted in legislation, preferably via a law (UU) to allow for criminal sanctions and to provide a clear mandate to government officials about information disclosure. It is, nevertheless, more likely that a Ministry of Forestry regulation will have to be used as the legal instrument for releasing a disclosure policy because a new law would need to be deliberated and passed by parliament. This regulation will need to be reinforced with considerable dialogue on the significance and importance of transparency. Bellver & Kaufmann (2005) have pointed out that even though ministers and officials may recognize the importance of transparency, the political and bureaucratic pressures to control information can be irresistible. Merely the act of adopting a law can limit certain abuses and can make people aware of their rights. It is also a way of signaling government's commitment to transparency and the first step of institutionalize the right to access information and provide resources to it.

The new regulation should ideally draw upon Indonesia's draft Freedom of Information Act as much as possible to ensure that it does not considerably contradict this Act if it is signed and contain clear and concise articles on:

- ➤ The Ministry of Forestry's commitment and obligation to disclose forest sector information to the general public;
- ➤ The public interest test;

- ➤ Clear, concise and limited exemptions personal information, commercial information, law enforcement information, defense and national security, policy making, intellectual property rights and conflicting statutes;
- > Costs of disclosure;
- ➤ Complaint and appeal mechanisms;
- The establishment of an information division that is obliged to ensure that the act is effectively implemented;
- > Time-limits for government officials to respond to information requests;
- Procedures for how requests can be made;
- ➤ The Ministry of Forestry's obligation to regularly publish inventories of information it holds:
- ➤ How refusals to supply information should be handled.

A number of measures will also need to be undertaken to ensure that information disclosure is effectively implemented. These measures include:

- > Developing a comprehensive inventory of forest sector information.
- > Updating forest sector information.
- Establishing a systematic archival information system.
- > Developing a user manual to guide citizens on how they can request information.
- ➤ Developing a user manual to guide Ministry of Forestry officials on how to respond to information requests.
- Establishing an information division to handle information requests.
- > Training and informing government officials about their obligations to disclose information.
- > Establishing a reporting system.
- ➤ Allowing independent monitoring of disclosure compliance.
- ➤ Creating a constituency of supporters to spread the news about the Ministry of Forestry's disclosure policy.
- Establishing several public information centers, not only in Jakarta, but also in several provincial centers.

Extensive dialogue and consultation will also be required to ensure that: a sectoral disclosure policy targeting forest sector information does not contradict Indonesia's draft

Freedom of Information Act; an appropriate legal instrument is chosen to legitimate the Ministry of Forestry's disclosure policy; an independent body is formed to handle complaints and appeals; the costs of information disclosure are fairly managed; and government officials understand and are willing to comply with the disclosure policy.

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APPENDIX 1: A BRIEF OVERVIEW OF INDONESIA'S DRAFT FIA

General Issues

- > The act is based on the premise that all public information should be open to the public and that every person has the right to see, obtain or know about information;
- > The law supports accountability and public participation in decision-making.

Time Limits and Fees

Information should be provided promptly and at minimum cost. (no specific time limits for responding to requests are provided, which is a significant weakness).

Information Commission

The Act provides for the establishment of an Information Commission, which is an independent organization who mediates and adjudicates complaints or appeals made by citizens about the implementation of the Freedom of Information Act. The information commissioner can decide to make public information exempt under the law if he/she feels it to be in the public interest. The commission is to be represented at the central, provincial and district level.

The information commission at the central government level is to consist of 7 members, while the commission at the district and provisional level is to have 3 members. The information commission is responsible to the public and is obliged to issue yearly reports on their activities to the mass media.

The commission members are to be: Indonesian citizens, have integrity, have not been associated with a political party for three years, not a member of TNI or POLRI, not be prosecuted, have an understanding about human rights and public policy, be provided to leave their official position, be prepared to work with full capacity. The information commission is required to respond to complaints or appeals within 30 days.

The information commission has to be formed 6 months after the law is signed. Information commissions at the provincial level must be formed within 3 years; while information commissions at the district level, must be formed within 5 years after the law is signed.

Obligations of Government Bodies

The Act states that government bodies are obligated to implement the Freedom of Information Act, educate the public about the act and build the capacity of government officials to implement the act. Government bodies are also obligated to ensure that they have an up-to-date inventory of the information it holds and makes this information public; and to ensure that information is regularly published.

Exemptions

The government agency also has the right to refuse information requests if:

- > the information is regarded as state secrets;
- > Endangers commercial competition
- Violates personal privacy
- > Relates to official secrets
- > Endangers the lives of others
- > Interferes with law enforcement operations.

However, this does not include, court decisions, instructions to cease law enforcement operations; financial reports of legal institutions, reports of corruption investigations. Information can only remain confidential for a period of 20 years.

Procedures for Submitting an Information Request

Detailed guidelines are provided for submitting an information request. These guidelines specify that requests can be submitted in writing and that an information officer is obliged to take note of requests that are not made in writing (i.e. oral requests). The Information Board is obliged to tell the requester that they have received the request and are processing it. Requests can also be made via email, or other electronic means.

Within 10 days the information board is required to inform the requester if it holds the information or if it is held by another government institution. It is also obliged to tell the requester if it will provide the information or if it is exempt from disclosure in accordance with the exemptions specified in the law. It should also tell the requester if he/she can receive all or only some of the information requested; provide the format in which the information will be provided; and the cost of the information request.

The Board can extend the time frame for providing this information by 7 days if it provides a written reason.

Costs of Disclosure

The general public should be charged the actual costs of searching and duplicating information. Commercial businesses can be expected to be charged more.

Information Institute

Ensures that government bodies are carrying out their obligations and builds the capacity of government bodies to implement information disclosure. The institute is obligated to monitor the implementation of the act, monitor citizens use of the act, evaluate government bodies ability to carry out the act and to ensure that citizens aspirations about the act are being fulfilled.

Appeals

Every person has the right to appeal a disclosure decision it their request is rejected, they don't obtain all of the information they requested; they receive the wrong information; the fee charged for obtaining the information is considered to high, or the request is not dealt with in the timeframe specified in the law. Appeals should first be submitted to the information officer in the government agency. If the requester is not satisfied with their response, they may submit a complaint to the information commissioner. A final recourse is to submit an appeal with the high court. If a requester complains that he/she is having difficulty obtaining information, the government agency must respond to his complaint within 7 working days. The requester may submit an appeal to the information commissioner within 14 working days if he/she is dissatisfied with the agency's response. The Information commission must respond to the appeal within 14 working days and is obliged to act as a mediator between the two parties. The information commissioner's response is considered to be the final decision and overrides the former decision of the public body.

Sanctions

Criminal sanctions apply for:

• Any person who intentionally does not carry out a decision made by the Information Commission can be imprisoned for a minimum of 1 year and a maximum of 5 years.

- Any person who neglects to carry out a decision made by the Information Commission can be imprisoned for a minimum of 1 year.
- Any person who doesn't cooperate by providing information to the Information Commission so that it can consider an appeal can be imprisoned for a minimum of 6 months.
- Any person who prevents the Information Commission from doing their job can be imprisoned for a minimum of 3 months.
- Any person who destroys information can be imprisoned for up to 5 years.
- Any person who releases false information can be imprisoned for a maximum of 2 years.
- Any person who releases information in accordance with this law is protected from being prosecuted.

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FOREST TRANSPARENCY INITIATIVE (DISCLOSURE POLICY ON FORESTRY SECTOR) IN THE MINISTRY OF FORESTRY REPUBLIC OF INDONESIA

Anwar Purwoto
Forest Research & Development Agency
Wellington, November 2007

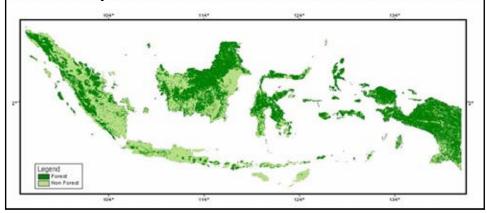
Background

- Indonesian forest is one of the richest forests on earth (possess at least 10 percent plant species, 12 percent mammals, 16 percent reptile and amphibians, 17 percent bird species)
- Covering 70% of Indonesia's land: important roles for economic development, resources for poor people living within and around the forests, provide environmental services
- Forest area: 126.9 million hectares, consist of:
 - Conservation forest: 23.6 mil. Ha;
 - Protection forest: 31.7 mil. Ha;
 - Production forest: 57.6 mil. Ha;
 - Converted production forest: 14 mil. ha

Problems : Land use c

- Land use changes → non forest uses
- Over exploitation
- Illegal logging
- Forestry industries decreased

Promote transparency in forestry sector



Why is transparency important?

- An essential element of good forestry government;
- Increase accountability;
- Combat corruption;
- Maintain and strengthen the trust of citizens.

Problems caused by the lack of transparency:

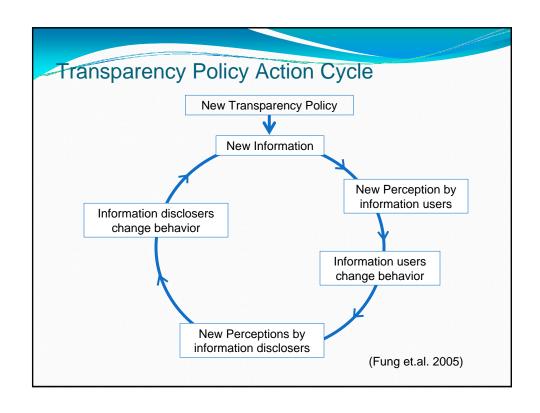
- Creating unnecessary cost;
- Poor forest governance & poor accountability
- Discourage potential investors from entering forestry sector;
- Prevent investor from developing long-term plans;
- Hamper business opportunity and delay job opportunity

What is transparency?

- Good access to information;
- Making available relevant information to all interested parties;
- Free access to government political and economic activities and decisions;
- Increase flow of timely & reliable information to all relevant stakeholders;

→Availability & accessibility of information





Objectives of transparency

- Develop transparency as a corporate value in MoF;
- Establish accountability;
- Provide up-to-date & accurate information to the public;
- Develop guidelines on the implementation of transparency;
- Allow stakeholders to participate in the decision making processes (through National Forestry Council, FOMAS, etc.)

Transparency in MoF

Stated in Forestry Act No. 41/1999 :

Consideration, point b:

...forest as a part of life supporting system and a resource for human welfare....should be managed based on fairness, openness, professionalism,

Article 2:

The accomplishment of forestry affair should be based on fairness, transparency, togetherness.....

Article 11 point 2:

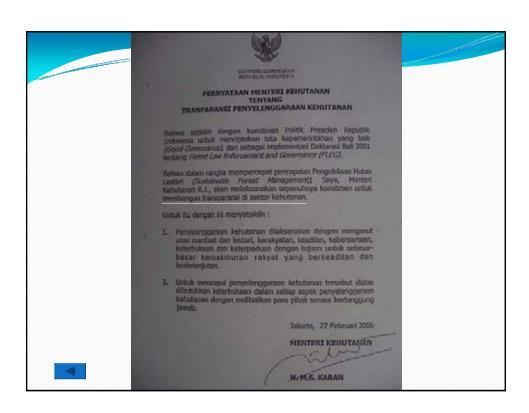
Forestry planning should be developed through multi stakeholder participation, transparent processes, integration and pay attention to local government aspirations

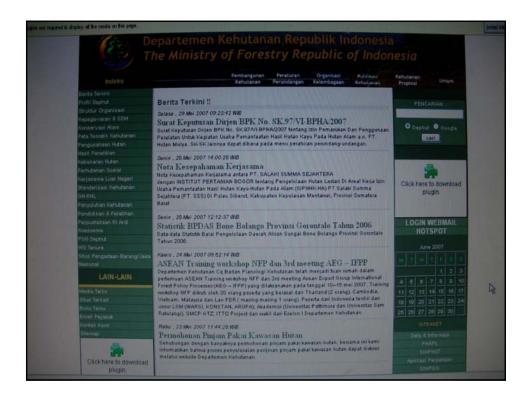
Transparency in MoF... (continued)

Article 68 point 2:

Community has the right to:

- a. ..
- b. know forest allocation planning, the use of forest products, and information on forestry;
- C. ..
- d. supervise the implementation of forestry development, directly or indirectly.
- Commitment of the Minister of Forestry
- Developed MoF <u>website</u>
- Setting-up a Task Force to work on transparency issues within MoF
- Supported by multi-stakeholders (FOMAS)





Fransparency in MoF... (continued)

- Draft of guidelines have been developed:
 - Update forest sector information
 - Establish a systematic archival system;
 - Develop a user manual for information request;
 - Establish an information division;
 - Train & inform government officials;
 - Establish a reporting system;
 - Establish public information center (infoshops);
 - Create a constituency of supporters.

Guidelines....(continue)

- Exemptions of disclosure, such as :
 - ✓ Personal information about government officials;
 - ✓ Commercial information;
 - ✓ Information that may pose a risk to national security or foreign relation;
 - ✓ Law enforcement information

Transparency issues in MoF

- Type of information which should be or not should be disclosed;
- Consultation processes to identify public necessity;
- Readiness of MoF to prepare the needed information;
- Mechanism to access & getting information;
- Sharing data/information protocol (among stakeholders)

Issues....(continue)

- Cost of disclosure;
- Complaint & appeal mechanism;
- Handling of refusal to supply information;
- Legal instrument of MoF's disclosure policy





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Transparency Program's Director, CIPPEC.

 $\label{eq:Paper delivered} \textbf{Paper delivered at the} \\ \mathbf{5}^{\text{th}} \ \textbf{International Conference of Information Commissioners}$

Transparenting Subsidies:

Promoting a Pro-poor Reform in Public Subsidies Allocation

1. Brief Summary of the Program

The efficient and transparent allocation of governmental subsidies constitutes an essential public policy for the promotion of social and economic development in any country. Indeed, the different types of subsidies may work as a key public policy's tool that could serve to fight poverty, to improve the schooling indexes, to guarantee adequate levels of child nutrition, to support productive enterprises, to guarantee low rates in public services and to promote technical and scientific research, among many other social and economic public interest objectives. However, if governmental subsidies are allocated under conditions of lacking transparency, high discretionality and without involvement of civil society, ideal conditions are created for corrupt practices and political clientelism.

Thus, the program had a twofold objective:

1. The program aimed at modifying the institutional conditions that promote corrupt practices and political clientelism in the allocation of public subsidies. This change was stimulated by generating public information, guaranteeing the access to such information and promoting citizens' control over the allocation of subsidies. Access to information was created via a free database of governmental subsidies.

2. The program aimed to promote transparency and access to information for poor and excluded groups. The promotion of transparency in the allocation of subsidies does not end in the development of mechanisms to enable citizens to access to public information. On the contrary, attaining real transparency demands the development of instances that may create opportunities for excluded social groups to obtain information on subsidies available and creating specific mechanisms to challenge the misuse of subsidies by politicians and public officials

2. Social Impact of the Program

Within the State, different regimes of subsidies coexist in a chaotic universe that promotes dissimilar and sectarian treatment and generate a general "lack of information and understanding" by both the society and the State regarding its implementation and allocation. Importantly, programs that provide subsidies in Argentina constitute approximately 15 percent of the total national budget.

The creation of an organized and systematized Database of public subsidies enabled citizens, NGO, journalists, political parties and private firms to identify the sources and allocation of public subsidies. Indeed, many governmental agencies, such as the Anticorruption Office and others in charge of the control of the State, have pointed out that this kind of public spending is one of the riskiest in terms of being subject to corrupt practices. The most common pattern identified by these agencies is the lack of transparency and access to information established for the allocation of a subsidy.

Against this background, transparency of subsidies in general, but of social programs in particular, often collides with serious obstacles. Where laws on access to public information exist, they often lack clear implementation guidelines or information is provided only after a long delay. Public officials may count on the fact that few people will persist as they fear the costs (social and political as well as financial) will be prohibitive.

When those laws do not exist, citizens are bound to the good will of public officials to obtain public information. The situation is even more critical for poor people. For example, a recent comparative study published by the Open Society Institute on access to information in 14 countries (including Argentina) found that individuals who identified themselves as journalists or NGO representatives when they submitted information requests to government bodies received responses 26 percent and 32 percent

of the time, respectively, while requesters from excluded groups received responses just 11 percent of the time. In these institutional settings, asymmetry of information reinforces asymmetric power relations. Against this background, the program also takes into account the greater social vulnerability that females face against social risks and the abuse of power produced by systematic inequality across gender lines. Furthermore, gender inequality is also reflected in the design and operation of political institutions, where women face restricted access to the decision-making process and public participation spaces. In this context, women are victims of discrimination, and thus have less access to information, social services, and the justice system. Moreover, corruption and clientelism also has a more severe impact on women than men. Though the topic of whether women are more or less corrupt than men has been extensively discussed, less attention has been given to the differential impact that corruption and clientelism might have between men and women. First of all, corruption diverts public resources that could potentially be assigned to policies designed to combat poverty. It also has disproportionately negative impact on the well-being of women and their children. Secondly, in an institutional environment dominated by men, the authority of women is insufficient to challenge either corruption or clientelistic practices. Moreover, these women can suffer forms of clientelism rooted in gender inequality, such as when a woman's inscription in a social program becomes conditional on sexual favors

3. Detailed Description of the Program

- 1) To promote transparency and apply full access to information about the cost and recipients of subsidy policies in order to prevent corruption and clientelism.
- 2) To promote transparency and apply full access to information in the allocation of public subsidies at the local level, taking into account that social programs are implemented in a decentralized way, and it is precisely at the level of local governments where the greatest asymmetries of information and power occur.

3)

In order to achieve the first main goal the program developed a free database which enable citizens, journalist, NGO, private firms and political parties to identify and track the sources and allocation of public subsidies. The program used provisions under an executive decree that enables citizens to demand information from the government to request for information on subsidies from various government agencies. The program not only requested for information on the subsidies given by the government but also on the management of the subsidy programs, including information on the legal provisions

for transferring subsidy funds, the names of beneficiaries and the procedure for selecting beneficiaries, the regulation under which public sector agencies provide subsidies to the private sector, and internal controls for accounting and auditing the allocation of subsidies.

In order to achieve the second main goal the program carried out a pilot case in the Municipality of Moreno, which has a population of 380,500 habitants (with a population density of 2,113.9 habitants per km²), an unemployment rate of 43%, while the official statistical indicator reflecting unsatisfied basic necessities (NBI) suggests that in city of Moreno, there are 22% of households that live with their basic necessities unsatisfied. In this political-economic context, the program also takes into account the greater social vulnerability that females usually face in Argentina, where women typically earn less in income than men, experience a greater rate of unemployment, and are concentrated in the job market sectors with the lowest income. These indicators are also reflected in the feminization of the social program with the greatest level of national coverage – *Plan Jefes y Jefas de Hogar Desocupados* – where 75% of beneficiaries are female.

Hence, based on these arguments, the program established in Moreno an alliance with RAZONAR, a women's human rights grassroot local organization, with the purpose of focusing attention on the administration of social programs from gender based perspective. The program followed this line of work not only because a large majority of social program's beneficiaries are women, but also because it is necessary to take into the account the strongly patriarchal institutional structure and the authority of local governments that administer these targeted social programs. In this institutional environment, the exclusion of women is framed within a more general context of Argentine social policy, one in which the gender perspective of this issue is practically ignored or underestimated within the framework of social program management.

Within this sociopolitical scenario, the program carried out a twofold innovative approach:

1) At the national level it developed a Database to promote and facilitate free access to public information in order to make the allocation process for public subsidies more transparent. The Database contains key information about costs per unit; individual and institutional beneficiaries; aggregate economic information; user friendly graphs, indicators and data panels; etc. The program also disseminates and widely publicizes

information and data through public reports, public presentations and by organizing meetings with journalists, legislators and public officials. Further, the program analyzed the information contained in the database and identified cases that contained irregularities. The program also used this information as a benchmark to compare the performance of public agencies, to identify best practices, and to promote reform in the management and allocation of subsidy programs in Argentina.

2) At the local level, where asymmetries of power between men and women are more severe, the program took into account asymmetries of information seriously and established an innovative system to provide information and receive denounces and complaints from social programs' beneficiaries. Hence, in order to provide and disseminate information the program established an alliance with a local community radio. Radio is a powerful media in Argentina; it can reach people who live in areas with no phones and no electricity. And radio reaches people who can't read or write. From this perspective, it can be a strategic channel to distribute information and empower excluded people. The local radio program in Moreno provided key information about the supply of different social programs; determination of eligibility; recertification of eligibility, amount of the subsidy, frequency and mechanisms of benefit payments; registration processes; and complaints and appeals mechanisms. At the same time, the radio program invited the people to reach the local NGO RAZONAR in order to receive more information or to present complaints and denounces. Once the people reached RAZONAR, the complaints were received and classified. A few were due to lack of information, but most of them were caused by the abuse of power of public officials or political brokers against women. In these cases, the program transfers the complaints to the Specialized Attorney (UFISES) in charge to investigate and prosecute crimes in social programs. In parallel, the program followed up the whole process, until the final sentence. RAZONAR complemented this approach with empowerment workshops in order to help recipients of social programs feel entitled to complain when they do not receive the quality service that they deserve. These empowerment workshop were based on the fact that during the first two months of the program, RAZONAR interviewed more than 90 women and found that the majority of them (97%) have never filed a formal complaint against government abuse, but also that if they wanted to do so, the majority (90%) would not know how to do so.

4. Impact/Outcomes of the Program

At the national level, the program achieved its main first goal by making the allocation process of subsidies more transparent. From 2005 to 2006, the overall transparency level on subsidies allocation increased in terms of access to information. If we analyze the program's impact on a case by case basis we can remark the case about the President's Secretary's Office which after the second version of the Data Base (2006) it included in its web page the same information format and level of desaggregation published by the Data Base. Or we can mention the case of the Ministry of Internal Affairs which was chosen in 2005 as the worst case, when no disaggregated data for 50 million \$ in subsidies was available in the Ministry's budget. The program requested for disaggregated information on those subsidies but the Ministry refused to deliver that information. Findings from the program's analyses showed that those subsidies were in fact transfers made by the Ministry to political parties and public institutions responsible for managing the electoral process in Argentina. Hence, the Administrative Investigations Attorney responded to the program's findings and initiated an investigation into the management of subsidy programs by the Ministry of Internal Affairs and finally the information was completely released. However, after the 2006 version of the Data Base, the Ministry of Internal Affairs ranked as one of the most transparent public agencies.

At the local level, the program working with RAZONAR won a case and obtain a favorable sentence in order to reincorporate a female beneficiary who was excluded by discriminatory requirements. The case was widely disseminated by the local Radio and used as a symbol of what beneficiaries of social programs can achieve if they are informed about their entitlements to complain against abuse of power. Immediately after that case, more than 20 women asked for assistance at RAZONAR in the same week.

Finally, with regard to capacity building outcomes, after the program was ended in 2006 RAZONAR incorporated the program's methodology within its institutional routine and operational activities. Furthermore, in order to secure funding to cover this new activity in a sustainable manner RAZONAR applied and won a small grant from the World Bank. The purpose of the World Bank's Small Grants Program is to strengthen the voice and influence of poor and marginalized groups in the development processes, thereby making these processes more inclusive and equitable. Thus, it supports activities of civil

society organizations whose primary objective is civic engagement of the poor and marginalized populations. Hence, RAZONAR will keep on gaining experience and working to improve access to information to social programs in the Municipality of Moreno during 2007/2008.

5. The Scope of the Project for Replication/Scaling

In all countries governments allocate subsidies. But in developing countries lack of transparency is the rule. Hence, from this perspective the potential for replication is very significant. Furthermore, one NGO in Chile (Corporación Participa) is already replicating the program and another in Ecuador (Grupo Faro) is demanding capacity building and technical assistance in order to replicate and adapt the program to extractive industries. Thus, CIPPEC is trying to raise a grant to establish the basis for a regional network of NGOs working together by sharing information and experience.

In Argentina, as a federal country with 24 provinces, this grant will enable CIPPEC to cover at least 2 provinces, beyond the national state. And will enable CIPPEC as well to replicate the capacity building and empowerment process carried out with RAZONAR with, at least, one local NGO in a new large municipality, with more than 300,000 inhabitants.

7

Centro de Implementación de Políticas Publicas para la Equidad y el Crecimiento

TRANSPARENTING SUBSIDIES:

PROMOTING A PRO-POOR REFORM IN PUBLIC SUBSIDIES ALLOCATION

Christian Gruenberg

CIPPEC www.cippec.org

CIPPEC

Centro de Implementación de Políticas Publicas para la Equidad y el Crecimiento

THE INVESTIGATION QUESTION:

THE MOST FAMOUS DEFINITION OF POLITICS IS AS THE ART AND SCIENCE OF:

"WHO GETS WHAT, WHEN AND HOW?

(see Lasswell 1958)

TWO MAIN PRODUCTS DELIVERED

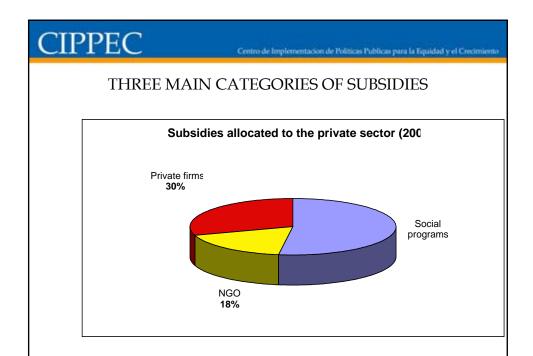
- ON LINE FREE DATABASE: which releases detailed data on who gets what from the subsidy policy in order to identify, track, monitor, control and reform the governmental subsidy policy (available in www.cippec.org)
- TRANSPARENCY INDEX: which measures the degree of access to information to subsidies allocation and enables to benchmark government agencies performance and compliance with access to information regulations.

CIPPEC

Centro de Implementación de Políticas Publicas para la Equidad y el Crecimiento

SOME BIG FI\$CAL NUMBERS

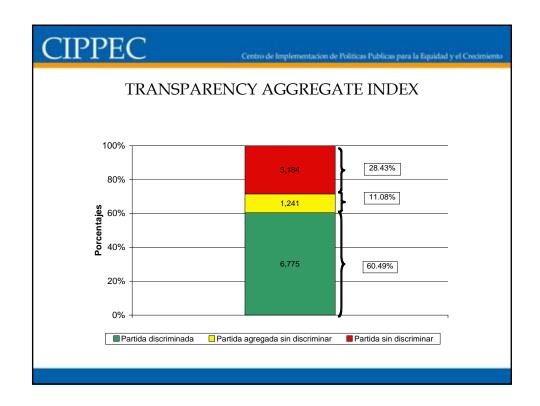
- ✓ 15 % of the national budget is allocated to subsidies
- ✓20 times the Judiciary budget
- ✓10 times the Congress budget

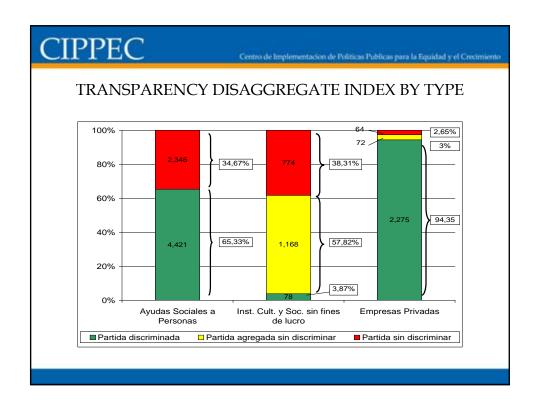


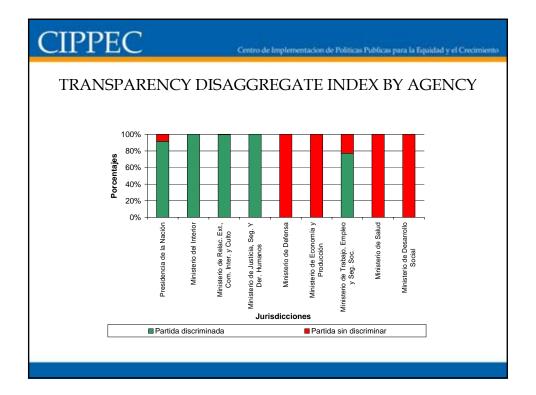
Centro de Implementación de Políticas Publicas para la Equidad y el Crecimiento

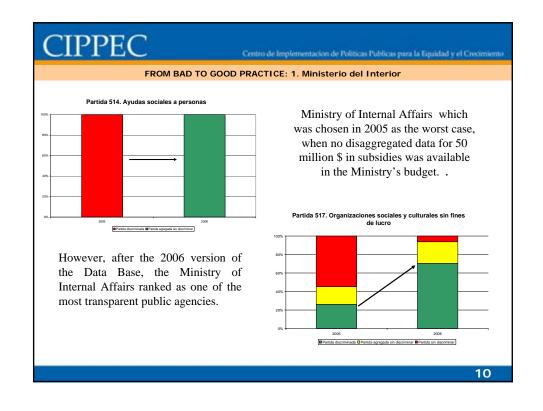
HOW WE MEASURE TRANSPARENCY?

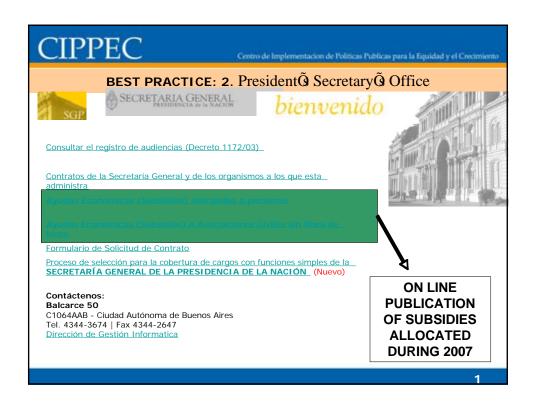
- TRANSPARENCY as the degree of access to information in order to identify the final recipient and unit cost
- Three levels of transparency:
- 1) Full disclosure: final beneficiary and unit cost (green)
- 2) Partial disclosure: group of beneficiaries and aggregate cost (vellow)
- 3) Full opacity: full aggregate information (red)
- The benchmark measure is an ideal 100 % transparent budget allocated to subsidies.

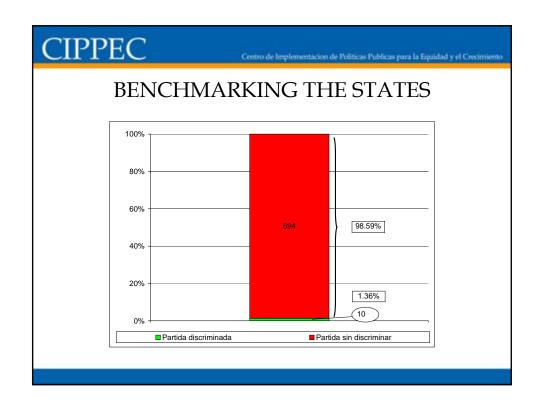


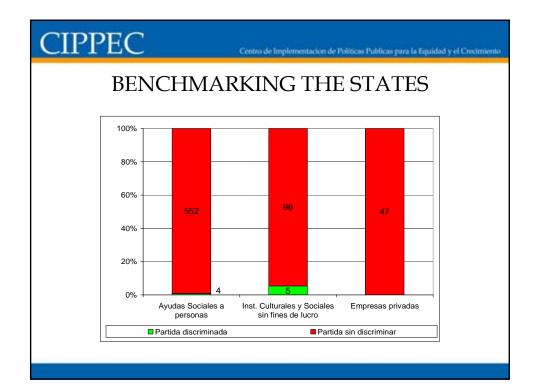












Centro de Implementación de Políticas Publicas para la Equidad y el Crecimiento

POOR INFORMATION FOR POOR PEOPLE

<u>Implementing an INFO EMPOWERMENT approach:</u>

- 1. Human rights approach: asymmetry of information reinforces asymmetric power relations
- 2. How we create opportunities for excluded social groups to access to information?

Centro de Implementación de Políticas Publicas para la Equidad y el Crecimiento

THE END THANK YOU!

CIPPEC www.cippec.org

Accountability and Challenges to Commissioners' Decisions

Graham Smith Deputy Information Commissioner (UK)

29 November 2007 ICIC, Wellington, New Zealand





Outline

- The UK FOI Act
- The Information Commissioner's functions
- The Information Tribunal
- How it works in practice
- Examples of Appeals
- Parliamentary scrutiny of the ICO





The UK FOI Act (1)

- Freedom of Information Act 2000
- Request in writing
- To a public authority (100,000+)
- Right to be informed whether information held
- Right to have information communicated unless exempt
- Many exemptions subject to public interest test





The UK FOI Act (2)

- Most requests free, but fees and cost limit provisions
- Time limits 20 working days
- Exclusion for repeated or vexatious requests
- Duty to provide advice and assistance to requesters
- Requester may specify form and format





The UK FOI Act (3)

- Refusal notices
- Non-statutory internal review
- Right to complain to Information Commissioner
- Whether the request dealt with in accordance with the Act
- Environmental Information Regulations 2004





The Information Commissioner's Functions

- To make a decision unless
 - internal review procedure not exhausted
 - undue delay in making complaint
 - complaint is frivolous or vexatious
 - complaint withdrawn or abandoned



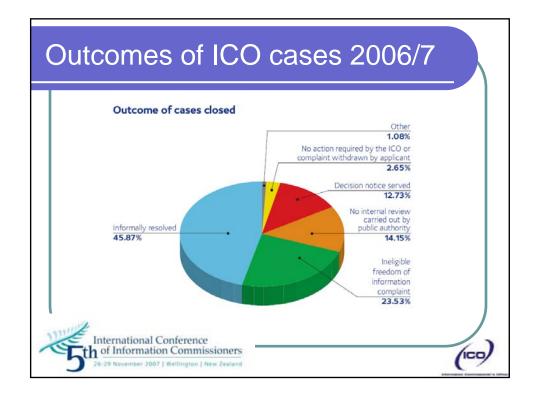


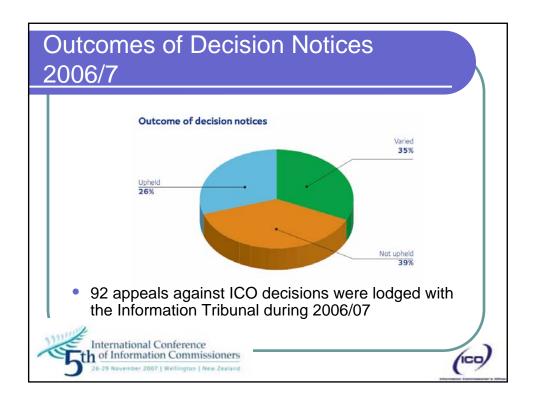
Decision Notice (section 50)

- Must state whether there has been a failure to comply with the requirements of the Act
- If so must specify
- Must specify the steps which must be taken to achieve compliance and time period
- Must give details of right to appeal to Information Tribunal









Information Notice (section 51)

- Public authority to furnish the Commissioner with information as specified
- Relating to complaint or conformity with codes of practice
- Must specify time period for compliance
- Legally privileged information excluded
- Right of appeal to Information Tribunal





Enforcement Notice (section 52)

- Where public authority failed to comply with requirements of Act
- Likely to be series of failures indicating systemic problem
- Must specify steps to be taken to achieve compliance
- Must specify time period
- Right of appeal to Information Tribunal





Failure to Comply

- With steps required by Decision Notice
- With Information Notice
- With Enforcement Notice
- Information Commissioner applies to High Court
- Treated as a contempt of court
- Court may order fine or imprisonment





The Information Tribunal

- Formerly Data Protection Tribunal
- Data protection enforcement jurisdiction
- Appeals against national security certificates
- Free right of appeal





Composition

- 3 members, each from a pool
- Legally qualified chair
- Deputy chairs
- Interests of FOI users/data subjects
- Interest of public authorities/data controllers
- Tribunal Service (Ministry of Justice)
- No permanent home so various venues





Jurisdiction

- Considers issues of fact and law
- Can re-examine or call further evidence
- Can consider exercise of discretion, e.g. steps required
- Public authority of requester may appeal
- Information Commissioner responds
- Other parties may be joined to the proceedings (e.g. public authority complainant)





How it works in practice (1)

- Legalistic, but not as formal as courts
- Hearings may be on paper or oral hearings (more formal)
- Advocates may be used and often are
- Legal aid not available
- Power to make a costs award against a party
 rarely used
- Cost implications for Information Commissioner



How it works in practice (2)

- Formal, written judgments
- Embargoed draft shared with parties/ representatives on confidential basis
- Decisions promulgated
- Publication on Tribunal website
- Right of further appeal on point of law only – High Court





Examples – Decision-making

Department for Education & Skills v Information Commissioner and Evening Standard

Department of Work & Pensions v Information Commissioner

Guardian Newspapers & Heather Brooke v Information Commissioner and BBC





Examples – Commercial Interests & Confidentiality

Derry City Council v Information Commissioner

John Connor Press Associates v Information Commissioner



(100)

Examples – Personal Information

Corporate Officer of the House of Commons v Information Commissioner & Norman Baker MP

Mr C P England & London Borough of Bexley v Information Commissioner





Parliamentary Scrutiny

- Information Commissioner reports to Parliament, not Government
- Annual Report
- Other reports as he thinks fit
- Select Committees, e.g. Justice, Public Administration, Home Affairs
- House of Lords
- Government responses





Websites

www.ico.gov.uk www.informationtribunal.gov.uk www.parliament.uk







David McGee

Ombudsman

New Zealand

Paper delivered at the

5th International Conference of Information Commissioners

Is Scrutiny of Commissioners by the Legislature Working?

I speak as decidedly a "new boy", having held office as an Ombudsman for just over one

week. Technically, I have not moved between different branches of the government,

having been Clerk of the House of Representatives before being appointed as an

Ombudsman. I remain in the Legislative branch as an Officer of Parliament. But my

background as a parliamentary officer means that I may have a slightly different

perspective from longer serving officers on legislative interaction with an office such as

the one I now hold.

In brief, my own response to the question (or one of the questions) posed in this session,

is to question the nature of the scrutiny that should or could occur.

A good deal of work has been undertaken in New Zealand over the last 15-20 years on

putting flesh on the "Officer of Parliament" model. There is now much commonality of

provision between those officers enjoying that status.

The result is that both in theory and in practice, the Officers of Parliament enjoy a high

measure of independence from both the Executive and the Legislature. The desirability

for independence from the Executive can be readily acknowledged. Indeed, it was a

major objective of the development of the Officer of Parliament model to achieve this.

But independence from the Legislature for an Officer of the Legislature, whatever advantages it may have, seems on the face of it paradoxical. Surely, the Legislature should exercise control over one of its own officers? It is how this status or relationship with the Legislature is maintained whilst preserving independence that I want to examine.

First, I should outline just how this independence is given expression in the New Zealand context. There are two main instances of it.

The appointment of an Officer of Parliament is made on the recommendation of the Legislature. This, in itself means nothing. US Cabinet Ministers must be confirmed in office by the Senate, but no one expects them thereby to be independent of the President. It would be open to any government to use its majority to recommend the appointment of one of its supporters or of a person who was not at all likely to gain the respect of the community. The legal provision for appointment on the recommendation of the Legislature is neither a necessary nor a sufficient condition of independence.

But what has emerged is a practice of seeking cross-party agreement *before* the recommendatory power is exercised. This practice is extra-legal, the law does not require it. It has nevertheless developed as so strong a practice (a protocol for the process by which agreement is sought among the parties has been endorsed by a select committee) that the requirement for consensus on the appointment of an Officer of Parliament is, I would argue, now a Constitutional Convention. A particular select committee, the Officers of Parliament Committee, chaired by the Speaker, manages the selection process.

Thus, the appointment of an Officer of Parliament is in practice insulated from political capture by any party or by the Executive. (There are other practical problems though that arise from this Convention, particularly that resulting from the need to secure agreement across many more political parties under our current electoral system than were represented in the Legislature at the time that the Convention began to develop. Securing agreement of all parties has proved very difficult, even for apparently suitably qualified potential appointees. The Convention may have to adapt to this reality. It is of the nature of Conventions that they can do this provided that they maintain the essence of their purposes – in this case delivering a non-partisan appointee).

The Officers are also given a high degree of financial independence.

No one can have conceded to them the right to a blank-cheque. Officers of Parliament are not, and cannot be, totally financially independent. But in the Officers of Parliaments' case their financial authority proceeds from the Legislature itself, not from the Executive. In theoretical terms, this is how financial authority should proceed in any case, but we all know that in practice this is not so. While the legal authorisation for finance may be given by the Legislature, in practice the Legislature in most cases merely endorses the Executive's expenditure proposals. Legislatures of the Westminster type are among the more extreme examples of this and New Zealand, in this sense, is itself an extreme example of the Westminster type of Parliament.

But in respect of Officers of Parliament, the *Legislature* in New Zealand agrees to each officer's funding before the Executive's budget is formulated and this agreed funding is automatically incorporated into the Executive's overall budget proposals. Again, it is not the law that accomplishes this (although the budget law is framed in a way that facilitates it). It is what I would again term a Constitutional Convention that does so. The same select committee that deals with appointments, the Officers of Parliament Committee, considers budget bids from the officers and recommends them to the full Legislature. It works according to the same consensual practices that it employs when considering appointments, though this does not mean that full consensus is necessarily a part of any Convention on budget work (as it is on appointment work). Once endorsed by the Legislature (in practice, a formality) the bids are formally transmitted to the Executive for inclusion in its annual Budget. The Executive is not legally obliged to include the endorsed expenditure in the Budget, but it does so as part of the Convention.

Thus Officers of Parliament have direct access to the Legislature in preparing their own budgets. The determination of their funding is not an intra-Executive matter, it is quite openly a legislative matter. The Executive will have its say, of course, and members of the Officers of Parliament Committee may not be entirely sympathetic to the Officer's bids. But, granted that any such process is contestable, Officers of Parliament operate in as great an independent process as one could envisage.

So Officers of Parliament are independent in ways that have become an embedded part of our political culture. They are appointed as independent, non-partisan, persons and they have direct access to the Legislature for their funding in a way that is unique to them.

But if Officers of Parliament have an advantageous relationship with the Legislature in how they are constituted and the resources that they are provided with, the picture is more mixed when one considers the results of their operations. In this case the Legislature pays relatively little attention to them. In my view this is largely due to the nature of our political system.

In parliamentary terms Officers of Parliament are subject to the same accountability regime as any other agency that reports to the Legislature. Their annual reports are referred to the most appropriate subject select committee for study. A number of years ago a deliberate decision was taken to separate the budget-approval and the scrutiny processes for Officers of Parliament. Thus the review of an Officer of Parliament's annual report and performance is not carried out by the Committee which approved its budget, the Officers of Parliament Committee, but by one of the general scrutiny committees. In the Ombudsmen's case this is usually the responsibility of the Government Administration Committee.

In practice, little scrutiny actually takes place at this point, certainly for the Ombudsmen. Committees do not conduct a full examination of all departments or agencies referred to them every year. This is largely a function of time. Committees are general purpose committees. They have legislative and other functions to perform as well as expenditure and performance scrutiny functions. They are forced to be selective in how they use their time and, in practice, it will be opposition members who largely make this selection by pushing for examinations of the departments or agencies in which they foresee issues of political advantage or significance. Ombudsmen, fortunately in a sense, tend to not be selected for scrutiny.

Unlike in the United Kingdom where this annual interchange with a scrutiny committee may be important in building up a case for resources, this is not a disadvantage in New Zealand because of the Officers of Parliament Committee's role. But it does mean that the Ombudsmen's overall work tends not to have direct exposure before the Legislature, though individual aspects of it will, of course, from time to time contribute to debate and consideration of issues that become matters of political controversy. I suggest ways of enhancing this contribution later in this paper.

But before jumping to the conclusion that such an interchange is wholly desirable we should consider carefully the culture of the Legislature involved and what interchange may imply.

For one thing, if members are not themselves interested in an interchange, then even adopting rules that provide for one will not ensure that it takes place – at least, on any meaningful level. Rules provide for committees to examine every department and agency on an annual basis but this does not mean such an examination actually occurs, for the reasons already given. Members do not have enough time and will often resort to "pro forma" reports to satisfy their reporting obligations. If we want members to give up time that they barely have in any case to conduct an examination of an entity, there has to be something in it for them, otherwise it will not happen. What is "in it" for parliamentarians tends to be the perception of political significance. This can be illustrated by contrasting New Zealand with the United Kingdom.

The parliamentary situation in the United Kingdom is quite different in this respect despite the many similarities of the two systems. The House of Commons has some 650 members, 80% of whom hold no ministerial office (I am approximating). The New Zealand House of Representatives has only 120 members and a much higher proportion of those are office-holders, thus removing them from meaningfully contributing to scrutiny work. The parliamentary resources (the members) barely exist in New Zealand to do all of the work one could conceive of.

A further consideration is what such an examination might consist of. Multi-party politics in New Zealand is not less partisan because of the need to form coalitions and the difficulties in forming them. Parties do not act noticeably differently towards each other just because at some unspecified time in the future they might form an alliance

(and unpredictable alliances can be formed from time to time as "Grand Coalitions" in Germany and Israel demonstrate). There is no guarantee that any examination of an Officer of Parliament's work will be "constructive" in the way that a public administrator or an academic might hope. In a small Legislature like New Zealand's parties operate more corporately than in a larger Legislature like the House of Commons. Mavericks or members who have different interests and agendas from their party colleagues are less likely to be tolerated or indulged by those colleagues. All members are in a very real sense potential Ministers. The incentives for them in career terms are strongly to make the party's priorities their priorities. Indeed survival in politics at all demands this. Being a backbencher is not seen as a career option.

In these circumstances members participating in parliamentary processes will naturally look for party angles, and their parties will expect them to do so. The Conventions developed for the appointment and funding of Officers of Parliament are hard-won *exceptions* to the norm of parliamentary practice - partnership. There is no likelihood that greater parliamentary attention for Officers of Parliament will, in New Zealand at least, attract similar political restraint. Indeed, there is every reason to think that trying to extend the Legislature's interactive role with Officers of Parliament too far may endanger what already exists.

If we wish Officers of Parliament to remain independent officers - which I am sure that we do – then we must exercise caution in scrutiny interaction with the Legislature. Too great an attention by the latter may undermine that independence by politicising those officers.

This does not mean that, at a limited level, greater interaction could not be promoted. I will conclude this paper by outlining some of the ways in which in my view this could occur.

Officers of Parliaments' staff can be attached to assist parliamentary committees. This could take the form of lending a staff member with particular knowledge to a committee for an inquiry. Even better would be to establish a corporate presence with committees either as part of their secretariats or as a source of expertise on which they can draw. The Auditor-General's staff already play this role in New Zealand to some extent. If we are serious about the meaning of the term "Officer of Parliament" a closer relationship

with the actual working of the Legislature than has perhaps obtained hitherto is warranted.

Officers of Parliament should endeavour to find a means of linking in their planned work programmes (so far as they can control them) with priorities suggested by parliamentarians. At the very least they should take account of them. This need not and should not involve taking direction from the Legislature. (Though there may be a case in this regard for allowing the Legislature to direct the carrying out of a specific inquiry. If so, any direction should be a formal one addressed by resolution of the Legislature). In terms of work programmes I suggest engaging in a process of consultation with committees at a strategic level and ensuring that their views are invited and, where proffered, considered. It may be, for the reasons I have discussed, that little of value results. But the opportunity for members to contribute their views on work programmes, should be given, though without surrendering final responsibility for these as lying with the Officers concerned.

Meaningful consideration of reports (annual and other) emanating from Officers of Parliament cannot be guaranteed either. Indeed, as I have suggested earlier, consideration may be quite the reverse of meaningful in a public administration (as opposed to a political) sense. But a means of at least ensuring that reports are placed before committees can be promoted. If a report is simply presented to the Legislature, individual members can, of course, pick it up and use it as they think fit. But building-in requirements that the Executive respond on the record to comments addressed to it and that the report and any response are drawn specifically to the attention of committees could spark interest on the part of a committee in taking the matter further.

A further step would see Officers of Parliament producing reports and information at critical points in the parliamentary year that are relevant to business about to be transacted. A good example from Canada is the "Departmental Report Cards" produced annually to show how well (or badly) departments deal with freedom of information requests. By timing these for release when departmental performance is under examination by the Legislature these could be important sources of information available to committees carrying out those reviews.

These may seem unspectacular suggestions. But in my experience it is wise not to have too high an expectation of legislative interest. A Legislature has its own priorities, there is no reason why these should coincide with those of persons working in a particular field and who, for that reason, have an understandable feeling of the centrality of the tasks on which they are engaged. Politicians may feel quite differently. This is not to suggest that these activities are not important. They are just different to the priorities of parliamentarians. There is also a great danger that encouraging too close a legislative interest may politicise and damage the discharge of those tasks. Before inviting a close relationship with the parliamentary process, Officers of Parliament need to take account of the dangers and tread carefully.

8



Robert Hazell

The Constitution Unit, University College London

 $\label{eq:Paper delivered} \textbf{Paper delivered at the} \\ \textbf{5}^{\text{th}} \textbf{International Conference of Information Commissioners}$

Measures of Success for Freedom of Information

INTRODUCTION

How do we measure the success of Freedom of Information (FOI)? The Constitution Unit is carrying out what we believe to be the first systematic study of the objectives, benefits and consequences of FOI ever undertaken. We are seeking to answer two questions: are the objectives of the UK FOI Act being achieved? And how has FOI affected the workings of central government? There is a preliminary question on which these questions depend, however. How do we measure the success of FOI? In this paper I would like to pick up the challenge laid down by Al Roberts earlier in this conference, who showed that the Right to Information (RTI) movement could be criticised for its lack of knowledge about even the most fundamental questions, by talking about our attempt to increase our understanding of the impact of FOI in the UK.

It is surprising that there is so little hard, systematic evidence about the impact of FOI, and that ours appears to be the first study of its kind. But this is not just the academic community keeping itself in work. FOI is now on the good governance agenda for all democracies. It is spreading rapidly across the world, but with surprisingly little testing or firm understanding of what FOI achieves in practice. Even without the global dimension, all policy requires an 'evidence base' which is currently lacking in FOI. So understanding how it works and what it does and does not do is highly important.

In this paper I will show the methods we are using to evaluate FOI and against which criteria. I will start, however, by setting the scene with a short background on the UK FOI Act.

THE UK FOI ACT: KEY CHARACTERISTICS AND UNIQUE POINTS

The UK Freedom of Information Act was passed in 2000 and came into force on 1st January 2005. It grants a statutory right of access to government information held in any form and places public authorities under a duty to pro-actively release information through publication schemes. While it is comparable to other RTI laws, it has a number of salient characteristics.

Firstly, the Act has an extremely wide scope. It covers more than 100, 000 public bodies across central and local government and the wider public sector across the UK. It was implemented simultaneously across these levels government rather than gradually, sector by sector. And it was entirely retrospective from day one: it applies to information held or collected before it came into force. Anyone can make a request for information, from the UK or abroad.

Secondly, there is effectively no fees regime. Authorities do have the right to charge a fee, but only the National Archives do. Authorities can however refuse to process a request if doing so would cost more than a maximum limit set out in the Act (£600 for central government; £450 for local government).

Thirdly, at first sight the exemptions seem highly restrictive, with no less than 23 exemption provisions. But of these there are 15 exemptions which require application of the public interest test: even if information falls within the exemption it can only be withheld if it is in the public interest to do so. The starting point of the public interest test is that there is a general public interest in disclosing information, and the Information Commissioner and Tribunal have been rigorous in upholding this.

Fourthly, there are four tiers of appeal. A dissatisfied requester can ask first for an internal review, then appeal to the Information Commissioner, then to the Information Tribunal, and finally to the High Court on a point of law. This is unlike the USA, for

example, which relies upon the mainstream court system, or Ireland where the FOI regime is overseen by a Commissioner only. The Information Commissioner has the power to order disclosure, unlike the Information Commissioner in Canada or the Ombudsmen in Australia and New Zealand who can only make recommendations.

MEASURING THE IMPACT OF FOL

One reason why this is the first study which attempts to 'measure' the impact of FOI may be because it is far from easy to do so. How is it possible to measure the success of FOI? We have five main research methods, which I will review briefly below. These are:

- Review of official and academic literature;
- Survey of FOI requesters;
- Interviews with government officials and others knowledgeable about the FOIA;
- Analysis of publication schemes and websites;
- Analysis of articles about FOI disclosures in national newspapers.

Literature Review To Identify The Objectives Of FOI

The starting point of any evaluation is to measure the effects of the policy against its objectives. Unlike some FOI laws, the UK FOI Act has no purpose clause. We therefore conducted a literature review of official sources – such as the government's Green and White Papers, ministerial speeches and parliamentary debates – to identify the stated objectives of FOI. Having identified these objectives, we used the remaining methods to analyse the extent to which FOI is achieving these objectives in practice.

Survey Of Requesters

Our most innovative research method is the survey of requesters. As Al Roberts sets out in his conference paper, we still do not know the answer to three fundamental questions about RTI legislation: who are the requesters? What sort of information do they ask for? What do they do with the information when they get it? We hope to answer these questions by asking the people who make the requests. We have set up a survey online, to which requesters will be provided with a link when government departments respond to their requests. This obviously requires government cooperation, but departments have been hesistant for a number of reasons. As with all surveys, there is a risk of bias: because those who choose to respond may be those who want to express their

dissatisfaction. This is something we will never know for certain, because we are unlikely to get a 100% response rate.

Interviews With Officials

The view from the survey of requesters needs to be supplemented by the view from the Civil Service. We aim to interview a sample of senior officials in a number of departments: those with FOI expertise and those with broader policy experience, such as permanent secretaries, senior information champions, legal advisers, heads of communications, heads of procurement, heads of parliamentary relations, and policy officials dealing with a lot of stakeholders. We will also interview retired officials, others knowledgeable about FOI, and those involved in the drafting of the legislation. This is the only way to uncover the impact of FOI on government working practices beyond a superficial, anecdotal analysis.

Analysis of Publications Schemes, Websites and Disclosure Logs

The UK Act is innovative in placing public authorities under a duty to proactively publish information through publication schemes. (A publication scheme is a list of classes of information that authorities commit to publishing, and a guide to how the information can be accessed. The scheme has to be approved by the Information Commissioner.) By analysing publication schemes and websites in tandem we hope to be able to evaluate whether authorities are becoming increasingly transparent, and why. If there is increased transparency, how much of this is because of FOI, and how much because of other factors, for example developments in information technology?

Disclosure logs are an innovation by the public authorities themselves. They involve listing on their website all previous FOI releases. This saves departments the administrative effort of dealing with repeated requests for the same information. We can ask questions about the logs themselves, such as how popular a feature they are of departmental websites. And we can evaluate how media coverage of a disclosure corresponds with the information disclosed by the department.

Media Content Analysis

99 per cent of the population do not make FOI requests. Few read disclosure logs on government websites. Most people hear of FOI or information obtained under it through a secondary source, the media. To understand the impact of FOI disclosures which are selected and edited by the media, we are carrying out a media content analysis of FOI stories in the UK national press. And to understand the media's selection and editing policies, we have interviewed journalists who make FOI requests and write FOI stories. We aim to find out what types of government information the media select to publicise through FOI stories, and the impact of those stories on people's understanding of government decision making, and on their trust in government. Understanding media use of FOI is critical to understanding how the vast majority of the population learn about FOI and government through the selective prism of the media. We will compare the results of the media analysis with results from our surveys of requesters and disclosure logs.

THE OBJECTIVES OF FOI

If the UK FOI Act does not have a purpose clause, what is it for? A trawl through the literature reveals a range of primary and secondary objectives. Some of the latter include: better record keeping; more thorough and balanced advice to Ministers; increased efficiency in government procurement; improved service delivery; and increased administrative efficiency. We have restricted our analysis to six primary objectives, which are the ones most frequently mentioned by ministers and in the official literature:

- 1. Greater transparency;
- 2. Increased government accountability;
- 3. Better quality government decision-making;
- 4. More effective public participation in the political process;
- 5. Greater public understanding of government decision-making;
- 6. Increased trust and confidence in government.

I will attempt next to describe how we can measure whether each objective is being achieved, and provide one or two examples. The examples are limited at this stage because we have not yet started on our two main research methods, the survey of requesters and interviews with officials.

1. Greater Transparency

Transparency is the prime objective of Freedom of Information. We define transparency as the ability to observe what is going on inside an organisation - as an organisation being transparent about its policies, procedures or activities. The UK Act emphasises transparency through a duty of proactive publication.

How much does FOI contribute to increased transparency? We have divided this question into a number of sub-questions and indicators, of which the following are examples:

- Is more information placed in the public domain through proactive means (publication schemes, disclosure logs, other)?
- Is the breadth/quality/relevance of the information released greater under FOI?
- Do requesters and officials believe that authorities are more transparent as a result of FOI?

Each of our methods will help us answer these questions. Interviews will tell us what civil servants think; the survey of requesters will give their point of view; publication schemes will provide evidence of the quantity and quality of information being proactively disclosed; media content analysis will show how transparent government is portrayed as being by the press.

In the meantime, we have only hints at answers to these questions. There were 38,108 requests in 2005, the first year of the legislation, and 33,688 in 2006. According to official statistics, approximately 60% of 'resolvable' requests have been granted in full each quarter since the Act came into force. It is difficult to say for certain whether these requests have led to more information being placed in the public domain than prior to FOI. According to research done by the UK's Information Commissioner, 68% of public authorities (who responded to their survey) felt their organisation released a lot or a little more information than they would have done without the Act.²

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¹ A request is 'resolvable' if the authority is not waiting for a fee to start processing, the information is held by the authority, and the authority does not need more information to start processing.

² Freedom of Information: One Year On, Information Commissioner's Office, 2006

Whether requesters believe that government is more transparent after their request is a question we will ask in our survey of requesters. Asking a related question of the general public in its Annual Track research, the ICO finds that the perception that the right to access information increases transparency and accountability increased from 53% in 2004 to 58% in 2005 and 74% in 2006. In our own study of UK journalists' use of the Act, we found grudging acceptance that things, though not perfect, had got better from their point of view.

2. Greater Accountability

In 2000, the Justice Secretary stated that 'FOIA 2000 will deliver a more responsive, better informed and accountable public service'. Accountability has two aspects: giving account and being held to account. Giving account overlaps with transparency. Being held to account encompasses mainly:

- making public (read: publishing) mistakes and rectifications;
- explaining why decisions have been taken, by whom, and how outcomes came about:
- taking responsibility for and rectifying maladministration.

FOI provides people with the mechanism to access information, which they can then use to hold government to account. We are interested in finding out whether public authorities are held to account by the public, Parliament, judiciary, media or other relevant bodies, and whether ministerial accountability to Parliament has increased or decreased. Building on the above definition, we would ask questions such as the following:

- Do members of parliament hold ministers more closely to account by using information obtained under FOI?
- Does the government explain more often why and how decisions have been taken as a result of FOI?
- Do the media hold government more closely to account by using information obtained under FOI?
- Do members of the public hold government to account by writing to public officials or their MPs as a direct result of information they have received via an FOI request, or in response to something the media have published as a result of FOI?

Since holding to account depends mainly on the use to which information is put, it is a question which is best answered through analysis of the user: the requester and the media. I will discuss the specific issue of ministerial accountability below.

3. Better Quality Decision-making

The 1997 White Paper proclaimed that '(u)nnecessary secrecy in government leads to arrogance in governance and defective decision making'. While the quality of a decision is arguably judged more by its outcome, we are primarily concerned with the decision-making process. It can be judged of high quality if based on thorough, balanced and impartial advice, and a frank exchange of differing views. The argument is that advice will be of higher quality if drafted with potential public scrutiny in mind. On the other hand, the threat of disclosure is sometimes thought to hinder the possibility of 'free and frank' discussion.

Does FOI contribute to better decision making on the part of government? It is difficult to evaluate, but in our interviews we can ask officials for their views and evidence to back up their views. Specifically we would be interested in asking the following:

- Do officials and ministers write briefings and memos with FOI in mind (i.e. they may be released)? Does this result in better or worse quality documents, which are then fed into the decision making process?
- Do official submissions sum up fairly the full range of representations received, and set out the full range of options, including ones ministers do not want to hear?
- Does FOI result in a better or worse audit trail, to record how a decision was made, by whom, and on the basis of what information?

[As we have not yet started our interviews with officials, I will just provide one example of the way in which FOI and the process of decision-making are interlinked. It involves the Department for Trade and Industry's consultation on the future of nuclear power and the environmental group Greenpeace. The government promised the 'fullest public consultation' on the matter before making its decisions. Greenpeace asked for a judicial review of the decision, alleging that the consulation had not been procedurally proper.

The outcome of an FOI request played an important role in the court case. Greenpeace had requested the economics papers on which part of the consultation document was based. The amount of information released in response to the request crystallised for the judge the difference in the amount of information available for those consulted to base their decisions on and the amount of information considered by the DTI. The difference was so great that the High Court Judge ruled that the promise to consult fully had not been kept, and the DTI was required to consult further. ³]

4. Better Public Understanding of Government Decision Making

The Justice Secretary in 1997 linked Freedom of Information with public understanding of decision-making: 'Freedom of Information...is about giving people the chance to understand how Government works and why it has reached particular decisions (Irvine, 1997). The assumption is that with more information available – information that people want, in addition to that which is volunteered or chosen by others (e.g. the media) – members of the public will better comprehend how and why their government makes its decisions. In short, in addition to being better informed through FOI, people should also become more knowledgeable about government.

Public understanding has been an important factor in the Information Commissioner's public interest test. The Commissioner's annual tracking research indicates that the percentage of people agreeing that being able to access information held by public authorities 'increases knowledge of what public authorities do' has increased from 54% in 2004 to 76% in 2006. This is in the abstract, however, not related to a specific request. We will explore this issue at the level of individual requests through the survey of requesters and on a higher level through media content analysis. We will explore questions such as the following:

- Do responses to FOI requests include clear explanations of the processes through which government went to reach the decision?
- Could members of the public learn about government decision making by reading a newspaper article that is based on information obtained through FOI, and includes background information about how government works?

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³ Greenpeace Limited v Secretary of State for Trade and Industry [2007] EWHC 311 (Admin), 15 February 2007

5. More Effective Public Participation in the Political Process

If people better understand government decision-making, the theory is they will be able to participate more, and more effectively, in the political process. Minister of State Lord Filkin, stated in 2003 that 'Freedom of Information is part of the culture of giving information so you can then have a more informed dialogue with the citizens we serve'.

Public participation in the political process is any method by which people attempt to influence policy or decision-making. Examples of this include communicating with government officials and elected leaders, responding to consultations, protesting, contributing to campaigns, etc. Participation is effective if people seeking to participate are better informed about the political process they are seeking to influence, and/or succeed in having an impact on the outcome.

- Does FOI, or information obtained through FOI, engage people and government officials in dialogue?
- Through information obtained via FOI are NGOs better informed about government policy on issues for which they campaign?
- Has information obtained through FOI spurred people to respond to a government consultation, lobby their MP, sign a petition, etc?

The key to answering these questions lies in our survey of requesters, and asking them what they do with the information they receive.

6. Increased Trust and Confidence in Government

The objective that is perhaps most difficult to achieve and hardest to isolate as a direct outcome of freedom of information is increased trust and confidence in government.

Trust and confidence in government, for the purposes of this study, shall be understood as an expectation that: government will listen to the public's concerns and weigh them carefully before coming to a decision; and that the government or its representatives will follow procedure (e.g. the law, or any ethical rules or codes of conduct) impartially and thoroughly.

Not only is the link between trust and any action on the part of government tenuous, but FOI might actually have the opposite effect. For example, after reading media articles on the 'negative' things government has done, which are based on information obtained through FOI, citizens might trust government less.

There are two aspects to measuring this: firstly the public as FOI requester; secondly the non-FOI requesting majority. Through the survey of requesters we hope to be able to ask requesters to assess their levels of trust in government following receipt of the response to a request. We are not able to poll the opinions of the public at large (although the Information Commissioner's research shows again that, in the abstract, the percentage of people who believe that access to information held by public authorities increases trust and confidence in government increased from 51% in 2004 to 69% in 2006). But the way the media report on FOI stories may have the opposite effect. In an initial analysis of the 700 FOI stories in the UK national press in 2005, our researchers estimated that 55 per cent had no effect either way on trust. But of the remaining 45 per cent, they estimated that 44 per cent served to decrease trust, and only 1 per cent served to increase trust in government. This media effect may help to explain why FOI might lead to reduced trust in government.

THE IMPACT OF FOI ON CENTRAL GOVERNMENT

What if some of the objectives of FOI are achieved at a cost? What if, for example, increased government transparency reduces government effectiveness? Or increased accountability in general reduces ministerial accountability to parliament? To fully evaluate the success of FOI, we need to evaluate its impact on the workings of government. We have chosen five central characteristics of the Westminster and Whitehall model to monitor:

- 1. 'Culture of secrecy';
- 2. Civil service neutrality;
- 3. Ministerial accountability;
- 4. The Cabinet system;
- 5. Effective government.

1. 'Culture of Secrecy'

The UK has long been famous for its 'culture of secrecy', even if this is a universal characteristic of bureaucracies. While this has changed significantly in recent years, it

still persists to an extent – indeed one of the objectives of FOI was specifically to 'end the culture of secrecy'. Measuring it is a challenge which we will address mainly through interviews: of officials, stakeholders, the media and requesters.

2. Civil Service Neutrality

The UK Civil Service is permanent, that is, its top officials do not change as the elected government changes. This necessitates a neutral Civil Service – so that they are equally able to serve governments of any political colour.

Neutrality is thought to depend to in part on the anonymity of Civil Servants. If Civil Servants are not named, they cannot be identified with a specific policy or minister, which could potentially hinder their ability to serve a different government. Freedom of Information was thought to threaten this longstanding principle.

So far we have noticed two things. Firstly, that the names of Civil Servants are being released under FOI. Secondly, we have not noticed any Civil Servant's neutrality being brought into question by such a disclosure. When the press seek to pin blame following an FOI disclosure, it is invariably the minister they focus on rather than the official who tendered the advice.

3. Ministerial Accountability

In a representative system like the UK, civil servants are accountable to ministers, who are accountable to their electors through parliament. Civil Servants, therefore, are nor directly accountable to parliament. Margaret Thatcher, among others, feared FOI would undermine this principle: 'Under our constitution ministers are accountable to Parliament for the work of their departments, and that includes the provision of information...Ministers' accountability to Parliament would be reduced, and Parliament itself diminished'. To understand the impact of FOI on this convention, they key questions are:

- Have FOI disclosures caused officials to account directly for their actions or decisions?
- Have FOI disclosures strengthened or weakened ministerial accountability to parliament?

• Have FOI disclosures increased official or ministerial accountability outside of parliament?

Once again analysis is only provisional. As stated above, the political pressure is on the minister rather than the official. And if the issue is high-profile, the minister in question often ends up accounting for his or her decision in parliament. (I am referring here specifically to a request from The Times to request to see the advice given to Gordon Brown when he was chancellor about the impact upon UK pension funds of the decision to change the regime for tax credits on UK dividends in 1997.) Equally, however, it is clear that the media are frequent users of the Act, and that accountability to the media and to parliament are not necessarily mutually exclusive.

4. The Cabinet System

The crux of the Cabinet system is the convention of collective cabinet responsibility. According to this convention, cabinet speaks and votes as one; disagreements are therefore not expressed in public. FOI disclosures were thought to be a threat to this convention, which is why it is given explicit protection in section 36 of the Act, which protects 'the convention of the collective responsibility of Ministers of the Crown'. The main question to ask, therefore, is whether FOI disclosures have resulted in the Cabinet losing its appearance of unanimity. This has been an argument put to the Information Commissioner and Tribunal against disclosure. When disclosure has ensued, however, there have been few articles claiming Cabinet 'rifts' or 'splits'. The Information Commissioner and Tribunal have both expressed themselves on this specific point, and it is worth quoting the Information Commissioner at length:

'This is an unwritten convention which undoubtedly survives the enactment of the Act. Equally, however, the new requirements – which Parliament has made legally binding – call for some adjustment of thinking in government and elsewhere about the interpretation and application of the underlying principle. For example, the strength of the convention lies primarily in the political commitment of all Ministers to a government decision once it has been made. It is less powerful in relation to any personal or departmental differences of view or emphasis which arise during the decision-making process. The convention should

not be used to create or reinforce any fiction that Ministers have always been of a single collective opinion. The public do not expect such an approach and would probably be dismayed by the absence of rigorous debate before complex decisions are taken.' (*Information Commissioner*, 4 April 2007, FS50076355)

5. Effective Government

Effective government – the ability of government to achieve its objectives – is a traditional part of the Westminster and Whitehall model. It allows us to pose some crucial questions with regard to FOI: has it made government less effective? If so, in what ways? And was it worth it? On the one hand, the fear was that it would be yet another accountability 'overhead', and that innovative or robust policy could not be made in a 'goldfish bowl'. On the other hand as we have seen, proponents thought transparency would improve decision-making and, by extension, effectiveness. From an FOI point of view, the most interesting aspects of effective government are:

- The nature of advice given to ministers;
- Efficient records and records management;
- Whether FOI is a diversion of resoures from 'frontline' activities.

The impact of FOI on each of these we hope to ascertain through our interviews with officials and with retired ministers.

CONCLUSION

This is not proving an easy study to undertake. But I hope that if we can crack some of the methodological difficulties others might be encouraged to follow our example. Only through systematic studies of this kind can we gradually build up an evidence base and a more realistic sense of the costs and benefits of FOI. In theory FOI delivers multiple benefits. Practitioners know the picture is more nuanced than that. Through systematic studies of this kind I hope that academics can show more precisely which benefits FOI delivers and which it does not, so that we can develop a more balanced overall verdict on the impact of FOI. I am proud to be leading this pioneering study, but I sincerely hope that it is not the last, and that comparative studies will soon follow.

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Measures of Success for Freedom of Information

Prof Robert Hazell The Constitution Unit, UCL

www.ucl.ac.uk/constitution-unit

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How do we measure the success of FOI?

- Is FOI achieving its objectives?
- How has FOI affected the workings of central government?
- Important questions; scant research
- Is our study the first systematic evaluation of FOI ever undertaken?

The UK FOI Act: key points

- Came into force on 1st January 2005
- Data Protection Act 1998 grants access to personal files
- Duty to release proactively by publication schemes
- Wide scope (100,000 bodies) and fully retrospective
- · No fees charged
- 23 exemptions, 15 of which require public interest test
- 4 tiers of appeal

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Measuring the success of FOI: the methods

- Literature review
 - what are the main objectives of FOI?
- Online survey of requesters
 - Who are they?
 - What do they do with the information they receive?
- Interviews with officials
 - What is the impact on government's working practices?
- Publication schemes/websites
 - Increased transparency? Effect of FOI, or technology?
- Media content analysis
 - How do the public learn about FOI? How do media report it?

Is FOI achieving its objectives?

Six main aims:

- 1. Increased transparency
- 2. Increased accountability
- 3. Better quality decision-making
- 4. Increased public understanding of decision-making process
- 5. Increased public participation in political process
- 6. Increased trust and confidence in government

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1. Transparency

- What is going on inside the organisation?
- UK FOIA's emphasis on proactive publication
- · Answers from each main method
- 60% of 'resolvable' requests have been granted in full each quarter since the Act came into force (official statistics)
- 68% of public authorities felt their organisation released more information than they would have done without the Act (ICO research)

2. Accountability

- Key points: government explaining and amending
- Does information obtained under FOI cause government to be held to account? To whom and by whom?
- The FOI requester and the media

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3. Better quality decision-making

- 'Unnecessary secrecy in government leads to arrogance in governance and defective decision making' (1997 White Paper)
- Concentrate on process not outcome
- Interviews with officials
- Examples:
 - reduced candour
 - FOI request forcing government to follow procedure

4. Increased understanding of decisionmaking

- Assumption: more information equals better understanding
- Important factor in public interest test
- Do FOI disclosures clarify the decision-making process?
- Ask the requesters and analyse newspaper articles

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5. Public participation

- 'A more informed dialogue'
- Are requesters spurred by FOI information to 'engage': write to MP, campaign etc?
- We know nothing about this: we need to ask the requesters

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6. Trust in Government

- Hard to define; harder to measure
- Components: listening, acting in public interest and following law/procedure
- What happens to a requester's trust after receiving a response?
- What happens to the public's trust after reading a newspaper article based on FOI?

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The impact of FOI on central government

The five characteristics of central government

- 1. Culture of secrecy
- 2. Civil Service neutrality
- 3. Ministerial accountability
- 4. Cabinet collective responsibility
- 5. Effective government

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1. Culture of Secrecy

- Universal characteristic of bureaucracies
- Ending 'the culture of secrecy' was an FOI objective
- Overlap with 'increased transparency'

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2. Civil Service Neutrality

- Feature of Whitehall/Westminster style systems
- Ability to serve governments of different political colours
- Depends on anonymity
- Undermined by names released under FOI?
- Names released; neutrality not called into question

UCL

3. Ministerial Accountability

- Ministerial [not official] accountability to parliament [as opposed to elsewhere]
- Has FOI caused officials to account for their actions?
- Has FOI increased or decreased ministerial accountability to *parliament*?
- Political pressure following FOI disclosure on minister not official

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4. Collective Cabinet Responsibility

- Public unanimity
- Few reports of 'splits' as a result of FOI
- Evolution of the convention in Information Commissioner's case law

5. Effective Government

- Has FOI made government more or less effective?
- Policy-making in a goldfish bowl versus robust decision-making under scrutiny?
- Specifically: candour; records management; diversion from 'front line' activities

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The impact on the five characteristics

- 1. Culture of Secrecy
 - Was the target of FOI objectives
- 2. Civil Service neutrality
 - Names disclosed; neutrality not called into question
- 3. Ministerial Accountability
 - The minister still takes the heat
- 4. Cabinet Collective responsibility
 - Few reports of 'rifts'; convention evolving in ICO case law
- 5. Effective Government
 - FOI as a diversion? Reduction of candour? Robust policy under scrutiny?

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Conclusion

- High-flown benefits of FOI in theory; practical realities
- Difficult study but need for an evidence base
- More systematic studies needed to build a balanced verdict on costs and benefits of FOI

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Any questions?

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How well does the NZ OIA work?

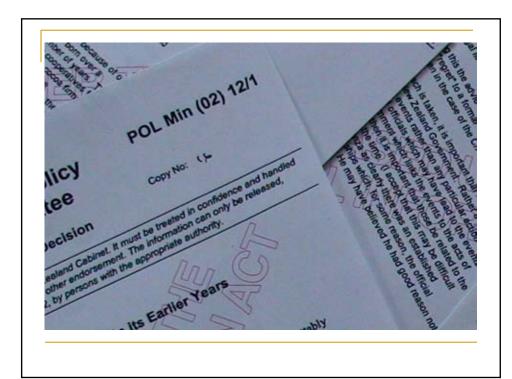
Nicola White Presentation to ICIC 2007 Wellington, NZ 27 November 2007

Some OIA history

- Enacted in 1982 now 25 years old
- Based on proposals from the Danks Committee, but with some changes
- Most notable change: removing the Information Authority as a permanent feature of the system
- Minor amendments in 1987, but otherwise largely unchanged from 1982

The NZ OIA approach

- No categories of documents, but direct application of principles to information in each case
- The Ombudsmen as review authority
- Very little recourse to the courts
- Government agencies responsible for their own systems: no central oversight or guidance



The IPS research project, 2005-06

- Aim was to understand the administrative reality of the Act, and to investigate apparent frustration
- Comprehensive review of NZ literature
- Interviews with over 50 people working with the Act, across a range of roles
- Analysis of themes, challenges, successes: what does and doesn't work well
- A prescription for future directions

What works well with the NZ Act?

- Many government systems are now geared to openness and participation
- Basic systems for processing requests generally work well
- The quality of decision making and advice has improved
- The Ombudsmen has been very successful as the review authority

What doesn't work well?

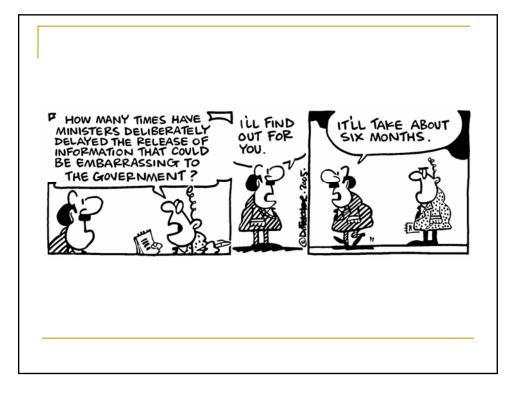
- The political-administrative interface who is responsible for decisions - is confused and creates controversy
- Protecting government advice and decision-making processes has always caused problems and remains controversial and uncertain
- Large requests are hard to manage
- Time-frames: delay has always been a problem
- Managing electronic information is hard, and so is processing it for release

What else doesn't work well?

- The Act appears to have had a significant administrative impact, but it is hard to tell
- We have built up some systematic expertise, but not enough
 - Limited agreed expectations in key areas
 - Culture of openness still patchy
 - Training of public servants still variable
- The overall balance between the rhetoric of a "right" to "the people's information" and the practical terms of reasonable access is not well understood or accepted

The overall picture from the research

- Undoubted achievements, but...
- A building atmosphere of cynicism and frustration, on all sides
- Gradual erosion of trust in government and in the public service
- Administrative costs becoming disproportionate
- Inability to cope with the volume of electronic information



A diagnosis: key challenges

- Managing electronic information
- Building shared understandings and expectations, on a wide range of substantive and procedural issues
- Embedding open government values across the state sector
- Finding a better balance between case by case flexibility and administrative rules
- Building a framework that can withstand tough working conditions

What can't be solved?

- The reality of modern politics and media
 - Looking for instant access and instant answers
 - Highly competitive political environment
 - Information can and will be used strategically
- Two overall factors that make a request go badly:
 - □ If it is for a large volume of information
 - If it touches on a current or potentially political topic

Suggestions for change

- Supplement the system with a set of working rules or guidelines to build shared expectations – template answers for standard issues
- Develop an expert unit inside government the State Services Commission – to issue guidelines and work with agencies on hard cases
- Ongoing work on electronic information systems, led by SSC and Archives NZ
- Some tougher sanctions around delay

Concluding thoughts

- The OIA creates a rule framework that is based on 'reasonableness'
- But it operates in an unreasonable environment
- We need more 'rules' so everybody is clear about the expectations on key issues, without losing the strengths of the case by case application of principle
- We need more leadership on OIA issues in the state sector

Why it matters

- The OIA is an important constitutional measure
 - Supports constraints on executive power by enhancing accountability and openness
 - Gives depth to the citizen state relationship by enabling greater participation
 - Supports the rule of law, through the interplay with judicial review
- Information is the oil in the system; the currency that makes the democratic bargain effective
- Trust in government matters, and cynicism corrodes it



Rajan Kashyap

State Chief Information Commissioner Punjab India

 $\label{eq:Paper delivered} \textbf{Paper delivered at the} \\ \mathbf{5}^{\text{th}} \ \textbf{International Conference of Information Commissioners}$

Central and State Information Commissions in India : Their inter- relationship

I. INTRODUCTION: THE CONSTITUTIONAL FRAMEWORK FOR INFORMATION FREEDOM IN INDIA.

A single national statute, the Right to Information Act, 2005 (RTI) determines the freedom of information (FOI) regime in India. The country has opted for a unitary legislative device to cover its vast union of twenty nine states and six centrally administered Union Territories (excluding the state of Jammu and Kashmir, which has a special constitutional status). In order to appraise the FOI regime in India, it is important to appreciate the emergence of the centre-state relationship in the country.

When India attained independence from British colonial rule on 15th August 1947, the country consisted of two categories of political entities. Some two-thirds of the country had been directly administered by the colonial Government of India. This was loosely labelled as 'British India'. The remaining one third, composed of 563 princely states, all of whom enjoyed considerable autonomy for governance, was indirectly controlled by the British in regard to vital matters such as defence, foreign affairs, currency etc. The relationship between the paramount power, Britain, and these princely states, curiously termed as 'Indian India', was determined by certain treaties of friendship between the Crown on one side, and each of the 563 ruling princes on the other. Immediately after

the British withdrew from the subcontinent in 1947 all the states acceded formally to one or other of the two new national entities India and Pakistan. Most of the princely states ceded to India.

After independence, the entire country that we know as India today was reorganized into a number of subnational political units that were thenceforth called the States. The erstwhile territories under the princes were merged generally into the adjoining States, which were reorganised on linguistic lines.

India is spacially vast (an area of 3,287,000 square kilometers), has a large population (1081 million), and a huge diversity in terms of language (15 recognized major languages and thousands of local dialects), religion (Hindu, Muslim, Christian, Budhist, Sikh and numerous other faiths), and socio - economic development. India's geographical zones extend from the Himalayan to tropical coastal, interspersed with fertile plains, low plateaus and arid deserts in between.

The framers of the Constitution of India accomplished a mammoth task of devising a democratic political system that assured national unity amid so many forms of diversity. When the new Republic came into being on 26th January 1950, India was declared "a Union of States" (Article 1). The Constitution of India elaborately addresses and defines the relationship between the Union Government and the State Governments. All matters relating to governance are apportioned in three different lists, each clearly defined in the seventh schedule to the Constitution, as the Union list, the State list, and the Concurrent list. Freedom of Information derives from the fundamental right of Freedom of Expression, guaranteed by Article 19. Being placed in the Concurrent List, both the Centre and the States are empowered to legislate on the subject. In India, where both a State and the Centre happen to legislate on a subject in the Concurrent List, the Central legislation prevails.

It is with this constitutional backdrop that the Right to Information Act 2005 was promulgated as a Central legislation on 12th June 2005 "to provide an effective framework for effectuating the Right to Information recognized under Article 19 of the Constitution of India". RTI Act 2005 supersedes certain laws on information freedom passed by nine different states between 1996 and 2005. After the promulgation of RTI

Act these states have by and large repealed their state laws. Of these nine states, the State of Jammu and Kashmir, which enjoys a higher level of autonomy under special provisions in the Constitution, is presently engaged in bringing in fresh legislation on the lines of RTI Act, to replace its previous Act.

II. THE RIGHT TO INFORMATION ACT, 2005

Accepting the delicate balance of power between the Centre and the States that has emerged under the Constitution, the Act has a number of unique features.

- 1. Any citizen of India can demand, and obtain information from every single public authority in the country, whether such custodian of information is subject to the jurisdiction of any State Government, or of the Central Government.
- 2. The Central Government as well as the State Governments are both defined as "appropriate Governments", whose responsibility for assuring information freedom under the Act is spelt out. For all public authorities that are established, constituted, owned, controlled or substantially financed by the Central Government, the "appropriate Government" is the Central Government. In the same way, where a State Government has a similar link with a public authority, that State Government is the "appropriate Government".
- 3. The Act provides for the establishment of separate Information Commissions at the Centre and in the States, which wield powers that are absolutely identical. The Central Information Commission has powers of regulation and adjudication over all public authorities that fall within the jurisdiction and ambit of the Central Government. Identical powers over public authorities within the jurisdiction of each state are assigned to the respective State Information Commission.
- 4. In case supply of information is denied or delayed, the aggrieved citizen, after exhausting the remedy of first appeal, can seek redressal from the Central or State Information Commission, as the case might be. The procedure for addressing complaints and appeals to the Commissions at State and Central level is identical.
- 5. The responsibilities of all public authorities at State or Centre, in such matters as voluntary suo-motu disclosure, the appointment of Public Information Officers charged with supply, and in adopting the procedure for acceptance and delivery of items of information etc., are again identical. Categories of information exempt from disclosure are similarly defined in identical fashion for all public authorities, State or Central.

6. The RTI Act has parallel and identical sections that apply to Central and State bodies as under:

Sr. No.	Item	At the Centre	In every State		
1.	Constitution of Commission	 Chief Information Commissioner (CIC) Information Commissioners (upto 10 in number) 	State Chief Information Commissioner (SCIC) State ICs (upto 10 in number)		
2.	Mode of appointment of Information Commissioners	 Committee of Prime Minister, Leader of the Opposition A Union Cabinet Minister 	 Committee of Chief Minister Leader of the Opposition A State Cabinet Minister 		
3.	Management and Administration	CIC	State CIC		
4.	Headquarters of Commission Other offices of Commission	National Capital Anywhere in India	State Capital Anywhere in the State		
5.	Term of office of Commissioners	5 years, or age of 65 years	5 years, or age of 65 years		
6.	Salary & Allowances of Commissioners	CIC equivalent to Chief Election Commission of India ICs equivalent to Election Commission of India	State CIC equivalent to Election Commissioner of India. State ICs equivalent to Chief Secretary, State Government		
7.	Final Controlling Authority	President of India	Governor of State		
8.	Monitoring and Reporting	CIC for Central Ministries, Departments & Central Public Authorities	SIC for State Departments and State Public Authorities		
9.	Action & reform by Government	CIC recommends to Central Govt.	SIC recommends to State Govt.		
10.	Annual Report of Commission	To Central Government for placing before Houses of Parliament	To State Government for placing before house of State Legislature.		
11.	Adjudication: The procedures, powers and functions, including powers for imposition of penalties are common for Central and State Information Commissions. (Sections 18,19, 20)				

It is seen from the above that the Central and State Commissions have identical powers and responsibilities, and exercise exactly the same authority, in respect of institutions within the jurisdiction of each. Following the provisions made in the Constitution of India, the Act clearly defines the role, responsibility and jurisdiction of the national and

sub-national bodies, the Central Information Commission and the State Information Commissions. Each is independent of the other. The relationship between a State Information Commission and the Central Information Commission in no way compares with that of a High Court in a State with the Supreme Court of India at the national level. The Supreme Court of India is the final court of appeal against orders emanating from every High Court, all High Courts being subordinate to the Supreme Court. In so far as Information Commissions are concerned, those at the Centre and in the States enjoy exactly the same powers, but over different Governments and public authorities. Judicial orders of the CIC are not in any way binding upon State ICs. Central and State Information Commissioners and SICs are both the final appellate authority for matters brought before them under RTI Act.

III. OPERATION OF RTI ACT AT THE CENTRE AND IN THE STATES

Even as the freedom of information regime in India is unitary, in actual operation of RTI Act some variations are observed in the method of implementation of the Act at the Central and State levels. Within the overall provisions of the common statute, the arrangements for assuring information rights vary even between state and state. We can appraise the factors responsible for such visible differences.

1. Differences in the nature of Public Authorities:

The institutions at the central level labelled as Public Authorities handle various matters in the Union List. A sample list would include the Comptroller and Auditor General of India, and the Ministries or Departments of Atomic Energy, Science & Technology, Mines, Civil Aviation, Railway, Defence, Chemicals & Fertilizers, Commerce & Industry, Information & Communication, Foreign Affairs and many others. The offices in the purview of the Ministries etc. being spread all over the country, directions from the national level percolate to the field offices for uniform application. The Public Authorities in the States relate to such matters as Police, Law and Order, Agriculture, Rural Development, Food and Supplies, Municipal Local Government, Education etc. These subjects fall generally in the State List. The Public Authorities in the States are found to be generally closer to the grassroots than those linked with the Centre. Institutions such as Municipal Local Bodies and Village *Panchayats*¹ impact directly the

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¹ * Panchayats are village level institutions of local self Government in India.

day-to-day living of citizens. On the other hand, national level institutions such as, say, Ministry of Science & Technology, or the Boards of Direct and Indirect Taxes impact national policy making and might not immediately touch the day to day life of citizens. Thus there is a vast difference between the nature of information

demanded from the Ministry of External Affairs at the Centre, and a Village *Panchayat* in a State. The mechanism for management of data in such disparate organizations has necessarily to be different one from the other.

2. Physical distance of the adjudicatory body from the information seeker:

Denial of information from a Public Authority such as a gas distribution agency in the Central Public Sector situated in a remote area, would require the appellant to approach CIC in the national capital for final redressal. Considering the present status of communications in the country, the seeker might be compelled to engage a lawyer to pursue his case with the CIC. On the other hand, redressal mechanism at the State level is comparatively easily accessible. It is observed that information seekers in the States have less need of professional lawyers for assistance, and usually pursue their cases on their own before State ICs. CIC is installing modern communication systems for video conferencing etc. for convenient hearings through electronic links all over the country.

3. Level of preparedness for data management

This varies considerably from State to State and between the Centre and the States. A good FOI regime rests on the base of systematic and accurate data management. Central bodies are by and large better organized in this respect. The major problem in the States is the codification of existing data, for convenient retrieval and delivery. Less frequent are instances of deliberate denial of information by the Public Information Officers. The road to the establishment of strong management information systems at all levels is long and tortuous. For example, in Punjab, which is a small state, the number of such Public authorities is close to 25000. Many of these are based at local levels, such as the village, small towns and colonies. The process of administrative reform for these innumerable bodies is inextricably linked to management and supply of data.

4. Public awareness

Public awareness, both at the Centre and in the States, about the Right to Information, is admittedly poor. Different mechanisms for enlightening the public are necessary at both levels. Under RTI Act the "appropriate Governments" have been charged with the responsibility of promotion of public awareness and also for training State Public Information Officers (PIOs) for handling and delivering information. The Central Government, as well as the State Governments, have both been limited and slow in taking initiatives for public awareness and education about RTI, and also in conducting training programmes.

5. Effectiveness of non-government organizations:

NGOs can play a significant role in the success of any FOI regime. There is wide difference in the seriousness, knowledge, and mode of functioning displayed by different NGOs working in various parts of the country. Active NGOs are seen to publicly expose malfunctioning of Public Authorities, even as they successfully take up vital causes of society and individuals under RTI Act.

6. Linkage of the FOI Regime with local laws:

RTI Act requires information to be supplied by Village *Panchayats* in villages as well as Municipal Councils in towns. Many States have not as yet adopted laws, as required by the Constitution of India, for decentralization of power and responsibility to the local self governing institutions, nor are these bodies as yet equipped to handle information systematically. Consequently the official departments of the Government are often required to handle requests that should normally have been settled at the local level.

7. Political Commitment:

Any regime for Freedom of Information is founded on the base of commitment by the political leaders to assure transparency and accountability. RTI Act had been adopted unanimously by India's Parliament, reflecting a broad acceptance of the ideals of information freedom by all parties across the political spectrum at the national level. The political leadership charged with executive responsibility, especially at state level, is yet to realize that RTI is not an impediment in the pursuit of development and growth. The political executive has not yet accepted that openness can contribute to administrative

efficiency. Resistance to supply of "sensitive" information is not confined to developing countries alone.

8. Volume of Litigation:

Inevitably, the Central Information Commission in India has had to handle a huge volume of complaints and appeals regarding denial or delay in delivery of information. The burden of such litigation with the State Information Commissioners is somewhat smaller. The mechanism for settlement of the disputes at the Centre and the States has to be designed to secure expeditious disposal. Expectedly, the various Commissions have adopted procedures, within the mandate of the Act, most suitable to their respective needs and local situation. It is paradoxical that at early stages of establishment of an FOI regime, the number of matters for adjudication before the Commissions would be seen to rise, since the official machinery is not fully geared to organize, review and deliver data. As the system of data management improves the need for legal remedy should reduce. Some State Information Commissions have taken their own initiatives for disposal of complaints and appeals under RTI Act. They have also designed a user-friendly system of adjudication. A model of a user-friendly system of adjudication adopted by one of the State Information Commissions is described below:

- Citizens are encouraged to pursue their cases on their own, rather than take recourse to professional lawyers;
- During the process of adjudication, all Benches of the Commission conduct prompt hearings and avoid adjournments.
- In a majority of cases, the benches announce and record decisions in open court.
- All cause lists of matters for hearing are placed on the website well in advance.
- All proceedings, including interim and final orders are promptly displayed on the website. Litigations as well as other interested persons are free to download all such orders conveniently.
- All litigants and even members of the public are invited to give to the Commission their feedback on their experience of implementation of RTI Act at all levels, and also to give suggestions for improving the systems of

- delivery. The Commission reviews the feedback so received for initiating measures for improvement.
- Benches of the Commission frequently visit various district headquarters to conduct hearings in cases emanating from and involving public authorities in the geographical areas adjoining these district headquarters. This helps to bring justice under RTI Act closer to the doorsteps of information seekers.
- The Commission does not believe that its role as adjudicator for information supply has ended with the issue of directions to public authorities to deliver information. After issue of such directions of delivery of information, all matters are marked for confirmation of compliance by the public authorities concerned. Thus the appeal or complaint is finally disposed of only after the Commission is satisfied that its orders have been duly complied with.

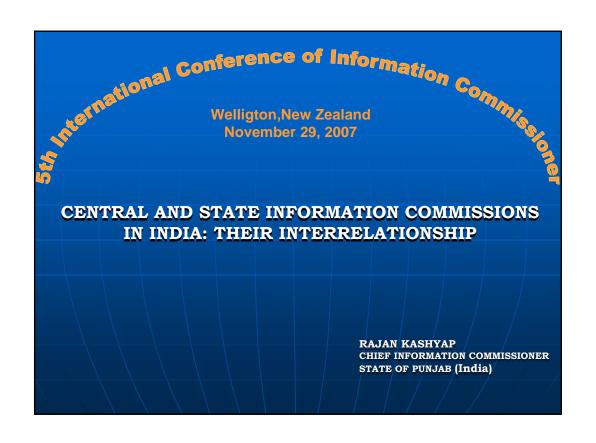
The public has generally welcomed the initiatives of the Commission to simplify procedures and facilitate delivery of information.

IV. CONCLUSION: SOME QUESTIONS

Given the basic framework of RTI Act 2005 in India, the following questions are posed.

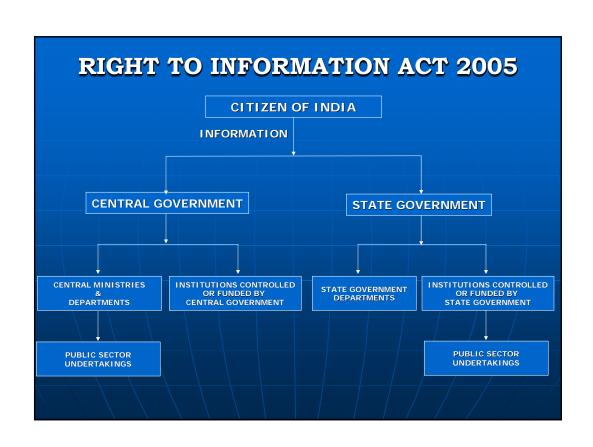
- Q 1. Can there be a concerted approach to efficient data management at the national and state level?
- Q 2. The bureaucracy is proving to be an obstacle in the FOI regime. How can the bureaucracy be motivated to change its mindset?
- Q 3. Can the Centre and the States compete with each other in providing public satisfaction in delivery of information?
- Q4. Must empowerment of the public reduce the authority of the custodians of information?

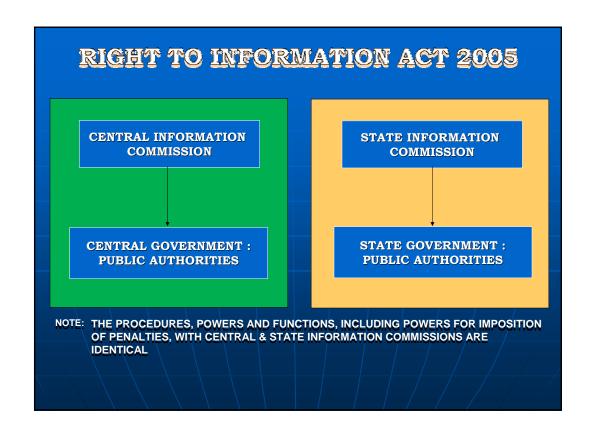
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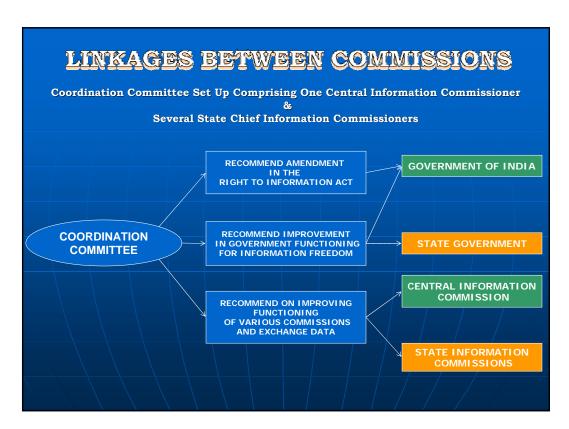




Information Freedom In India The Constitutional Framework







ANNUAL MEETING OF CENTRAL INFORMATION COMMISSION AND ALL STATE INFORMATION COMMISSIONS

- → EXCHANGE OF EXPERIENCES
- → REVIEW OF ENFORCEMENT OF RTI ACT IN CENTRE & STATES
- → ADMINISTRATIVE MATTERS
- → PROCESS OF ENFORCEMENT OF DECISIONS & PENAL CLAUSES
- → FUTURE EVOLUTION OF RTI REGIME

MORE THAN 80 COMMISSIONERS ATTENDED LAST MEETING - OCTOBER 2007

LINKAGES BETWEEN COMMISSIONS

STATE INFORMATION COMMISSION PUNJAB, INDIA

A UNIQUE FRIENDLY SYSTEM OF ADJUDICATION

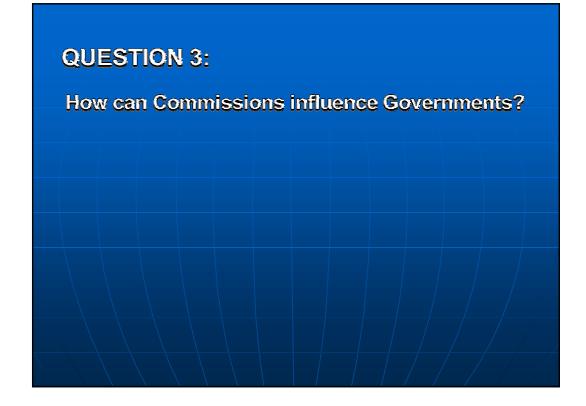
- → Citizens generally pursue cases on their own, not through lawyers.
- → Prompt hearing, no routine adjournment.
- → Decisions announced and usually recorded in open court.
- → All cause lists on Commission's website in advance.
- → All decisions placed on Commission's website within 48 hours.
- → Feedback on implementation of RTI Act invited.
- → Reaching out to the people: Commission also conducts hearings in the districts.

CONCLUSION SOME QUESTIONS

QUESTION 1:

How to develop a coordinated approach between Central and State Commissions?

QUESTION 2: THE BUREAUCRACY IS PROVING TO BE AN OBSTACLE IN THE FOI REGIME. HOW CAN THE BUREAUCRACY BE MOTIVATED TO CHANGE ITS MINDSET?



QUESTION 4: MUST EMPOWERMENT OF THE PUBLIC REDUCE THE AUTHORITY OF THE CUSTODIANS OF INFORMATION?





Session 3D The relationship of subnational FOI review bodies to their national counterparts: tensions and synergies

Commissioner President Alonso Lujambio Irazábal IFAI México

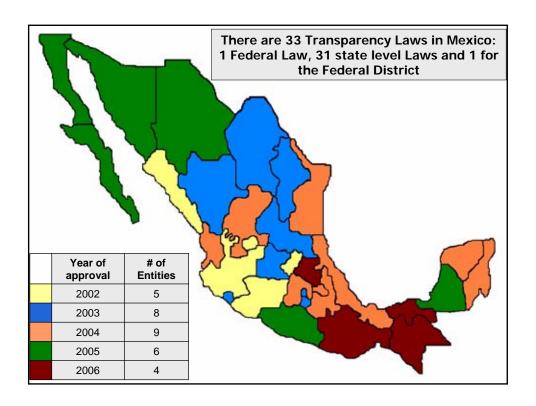
November 29th, 2007



Basic Information: Mexico

- Territory: 1,972,550 km2 (#14 in the world)
- Population: 106,202,903 inhabitants (#11 in the world)
- Economy: GDP of approximately 740,000 billion dollars (#14 in the world)
- Political System: Federal System integrated by a Federal Government, 31 states and 1 Federal District.
- Federal Transparency Law: 2002
- Transparency Laws at the State level (see map).







The access to information right in the legal framework

- In 1977, the right was partially added into the Constitution with this phrase: "the right of information shall be guaranteed by the State".
- In December 2001, an initiative for the Transparency Act was presented in Congress.
- In June, 2002 the Act came into force.
- The IFAI was created on December 21st, 2002.
- Since June 12, 2003, any person can present an Information Request to any obliged party under the Federal Law.



How is Mexico different since 2002?

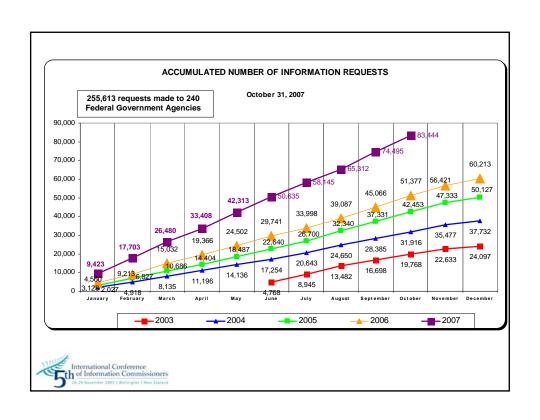
- The Transparency Law, which is considered Mexico's Freedom of Information Act, was approved unanimously in Congress in April 2002, and was implemented one year later in June, 2003.
- The Mexican Transparency Law also regulates Data Protection for information in the hands of the public sector.
- At present, there is a Data Protection Bill in Congress that would regulate the privacy matter, in the private sector.
- The IFAI is the authority that enforces the Transparency Law and is composed of 5 Commissioners that are proposed by the President and approved by the Senate.

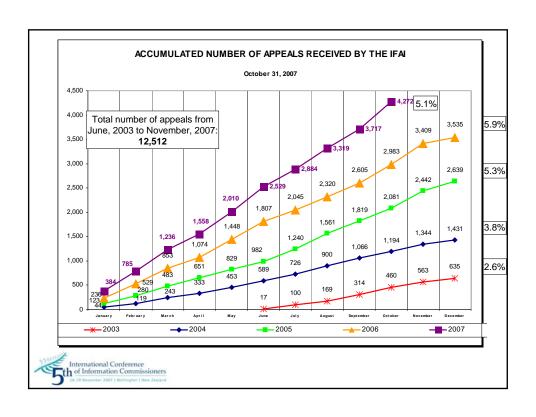


Federal Institute of Access to Public Information -National Level-

- In the national arena, the IFAI is an autonomous institution that settles controversies between citizens and Public Agencies. It works somewhat as an Administrative Disputes' Court on transparency matters.
- The IFAI has the mandate of promoting the right of access to information, and training public servants regarding matters of access to information and protection of personal data.
- The Mexican particularity, in a worldwide perspective, is the electronic system (SISI) through which the requests are made. In the first 4 years of the Transparency Act, 95% out of 255,613 have been made through the Internet.







Requests by Geographical Area

5 out of 32 States controls the 62.3% of all requests.

STATE	2003	2004	2005	2006	2007
Mexico City (8.44% of the total population)	50.4%	49.6%	46.9%	44.1%	44.1%
State of Mexico (13.56%)	13.0%	14.1%	11.6%	13.3%	12.5%
Jalisco (6.53%)	3.3%	2.9%	3.9%	4.2%	4.0%
Puebla (5.21%)	3.1%	2.9%	2.9%	3.5%	3.0%
Nuevo León (4.06%)	2.7%	2.7%	3.2%	2.1%	2.1%



Transparency on the Sub-National Level

- Since 2002, every State has adopted its own Transparency and Access to Information Law. Unfortunately, the many differences between them in terms of quality affect the citizen's right to access information. Among some examples of the heterogeneity are:
- ✓ In 16 cases, the state law requires the person requesting information to present an identification, fingerprint or signature to request any information.
- ✓ In some states the state law requires individuals to live in the state where the information is requested.
- ✓ In other cases, controversies are settled by non-specialised tribunals or authorities that only possess a ceremonial status.
- ✓ In many states, the Law does not permit the creation of an electronic system for making and following requests.
- ✓ Only in some states, political parties are obliged by the law.



Constitutional Reform

- Three governors from the 3 main political parties introduced an initiative- "Iniciativa Chihuahua"- to promote a Constitutional Reform to Article 6 dedicated to matters of transparency.
- The initiative was presented to Congress on December 13th, 2006.
- March 6, 2007: The proposed reform is approved unanimously by the Lower Chamber of Congress.
- April 24, 2007: The reform is approved unanimously by the Senate.
- April 26 June 8, 2007: 22 Local Congresses approve the initiative (16 approvals were needed).
- July 20, 2007: The Constitutional Reform is published by the President.



Constitutional Amendment -Central aspects-

• All information in possession of any public authority, entity, or organ, in the federal, state or municipal level, is public and may only be reserved temporarily and for reason of public interest in the terms established by the Law. In the interpretation of this right, the principle of maximum publicity must always prevail.



Constitutional Amendment -Central aspects-

 Information regarding private life and personal data shall be protected according to the terms and exceptions established by the Law.



Constitutional Amendment -Central aspects-

- Every person, without the need of demonstrating any interest, o justification, will have free access to public information, to their personal data and the possibility of correcting this data.
- Speedy mechanisms of access to information and revision procedures shall be established. These procedures will be substantiated before specialized and impartial organs with autonomy in their operation, management and decisions.



Constitutional Amendment -Central aspects-

- Within the next two years, the Federation, and every state shall establish electronic systems that would allow any person to use the mechanisms of access to information and appeal procedures from any location in the world, without the need to prove the Mexican nationality.
- In addition, Municipalities with population greater that 70,000 inhabitants should also have electronic systems for the same purpose.



National to Sub-national Relation

- The Constitutional Reform requires the States and the Federation to correct the differences between laws that create obstacles for the exercise of the right to information.
- The IFAI, with the support of the World Bank, developed an electronic system for making requests, following a request and making appeals through the same electronic channel. The system works as a crystal box in which all requests and answers can be seen by any person from anyplace.

Federal	The system is working with an accumulated of 255,613 requests to date.
3 States	Are using a system similar to the Federal one developed by the IFAI.
7 States	Have signed an agreement with the IFAI to use this system in the near future.
1 State	Also uses the system developed by the IFAI, but appeals cannot be made through it, due to current obstacles in the Local Law.
8 States	Have a system of their own without the possibility of making an appeal.
13 States	Do not have an electronic system to guarantee access to information through electronic channels.





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 ${\bf Paper\ delivered\ at\ the}$ ${\bf 5}^{\rm th}$ International Conference of Information Commissioners

The Impact on the Mexican Republic States, and Especially on the State of Mexico, of the Amendment to Article Six of the Constitution.

The access to public information in México has highly developed and advanced in a fast pace, because people are requiring more sophisticated information every day. All the same, the so called State sovereignty has been misunderstood in such a way that, when transferred to the State field, the right to access public information stops being a fundamental universal right, and becomes a matter subjected to regional interests. In my country, the State laws regarding access to information are so uneven or different, that we find classified information catalogs of all kinds, which for instance in certain States, keep a Government's employee or a public servant's salary as confidential. Yes indeed, the problem is that not all the States of The Mexican Republic, base their Access to Public Information laws on the principle of maximum disclosure or maximum publicity, but all the opposite, they try to broaden the supposition of classified information.

Nevertheless, the preceding is not the only problem existing in Mexico regarding this subject matter, not the most serious one; for The Mexican Federation States are formed by Municipalities, which, in pretending to take advantage of a wrongly understood municipal autonomy, have tried to regulate Access to Information, through the setting up of rules and regulations, and by naming their own authorities. In The State of Mexico case, there are 125 Municipalities, which form a part of the more than 2400 Municipalities established in the country. This matter is absurd because fundamental

rights are not, and shouldn't be in any legal system, regulatory of the same, for this a Federal Power.

The third problem lies in the legal nature of The Access to Information Guarantor Entities, because essentially, the ideal situation would be that those organizations should not be dependent on any Government Entity. The above issue has been a constant in Mexico: that is to say, the autonomy of the organizations responsible to enforce the compliance with the access to information laws is not the general rule but the exception, which has to be the other way around. The coordination between the Federal and State Governments through their Federal Access Organization and the Sub-National Access Bodies respectively, is fundamental in order to avoid stress and to promote synergy among them.

Actually, within the Mexican reality, we don't find tension among Government circles or among Access to Information Organizations, but we do find uneven laws which harm or go in detriment of private individual rights. The coordination is fundamental of course, and it is there, where The Federal Congress Support has been of paramount importance in order to clarify those issues, as it is explained down bellow.

The fourth problem is about the Access to Public Information mechanisms, due to the fact that at the beginning, the Sub-National or State Laws' trend was to submit a written and signed request for information, a mechanism that inhibited the applicants requesting access to information, not only because it is threatening within the Mexican reality, but also because it forces individuals to go to government offices. The Federal Institute for Access to Public Government Information generated an electronic system called SISI which had, and has had as its main objective to facilitate access to information for the public. Nowadays, it has generated a system called INFOMEX, which is established as a base platform on which The Federation States that so desire, can operate. In The State of Mexico's case, The State's House of Representatives, authorized a budget aimed at the creation and organization of a State's computer information system that is called SICOSIEM, which has allowed to increase fivefold the number of applications and requests for information, as well as the number of resources through which individuals protest for nonconformities, against answers given by, or omissions made by the government.

As it has already been said, it was necessary by The Federal House of Representatives to solve the set out problems; therefore, in July of this year (2007), an amendment to Article Six of The Political Constitution of The Mexican United States was submitted. Originally, this article only stated that "The Right to Information shall be guarantied by the State". Today, Article 6 has been amended in order to add one paragraph and seven fractions or parts of the same.

The amendment recognizes the existence of the right to access information as a part of the right to information and rising or elevating it up to a Constitutional rank or level, which implies acknowledgement of a fundamental right of a new generation.

In other words, it is to say that the reality of our times demanded that a Constitution as the Mexican, long standing since 1917, would have to be updated regarding this issue, for the fundamental rights in it regulated, do not exceed the second generation.

In such amendment, the principal of maximum disclosure is established in an explicit manner, a situation that forces the States to render information rather than deny it, and reducing the assumptions of classified information. At the same time it is established that it is not required an interest either legal nor legitimate or simple in order to request information; neither it is required to set or establish the use that will be given to such information. It is established also that access to information shall be free of charge and that the procedures to access information and nonconformities shall be expeditious and fast.

The outcome of the amendment is important from the perspective that it reiterates that organizations for access to information shall be autonomous in management and decision making. Minimums of public information are established which will have to be found in a permanent manner within electronic media.

The principle of protection of privacy and of private life and the protection and preservation of personal data is established; these concepts are not properly shaped or expressed in the amendment, for it would have sufficed to mention personal data, because when these are properly protected, private life is protected as a result.

Nevertheless, it seems to me that the most important part of the amendment is that it solves the problem of the Municipalities, previously presented, because it declares The Federation, The States and The Federal District (which strictly speaking is not yet a Federal State) as the sole responsible for regulating this issue and for establishing the organizations to access public information.

Finally, the amendment establishes a "vacatio legis" (Period between the promulgation of a statute, and its entry into force) of a year, for the Federation, The States, and The Federal District to amend and adjust their laws to the principle of Article 6, and two years to establish electronic systems for the access to information, and for the promotion of nonconformities.

Again, the support of the Federal Organizations and of the State Congresses has been fundamental of paramount importance; the problem ladies and gentlemen was as you could see very serious.

That is why the Federal House of Representatives, the Federal Senate and State Congresses approved an amendment to Article 6 of the Mexican Constitution, in order to standardize access to public information in the country, establishing, minimums of transparency and maximums of classified information, as well as allowing access to public information via electronic media. The State of Mexico has a law similar to the Federal One, because in an objective sense it can be improved, but generally speaking it is a good one. The State of Mexico's Institute for Transparency and Access to Public Information as it was mentioned above has its own system, which is equivalent to a SISI but with superior safety standards, which is called SICOSIEM, through which any person, either a Mexican citizen or a foreigner, can request information about the State of Mexico, a region which is considered the most important in the country for having the largest gross domestic product in the country and the largest population of inhabitants, with almost fifteen million people. Therefore I invite you to visit this system and request information through the SICOSIEM window on the web page www.itaipem.org.mx

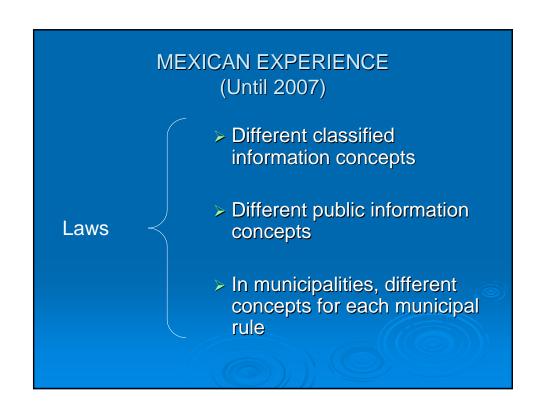
Without deflecting me from the subject at hand, the Amendment to The Federal Constitution will allow access to information to get closer to the democratic concept we all want, even though, of course, we need that State Public Servants assimilate the culture of Openness, and that the guarantor Institutions or Organizations should be

invested with more supervision, surveillance, sanctions and penalties powers. The impact this way, is positive, for the fundamental rights can not be some in a certain determined place, and different in another place; they cannot be limited or have boundaries of some nature in a jurisdictional matter's scope, and of other nature in another. The above mentioned Amendment entails these types of advantages. In accordance with the same, issues and published on July 20, 2007, The State Members of The Federation, have a time period of one year beginning on that date, to make amendments and adjustments to their State and local Constitutions and applicable Laws. The State of México is already working on these subject matters, in order to comply accordingly, although it is very little what has to be amended; due to all what has been explained above regarding the Constitution and State Laws, they are very close to, and are much alike the primary and secondary federal legal bodies.

¿Would it be more practical a unique Law applicable throughout the national territory, with State Guarantor Organizations enforcing and applying it?

5





MEXICAN EXPERIENCE (Since 2007)

- ACCORDING WITH ARTICLE 6 AMEND:
- -Same classified information concepts
- -Same public information concepts

It suposes

- -Electronic acces process will be vinding
- -Government bodies must avoid ask for legal interest
- -Municipalities can't be a regulatory bodie in access to information. It must be the subnationals bodies (the amend is not clear)

State of México

Status

- > 125 municipalities (60 of them with their own rules)
- A strong access to information electronic system named "SICOSIEM" (just for State of México)
- The legal and constitucional amed is in process
- The federal amend is not so clear in relation with municipalities (acording with the Constitution 6, 115)

THANKS

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Commissioner Juan-Pablo Guerrero Federal Institute for Access to Public Information, Mexico

Paper delivered at the 5th International Conference of Information Commissioners

Information & Communication Technologies as Tools to Facilitate the Right to Information: the Case of Federal Government in Mexico

INTRODUCTION

The most relevant component for the implementation of the Federal Law for Transparency & Access to Information (**LAI**) in Mexico approved in 2002 and enacted in June 2003 has been the use of Internet technology. So far, nothing has proven to be more important.

The goal of the LAI is to guarantee citizens' right to access government information, and increase transparency and accountability in the Federal Government. The law also clearly establishes that *anyone* can request information from the Mexican government, whether or not you are a citizen of Mexico. The law itself establishes that access to government information should be facilitated through the use of advanced technologies. Three major information tools were developed to facilitate the exercise of these new information rights; all three ICT show the extent to which advanced electronic information technology can encourage, simplify and broaden access to government information.

A significant feature of the LAI in Mexico is the creation of the Federal Institute for Access to Public Information (**IFAI** for its acronym in Spanish), an independent body charged with regulating, monitoring and enforcing the application of the LAI. The jurisdiction of the IFAI is limited to the Executive Branch, which is comprised of more than 240 agencies and programs, 2.8 million public

servants, and 95% of the federal budget. Currently, this legislation does not regulate information access in state and local governments, though all 31 states and the Federal District have implemented their own LAIs.

The IFAI works in a manner very similar to an administrative court of appeals. When an agency response to an information request is unsatisfactory, applicants can easily complain to the IFAI to intervene in order to determine whether or not the initial agency response was appropriate, and when applicable, mandate the disclosure of the information by the agency. One of the main advantages to the Mexican LAI is that requestors can easily appeal to the IFAI directly without the need for lawyers or advanced technical knowledge.

ICT FOR TRANSPARENCY AND ACCESS TO INFORMATION

The first tool developed is the **Information Request System** (*Sistema de Solicitudes de Información*, **SISI**, www.sisi.org.mx), which allows any person to request information from the Federal Government (entirely though the Internet) follow-up on the request, retrieve the agency's response through the web, and eventually file an appeal if the response is unsatisfactory. This allows for information requests to be submitted from anywhere in the world, at any time.

The entire target population for these electronic tools is essentially anyone who has an interest in knowing more about how government works in Mexico. However, looking inward, the main target population within Mexico is the portion of the population with access to the Internet who has an interest in requesting information from the government. Estimates show that over 15 million people in Mexico have consistent access to the Internet, which represents approximately 15.3% of the total Mexican population of 105 million. We will look at complications due to inequality in access to information technology later.

Official IFAI statistics show that, from the 12th of June, 2003 through October 11 th, 2007, there have been over 250,000 information requests submitted to the Executive Branch. 95.5% of those requests have been submitted electronically. Over 12,000 appeals have also been filed to the IFAI.

Electronic requests, responses, and appeals filed to the IFAI through October 11th, 2007								
	2003	2004	2005	2006	2007	TOTAL		
ELECTRONIC REQUESTS	22,488	35,055	47,874	57,739	75,777	238,933		
WRITTEN REQUESTS	1,609	2,677	2,253	2,474	2,075	11,088		
TOTAL REQUESTS	24,097	37,732	50,127	60,213	77,852	250,021		
ELECTRONIC RESPONSES	19,831	31,744	42,673	51,169	65,356	210,773		
RESPONSES THROUGH OTHER MEANS	1,445	2,369	1,925	1,929	1,596	9,264		
TOTAL RESPONSES	21,276	34,113	44,598	53,098	66,952	220,037		
APPEALS FILED TO THE IFAI	635	1,431	2,639	3,533	3,977	12,215		

Many of the requests are about results of substantial activities of the federal agencies (8.7% of the total in 2006); information on procurement and contracts (7.8%); information on procedures for citizens (5.7) and paychecks and salaries of officials (4.3%).

The technology behind SISI's electronic request system has also been transferred to several local-level governments, through an advanced technology known as *Información Mexicana* (**Infomex,** www.infomex.org.mx). This technology received in 2005 a grant from the World Bank for its development, it allows local governments to adapt the system to their own particular needs and local information access legislation. Infomex has been implemented in response to demand by local governments to provide users accessible means for requesting information at the state and municipal levels.

A recent Constitutional reform that extends the scope of the right to information mandates all local governments to adopt ICT as tools to provide access to government records. So the main future goal is to implement Infomex in as many state and local governments as possible. Currently, Mexico City and Chihuahua governments are using Infomex or are in the process of implementing the program. Infomex transfer to the states of Jalisco, Aguascalientes, Baja California and Nuevo León is underway.

Let us look into the second toll. To facilitate access to previous information requests, an advanced web-based search engine was developed, known as **ZOOM** (www.ifai.org.mx), which allows any interested party to consult all electronic information requests that have been submitted through SISI (more than 250,000 requests to date). **ZOOM** permits users to easily search, (by keyword, phrase, date, or agency) the universe of electronic information requests submitted to the Federal Executive Branch, their corresponding responses from government agencies, and any appeals that have been filed, along with their resolutions. ZOOM has served to greatly facilitate the work of specialists and academics, as well government agencies who can now easily find precedents both in information requests and IFAI resolutions, which help them to improve their responses to requests and compliance with the LAI.

Transparencia, Portaltransparencia.gob.mx). The LAI mandates that each government agency publish certain basic information about its operations (such as directories, audits, budgets, rules of operation, etc.) through the Internet. The Por-Transparencia is a web system that organizes, systematizes and homogenizes the presentation of this information across agencies. Additionally, the web portal allows the user access to the majority of Executive Branch agency compliance with mandatory disclosure requirements in one single location. In other words, users are no longer required to consult each agency's individual website to access this important information.

The PortalTransparencia has registered more than 3 million visits in only 5 months of operation, which averages to approximately 15,000 searches per day. In average, 25% of them to the directory of public officials; 17% to salaries and benefits; 15 % to procurement and contracts; and 6% to authorizations, licenses and concessions. For instance, the PorTransparencia makes it possible to find out how many procurement contracts the National Oil Company, Pemex, has signed with IBM; but it also provides the number of contracts IBM has signed with all the agencies that integrate the Federal Public Administration.

MAIN RESULTS: RELIABILITY AND TRUST

The political culture in Mexico has lead many citizens to distrust or even fear public authorities. So an important innovation of the recent LAI is that citizens are not required to identify themselves in order to request public information from the government. SISI-Infomex provides users with a considerable "protection" against the perceived power imbalance between the government and the citizenry, by allowing the submission of information requests through an electronic system where the user is in complete control over their personal information that can be accessed by government agencies. In short, SISI-Infomex increases citizen confidence in requesting information.

Additionally, ZOOM and PortalTransparencia facilitate access and address both of the above-mentioned problems, by *socializing* the public information already released by the government through the Internet. Not only do these search engines permit users to access previous information requests and mandatory basic information that may already contain what they are looking for, without having to submit their own request or travel to access information, but also allow users to maintain complete anonymity vis-à-vis the authority.

SISI-Infomex, ZOOM and PortalTransparencia have successfully generated citizen confidence in the information request process, due to the correct implementation of these three electronic systems. The vast majority of information requests submitted to date have been through SISI. At the same time, these information innovations have provided important tools essential to the IFAI's own ability to fulfill its function. They also have encouraged a significant change in the "culture" of information access from the perspective of the government bureaucracy.

Therefore, these information tools address two major problems related to accessing public information in Mexico. The first is related to the extent to which federal government operations are centralized in Mexico City, and transportation and communication systems outside the city are unreliable and expensive. By providing citizens with an electronic system to request information and retrieve the agency's response, search previous requests, and consult mandatory information through the Internet, these tools allow citizens the possibility of exercising their new information rights without having to travel to Mexico

City or rely on an inefficient postal service to deliver the requested information. These systems greatly reduce transaction costs for users.

At the same time, the political culture in Mexico has lead many citizens to distrust or even fear public authorities. Another important innovation of the recent LAI is that citizens are not required to identify themselves in order to request public information from the government. SISI-Infomex provides users with a considerable "protection" against the perceived power imbalance between the government and the citizenry, by allowing the submission of information requests through an electronic system where the user is in complete control over their personal information that can be accessed by government agencies. In short, SISI-Infomex increases citizen confidence in requesting information.

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From the perspective of the IFAI, whose job is the enforcement of the LAI in the Executive Branch, the use of electronic systems greatly facilitates monitoring of agency compliance, while reducing the cost of supervision. This is due to the ease of monitoring statistics and agency responses that these electronic systems provide. Because the IFAI can easily monitor trends and identify roadblocks to access, the Institut can quickly intervene to address problems as they arise. Therefore, in addition to facilitating access to government information from the perspective of citizens, these electronic innovations also serve to simplify and improve the IFAI's ability to do its job effectively and efficiently.

At the same time, one of the biggest achievements of the implementation of these electronic systems is that their emphasis on *accessibility* and *publicity* has effected a significant change in bureaucratic culture in Mexico. Concurrent to the distrust and power imbalance perceived by citizens in relation to public authorities, bureaucrats in Mexico have historically expressed resistance to releasing information, due to a similar distrust and skepticism as to who is requesting information, and for what purpose it will eventually be

used. There had also previously been a notable preference to provide information discretionally, without allowing it to enter the public domain.

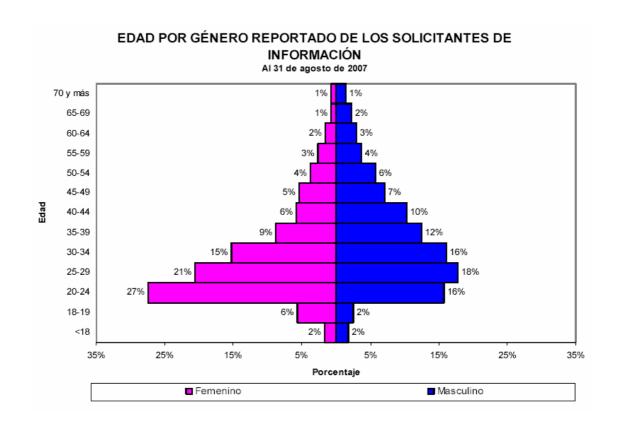
However, due to the LAI and electronic information access systems implemented in Mexico, the possibility of dwelling on questions of *who* is requesting information and *why* is now eliminated. An information request must be answered, when possible through the SISI system, and the only means through which government agencies can deny access is if the information requested falls under narrowly defined categories of classification. These classifications are often reviewed directly by the IFAI, further ensuring that a denial of information is legitimate. Hereford, it is no longer acceptable for government officials to deny access for fear of the motivation behind the request.

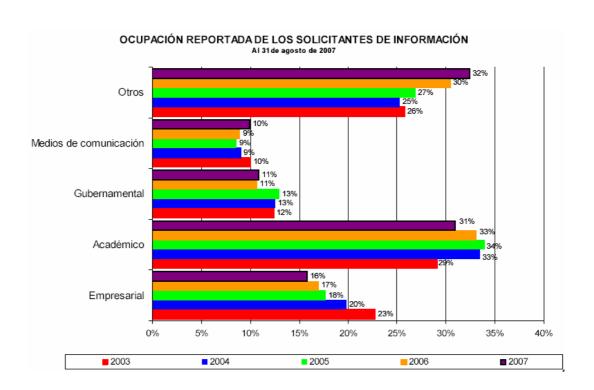
Additionally, the ZOOM and Por-Transparencia search engines fortify the *publicity* of government information, because of the ease in accessing previous requests, basic government information, and agency responses. This eliminates the tendency to provide information on a discretional basis, by making it available to anyone interested in consulting it. The result is not only greater publicity of government information, removing previous cultural obstacles to access, but it has also shifted the debate *within* the bureaucracy toward viewing public access to government information in a new, less threatening light.

WHO BENEFITS FROM THE SYSTEM? DESCRIPTION OF THE USER POPULATION

As been said; anyone, anywhere in the world can access government information in Mexico through these electronic systems. The fact that requests are practically anonymous grants confidence to applicants. On the other hand, an accurate profile of users is hard to get: information available to IFAI is given by the applicants themselves, voluntarily and without rigorous verification (65% of users have spontaneously provided this information). Taking this limitation into account, the available profile shows that the average applicant is a young metropolitan male, with an income and education higher than the national average: 64% are male, 55% live in the Metropolitan area of Mexico City, 54% are between 20 and 34 years old, 32% locate professionally themselves in the

academic sector, 18% in the business sector, 12% are bureaucrats and 9% work in the media.





One important fact regards the concentration of the demand for public information. From June 2003 to August 2007, there were only 92,000 SISI users and only five thousand

accounted for 50% of the requests. Four hundred and fifty users made 25% of the total number of requests and 170 users made 17% of the total.

This means that less than 13,000 users have made almost two thirds of the total number of the requests at the federal level. We will come back to this problem at the end of the note.

Registered users to file electronic applications

October 14th de 2007

Ranks	Number of users	Total requests	
1 request	68,306	68,306	28.2%
2 requests	11,745	23,490	9.7%
3 - 5 requests	7,671	27,807	11.5%
6 - 10 requests	2,585	19,136	7.9%
11 - 20 requests	1,317	19,327	8.0%
21 - 50 requests	786	24,362	10.1%
51 - 100 requests	274	18,785	7.8%
101 - 200 requests	102	14,643	6.1%
201 - 300 requests	36	8,682	3.6%
301 – 400 requests	16	5,274	2.2%
401 and over	16	11,981	5.0%

LESSONS AND IMPACTS

The first major impact these systems have produced, is that they provide important tools no only to requestors to facilitate the submission of information requests, but they also drastically increase the efficiency of government response. The ease of responding to information requests through SISI greatly reduces the transaction costs for government agencies in this process. Additionally, ZOOM and Por-Transparencia, by making it easier for interested parties to consult previously released public information, also reduces labor costs on government agencies to implement the new law.

Secondly, by directly confronting many of the afore-mentioned obstacles to citizen use of the law, during the last 4 years, information requests have shed light on a large number of government operations previously shrouded in secrecy. One example is related to the infamous "bank rescue" in the mid-90s. Despite high levels of government resistance to disclose this information, through a series of citizen requests and subsequent appeals, the IFAI was able to mandate that the Savings & Loan Institute (IPAB for its acronym in Spanish) release records related to the decision-making process that resulted in the privatization of the banking system. Other examples include: the publicity of files related to Federal investigations into crimes committed during the "dirty war"; the mandate that the Treasury Ministry publish relevant information about public funds transferred to public-private trust funds; publicity of government transfers to labor unions such as the teachers' union and petroleum workers union; and formulas for the calculation of official economic projections.

Again, since the use of these electronic tools is demand-driven, these examples show that the citizen demand for this type of information has been successfully satisfied by the implementation of the LAI in Mexico to date, where the use of electronic tools has been the central strength behind information disclosure. All of these examples have resulted from citizen requests and subsequent appeals, which have allowed the IFAI to mandate the release of information previously unimaginable in Mexico. Because of the highly sensitive nature of the information requested in the above-listed examples, one can imagine that if requestors were required to identify themselves to the agency, or physically enter the government office to get the information requested, fear of reappraisals could have prevented them from submitting the request in the first place. Because of SISI and its intermediary capacity between the requestor and the government, these requests were made possible. At the same time, now that the information has been mandated to be made public, ZOOM and Por-Transparencia permit other interested parties to consult this information, again without fear of reappraisal or identification by the agency.

The Annenberg School of Communications of the University of Pennsylvania produced a report in February, 2006 that highlights the high degree of citizen satisfaction with SISI, and its importance for guaranteeing the efficient use of the new LAI in Mexico. The report is called, *The Federal Institute for Access to Information in Mexico and a Culture of Transparency*, available at http://www.global.asc.upenn.edu/index.php?page=32.

More recently, these information tools has been chosen as one of the "Top 20" programs of the 2007 IBM Innovations Award in Transforming Government, administered by the

Ash Institute for Democratic Governance and Innovation at the John F. Kennedy School of Government at Harvard University. This award, given on the occasion of the 20th Anniversary of the Innovations in American Government Awards program, marked the first opportunity for the most transformative government programs from across the globe. As a "Top 20" finalist, the Mexican program joined a select group of initiatives, whose accomplishments warrant this special recognition (www.innovations.harvard.edu).

WEAKNESSES

One of the main shortcomings of these 3 electronic tools for accessing public information in Mexico is directly related to the complexity of the technology itself, and its usability for a wide audience with differing levels of experience using computers and the Internet. It will be extremely important that future developments in these tools take into account the need to keep the technical aspects of their usability as simple as possible, to increase their usability for a broad audience.

Secondly, these systems are currently limited to the Federal Government, and access to information at the local level is limited only to those states and municipalities who have chosen to adopt Infomex to date. SISI should be integrated into Infomex to permit users access to public information about all levels of government in any state through one portal.

Thirdly, while SISI allows the IFAI to monitor agency responses to a limited extent, it does not allow them to verify the *quality* and *relevance* of the information provided by agencies in response to the specific information request presented. This presents a serious limitation to the IFAI's ability to monitor agency compliance with the LAI, as they are limited to ensuring that agencies reply within the time limit established, and in the manner requested by the user. Full monitoring of compliance with LAI mandates would also require verification that the information provided through SISI meets the demands of the original request.

THE CHALLENGE OF DISSEMINATION

It is obvious that the concentration of the demand undermines the positive effects of the right to know in Mexico. In general, it is accepted that freedom of access changes the behavior of public authorities when they know they are observed or supervised. A large number of citizens applying for government information increase the social pressure on public servants as a system of decentralized social control. However, this phenomenon can hardly be fully credited in Mexico to this date, where 92,000 users cannot match the needs of more that 105 million inhabitants. Dissemination of the right to information is, among others, one of the big challenges of the IFAI in the short run.

That being said, with public deliberation sessions at IFAI, and given that frequently the people requesting information are journalists and specialized civil society organizations, many cases have reached large audiences due to the public attention that they receive. This attention has generated in many occasion media follow-ups, including front-page articles in the main newspapers, and pressure from public opinion. In other words, having a story related to governmental information in the front page of many national papers for a numbers of days has a clear multiplying effect on the impact of access. This has forced the government to correct or cancel some programs once opacity, excesses or corruption was revealed. For instance, the Office of the President ceased buying expensive clothes for the First Lady and the shopping list of previous acquisitions was revealed, due to a request for information. The expenses, use and destiny of the budget to finance the transition between administrations is now public, thanks to the publicity generated by another request for information. There is greater control on grants and financial donations to unions and non-governmental groups. Access to information concerning the financial management of public trusts is now possible. Criteria and allocations of subsidies are now disclosed at the community level; military procurement is now public. These are only a few of the many success stories that were made possible thanks to media requests, coverage and follow-up.

Social pressure for disclosure of government records is a new element in the equation for fighting impunity and corruption, one we would like to help strengthen. In this sense, is it essential to encourage demand for information on the part of strategic social actors, as well as to help reporters involved into investigative journalism, civil society groups that

could enhance their performance with the tool of access to information, or businessmen involved with provision of goods and services to government and procurement.

Looking to the other side of the social spectrum and driven by these concerns, since August 2005, IFAI launched the *Proyecto Comunidades* with the support of the William & Flora Hewlett Foundation. This program seeks to identify the best strategy for dissemination of the right to know and the use of the LAI within marginalized social groups, that is, social groups that under normal conditions would not be able to exert this fundamental right. After two years of activities, results of the Communities Program indicate that these groups can search, gather and obtain the technical and human resources to request information. However, one necessary condition is that their efforts be accompanied by a grass-root organization which they can trust.

Up to September 2007, 20 organizations from 7 states have participated in the Program. They have linked the right to information to various substantial and diverse activities: environment, productive projects, intra-family violence, sustainable economic activities, and human rights, among other. Beneficiaries of the Program are also diverse: teenage groups, women, children in schools and street children, farmers, artisans, educators, prisoners, municipal authorities and indigenous people who can only speak *nahuatl* and *mixteco*.

Some of the experiences are worth mentioning here. In the city of Monterrey, Ciudadanos en Apoyo a los Derechos Humanos (CADHAC), is working with federal prisoners. A study from 2005¹ reports that 46% of the prison population do not have any information regarding their behavior status and detected that the unit in charge of updating this information did not responded requests, especially related to early release due to good conduct. In this context, CADHAC helped prisoners to use the LAI and submit applications to request personal records containing the files of each of the prisoners and the status of the anticipated process for freedom. The Public Security Department denied access to the requests, so the applicants filed a complaint to the IFAI. Thus, simple by using the LAI and obtaining IFAI's intervention, some of the procedures went forward after months and in somecases years of stalemate.

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¹ Ciudadanos en Apoyo a los Derechos Humanos, *Diagnóstico de la Situación de Derechos Humanos en el sistema penitenciario de Nuevo León, 2005.*

In the State of Jalisco, the *Colectivo Ecologista* supported a local community's efforts to obtain information regarding the territorial status of their land. In spite of pressure from commercial developers, the land-owners decided to reject offers to sell, kept their properties and formed an association in order to sponsor projects dealing with natural resources protection and ecologically friendly development.

The *Instituto Mexicano de Desarrollo Comunitario* in Jalisco, requested information on federal concessions for timber and wood industry production. The responses they received made possible to identify the monopolist distribution of the forest exploitation. This information was the seed for the development of a project for environment protection and forest conservation that brought together land-owners, community leaders, local government authorities and environmental groups.

In Veracruz, the *Centro de Servicios Municipales Heriberto Jara* requested information related to the allocation criteria of federal regional funds for municipal development. The information was obtained after appealing to IFAI, and this experience has set a precedent that has showed other municipalities how to get information on the distribution of federal resources for local development.

In the State of Mexico, *Guardianes de los Volcanes* requested information on urbanization plans in a strategic area of water resources. This organization discovered that, in spite of the federal restrictions for construction due to the need for water conservation in the hydrologic zone, a big housing construction company owned 22% of the authorizations for the exploitation of the resources. The community, lead by *Guardianes*, organized various strategies, from public demonstrations to legal actions in order to expose the irregularities of the process.

On those accounts, the periodical magazine Cambio reported recently (September 2007): "Among the most prominent results are from the organizations from the state of Puebla, where there was great interest on the part of the Nahuatl, Popoloc, and Mixtec communities, mainly among students in tele-secondary school and high school. The right to information enabled them to learn of the conditions of the programs that provide support in health and productive organizations."

Among the achievements of this Program, some deserve special attention: under certain circumstances, these groups have started an incipient appropriation process of the right to know; at the same time, there has been a strengthening of the group identity through processes of auto diagnosis and the search for solutions by the communities. In the process, the use of the LAI has proven to be an effective tool for empowerment. Finally, the organizations have develop skills for the use of public information within more general strategies aimed at increasing the well being of the communities and empowering them in the relationship with local and federal authorities. The replication of these lessons is a grand public policy challenge for the access to Information Authority, for the right to know can only meet the challenge of empowerment when used by citizens. Magazine Cambio reported: "Thanks to the tools of transparency, in the communities that are lagging furthest behind socially, social assistance programs are now implemented punctually".

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TECHNICAL BOXES: CONCEPTION OF THE TOOLS, CHRONOLOGY OF IMPLEMENTATION AND BUDGET FEATURES

1. Original conception of the tools

In the case of SISI, the LAI clearly established the need to develop technologies that would facilitate citizens' exercise of their new information rights, making it clear that a new electronic system was needed to comply with the mandates of the law. Conceived at IFAI by Commissioner José-Octavio López, the Ministry of Audits and Administrative Development of the Federal Government took charge of developing the technology behind SISI, which was transferred in its entirety to the IFAI on 2004.

In the case of Portal-Transparencia, the IFAI has consistently monitored agency compliance with the mandatory disclosure requirements established in the LAI. Through this monitoring and evaluation process, the IFAI detected deficiencies across agencies in terms of both the quality and accessibility of the information published in compliance with the mandate. The General Direction for Coordination and Monitoring of the Federal Public Administration coordinated with a small technological development firm to create the standardized format for Por-Transparencia. Through the technology developed in this process, the ZOOM search engine was also made possible.

In terms of outside actors who have played a significant role in the conception, development and implementation of these 3 electronic tools for information access, across all 3 projects civil society, local governments, and users have participated in improving their usability.

In the case of the ZOOM search engine, the development of the technology and implementation of the system was in direct response to user demand to improve the *searchability* of previous information requests, IFAI resolutions and related documentation. Civil society actors and system users were active participants in the development of the search engine, helping to define search criteria and characteristics for the presentation of search results that would prove most useful to meet their needs. The strongest supporters of this search engine are those civil society actors and academics integrated into the network, at www.derechoasaber.org.mx.

Infomex has been implemented in response to demand by local governments to provide users accessible means for requesting information at the state and municipal levels.

The strongest criticism of these 3 electronic tools to date has come from a civil society organization whose goal is to evaluate electronic systems from the perspective of usability. The Center for the Study of Usability recently released an evaluation noting that these systems still require that users take several steps to reach the information they desire, and a relatively large "learning curve" for their correct use. They also showed that these tools are highly technical, especially in terms of a general audience relatively unfamiliar with the Internet.

2. Policy development chronology

Chronology of implementation:

SISI:

LAI passed: 2002

SISI open to the public: June 12th, 2003

IFAI Data Center: May, 2005

Portal-Transparencia:

Project conception and initiation: December 15th, 2005 Implementation: February 15th, 2007

Compilation of data: September, 2007

ZOOM:

Project initiation: October, 2006

Implementation: January 15th, 2007

INFOMEX:

Mexico City: October 31st, 2006

Chihuahua: January 1st, 2007

Municipality SP Garza García: October 15th, 2006

Municipality Mexicali: March 26th, 2007

Nuevo León:

August 15 th, 2007

Baja Californa, Jalisco (State and Municipalities),

Veracruz, Coahuila, municipalities of Puebla, Durango and Monterrey:

Early 2008

Over time, the IFAI's strategy to implement and improve these tools has continuously evolved in response to demand and accumulated experience. The main goals have been to improve the usability of these tools, while engaging in active publicity campaigns to increase awareness and demand.

The main future goal is to implement Infomex in as many state and local governments as possible. Currently, projects are underway to transfer Infomex to the states of Jalisco, Aguascalientes, Baja California and Nuevo León. On the municipal level, Monterrey and the city of Durango have also requested the technology. In Jalisco, two municipalities have also requested the technology, and in Aguascalientes the technology will apply to all branches of government, as well as municipalities.

3. Current operating budget

Any incurred cost related to the implementation of these technologies is paid for out of the IFAI's annual budget. The total annual operating for the entirety of the IFAI is approximately 20 million USD. The total costs for each of the three electronic innovations described above are the following:

SISI

The development of the technology was paid for by the Ministry of Audits and Administrative Development. Costs incurred by the IFAI for the operation and maintenance of the system are in the form of staff time dedicated to ensure its correct implementation. They are: 1 Department Head (full time dedicated to SISI) starting May, 2005, and 1 Department Head (part-time dedicated to SISI).

Por-Transparencia

The development of the technology, for which the IFAI contracted an external development company, was completed at a total cost of approximately \$324,000 USD. The purchase of relevant Internet software cost approximately \$18,100 USD, for a total of \$342,100 USD investment in technology. Human resources costs are: 1 Department Head (full time dedicated to Por-Transparencia) starting February, 2006, 2 Department Heads (full time dedicated to technical assistance to government agencies), and during the design and implementation phase also included were 1 Department Vice-Head (full time), and 1 Area Director and 1 General Director (part time).

ZOOM

The technology for the ZOOM search engine was acquired through the technology developed in Por-Transparencia. Human resources costs were: 2 Department Heads and 1 Assistant Director (full time, 3 months).

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ICT as Tools to Facilitate the Right to Information: The Case of Mexico

Juan Pablo Guerrero IFAI

November 2007



Instituto Federal de Acceso a la Información Pública

INTRODUCTION

- The most relevant component for the implementation of the Law for Access to Information (LAI) in Mexico has been the use of ICT
- LAI clearly establishes that anyone can request information from the Mexican government, whether or not she or he is a citizen of Mexico
- Three major information tools were developed to facilitate the exercise of these new information rights



- Federal Institute for Access to Public Information (IFAI): independent body charged with regulating, monitoring and enforcing the application of the LAI
- Executive Branch: 240 agencies, 2.8 million public servants, and 95% of the federal budget (State and Local Governments not included)
- Applicants can complain to the IFAI, who determines whether or not the initial agency response was appropriate; when applicable, IFAI mandates the disclosure of the information
- No need for lawyers or advanced technical knowledge



Instituto Federal de Acceso a la Información Pública

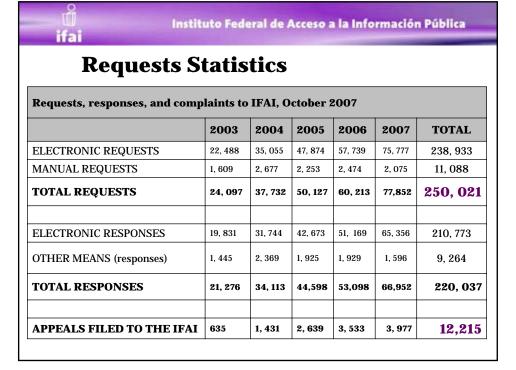
Information Request System - SISI

www.sisi.org.mx

- □ SISI makes possible to anyone to:
 - Request information from the Federal Government
 - Follow-up on the request
 - Retrieve the agency's response
 - File an appeal if the response is unsatisfactory
- □ Anyone can file an information request from anywhere, any time



- 15 million Mexicans have access to the Internet (15.3% of the total population of 105 million)
- June 2003 October 2007: 250,000 information requests (95 % processed electronically)
- Substantial activities of the federal agencies: 8.7%
- Procurement and contracts: 7.8%
- Information on procedures for citizens: 5.7%
- Paychecks and salaries: 4.3%







Información Mexicana - Infomex

www.infomex.org.mx

- ☐ SISI's technology is transferred to local Governments
- ☐ Infomex received in 2005 a grant from the World Bank
- ☐ It makes possible the adaptation of the system to local legislation



Instituto Federal de Acceso a la Información Pública

- A recent Constitutional reform extends the scope of the right to information: all local governments have to adopt ICT to provide access to government records
- The main future goal is to implement Infomex in as many State and Local Governments as possible
- Currently, Mexico City and Chihuahua Governments are using Infomex or are in the process of implemeting the program; Infomex transfer to the states of Jalisco, Aguascalientes, Baja California and Nuevo León are underway





ZOOM - www.ifai.org.mx

- ☐ Advanced web-based search mechanism
- ☐ User-friendly: by keyword, date, or agency
- ☐ Anyone can consult the system of public information
 - Requests submitted to the Federal Executive Branch
 - Responses from Government Agencies
 - Complaints filed, IFAI's rulings and disclosed information



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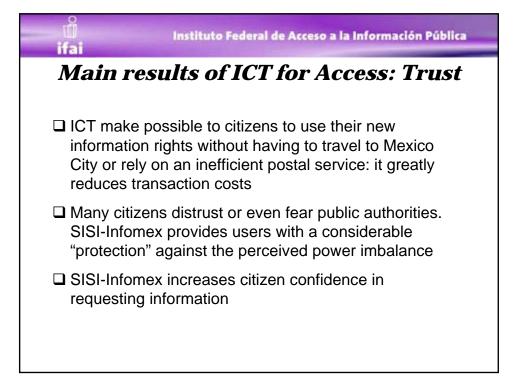
Transparency Website

portaltransparencia.gob.mx

- Web system that organizes, systematizes and homogenizes the presentation of information across agencies
- Makes possible to user to access to the majority of Executive Branch disclosure requirements in one single location
- ☐ Users are no longer required to consult each agency's individual website



- More than 3 million visits in 5 months of operation:
 15,000 searches per day average
- 25% searches to the directory of public officials; 17% to salaries and benefits; 15 % to procurement and contracts; and 6% to authorizations, licenses and concessions





Main results: IFAI's perspective

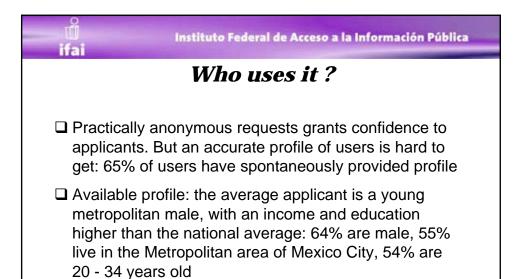
- ☐ The use of electronic systems facilitates monitoring of agency compliance and reduces the cost of supervision
 ☐ IEAL can easily monitor tronds and identify readblocks.
- ☐ IFAI can easily monitor trends and identify roadblocks to access, and quickly intervene to address problems as they arise
- ☐ ICT simplify and improve the IFAI's ability to supervise and enforce effectively and efficiently



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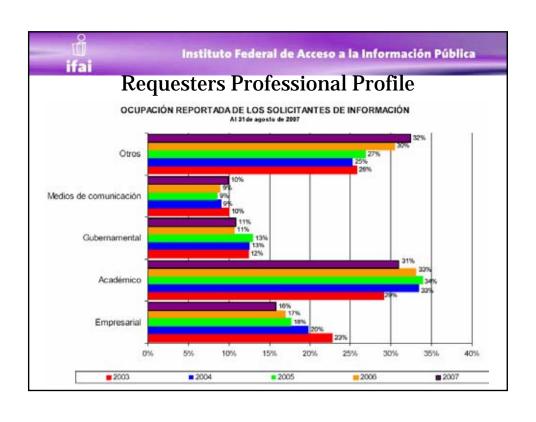
Main results in bureaucratic culture

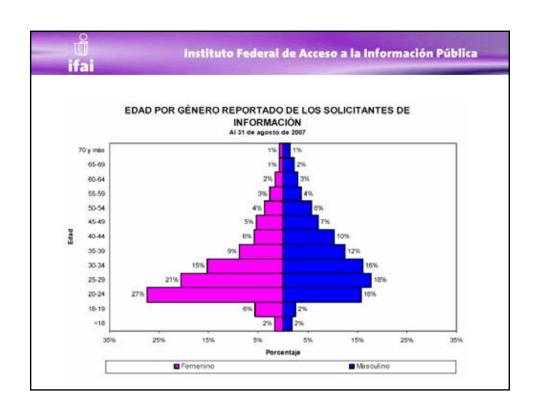
- ☐ The use of electronic systems facilitates monitoring of agency compliance and reduces the cost of supervision
- □ Dwelling on questions of who is requesting information and why is now eliminated
- No longer acceptable for government officials to deny access for fear of the motivation behind the request
- ☐ Reduces the tendency to provide information on a discretional basis
- Bureaucracy views disclosure of information in a new, less threatening light

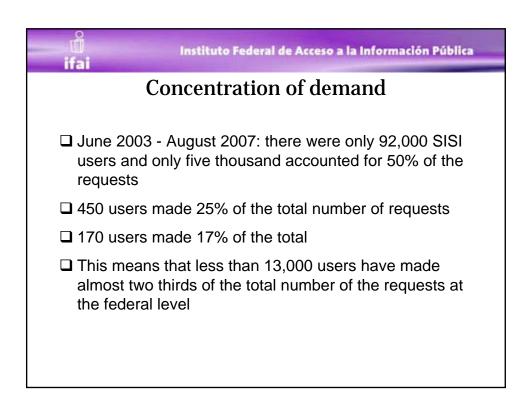


□ 32%: academic sector; 18%: business sector, 12%:

bureaucrats; 9% journalists







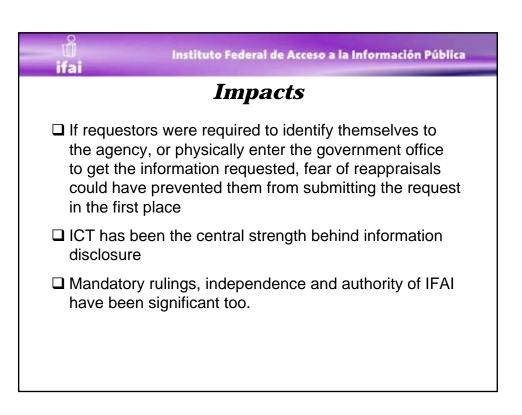


User Concentration

October 2007

Ranks	Number of users	Total r	equests
1 request	68,306	68,306	28.2%
2 requests	11,745	23,490	9.7%
3 - 5 requests	7,671	27,807	11.5%
6 - 10 requests	2,585	19,136	7.9%
11 - 20 requests	1,317	19,327	8.0%
21 - 50 requests	786	24,362	10.1%
51 - 100 requests	274	18,785	7.8%
101 - 200 requests	102	14,643	6.1%
201 - 300 requests	36	8,682	3.6%
301 – 400 requests	16	5,274	2.2%
401 and over	16	11,981	5.0%

Lessons & Impacts SISI greatly reduces the transaction costs for government agencies in this process ZOOM and Portal-Transparencia, by making it easier for interested parties to consult previously released public information, also reduces labor costs on government agencies to implement LAI Information requests have shed light on a large number of government operations previously shrouded in secrecy





Weaknesses

- □ Complexity of ICT and its usability for a wide audience with differing levels of experience using computers and the Internet
- ☐ ICT for access to public information are currently limited to the Federal Government and a couple of States of the Union
- □ SISI does not make possible to verify the *quality* and *relevance* of the information provided by agencies
- ☐ Concentration of the demand undermines the positive effects of the right to know in Mexico



Instituto Federal de Acceso a la Información Pública

Challenges

- ☐ Encourage demand on the part of strategic social actors (investigative journalists, specialized civil society groups, businessmen)
- □ Proyecto Comunidades: seeks to identify the best strategy for dissemination of the right to know within marginalized social groups
- □ After two years of activities, results indicate that these groups can be empowered by requested information, but a necessary condition is that their efforts be accompanied by a grass-root organization which they can trust



Juan Pablo Guerrero Commissioner

Federal Institute for Access to Public Information Mexico, October 2007

<u>juanpablo.guerrero@ifai.org.mx</u> <u>www.ifai.org.mx</u> International Conference
of Information Commissioners
26-29 November 2007 | Wellington | New Zealand

María Elena Pérez-Jaén Zermeño

Information Commissioner

Federal District Institute of Access to Public Information INFODF (Mexico City)

Paper delivered at the

5th International Conference of Information Commissioners

Strengthening Access to Public Information in the Capital of Mexico

Introduction

The process to provide real and effective access to public information in the Federal

District (Mexico City), the nation's capital, has neither been as easy nor as rapid as

occurred at the federal level. Since the initiative for an Access to Information Law was

first presented to the local congress in December 2001, a diversity of obstacles had to be

overcome. Currently, this process advances perhaps slower than we may wish, but

certainly in an irreversible direction in one of the largest cities in the world.

The purpose of this presentation is to share with you a unique and ambitious project in

our country designed to broaden the exercise of the right to public information in Mexico

City through the use of the telephone. Known as TEL-INFODF, this program is being

implemented by the Federal District Institute for Access to Public Information (INFODF

for its acronym in Spanish). I have the privilege of serving as one of six Commissioners

on the INFODF.

This innovative program gives all the population – regardless of social or economic

status – the ability to request information and seek guidance with respect to the process

of public information access as well as access to personal data by phone.

I wish to highlight five points in this presentation:

1) To offer some general figures on the Federal District to help provide a sense of the

scope of the task of providing access to information in Mexico's capital;

2) The integration and functioning of the INFODF, which is similar in many respects to

the Federal Institute for Access to Public Information (IFAI for its acronym in Spanish),

but the Federal and the Local Laws have substantial differences;

3) The antecedents to the Transparency Law in the Federal District;

4) The current situation relating to the exercise of the right of access to information in

the Federal District;

5) The TEL-INFODF system; and

Some Conclusions

1) General Figures on the Federal District

Mexico City is the seat of the federal government. It represents the greatest demographic

concentration in the nation as well as the center of the nation's financial, economic,

social and cultural sectors. A brief overview helps provide a sense of the scope involved

in providing effective access to information in the Federal District.

The Federal District, known internationally as Mexico City, represents 0.1% of the

national territory yet supports a population of approximately 9 million or roughly 9% of

the nation's population. Including the 40 adjacent municipalities in the neighboring

states that make up the larger metropolitan area, the total population surpasses 22

million.

The population density in the Federal District alone is more than 5 thousand inhabitants

per square kilometer. Together, the Federal District and the neighboring state of Mexico

2

constitute the largest labor markets in the country with 3.9 and 5.7 million workers respectively. As of the first trimester 2007, the rate of female employment in the Federal District stood at 48.4%, slightly above the national average of 41.1%.

According to the National Institute of Statistics, Geography and Computing (INEGI for its acronym in Spanish) the Federal District contributes 21.84% of the Gross Internal Product.

In terms of the public sector, there are 83 public institutions within the Federal District that are subject to the Transparency and Access to Information Law, grouped within four large sectors: executive, legislative, judicial and autonomous entities, including the INFODF. The executive branch is the largest area with 72 areas under the obligation of the transparency law, representing more than 190,000 employees. With the 11 remaining areas, this branch of the government encompasses approximately 205,000 workers: the second largest bureaucracy in the nation behind the federal government.

2) Integration and Functioning of the INFODF

The INFODF is an autonomous entity composed of six citizen commissioners or counselors who work collectively. Like the IFAI at the federal level, INFODF works like an administrative court of appeals. This means that when a petitioner for public information disputes the response provided by the public agency or fails to obtain a response to a request for information, the individual then has the right to request a revision from the INFODF. The INFODF then has a maximum period of 45 days to resolve the dispute by either revoking or modifying the ruling of the public agency or upholding their initial response. The INFODF can also order the agency to provide the information requested or order the reclassification of the requested information.

In contrast to IFAI which only has jurisdiction over the executive branch, the INFODF exercises authority over all the local branches of government (executive, legislative, judicial) as well as the autonomous agencies of the Federal District (i.e. the Electoral Institute and Electoral Tribunal, the Administrative Court, the Human Rights Commission, the Arbitration and Conciliation Board, the Autonomous University of Mexico City, and the INFODF itself).

Another difference with the Federal Government relates to the response periods specified in the law. While federal agencies have 20 working days to respond to requests for information with an option of obtaining an extension for another 20 days, the Federal District faces a period of just 10 days with an optional extension of another 10 days.

One very important difference between the Federal and local Law is that the latter has the "Proof of harm".

3) Antecedents for the Federal District's Transparency Law

The prior administration in the Federal District (2000-2006), headed by the elected mayor Andrés Manuel López Obrador, largely resisted transparency, impeded the exercise of the right to public information, and failed to provide a public accounting of activities. The first initiative for a Transparency Law was presented on December 7, 2001. It included the creation of an autonomous entity, the Council of Public Information (CONSI for its acronym in Spanish), to guarantee the right to information. This initiative was approved by the Legislative Assembly (ALDF for its acronym in Spanish), the local congress, but vetoed by the mayor who opposed the creation of an independent organ with its own budgetary autonomy to monitor compliance. The mayor, instead, sought a weaker, honorary advisor to fill this role. After various legal procedures and a decision by the national Supreme Court regarding questions of constitutionality, the CONSI was finally installed on March 2, 2004, but with 18 commissioners, the majority of which came from the city government itself. This maneuver rendered the entity inoperable (I was part of it as one of the three citizen counselors).

On October 28th, 2005, the Legislative Assembly approved a major reform to the Transparency Law. Among it features, this reform

Dismantled the 18 member CONSI, replacing it with a five member INFODF (A further January 5, 2007 reform added a sixth commissioner in accordance to a Supreme Court ruling calling for my re-incorporation into the Institute);

- Eliminated the requirement of having to present identification in order to make a request for information;
- Broadened the transparency requirements for public entities within Article 13
 (this encompasses the nature of the information public entities must make available on the internet);
- o Introduced the principal of "proof of harm," which authorities denying a request for information must present in order to establish the reserved or secretive nature of the information;
- Established "public versions" of information that contain some restricted information;
- o Introduced the option of presenting requests for information electronically; and
- o Called for new regulations relating to the handling of archives and personal data.

Chronology of main reforms

- May 2003: The publication of the Transparency and Access to Public Information Law of the Federal District (LTAIPDF, for its acronym in Spanish).
- o December 2003: First reform of the LTAIPDF.
- October 2005: Second reform of the LTAIPDF calls for the elimination of the CONSI and the creation of the INFODF, among other changes.
- o May 2006: Fifth reform of the LTAIPDF eliminates the participation of government representatives on the INFODF.
- January 2007: Sixth reform of the LTAIPDF adds a sixth commissioner to the INFODF.

4) Current climate surrounding the exercise of the right to public information in the Federal District.

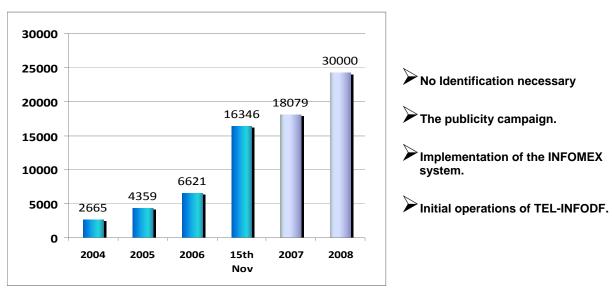
The Federal District began to enjoy significant and sustained progress in providing access to information following the October 2005 reform and the installation of the INFODF on March 31, 2006. The implementation of the Electronic System of Requests

for Information known as *Information México* (INFOMEX for its acronym in Spanish), which began operation on October 31, 2006 for the vast majority of public entities within the executive branch and gradually thereafter for the other branches of government and the autonomous entities, went a long way in providing real access to information, facilitating the request for information by internet from any location on earth (www.accesodf.org.mx). The Federal District was the first entity in the country to install INFOMEX.

During the first trimester 2007, a total of 7,745 requests for information were received compared to 2,747 such requests during the same period in 2006: an increase of 181%. Today, a total of around 16,000 requests have been received and processed. Any request for information, it should be noted, may contain more than one inquiry. Up to the first trimester of 2007, 63% of the requests were handled through the electronic system INFOMEX. The increase in the number of information requests is particularly impressive, climbing from 2,665 in 2004 to 4,359 in 2005 and 6,621 in 2006. At the close of this year we expect around 18,000 requests and for 2008 about 30,000.

The next table shows the breakdown of the requests. The most interesting figure is that the academic and the students who accounted for 23% of the total.

FACTORS CONTRIBUTING TO AN INCREASE IN THE NUMBER OF REQUESTS



SOURCE: Federal District Institute for Access to Public Information, Mexico City 2007

CLASSIFICATION BY TYPE OF EMPLOYMENT OF INFORMATION APPLICANTS

First Semester 2007 – 7,745 requests

Type of employment

(571 Requests- 7.4%)

	Applicants	Percentage
Business men	30	5.3
Mass media	127	22.2
Retailer	31	5.4
Civil Servant	49	8.6
NGO	15	2.7
Academic or student	133	23.3
Employee	75	13.1
Political association	12	2.1
Home	15	2.6
Other	84	14.7
Total	571	100

Information does not exist on this variable in 7,174 requests in the First Semester of 2007.

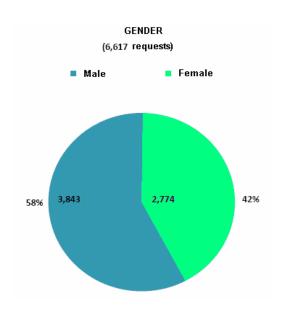
Schooling

(408 Requests - 5.3%)

	Applicants	Percentage
Without studies	4	1.0
Elementary	22	5.4
Junior high school	30	7.3
High school	71	17.4
Bachelor	259	63.5
Master or Ph. D.	22	5.4
Total	408	100

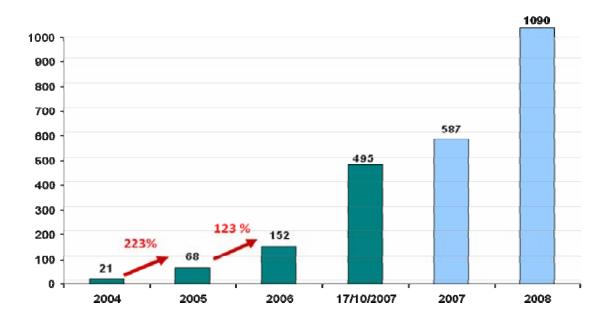
Information does not exist on this variable in 7,337 requests in the First Semester of 2007

DURING FIRST SEMESTER OF THIS YEAR, THE NUMBER OF FEMALE INFORMATION REQUESTS WAS VERY SIGNIFICANT IN PROPORTION WITH MALE REQUESTS (42 PERCENT)



In terms of the number of appeals or reviews, in 2005 there were 64 such appeals processed while in 2006 the number climbed to 154. So far in 2007, over 500 appeals or reviews have been filed with the INFODF, and we calculate in 2008 more than a thousand appeals.

APPEALS OR REVIEWS



Such figures reveal an important dynamic in the exercise of the freedom of public information in the Federal District. As has occurred at the federal level, in Mexico City the requests for information have not only increased quantitatively, but they have also become far more complex with many requests reaching well beyond mere academic interests or requests for budgetary information to focus on real problems or situations affecting the daily lives of citizens. For example, requests have been made for official studies relating to solid waste disposal, the bank accounts of public agencies, the logbooks of patrol cars and ambulances, the credentials of market inspectors, the construction manifests of buildings affecting neighborhoods, the justification of public roads as well as the technical studies supporting them, the receipts of public sector purchases, and taxi permits, etc.

5) The TEL-INFODF system

I turn now to the central focus of this presentation: the TEL-INFODF system.

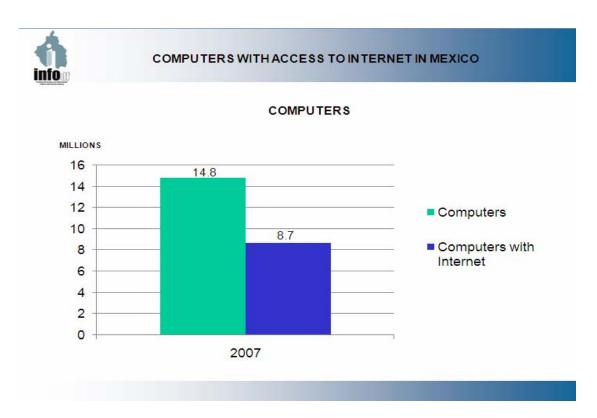
What is the TEL-INFODF?

The TEL-INFODF is a system that allows citizens with access to a phone to consult with an operator who can orient the citizen about their right to information and the obligations of the government under the Transparency and Access to Public Information Law of the Federal District and who can help facilitate a request for information. As is well known, the internet represents a fundamental tool providing quick and easy information and communications. Yet, as a developing country, large segments of Mexico's population, even in the Federal District, do not yet have access to this technological tool and thus are unaware of the INFOMEX system.

As of October 2005, 37.2% of homes in the Federal District contained at least one computer, according to the II Count of Population and House 2005 of the INEGI and 25% of the population has had access at least once to the internet either at home, work or an internet café. At the national level, one in five citizens has regular access to the internet. Though low, this is nonetheless a substantial number considering that as little as ten years ago less than a tenth of that number actually used the internet, according to a study by the Social Investigation Institute (IIS for its acronym in Spanish) of the

National University (UNAM). According to this same study, 8 of every 10 individuals living in poverty do not have access to the internet. Indeed, when compared to other Latin American countries, Mexico ranks 8th in the use of the internet, behind Costa Rica, Argentina, Chile, Uruguay, Paraguay, Venezuela and Puerto Rico.

The following table shows the number of computers and those with access to Internet in Mexico, a country with around 106 millions of inhabitants.

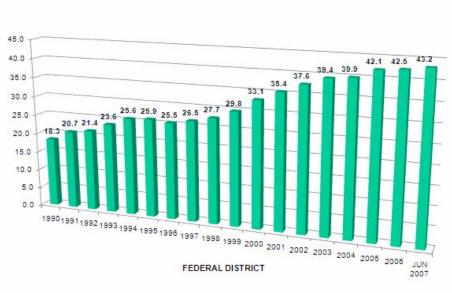


SOURCE: International Telecommunication Union and COFETEL Mexico.

By contrast, almost 100% of the population has access to a telephone, either in the home, work, nearby public phone, or cell phone. According to figures from the Mexican Federal Commission of Telecommunications, in 2006 there were 42 fixed lines per 100 people, more than double the level in 1990. In terms of mobile lines, while in 2000 there were 26.4 lines per 100 inhabitants, by 2006 that figure had grown to 91.3; in other words, the quantity of mobile phones in the Federal District increased by more than 300% in just six years.



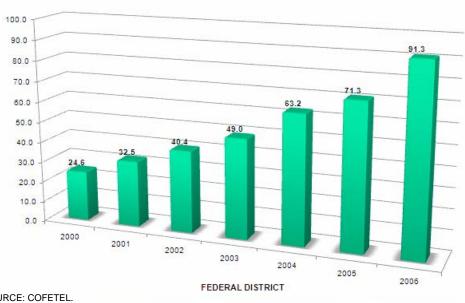
FIXED TELEPHONY DENSITY 1999 - 2007 LINES BY 100 INHABITANTS



SOURCE: Statics and Markets Information Management, COFETEL.



BREAKTHROUGH MOBILE TELEPHONY 2000 - 2006 **USERS BY 100 INHABITANTS**



SOURCE: COFETEL.

Besides the lack of access to the internet, people face other obstacles in requesting information. Many people, for instance, are unable to go to the various government offices to request information either because of the excessive distances or time involved or because of their own physical limitations or handicaps.

Given this situation, the INFODF initiated TEL-INFODF on September 17, 2007, making it the first call center in the country designed to receive requests for public information, thereby putting the INFODF in the vanguard in terms of its provisions for the exercise of the right to information.

How does TEL-INFODF work?

During normal working hours, Monday to Friday, 9:00 am to 6:00 pm, anyone can call 5636-INFO (5636-4636) and speak to an operator to register their request for information. The operator asks about the format the individual would like to have the information provided in – by mail, electronic mail, telegraph, fax, or in person at the government office – and then provides a file number for the request. The INFODF then forwards the request to the appropriate government agencies using the INFOMEX system. The public entity then has 10 days to respond.

TEL-INFODF required an infrastructure of a Call Center to receive multiple calls and well trained agents with access to an information system that allows them to provide information to callers or to process requests for public information. The system presents callers with information on the different types of services offered by INFODF depending on the needs of the user.

To ensure quality control and proper attention to requests for information, regulations require all public entities to register with INFOMEX the precise steps that must be followed to acquire information. This permits greater oversight into the compliance of the distinct aspects of the law regulating the public's access to information.

In the brief period stretching from the start of TEL-INFODF on September 17 to November 9, this instrument has produced the following results:

- o 2047 calls received.
- o 246 calls for general information or orientation.
- o 1801 calls resulting in official requests for information.
- o The calls for general information relate to the processes involved in gaining access to public information.
- The public entities receiving the most requests for information via TEL-INFODF have been: the Commission on Human Rights, the INFODF, and the Fire Department.
- o The principal topics of information requested include: programming and budgeting, financial, and acts of the government.

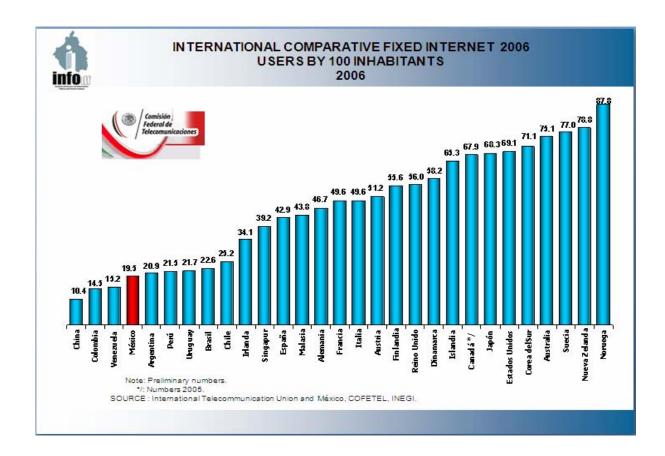
The following table shows the results from TEL-INFODF's first two months of operation. It distinguishes between calls making official requests for information and those for general orientation-type information.

	Two Months Total
Number requests	1801
Number of orientations	246
Total calls	2047

For 2008, the INFODF plans on launching a broad-based publicity campaign in conjunction with civic organizations to help consolidate TEL-INFODF. We estimate an average of a thousand calls per month in the coming year.

Of course, there are representatives from countries here today that probably have no need for such a call center to receive requests for access to information; nonetheless, I wish to emphasize that in countries that are unfortunately behind technologically, a tool such as this has the potential to benefit many people who do not have access to the internet.

The following illustration indicates that in countries like Norway, New Zealand, Sweden, Australia, South Korea, the United States and Japan, the level of internet penetration is extremely high, while in countries like China, Colombia, Venezuela, Mexico, Argentina, Peru, Uruguay, Brazil and Chile, the levels of internet use is quite low.



Providing diverse tools to allow the public access to information is not enough. It is also necessary to promote a broad public campaign and educate the population. For this reason, the INFODF seeks to strengthen its ties with civil society organizations to target the public campaigns to specific sectors of society, especially the poorest, most marginalized and vulnerable segments of society so that they too are able to exercise their rights, to demand accountability from their government, and to monitor government to ensure that their representatives are acting in accordance to the law. This also enhances the ability of the public to make better and more informed decisions.

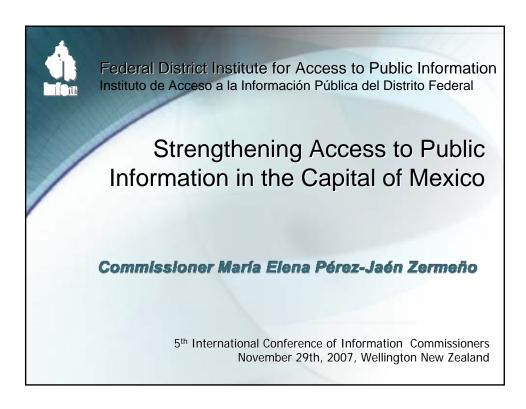
Some Conclusions

1. In the Federal District, the process of moving from a culture of opacity to one of transparency is advancing, perhaps slowly, but in a clear and irreversible direction. This is occurring in large part because society has become more aware of its rights and is increasingly exercising its right to information. This includes not just the increase in the number of requests for information, but also in the complexities of the requests for information. It is important to recognize that the press has played an important role in this process by exposing and denouncing cases of corruption and government opacity.

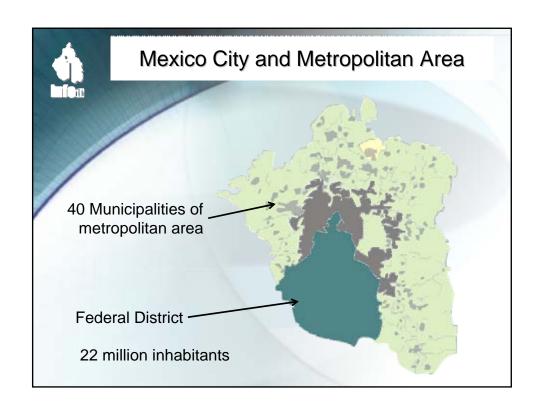
I would contend that today the public administration of the capital is under the constant vigilance of individuals in the city and throughout the country. This is due in part to the combination of the tools provided by INFOMEX, the TEL-INFODF and particularly to the activity of civil society. It is impossible for public servants to remain indifferent in the face of such pressures.

- 2. Transparency should be seen within the Federal District and in all the states of the country as a positive practice for politics and politicians. This means that a posture of greater transparency by the government should restore legitimacy, build confidence among the people, and facilitate electoral competition, eliminating the current practice whereby politicians hide information to protect themselves from attack.
- 3. With the instruments that have been implemented in Mexico City, such as INFOMEX and TEL-INFODF, that promote the people's exercise of their right of information, the willingness of the INFODF to contribute to the construction of a more egalitarian and participatory society -- a citizenry in control of its own destiny -- becomes clear.
- 4. Finally, I believe that the driving force behind all this is and will continue to be the active participation of citizens and the individuals who demand to know what their government is doing, how and why.

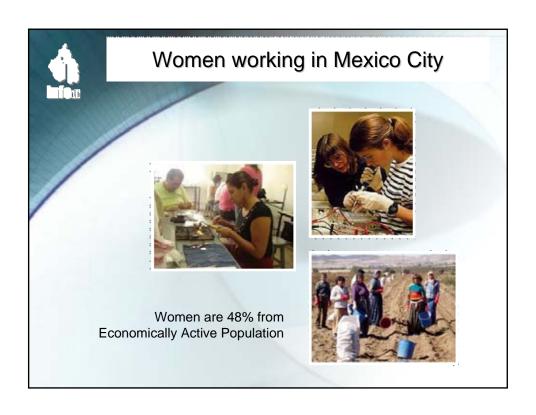
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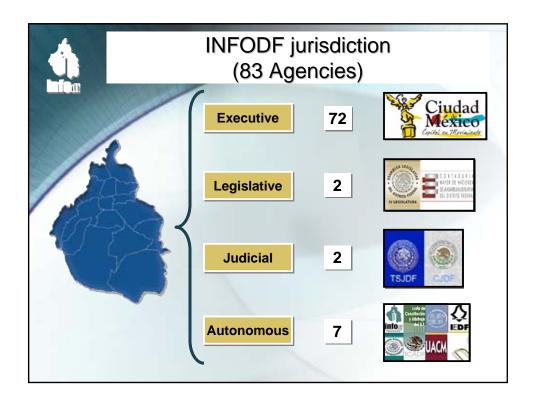


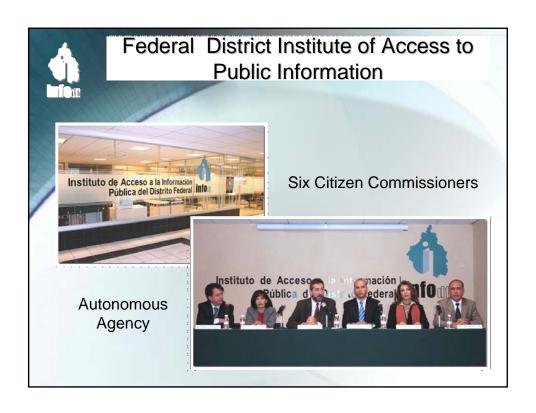


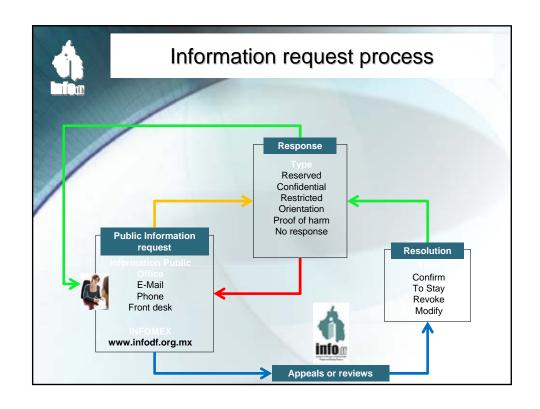


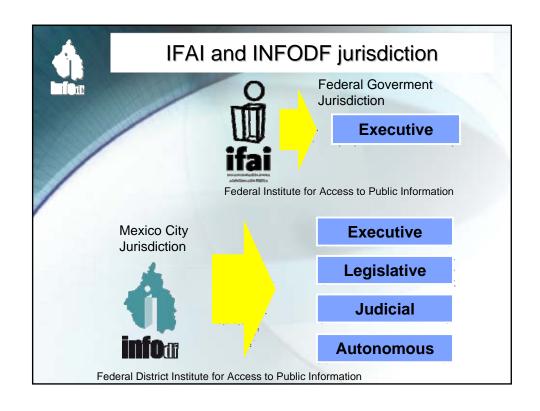


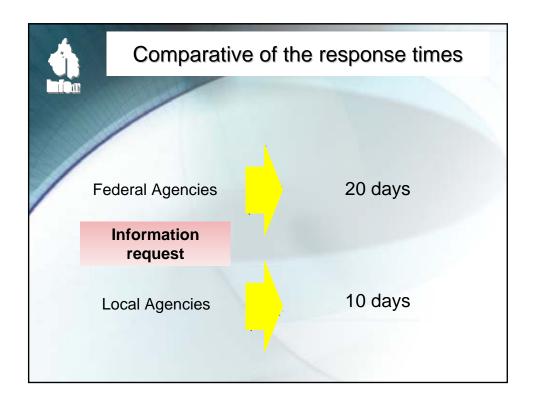


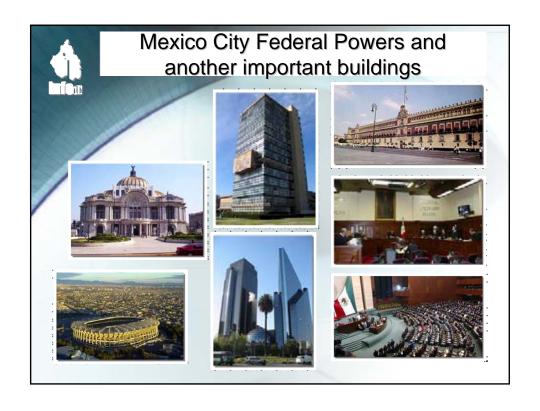


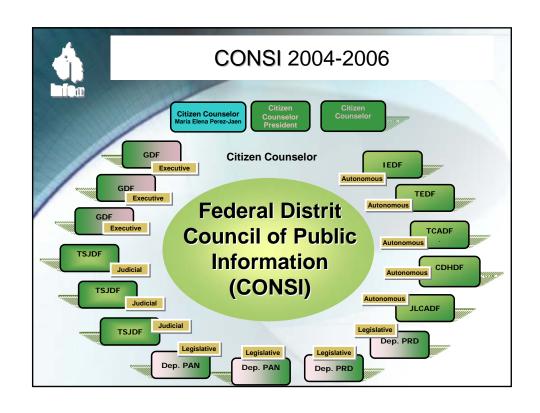


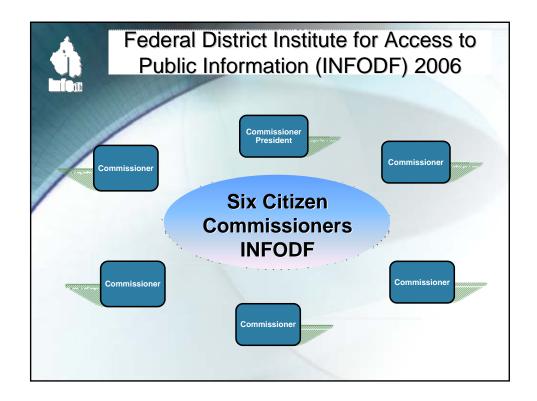














28th October, 2005 most important reform of the local Law

- Dismantled 18 members CONSI, replacing it with a five members INFODF (A further January 5, 2007 reform added a sixth commissioner in accordance to a Supreme Court ruling calling for my reincorporation into the Institute);
- Eliminated the requirement of having to present identification in order to make a request for information;
- Broadened the transparency requirements for public entities within Article 13 (this encompasses the nature of the information public entities must make available on the internet);



28th October, 2005 most important reform of the local Law

- Introduced the principal of "proof of harm," which authorities denying a request for information must present in order to establish the reserved or secretive nature of the information;
- Established "public versions" of information that contain some restricted information;
- Introduced the option of presenting requests for information electronically; and
- Called for new regulations relating to the handling of archives.



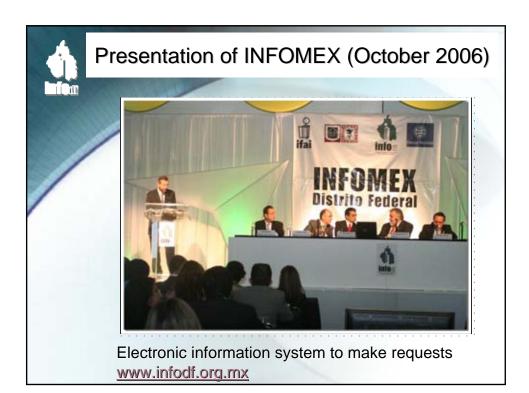
Chronology of reforms

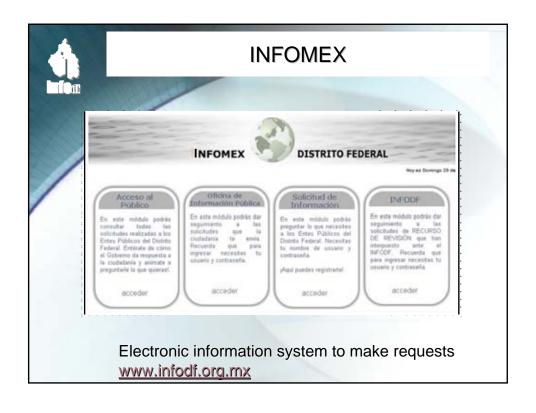
- May 2003: The publication of the Transparency and Access to Public Information Law of the Federal District (LTAIPDF).
- December 2003: The first reform of the LTAIPDF.
- March 2005: The Mayor issues an agreement that abolishes all classification listings and declares all information publicly accessible due to press of media and civil society.

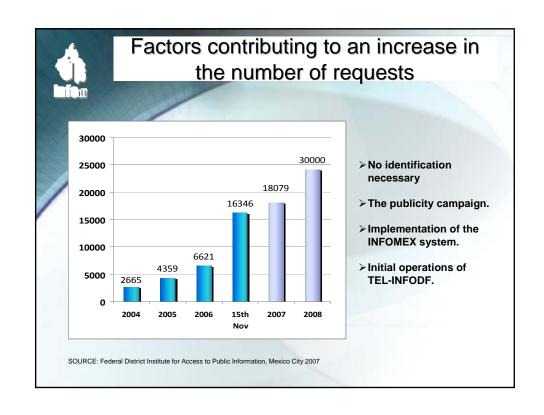


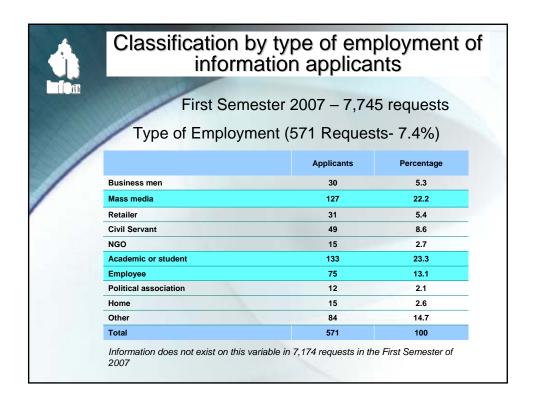
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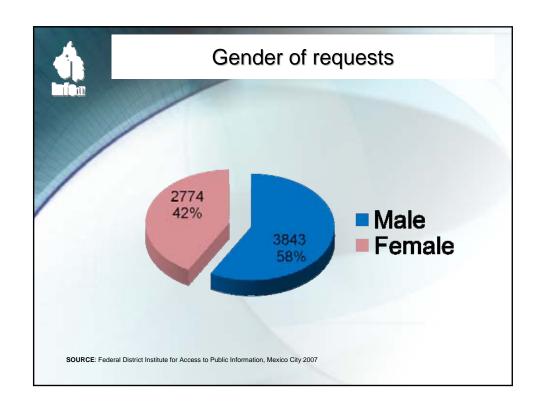
- October 2005: The second reform of the LTAIPDF calls for the elimination of the CONSI and the creation of the INFODF, among other changes.
- May 2006: The third reform of the LTAIPDF eliminates the participation of government representatives on the INFODF.
- January 2007: The fourth reform of the LTAIPDF adds a sixth commissioner to the INFODF.

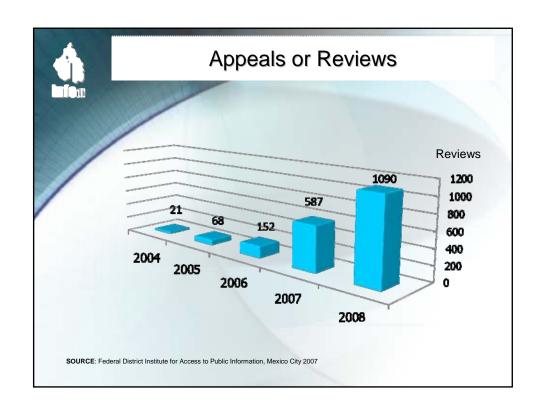
















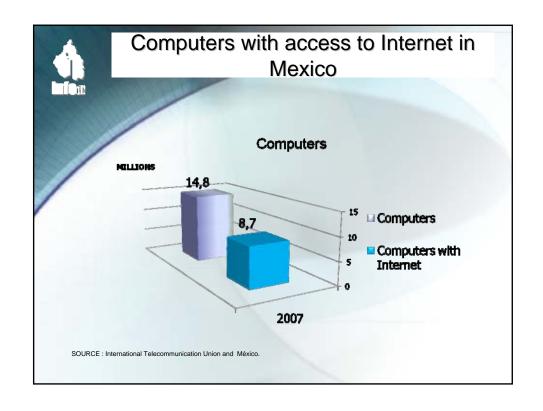


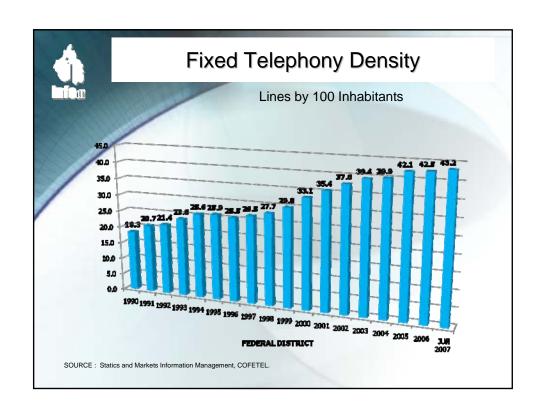


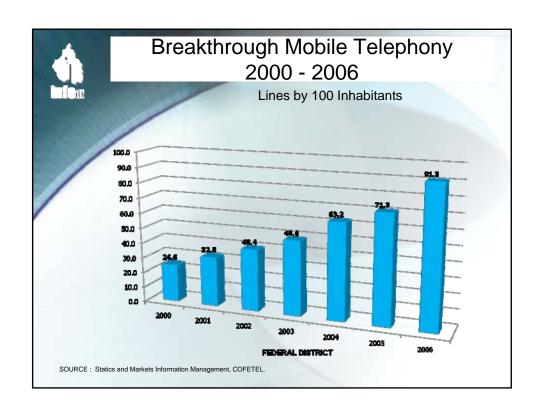




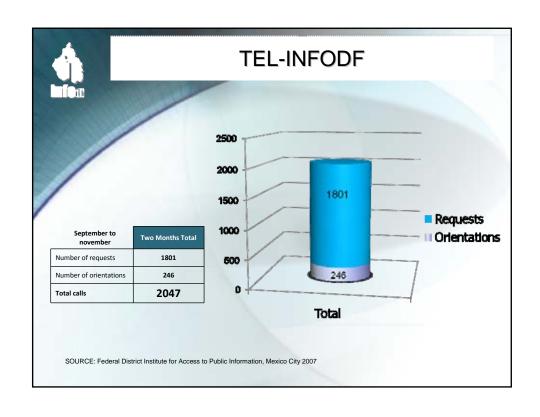


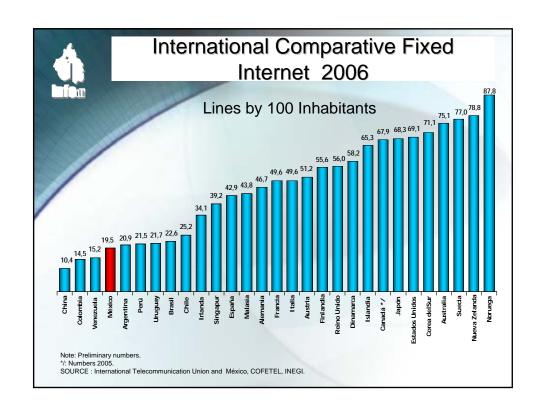








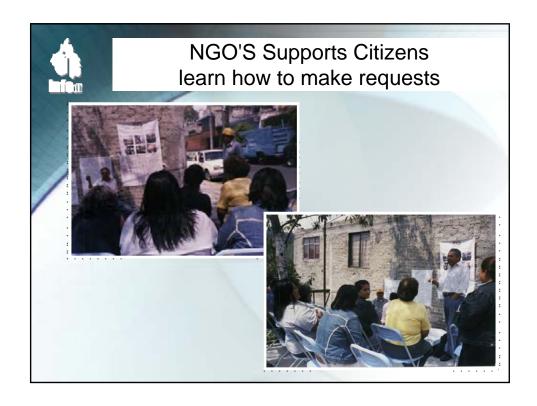


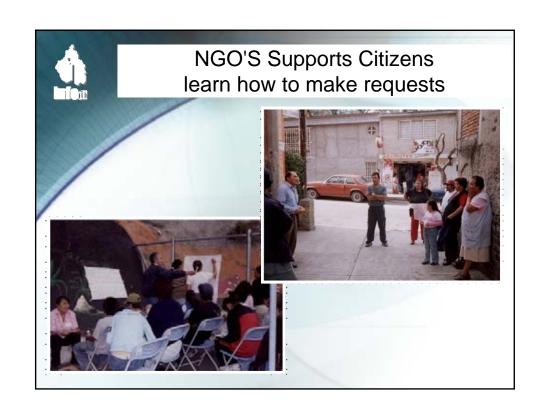


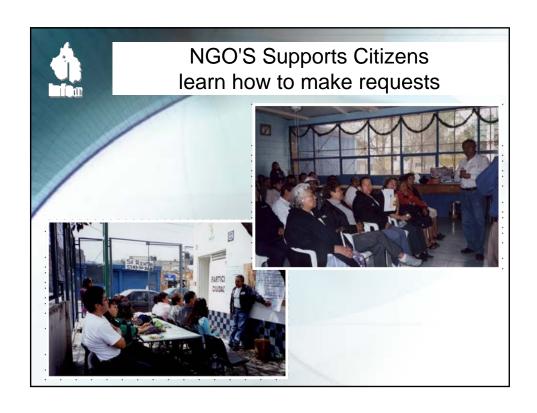


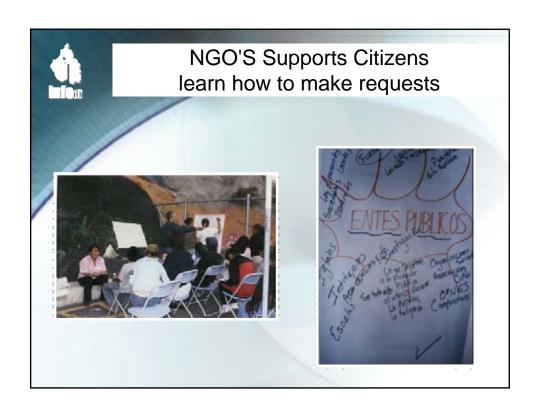


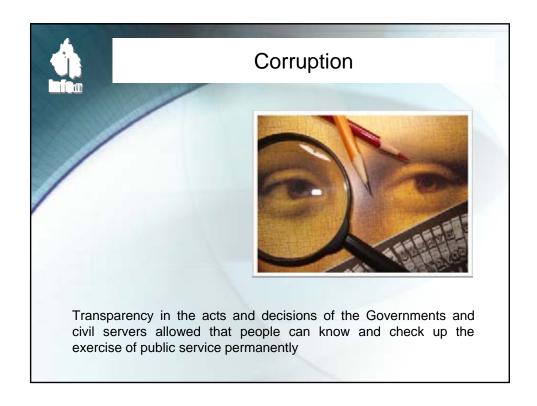


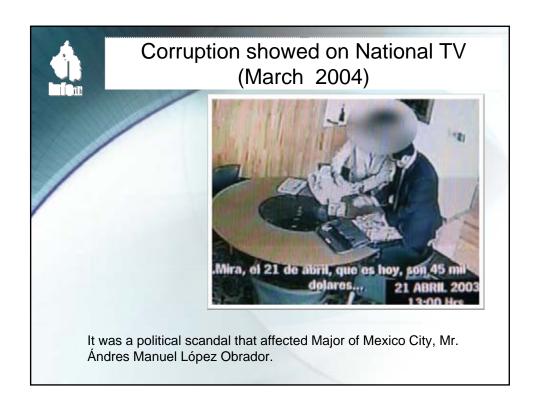
















Instituto de Acceso a la Información Pública del Distrito Federal

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Systems that facilitate access to information: the users point of view

International Centre for Transparency and Access to Information Studies



Using the systems:

- ✓ Usability
- **✓** Interconnectivity
 - Interaction user-public Servant

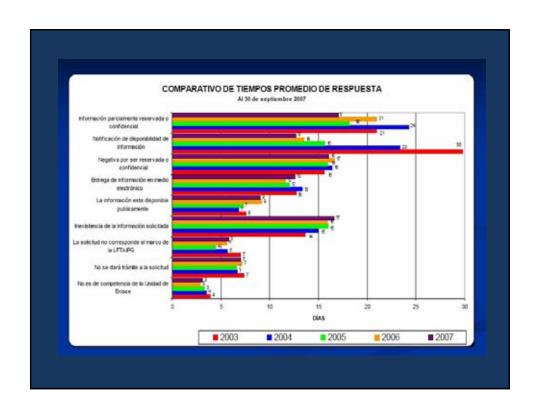




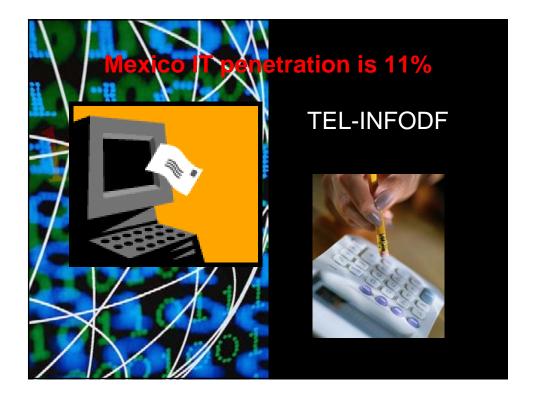


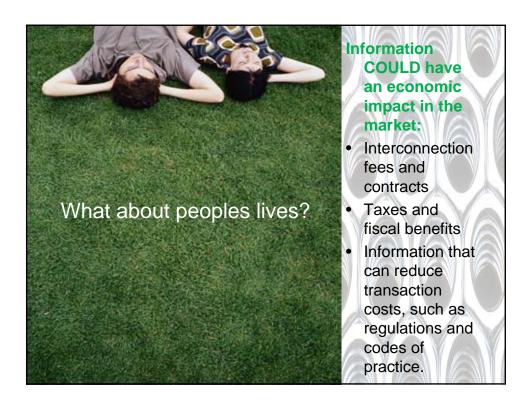
- Punctuality in answers
- Clarification and orientation through the systems
- Fees and bank arrangements

¿What are the real problems of the process?









Lack of empirical data reasons:

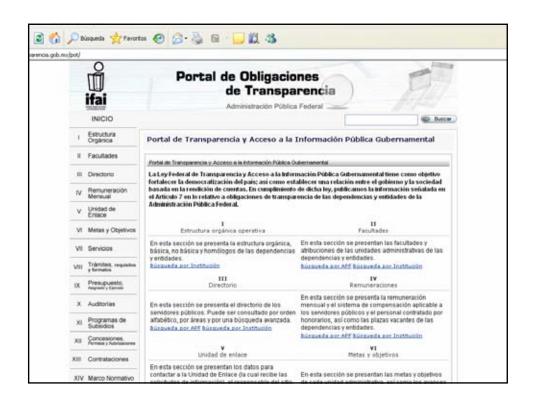
- Limited contact with the users.
- No possibility to do follow up with users.
- Anonymous users.
- Information needs to be processed to have an impact.

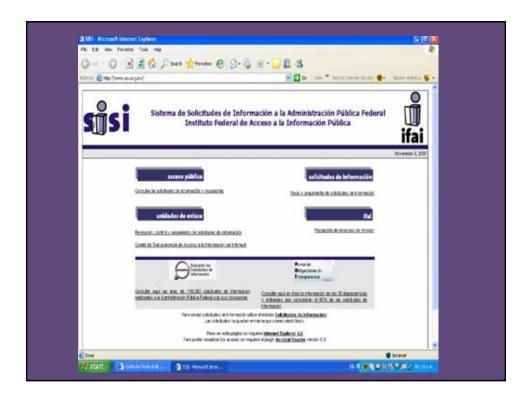
Less information is classified?

- Systems increase the number of appeals presented online.
- More appeals = more information disclosed

Information in portals with the basics
¿is it useful information?

IT DEPENDS









Charmaine Rodrigues¹ Pacific Regional Legislative Strengthening Expert UNDP Pacific Centre

 $\label{eq:Paper delivered} \textbf{Paper delivered at the} \\ \textbf{5}^{\text{th}} \textbf{International Conference of Information Commissioners}$

An Overview of the status of the Right to Information in the Pacific

(To be read in conjunction with the Pacific Information Disclosure Policy Toolkit)

The value of the right to information as a tool to entrench accountable democracy and promote participatory development has yet to be actively recognised by the governments of the Pacific. As Table 1 describes, while most of the member states of the Pacific Islands Forum Secretariat (PIFS) recognise some form a right to access information in their Constitutions, nonetheless, only Australia and New Zealand have yet pass right to information legislation.

PIFS Country	Status of RTI
Australia	There is no provision in the <u>Constitution</u> guaranteeing the right to information. Australia has a federal <u>Freedom of Information Act 1982</u> .
Cook Islands	Article 64 of the <u>Constitution</u> recognises the right to freedom of speech and expression, but there is no reference in the Constitution to the right to information.
	A draft <i>Freedom of Information Bill</i> was developed in 2005 but it is not clear whether it has progressed through Cabinet.
Fed. States of Micronesia	Article IV, Section 1 of the <u>Constitution</u> states that the no law may deny or impair freedom of expression, but there is no reference in the Constitution to the right to information.

¹ The author is currently the UNDP Pacific Centre Regional Parliamentary Strengthening Expert. Prior to joining the UNDP, the author was the Right to Information Coordinator at the Commonwealth Human Rights Initiative in New Delhi. This paper draws heavily on papers authored and information gathered while at CHRI.

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E::: Ialanda	Article 20(1) of the Constitution includes the free-desired and a seek and included the free-desired to seek and included the seek and included th	
Fiji Islands	Article 30(1) of the Constitution includes the freedom to seek, receive and impart information and ideas as part of the right to freedom of expression. Article 174 explicitly requires that Parliament should enact a law to give members of the public rights of access to official documents of the Government and its agencies, as soon as practicable after the commencement of the Constitution.	
	An Exposure Draft FOI Bill was released by the Government in 2000 but lapsed after the 2000 coup. In 2004, civil society launched a Model FOI Bill. An FOI Bill was being developed in 2006, but no progress has been made since the December 2006 coup. The Interim Government included passage of an FOI law in its 10-point plan.	
Kiribati	Article 12 of the <u>Constitution</u> includes the freedom to receive and communicate ideas and information without interference as part of the right to freedom of expression.	
Marshall Islands	Article II, Section 1 of the <u>Constitution</u> recognises the right to freedom of thought, conscience, and belief & to freedom of speech and of the press, but there is no reference in the Constitution to the right to information.	
Nauru	Article 12 of the <u>Constitution</u> recognises the right to freedom of expression, but there is no reference to the right to information.	
	During the 2006/7 review of the Constitution, it was proposed to introduce a specific right to information. It is understood that the Government is likely to endorse that recommendation and move forward with FOI legislation.	
New Zealand	New Zealand's <u>Constitution</u> does not guarantee any right to information. However, the <u>Official Information Act 1982</u> legislates for the right to access information.	
Niue	There is no provision in the <u>Constitution</u> guaranteeing the right to information.	
Papua New Guinea	Article 51 of the Constitution explicitly recognises the right of reasonable access to official documents, subject only to the need for such secrecy as is reasonably justifiable in a democratic society. In 1999, civil society developed a draft FOI Bill.	
Samoa	Article 13(1) of the <u>Constitution</u> recognises the right to freedom of speech and expression, but there is no reference in the Constitution to the right to information.	
Solomon Islands	Article 12 of the <u>Constitution</u> includes the freedom to receive and communicate ideas and information without interference as part of the right to freedom of expression. It is understood that FOI has been include on the Government's legislative agenda.	
Tonga	Article 7 of the Constitution guarantees the right to freedom of speech, expression and of the press, but there is no reference in the Constitution to the right to information.	
Tuvalu	Article 24 of the <u>Constitution</u> includes the freedom to receive and communicate ideas and information without interference as part of the right to freedom of expression.	
Vanuatu	Article 5 of the <u>Constitution</u> guarantees a list of rights and freedoms, but there is no reference to the right to information. In 2005-06, civil society developed a Model FOI Bill.	

Despite the slow progress in entrenching the right to information in the Pacific region, it is encouraging that the Pacific Plan for Strengthening Regional Cooperation and Integration, endorsed by Pacific Leaders at the Forum Leaders Meeting in 2005, specifically references freedom of information. Under the general objective of "Good Governance: Strategic Objective 12" (improved transparency, accountability, equity and efficiency in the management and use of resources in the Pacific), there is a mention of work on 'freedom of information'. The Pacific Islands Forum Secretariat has also been working on information disclosure issues internally, and it is understood to be developing an internal Information Disclosure Policy to guide Secretariat officials and the public.

At a national level, there has been some progress as well. As noted in the table above, Governments have flagged FOI as a area of potential activity in Cook Islands, Nauru and Solomon Islands (and the Interim Government in Fiji has identified FOI as a priority). Civil has also been active in promoting the right to information in Fiji, Vanuatu and PNG, in particular via the various local chapters of Transparency International.

There has been considerable discussion of the value of the right to information in the context of development (see Part 1 of the Pacific Information Disclosure Policy Toolkit for more). Notably however, in the Pacific there are unique implementation challenges – both institutional and cultural – which need to be considered by governments, NGOs and donors when attempting to promote and/or support the meaningful realization of this right. For example:

The tyranny of distance: Most Pacific Island countries are scattered across hundred and thousands of square kilometers of land and sea. The challenge of outreach is a very real problem for Governments bodies which are often highly centralized in the capital and struggle to engage with rural constituents, many of which make up around 70-80% of the population. There has been some work undertaken by government and donors to bridge the divide drawing on new information and communication technologies, such as satellite phones and the internet.

For example, in early 2006, the Solomon Islands Government signed a memorandum of understanding with the People First Network (PFNet), which operates 20 rural email stations across the country, to use their network to

disseminate government information. The Government Communication Unit, with assistance under the RAMSI Machinery of Government Programme, has started emailing a weekly government e-bulletin to the rural villages serviced by PFNet. The project also feeds back comments from villagers back to the government in the capital, Honiara, using the same arrangement The Director of the Government Communications Unit specifically noted the dissemination strategy was intended to empower the rural population by keeping them informed and giving them a means to communicate with the Government. Papua New Guinea is also experimenting with "telephone cafes" (akin to internet cafes, but using telephones), which provide a similar opportunity to harness community communications resources to disseminate government information.²

Cultures of silence: Many Pacific Islanders have reflected upon whether there exists a "culture of silence" in the region, which can lead to a disinclination on the part of ordinary members of the public to question their leaders. It is sometimes argued that this reluctance is rooted in the traditional respect the public have for community elders and chiefs. If an FOI law is to be effective, strategies will need to be devised to tackle this potential problem. Public education and awareness raising is one obvious approach. Consideration should also be given to focusing more heavily on the proactive disclosure provisions in any Pacific FOI law/policy, so that people do not have to proactive ask questions but rather can draw on information which is regularly published by the government. In the long-term, routine government disclosure may also build up a culture of transparency which will support greater public accountability.

Poverty and illiteracy: Throughout the Pacific, illiteracy remains a major challenge. Oral traditions are still deeply entrenched. Additionally, although most Pacific countries use English as their official government language (and a small number use French), most Pacific Islands are more comfortable in their local language. The fact that many people may not easily take in government documents written in bureaucratic English will be a challenge for any information disclosure regime.

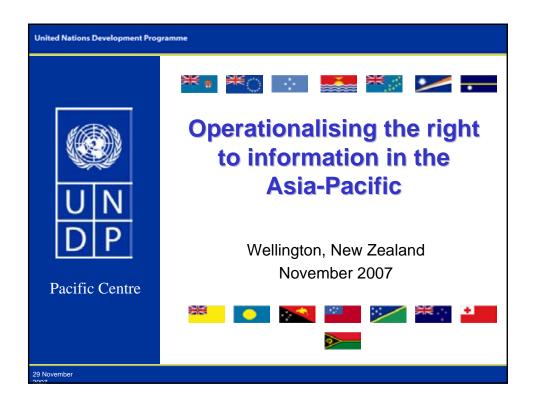
Consideration could be given to using more aural media to disseminate information, such as the radio. Notably, many governments have invested heavily

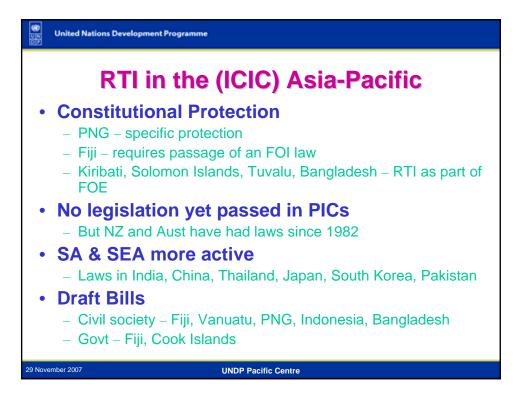
² Charmaine Rodrigues & Jeet Mistry (2005) "E-Governance in the Pacific Islands: Entrenching Good Governance & Sustainable Development by Promoting ICT Strategies Based On The Right to Information", presented at the IIDS Conference on Governance and Development, 1-4 December 2005, University of the South Pacific, Suva, Fiji.

in maintaining radio networks in provincial offices, local health clinics, schools or village centres. These could be better utilised as dissemination points. In fact, health clinics could be developed as "information hubs" as they often constitute a village meeting point, where parents meet and share information. Additionally, governments could consider working more closely with community NGOs/networks and the churches, to encourage them to take proactive disclosed information, simplify it and share it with their constituents. Basic training may be provided to community groups to assist them to understand government documents (eg. budget information) before they disseminate them to the general public. Many NGOs and church-based organisations have strong community outreach networks (eg. fieldworkers stationed in rural areas as community liaisons). Rather than attempting to duplicate these networks, government may wish to partner with them – formally or informally – so that they can be developed as community information points.

Poor government information management: The information held by government departments is probably one of the most valuable assets they have. But without an effective system for creating, managing, storing, archiving and destroying records, information will not be effectively utilised to create efficiencies for governments. It will also make the implementation of a new FOI law that much harder. Pacific Governments will need to be supported to put in place proper systems to create and maintain reliable records. Otherwise, even the most well-meaning officials can be defeated by their working environments. Although donors have poured considerable resources into Pacific government institutional strengthening and public sector reform projects, information management has rarely been prioritised for specific attention. However, good records management will have major efficiency dividends for the bureaucracy, in terms of the time saved looking for old records and/or starting documents from scratch instead of using a template or similar document. It will also make processes more transparent and thereby contribute to greater public accountability.

5







Why is RTI important?

- · Underpins human rights
- Strengthens democracy
- Facilitates participatory development
- Exposes corruption / promotes public accountability
- Strengthens the media
- Diminishes conflict

29 November 2007

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System challenges

- · Poor records management
- Limited resources
 - Personnel senior managers, lawyers
 - Financial stretched budgets
- Multiplicity of accountability institutions
 - Pacific: 7 Ombudsman, 1 (2?) Anti-Corruption Institutions, 1
 Leadership Code Commission, 1 Human Rights Commission
- Very limited internet connectivity
 - But radio can't be underestimated
 - Could use churches/NGO networks to get info out

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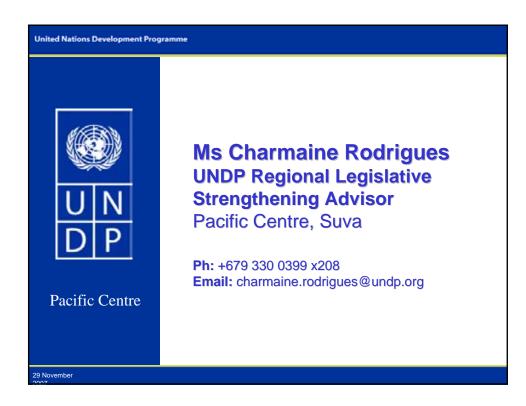


The road ahead?

- Awareness raising
 - For governments, CSOs and public
 - Devloping RTI campaigns
- Information Disclosure Policies
 - Sectorally or across govt
- Draft Bills
 - Provide support to govts / AGs Offices
 - Explain to policy-makers

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"FREEDOM OF INFORMATION IN THE ASIA PACIFIC REGION

(RIGHTS TO HAVE ACCESS TO INFORMATION AND WHAT MECHANISMS IN PLACE TO ALLOW PUBLIC TO HAVE ACCESS TO SUCH INFORMATION)

PAPUA NEW GUINEA CONTEXT

AND

HOW THE OMBUDSMAN COMMISSION

MIGHT FIT INTO THE PICTURE"

POSITION PAPER FOR THE 5TH INTERNATIONAL CONFERENCE OF INFORMATION COMMISSIONERS 26-29 NOVEMBER 2007

ILA GENO CHIEF OMBUDSMAN OMBUDSMAN COMMISSION OF PAPUA NEW GUINEA

NOVEMBER 2007

In Papua New Guinea there is an increasing call within the community for a greater `transparency' as the populace and media say, and it seems clear that there has been a failure by the State officials and the Parliament to fully appreciate the responsibility placed on them in Section 51 of the *Constitution*.

In the interests of freedom of information and open government it is incumbent on the Parliament to enact laws on freedom of information. In accordance with the principles stated in the Constitution Section 51

The Constitution of the Independent State of Papua New Guinea has been in existence since September 1975 and the Parliament has a duty under Section 51ⁱ of the *Constitution* to enact laws to enable ready access to official information.

Although every citizen has the right to reasonable access to official documents, this right may be regulated by an Act of Parliament and Section 38 (1) of the *Constitution* sets out the purposes for which a law may be made when regulating or restricting a right. A law may be made restricting a right for anyone of three different purposes namely:-

- (1) To give effect to public interest in defence, public safety, public order, etc. Section 38 (1) (a) (i).
- (2) To protect the exercise of the rights and freedoms of others. Section 38(1)(a)(ii).
- (3) To make reasonable provisions for cases where the exercise of one such right may conflict with the exercise of another. Section 38 (1) (b).

We say the Parliament has a duty to enact laws to enable ready access to official information, however, when the time comes for that duty to be discharged, one of the most important issues to address is: what external review procedures should be in place?

When a person makes a "freedom of information" request and is denied a document, who do they turn to?

Aggrieved parties can seek orders from the National Court within the right given in the *Constitution* Section 51 - Right to freedom of information.

The National Court?

But that would be cumbersome and unworkable. Time is of the essence in dealing with *freedom* of *information* requests. The Court would be unable to deliver on that score.

In fact, the Court already has the power under Section 57ⁱⁱ of the *Constitution* to enforce the right to freedom of information in proceedings commenced by "any person who has an interest in its protection and enforcement". The power has very rarely if ever been used.

Perhaps create a special body such as an information commissioner?

An information commission - although sounding good, this idea suffers from being an extra bureaucracy, with at least in the early years, an unpredictable workload. The human rights commission - a nice idea that has withered on the vine. No-one should hold their breath waiting for the revival.

■ The Ombudsman Commission?

The Ombudsman Commission of Papua New Guinea presents itself as the natural choice for an external review body. In fact, it already has that function. It is already established and entrenched as a constitutional institution. It is the most powerful oversight agency in the country. It deals with governmental bodies all the time.

However, the Commission has been shrouded in too much secrecy since its establishment and can afford to have some of its information assets made accessible. But documents obtained for the purposes of investigations need to be put into a special category.

What about all the information that the Ombudsman Commission has in its possession? Can that be made the target of a *freedom* of *information* request or should it enjoy a special immunity?

Good ombudsmanship entails bringing together a number of critical ingredientsⁱⁱⁱ that go to favour the Ombudsman Commission.

The Commission is independent and its *Independence* is given by the *Constitution*. But it still has to be protected at all costs.

• The Commission is impartial and its *Impartiality* in large part depends on an ombudsman's reputation. It has to be earned rather than received. The institution must be able to enter a dispute or conflict-driven environment and be regarded automatically as impartial.

This is sometimes a difficult balancing act to perform for the Ombudsman Commission as it invariably works in a politically charged environment by virtue of its Leadership Code jurisdiction.

- The Commission has integrity and it's *Integrity* depends largely on the individual qualities of the ombudsmen.
- The Commission creates initiative, has imagination and is intelligent and its initiative, imagination and intelligence are qualities that run together. A good ombudsman must be able to come up with creative solutions to disputes; to seize the initiative at the right moment; and to marshal intelligent arguments that will carry the day and move disputing parties to acceptable and realistic outcomes.
- Idealism there must be some ideals driving an ombudsman values worth striving for. In PNG these are provided by the Constitution, especially the National Goals and Directive Principles.
- Influence once the above factors are working together, the populace will have confidence in the ombudsman. The ombudsman will command respect. And with that comes influence. The ombudsman can be a steadying, sage force in the community.

IS THE OMBUDSMAN COMMISSION EFFICIENT ENOUGH?

The Ombudsman Commission is often times, far too slow. But isn't everybody? There are ways around this, such as imposing statutory time limits throughout the decision-making process. (Perhaps this needs to be considered for other parts of the Ombudsman Commission's jurisdiction, e.g. time limits imposed on the resolution of complaints; time limits on leadership investigations. Maybe the Courts need time limits imposed for the handing down of judgments - both oral and written.)

DOES IT HAVE TOO MUCH TO DO ALREADY?

Consider its already heavy workload.

FUNCTION	SOURCE OF POWER
1.Investigation of alleged wrong conduct and defective administration by governmental bodies.	Constitution, Sections 219(1) (a) & (b); Organic Law on the Ombudsman Commission.
2.Investigation of alleged discriminatory practices, by any person or body.	Constitution, Section 219(1)(c); Organic Law on the Ombudsman Commission.
3.Investigation of alleged misconduct in office under the Leadership Code.	Constitution, Section 219(1)(d); Organic Law on the Duties and Responsibilities of Leadership.

In addition to its primary functions, the Commission has a number of subsidiary functions.

COMPLEMENTARY FUNCTIONS OF THE OMBUDSMAN COMMISSION			
FUNCTION	SOURCE OF POWER		
1 Power to make special references to the Supreme Court on questions of constitutional interpretation.	Constitution, Section 19.		
2 (Implied) power to enforce the Basic Rights.	Constitution, Section 57.		
3.Power to advise (jointly with the NEC) the Queen and Head of State, to consent to the Governor-General holding another office or position or engaging in another calling.	Constitution, Sections 87(3) & (4).		
4. Power to partly supervise enforcement of the Organic Law regulating particular parties, political donations and the protection of elections from outside or hidden influences, i.e. the "Integrity Law".	Constitution, Sections 129 & 130.		
5 Power given to Chief Ombudsman to participate in judicial appointments etc, by virtue of his membership of the Judicial and Legal Services Commission.	Constitution, Section 183; Organic Law on the Judicial and Legal Services Commission.		
6 Advisory function – give advice to leaders and other persons on the proper discharge of their functions.	Informal.		
7. Education and public awareness – through the external relations program.	Informal.		
8. Chief Ombudsman's power to bring constitutional questions to the Supreme Court.	Constitution, Section 18.		

The enormous range of responsibilities and breadth of jurisdiction that is conferred on the Ombudsman Commission by the *Constitution* means that it is called upon, under the one roof, to perform functions which in other countries are usually dealt with by a multitude of different authorities. The Ombudsman Commission of PNG is not just an ombudsman institution. It is also:

- a <u>de facto</u> human rights commission;
- an anti-discrimination commission;
- a de facto anti-corruption commission;
- a conflicts of interests commission:
- a de facto law reform commission; and
- a watchdog of the *Constitution*.

Will a "determinative" role as an external review body be inconsistent with the traditional Ombudsman function of investigating, forming opinions and making recommendations?

Not really. The Commission already has some determinative functions under its Leadership Code jurisdiction. And even under its traditional complaint resolution jurisdiction, it does not make "mere" recommendations. There are duties imposed on the recipients of its recommendations.

What does the overseas experience tell us? Both New Zealand and Queensland have the external review function successfully carried out by their ombudsmen. The Ombudsman Commission of Papua New Guinea has a very good working relationship with both of those institutions and is well placed to tap into the store of existing expertise.

Can it do the job with its existing resources? Clearly, no. Is special funding required? Yes.

And that is the bottom line. The Ombudsman Commission is ideally placed to do the job. But a proper appropriation from the Parliament is essential.

Information held by the Ombudsman Commission: should it be accessible under a freedom of information law?

Yes and no, depending on the type of information that is sought. The documents that the Commission has in its possession can be put into (at least) four categories:

• Administrative information and in particular "financial documents".

This category of information relates to documents such as the appropriation and expenditure of the Ombudsman Commission; salaries and allowances of members of the Commission and staff; numbers of complaints received and resolved; various policies and determinations of the Commission for officers in the Service of the Commission; etc. This information should be easily accessible.

• The "annual statement" declarations of leaders.

Presently, details disclosed in the annual statements lodged with the Ombudsman Commission by leaders are confidential. To facilitate transparency and accountability among our leaders, this information should be accessible. PNG in some ways led the way in the mid-seventies with compulsory disclosure of leaders' financial affairs. But it has now lagged behind. In many countries, members of parliament are required to make declarations of their assets and liabilities in a public register.

The Final Report of the CPC remarked that unless leaders declare their assets, liabilities and business activities, the Ombudsman Commission will not know whether they are living up to what is expected of them. The same sentiment applies with the general public.

ⁱ51. Right to freedom of information.

- Every citizen has the right of reasonable access to official documents, subject only to the need for such secrecy as is reasonably justifiable in a democratic society in respect of –
 - (a) Matters relating to national security, defence or international relations of Papua New Guinea (including Papua New Guinea's relations with the Government of any other country or with any international organization); or
 - (b) records of meetings and decisions of the National Executive Council and of such executive bodies and elected governmental authorities as are prescribed by Organic Law or Act of the Parliament; or
 - (c) trade secrets, and privileged or confidential commercial or financial information obtained from a person or body; or
 - (d) parliamentary papers the subject of parliamentary privilege; or

- (e) reports, official registers and memoranda prepared by governmental authorities or authorities established by government, prior to completion; or
- (f) papers relating to lawful official activities for investigation and prosecution of crime; or
- (g) the prevention, investigation and prosecution of crime; or
- (h) the maintenance of personal privacy and security of the person; or
- (i) matters contained in or related to reports prepared by, on behalf of or for the use of a governmental authority responsible for the regulation or supervision of financial institutions; or
- (j) geological or geophysical information and data concerning wells and ore bodies.
- (2) A law that complies with Section 38 (general *qualifications* on qualified rights) may regulate or restrict the right guaranteed by this section.
- (3) Provision shall be made by law to establish procedures by which citizens may obtain ready access to official information.
- (4) This section does not authorize
 - (a) withholding information or limiting the availability of records to the public except in accordance with its provisions; or
 - (b) withholding information from the Parliament.

ii 57. Enforcement of guaranteed rights and freedoms.

- (1) A right or freedom referred to in this Division shall be protected by, and is enforceable in, the Supreme Court or the National Court or any other court prescribed for the purpose by an Act of the Parliament, either on its own initiative or on application by any person who has an interest in its protection and enforcement, or in the case of a person who is, in the opinion of the court, unable fully and freely to exercise his rights under this section by a person acting on his behalf, whether or not by his authority.
- (2) For the purposes of this section-
 - (a) the Law Officers of Papua New Guinea; and

- (b) any other persons prescribed for the purpose by an Act of the Parliament; and
- (c) any other persons with an interest (whether personal or not) in the maintenance of the principles commonly known as the Rule of Law such that, in the opinion of the court concerned, they ought to be allowed to appear and be heard on the matter in question,

have an interest in the protection and enforcement of the rights and freedoms referred to in this Division, but this subsection does not limit the persons or classes of persons who have such an interest.

- (3) A court that has jurisdiction under Subsection (1) may make all such orders and declarations as are necessary or appropriate for the purposes of this section, and may make an order or declaration in relation to a statute at any time after it is made (whether or not it is in force).
- (4) Any court, tribunal or authority may, on its own initiative or at the request of a person referred to in Subsection (1), adjourn, or otherwise delay a decision in, any proceedings before it in order to allow a question concerning the effect or application of this Division to be determined in accordance with Subsection (1).
- (5) Relief under this section is not limited to cases of actual or imminent infringement of the guaranteed rights and freedoms, but may, if the court thinks it proper to do so, be given in cases in which there is a reasonable probability of infringement, or in which an action that a person reasonably desires to take is inhibited by the likelihood of, or a reasonable fear of, an infringement.
- (6) The jurisdiction and powers of the courts under this section are in addition to, and not in derogation of, their jurisdiction and powers under any other provision of this Constitution.

iii [Freedom of Information In Papua New Guinea - How the Ombudsman Commission Might Fit Into The Picture, David Cannings, Counsel To The Ombudsman Commission - Workshop on Freedom Of Information: Defending the Public's Right To Know, Port Moresby November 2000]

5th INTERNATIONAL CONFERENCE OF INFORMATION COMMISSIONERS 26 - 29 NOVEMBER 2007 WELLINGTON NEW ZEALAND

ICIC Day

ILA GENO CHIEF OMBUDSMAN OMBUDSMAN COMMISSION OF PAPUA NEW GUINEA

NOVEMBER 2007

A INTRODUCTION

The Two Organic Laws

Besides its multiplicity of functions the feature of the Ombudsman Commission that sets it apart from equivalent institutions in other countries is that the institution itself and the laws it administers are established directly under the *Constitution*.

One of the hallmarks of an effective ombudsman institution is its independence, and in PNG this has been conscientiously guaranteed by the *Constitution*, through an array of legislative techniques.

The basic principle: freedom from direction and control as prescribed under Section 217(5) of the *Constitution* states:

In the performance of its functions ... the Commission is not subject to direction or control by any person or authority.

This does not, of course, mean that the Commission is free to apply the Constitutional Laws as it sees fit. Schedule 1.19 of the *Constitution* ensures that the Commission's independence does not affect its control or direction by a court or regulation of its powers by or under statute. Nor does it affect the jurisdiction of the Auditor-General or the Public Accounts Committee.

Section 217(6) of the *Constitution* states:

The proceedings of the Commission are not subject to review in any way, except by the Supreme Court or the National Court on the ground that it has exceeded its jurisdiction.

The investigative powers of the Ombudsman Commission are exercised, not only under the *Constitution*, but also under two Organic Laws:

- The Organic Law on the Ombudsman Commission; and
- The Organic Law on the Duties and Responsibilities of Leadership.

Status of Organic Laws

In its hierarchy of written laws the Organic Laws are special statutes, which have been enacted to elaborate on the key principles of law laid down in the *Constitution*. Section 10 of the *Constitution* states that the *Constitution* and the Organic Laws are "the Supreme Laws of Papua New Guinea".

Significance of investigations being conducted under Organic Laws

The fact that the two Organic Laws have been specifically enacted to provide for Commission investigations reflects the very high status of such investigations.

It also has significant practical consequences. If compliance with a direction issued by the Commission under one of its Organic Laws would involve the breach of an Act of Parliament, the Commission's direction will prevail.

The effect of having two different Organic Laws is to lay down two different procedural codes, depending on what particular aspect of its jurisdiction the Commission is exercising. An investigation of alleged wrong conduct by a governmental body is conducted under the *Organic Law on the Ombudsman Commission* (OLOC)ⁱ which law is also used for a discriminatory practices investigation. An investigation of alleged or suspected misconduct in office by a leader is conducted under the *Organic Law on the Duties and Responsibilities of Leadership* (OLDRL)².

For example, if the Commission uses its power to issue a summons for the production of documents to the Internal Revenue Commission, the secrecy provisions of the *Income Tax Act* and the *Customs Act* have to "give way" to the summons.

The Organic Laws put the Commission in quite a strong position if it is faced with any resistance during the course of an investigation.

Independence of the Commission.

One of the most important court cases concerning the powers of the Commission has been the 1992 decision of the Supreme Court in *Ombudsman Commission V Ellis*.

This case arose after the Chief Ombudsman refused to comply with a summons issued under the Commission of Inquiry Act by Commissioner Graham Ellis. The summons required the production of documents relevant to the Commission of Inquiry into the Poreporena Freeway project.

In concluding that the Chief Ombudsman acted lawfully by refusing to comply with the summons, the Court emphasised the constitutional independence of the Commission under Section 217(5) of the *Constitution*.

Section 217(5) states:

"In the performance of its functions under Section 219 (functions of the Commission), the Commission is not subject to direction or control by any person or authority".

ILA GENO OBE, QPM
CHIEF OMBUDSMAN

¹ Appendix 1 – OLOC

² Appendix 2 - OLDRLObtaining relevant information

APPENDIX 1: OLOC

Obtaining relevant information

The powers vested in the Commission are for the purpose of enabling the Commission to conduct its investigations thoroughly and without any obstruction or hindrance from any person or organisation so that it may obtain all the information that it needs from all sources in order to arrive at the facts before forming its opinion and making its recommendations.

The general purpose of an investigation under the OLOC is to determine whether any of the conduct under investigation was wrong, or whether any laws or administrative practices were defective. Under Section 22(1) of the OLOC, the Commission is expressly authorised to form an opinion on the merits of the complaint.

Privacy and secrecy during the conduct of an investigation

Unlike a court or a commission of inquiry, when it performs its fact-finding role, the Ombudsman Commission, and the persons with whom it comes in contact, are subject to a number of constraints which are intended to maintain the privacy and secrecy of the proceedings.

Investigations to be conducted in private.

Section 17(2) of the OLOC states that every investigation conducted under the OLOC must be conducted "in private". Public hearings are not permissible.

Section 20(2) states that all Investigators are subject to a duty of secrecy, imposed by their oath or affirmation of secrecy. However, Investigators should note that the duty to maintain secrecy is qualified by Section 20(3) in that the Commission may disclose matters, which would otherwise be subject to the secrecy provisions, if this were necessary in order to properly investigate the matter before it. This provision recognises that, in order to obtain information from a source, it may be necessary to disclose some otherwise "privileged" information.

Power to acquire information

The Commission's authority to obtain information is derived from the following provisions of the OLOC:

Sec 17(3) - The Commission may hear or obtain information from any person it considers can assist and make whatever inquiries it thinks fit.

Sec 18(1) - The Commission may serve a summons on any person, who in its opinion is able to give any information relating to a matter being investigated, to furnish information and/or produce any documents, papers or things that may be in the possession or control of that person.

Sec 18(3) - The Commission may summon any person to attend the Commission for examination on oath or affirmation.

Sec 36(1) - A member of the Commission, may, at any time, enter the premises of a State Service, provincial government body, local government body or statutory body and inspect the premises and carry out an investigation within the premises. (Refer 12.8)

Service of a summons under Section 18(1) of the OLOC

The OLOC does not prescribe any particular method of serving summonses under Section 18. However, if a person has failed to comply with a summons and is to be successfully prosecuted, it will need to be established that the summons has been personally served. This means:

- An attempt must be made to hand the summons to the person named on the summons.
- If the person refuses to accept the summons, simply place the summons in front of him and say: "this is a summons from the Ombudsman Commission requiring you to attend the Commission and produce documents", or words to that effect; i.e. put the document down in the presence of the person and convey to him the nature of the document.
- The summons cannot simply be left with the person's spouse or a close friend or relative or the person's executive secretary. This is so, even if an undertaking has been give that the summons will be handed on to the person.
- It is not necessary for the person to sign a copy of the summons as evidence of its receipt. This is a preferable procedure, but it is not essential.

- If a person consistently refuses to accept service or successfully evades service, the Legal Services Unit should be consulted for advice on alternative methods of service.
- Of course, if the person to whom a summons is being issued is likely to be cooperative, it will not be necessary to insist on personal service. In this situation, alternative methods of service e.g. leaving the summons with another person can be used.

Failure to comply with a summons

Part VII of the OLOC deals with offences, which can be committed by persons who fail properly to comply with directions, and summonses under Sections 18(1) and 18(3).

Section 30 makes it an offence for a person to fail, without reasonable excuse, to attend the Commission or to produce documents, books or writings in his custody or control that he has been required by summons to produce. Special care needs to be exercised when drafting summonses under Section 18(1).

If it is considered that the person may be unco-operative, the person should be summoned to attend under Section 18(3), in addition to being required to furnish information etc. under Section 18(1).

Other offences

Other offences provided for in the OLOC include -

- **Sec 31** Refusing to be sworn or refusing to make an affirmation.
- Sec 31 Refusing to answer questions put by a member of the Commission or a delegated officer of the Commission, relevant to an inquiry.
- Sec 31 Leaving the Commission, after having attended, without the permission of a member of the Commission.
- Sec 32 Wilfully insulting a member of the Commission.
- Sec 32 Wilfully interrupting the proceedings of the Commission.
- Sec 32 Being in wilful contempt of the Commission.
- Sec 33 Wilfully giving false evidence, i.e. perjury.

Ombudsman Commission's power to enter premises

Section 36 of the OLOC confers the power of entry of premises. However, before this power is exercised it is essential that the Office of Counsel is given an opportunity to consider the facts of the matter and if necessary, provide advice to the Investigator, Director and/or member of the Commission, responsible for the conduct of the investigation.

Powers of search and seizure

The Commission has no independent power to conduct searches of buildings or places or to compulsorily seize documents or things. However, as the 1993 case of *Jimmy Tjeong v The Ombudsman Commission* confirmed, the Commission does have the power to apply for search warrants under the *Search Act. To* obtain a warrant, there must be reasonable grounds for suspecting that there is a certain thing in a particular place and that thing, if found, is likely to afford evidence of the commission of an offence.

The *Jimmy Tjeong* case followed a Complaints Division raid on the premises of JJ Wholesale Enterprises at Badili. Tjeong's application for judicial review of the decision of Boroko District Court Magistrate, Mr Vagi, to issue a search warrant to the Commission was successful. However, the result of the case did not disturb the principle that search warrants can be issued to the officers of the Commission.

Prosecution for offences

Any proceedings for an offence under OLOC is brought in the National Court by the Public Prosecutor and with the consent in writing of the Ombudsman Commission. (S.36)

Protection and Privilege available to the Commission and Investigators.

The principle that a member of the Commission or an officer or employee of the Commission has a right of privilege in relation to giving evidence or producing documents in any court proceedings, so far is such evidence may relate to matters arising out of the exercise of his functions, is provided by Sections 35(1) and 35(2) of the OLOC.

When carrying out investigations, Investigators have the protection of Section 13 of the

Organic Law on the Guarantee of the Rights and Independence of Constitutional

Office-holders.

Section 13 states:

"An officer whilst acting on the instructions and on behalf of a

constitutional office-holder in the performance of that office-holder's

constitutional functions is not subject to direction or control in the exercise

of those functions by any person other than that constitutional office-

holder".

Further protection is given to investigators by Section 35(1) of the OLOC, which

provides that all members, officers and employees of the Commission are not liable for

any act or omission done or made bona fide and without negligence under or for the

purposes of the OLOC. Furthermore, it is an offence for a person to obstruct or resist

an officer of the Commission who is lawfully carrying out an investigation or

performing other functions pursuant to his/her duties as an officer of the Commission.

In particular, Section 201 of the *Criminal Code* states:

A person who obstructs or resists -

Any public officer who is engaged in the discharge or attempted a)

discharge of the duties of his office under any law; or

Any person who is engaged in the discharge or attempted discharge b)

of any duty imposed on him by any law.

is guilty of an offence.

Penalty: Imprisonment for a term not exceeding two years.

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APPENDIX 2: OLDRL

Obtaining relevant information for investigations under the Organic Law on the Duties and Responsibilities of Leadership (OLDRL)

Under its Leadership Code jurisdiction, the Commission performs the role of conflicts-of-interests commissions in other countries and in the absence of an independent, adequately resourced anti-corruption body, it has also become a de facto anti-corruption agency. It has been able to combine its extensive powers under the Leadership Code, together with the exercise of powers as a traditional ombudsman institution, in the overall fight against corruption in PNG.

Privacy and secrecy during the conduct of an investigation

Unlike a court or a commission of inquiry, when it performs its fact-finding role, the Ombudsman Commission, and the persons with whom it comes in contact, are subject to a number of constraints which are intended to maintain the privacy and secrecy of the proceedings.

Under the OLDRL Section 20 provides that every investigation shall be conducted in private however, if after the investigations the Commission is of the opinion that there is evidence of misconduct in office, it shall refer the matter to the Public Prosecutor for prosecution before the appropriate tribunal. Before the referral is made, the Commission is obliged to inform the person whose conduct is being investigated, of the Commission's intention to refer the matter to the Public Prosecutor.

Section 21- production of documents

Section 21 OLDRL deals with the Commission's powers to summon persons who in its opinion is able to give any information and produce any documents required by the Commission in the course if its investigations. Under OLDRL, in general summonses issued by the Commission under the OLDRL are similar to summonses issued by a court of law.

Whether or not the person is an officer, employee or member of any state service, provincial service, local government body or statutory body, including the spouse and the children of the person whose conduct is being examined or investigated.

Witnesses who either disregard summons to appear before the Commission or refuse to cooperate with the Commission can be charged before the National Court. Witnesses before the Commission may be examined under oath or affirmation. They are entitled to the same privileges and subject to the same penalties, as those appearing before a court of law.

The offence referred to above is created by Section 31 OLDRL which provides that a person who having been summoned to attend the Ombudsman Commission, other authority or tribunal fails without reasonable excuse the burden of proof which lies on him to attend the commission, other authority or tribunal or to produce any documents, books or writings in his custody or control that he is required by the summons to produce is guilty of an offence which penalty is a fine of K500.00 or imprisonment for 3 months.

However, Section 22 of OLDRL provides qualification for which the Commission shall not require a witness to answer questions or produce documents only in cases where the Prime Minister, after consultation with the Chief Ombudsman, certifies that the giving of such information or the answering of such questions or the production of such documents or things are likely to:

- a) Prejudice the security or international relations of Papua New Guinea (including relations of PNG with the government of any other country or with any international organisation) or the investigation or detection of offences; or
- b) Involve the disclosure of proceedings, deliberations or decisions of the NEC or of any committee of that council which the Prime Minister certifies relate to matters of a secret or confidential nature, disclosure of which would be injurious to the public interest.

Section 23 OLDR provides that a leader must cooperate to the best of his ability with the Ombudsman Commission at all times. This duty of cooperation applies whether the Commission is investigating his own conduct or the conduct of another leader.

OFFENCES

Failure to attend or produce documents.

Section 31 of the OLDRL provides that a person who, having been summoned to attend the Commission, fails without reasonable excuse, the burden of proof of which lies on him, to attend the Commission or to produce any documents, books or writings in his custody or control that he is required by the summons to produce, is guilty of an offence which penalty is a fine of K500,00 or imprisonment for three months. (S.31)

In the case of *The State v Gabriel Ramoi (No 2) [1990] PNGLR 136* (N848), a trial of a Member for Aitape Lumi Electorate in the National Parliament of Papua New Guinea, the Court found Mr Ramoi guilty for failure to answer a summons to furnish information and produce documents to the Ombudsman Commission contrary to s 31 of the Organic Law and fined him K200

The Court held that

For the purposes of s 31 of the Organic Law:

- (1) absence from the country does not constitute reasonable excuse for failure to attend before the Ombudsman Commission particularly where adequate time existed between the date of the service of the summons and the date fixed for attendance for another date to be fixed;
- (2) absence of prior consent by a prospective witness to a suitable hearing date cannot constitute reasonable excuse for failure to attend;
- (3) reliance by the prospective witness on mere knowledge in the Ombudsman Commission of his likely absence from the jurisdiction on the date fixed for attendance does not constitute reasonable excuse for failure to attend.

Refusing to be sworn or give evidence.

A person appearing as a witness before the Commission who refuses to be sworn or to make an affirmation or to answer any questions relevant to the inquiry put to him by a member of the Commission, or having attended leaves the Commission without the permission of a member of the Commission, is guilty of an offence which penalty is a fine of K500.00 or imprisonment for three months. (S.32)

Contempt of the Commission.

A person who willfully insults a member of the Commission, or willfully interrupts the proceedings of the Commission, or is in any manner guilty of willful contempt of the Commission, is guilty of an offence which penalty is a fine of K500.00 or imprisonment for three months. (S.33)

Giving false evidence.

A person appearing as a witness before the Commission, who willfully gives false evidence, is guilty of perjury and is liable to prosecution and punishment accordingly. (S.34)

Any person previously covered under the Leadership Code who within three (3) years of ceasing to be that person must first seek approval from the Ombudsman Commission before accepting or holding directorship or any prescribed position with a foreign enterprise is guilty of an offence which penalty is a fine of K1,000 or imprisonment for 12 months. (S.35)

Prosecution for offences

Any proceedings for an offence under OLDRL is brought in the National Court and with the consent in writing of the Ombudsman Commission. (S.36)

The Commission gives consent to the Public Prosecutor who prosecutes the *Protection of witnesses, etc.*

Witnesses and persons appearing before the Commission have the same privileges and immunities as witnesses appearing before the National Court. (S.38)

Section 27(4) Constitution Power to issue Directions

The Ombudsman Commission is empowered under Section 27(4) of the *Constitution* to give directions either generally or in a particular case, to ensure the attainment of the objects of the Leadership Code and that is the fulcrum on where the Commission's supervision and enforcement of the Leadership Code depends.

All these powers vested in the Commission are for the purpose of enabling the Commission to conduct its investigations thoroughly and without any obstruction or hindrance from any person or organisation so that, subject to certain constraints

prescribed in OLOC, it may obtain all the information that it needs from most sources in order to arrive at the facts before forming its opinion and making its recommendations.

Failure to comply with a direction issued under section 27(4) of the *constitution* may attract the following consequences:

- In respect of a leader, misconduct in office under section 27(5)(b) of the *constitution* and liability to prosecution before an appropriate tribunal and subject to penalties under section 28(1)(g)(ii) of the *constitution*, section 27(5) of the *organic law on the duties and responsibilities of leadership* and section 2 of the *leadership code* (alternative penalties) act, including dismissal from office.
- In respect of any other person, enforcement proceedings in the national court under section 23 of the *constitution*.

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 $\label{eq:Paper delivered} Paper \ delivered \ at \ the \\ 5^{th} \ International \ Conference \ of \ Information \ Commissioners$

Electronic Records and Access to Information – Have We Revolutionized the Process or Are We Simply Killing More Trees?

INTRODUCTION

In 1775 the English poet, biographer, essayist and lexicographer Samuel Johnson said that "Knowledge is of two kinds. We know a subject ourselves, or we know where we can find information upon it." At the time, Dr. Johnson was referring to the value of books rather than the usefulness of access to information legislation. However, his comment does illustrate the value inherent in the ability to seek out knowledge. Some 220 years later, the Supreme Court of Canada has clearly established the importance of this ability, specifically as it relates to access to information. In *Dagg v. Canada* (*Minister of Finance*), 1997 2 S.C.R. 403, Justice Gerard LaForest said that

The overarching purpose of access to information legislation...is to facilitate democracy. It does so in two related ways. It helps to ensure first, that citizens have the information required to participate meaningfully in the democratic process and secondly, that politicians and beauracrats remain accountable to the citizenry.

This paper will explore the advantages as well as the challenges inherent in an electronic environment as it relates to the access to information process. As technology advances at lightning speed, the modern workplace is becoming more and more digital and the rise of the electronic record is unprecedented. The use of word processing programs, spreadsheets, presentation programs, digital audio and video, electronic mail, etc. has become so commonplace that it is now hard to imagine how people managed just a decade ago, let alone 50 years ago. Along with the rise of the electronic record, we have also experienced a significant rise in the creation, recognition and use of modern access to information (freedom of information) legislation. As such, while technology facilitates and promotes the creation of more information, there is a corresponding desire to want access to more of that information. On its face, it may appear that the widespread use of electronic information should revolutionize the access to information process. However, the examples highlighted in this paper, particularly with respect to e-mail, emphasize the need for caution and the complexities involved in seeking access to information stored in electronic form.

RECORDS MANAGEMENT

Fundamental to the operation of an effective access to information regime is good records/information management. In fact, the ability of an individual to exercise his or her right to have access to information is directly affected by the quality of a government's records management practices. When the quality of such practices is less than appropriate, the accountability envisioned by the Supreme Court of Canada is threatened. It is for this reason that the importance of a reliable, effective, secure and accessible records management system cannot be overstated.

The process of managing records is often explained in terms of a life cycle. Records are created, distributed and used, stored and maintained, and then finally disposed of or archived. Records management provides the framework under which these actions are taken. Whether records are in paper or electronic form, this life cycle provides the necessary guidance to an organization to ensure that it appropriately categorizes its records and applies specific policies to them accordingly. To be effective, however, these organizations must recognize each component of the life cycle, a task that is not always evident. For example, many organizations tend to be stuck in the storage and maintenance phase, failing to appropriately purge their records through disposition and

archives. This tendency to allow every record to survive will eventually have a significant adverse effect on any attempt to control those records. This in turn will prejudice the right of an individual to seek access to those records.

A crucial aspect of the modern records management system is the explosion over the last number of years of electronic information. The modern workplace has become more and more digital and our reliance on electronic records and databases is unprecedented. It is estimated that more than 90% of all records being created today are electronic.² There is no doubt that the advantages are numerous. We can search it, cut and paste it, update it in real time, e-mail it, automate it, audit it, secure it, and control it in ways that paper-based systems simply would not allow.³ Ultimately, this allows us to work faster, save money and accomplish much more with significantly less effort.

ACCESS TO INFORMATION

From an access to information perspective, the proliferation of the electronic record has had mixed results. On the positive side, technology has allowed organizations to create large volumes of recorded information simply and quickly, giving the public a glimpse into the culture and operation of these organizations in ways never experienced before. Nowhere is this more evident than in the use of electronic mail. Alasdair Roberts has said that e-mail provides "mother lodes" of revealing information about the internal life of organizations. The spontaneous nature of e-mail leads to the creation of records containing information that in the past would never have been committed to paper. Such information is often quite sensational to applicants, particularly journalists, who routinely seek out this type of "juicy" information. The results of these requests range from potential criminal charges to scandal to mere embarrassment. For example, our Office recommended the release of one particular e-mail from the head of a large public organization indicating that a particular female employee was "the reason blond jokes were invented."

The U.S. based Reporters Committee for Freedom of the Press refers to the ability to access electronic records as a tool for reporters, allowing them to do original analysis on subject matter, rather than relying solely on anecdotal evidence. The Committee acknowledges that fees, privacy regulations and other laws may create barriers to the acquisition of electronic information, but they point to a number of successes. As an

example, the Committee refers to a 2002 story by the *Washington Post* dealing with the neglect and death of 229 children in protective care. Reporters used databases to show that the District of Columbia had a role in this neglect. The story led to an overhaul in the child welfare system and earned its authors the 2002 Pulitzer Price for investigative reporting.⁵

While I in no way wish to detract from the usefulness and value of electronic record keeping (without it I would quite simply be lost), I do believe that from an access to information perspective, there are certain pitfalls. The continued growth in the creation and use of electronic records is no doubt inevitable, and in many respects necessary, but it is important to recognize the challenges and develop the ability and the capacity to meet these challenges.

A primary concern is the sheer volume and variety of electronic records. As I have indicated earlier, in some respects this volume can be an advantage for the access to information applicant. However, organizations often have difficulty cataloguing, organizing and preserving this information, while maintaining a reasonable ability to access it. This is in part due to the failure of many organizations to properly recognize and manage the records management life cycle. This life cycle is equally relevant to both paper records and electronic records, a fact often overlooked by these organizations. More importantly, however, many organizations appear to be overwhelmed by the volume and variety of electronic records. The technology has simply surpassed the capacity to react appropriately. In 2002, the National Archives and Records Administration in the United States concluded that most federal agencies are still baffled by electronic records. While Alasdair Roberts' concept of the "mother lode" is valid, I would also suggest that in many respects we may be experiencing information "overload." Notwithstanding the pros and cons of the electronic record, I believe there is still a long way to go before we have a clear handle on the management, storage and retrieval of those records.

Another area of concern is the fact that the nature of electronic records easily allows the creation and storage of many versions of the same record. Technology now allows us to create, edit, add, delete, revise and transfer in a matter of seconds with virtually no inconvenience and very little cost. Furthermore, we now have the capacity to save and store as many versions of as many records as we choose. In speaking to a number of

lawyers, for example, they indicate that as a matter of course, they keep every draft of every piece of correspondence they generate. Adding to this is the incredible speed and power of desktop and laptop computers as well as portable devices. For example, I use a USB flash drive with a 2 gigabyte storage capacity. A quick search of the internet reveals that 16 gigabyte flash drives are now available. One gigabyte can hold roughly 1000 novels or 18 hours of MP3 music. Large chunks of information, therefore, are not only being created within an organization, it is being stored on individual computers and on personal devices the size of a keychain. With so much information being stored in so many different places, how can an applicant be assured that all sources have been searched and whether or not the record eventually disclosed is the correct version? Alasdair Roberts has said that the "stockpile of government information has been liquified – broken down into a vast pool of elements whose significance, taken independently, is not easily grasped."

One issue that has been more of a concern in recent years is the speed at which hardware, software and storage media are developing. As these technologies become obsolete over a relatively short period of time, they often leave behind records that are no longer accessible, rendering them worthless. Remember the floppy? Throughout the 1980s and 1990s floppy disks, or diskettes, were quite ubiquitous and today we still have large amounts of information stored on these disks. As technology advanced, computer manufacturers were reluctant to remove the floppy drive from their computers, but more recently they have progressively reduced the availability of these drives, as well as the disks themselves. Today, the floppy is virtually obsolete, having been replaced by flash and optical storage devices, while e-mail has become the preferred method of exchanging digital files. More recent technologies are also being replaced at extraordinary rates. CDs have been overshadowed by DVDs and today the Blu-ray Disc technology is the next generation optical disc format with five times the storage capacity of traditional DVDs. 11

It is interesting to note that at the end of the 1990s the United States National Archives apparently had an entire warehouse full of obsolete equipment, which it hoped would some day allow them to read information that had been previously recorded in obsolete formats or media. I suspect that most organizations are not taking similar action, but are instead allowing vast amounts of electronic information to lie dormant. Instead of making decisions about retention and destruction, obsolescence will render many records

technically or practically irretrievable. This will likely have a noticeable affect on access to information requests over the next several years and beyond.

THE "PAPERLESS OFFICE"

Electronic record-keeping has been supported in part by the desire to reduce the amount of paper used in the office. The concept was simple: store your information electronically, thereby drastically reducing the need to create paper records. Along with the development of computers and networks and in particular e-mail, came a widespread expectation of a paperless society. Ironically, however, we are using more paper than ever. The reason in large part can be attributed to a single device: the printer. While the technology allows us to easily create an electronic record, the printer allows us to simply press the print button and in seconds we have the same record in our hands in the form of good old-fashioned paper. The fact is, we like paper. We can feel it, mark on it, staple it, highlight it, spread it out on a desk, stack it in piles. 13 In addition, we trust it. There is still a mentality among many of us that an electronic record can vanish into cyberspace, never to return, when we hit the wrong button, or the system crashes or the technology fails. Paper, on the other hand, is tangible and we can control it. We may misplace it or slip it into the wrong file, but we know it is there. It will always be there and it will always be accessible unless we make a conscious effort to physically destroy it. The apparently fleeting existence of electronic records (easily changed/deleted) is not like the concrete, physical existence of paper records. Certain applicants will always distrust certain public bodies, but requests for electronic records seem to sharpen that perception.

A 2006 report by Statistics Canada demonstrates that any notion of a paperless society is clearly defeated. From 1983 to 2003 the consumption of paper in Canada more than doubled from 1,198,100 tonnes to 2,867,442 tonnes. As the growth rate of consumption outstripped population growth during this period, per capita consumption of paper for printing and writing increased by a staggering 93.6% to nearly 20,000 pages per person. In the United States the numbers are also revealing. In 2004 the U.S. federal government used about 109,000 tons of office paper, up from 97,000 tons in 1996. It is estimated that this will rise to 114,360 tons by 2008, roughly the weight of 72,000 Toyota Camrys.

The younger generation that is following in our footsteps is no doubt more comfortable with computer screens and more trusting of the technology and, as such, may not share the same level of commitment to the printed word as we do. However, I would not recommend getting out of the paper making industry anytime soon.

E-MAIL

I believe that the dramatic increase in paper consumption over the last number of years is in large part correlated with the worldwide explosion in e-mail usage. E-mail is quick, easy and efficient, and has become the preferred method of communication, replacing the more traditional memo, letter or telephone call. In 2002, Canada's Chief Information Officer estimated that government employees were exchanging 6 million e-mails every day. It is fairly commonplace for co-workers to now send e-mail messages to each other rather than walk down the hall, or next door or even to the next cubicle. In many cases, we have lost that face-to-face interaction which I believe to be essential to the respectful and enjoyable workplace. Be that as it may, there is no doubt that e-mail is, and will continue to be, essential to the modern office setting.

Notwithstanding the many advantages of e-mail, the proliferation of its use has created a number of challenges in terms of access to information. In order to best illustrate these challenges I will use a case study from the Office of the Information and Privacy Commissioner for Newfoundland and Labrador. Before doing so, however, I would like to address the question of whether an e-mail is a record for purposes of access to information requests.

In Canada, the federal *Access to Information Act*, R.S. 1985, c. A-1 defines a "record" as any "documentary material, regardless of medium or form." The Newfoundland and Labrador *Access to Information and Protection of Privacy Act*, S.N.L. 2002, c. A-1.1 defines a "record" as "a record of information in any form, and includes information that is written, photographed, recorded or stored in any manner, but does not include a computer program or a mechanism that produced records on any storage medium." These definitions clearly anticipate that electronic records, including e-mails, are records for the purpose of access to information legislation.

In addition, the Government of Newfoundland and Labrador has clearly established in policy that any e-mail created or received in connection with the transaction of government business is a public record and is subject to all pertinent legislation including the *Access to Information and Protection of Privacy Act*.¹⁷ E-mail policies normally make accommodation, however, for copies of convenience. These documents are often referred to as transitory records and include, for example, an e-mail to confirm the time of a meeting, non-business related communications and duplicate copies of documents circulated for reference purposes only. According to such policies, all other e-mails received in the course of normal business operations are records and, in this regard, should be treated no differently than any traditional paper record. This is evident in the number and variety of e-mail resources produced by the Office of the Chief Information Officer for Newfoundland and Labrador. These include an e-mail policy, e-mail guidelines, a quick reference guide for managing e-mail, a guide for using e-mail effectively, acceptable use practices for e-mail and a series of frequently asked questions.¹⁸

In the United States, a recent decision of a federal judge deals directly with the preservation of e-mail records. In response to lawsuits brought by the Citizens for Responsibility and Ethics in Washington (CREW) and the National Security Archive, U.S. District Judge Henry Kennedy ordered the White House to preserve backup tapes containing copies of White House e-mails. CREW and the National Security Archive allege that 5 million White House e-mails have disappeared.¹⁹

As another interesting example of the seriousness with which e-mails should be considered, in December of 2002 the investment firms Deutsche Bank Securities Inc., Goldman Sachs & Co., Morgan Stanley, Salomon Smith Barney Inc. and U.S. Bancorp Piper Jaffray Inc. were each fined \$1.65 million U.S. by securities regulators for failing to properly store e-mail.²⁰

CASE STUDY

This case study involves an individual who had been terminated from his position with a large public body. This individual, along with his spouse (who was also an employee with the same public body but had not been terminated) began submitting a series of access to information requests. The majority of these requests sought access to e-mails

sent, received and copied among a number of other employees within the organization. Each request would name particular employees and would specify a date range. In other words, the applicant would ask for, among other things, access to all e-mails referencing him or his spouse that had been sent, received and copied to each of a specified number of individuals within a specified period of time. They also sought access to their own e-mail archives. The majority of these access requests resulted in Requests for Review being filed with the Office of the Information and Privacy Commissioner. The Commissioner's Office has been investigating these Requests for nearly three years and there are currently 25 ongoing investigations involving this applicant or his spouse. In a small office with only two Investigators, this represents a large proportion of our work.

Our experience with this situation has raised a number of issues with respect to an individual's right to seek access to electronic records, the public body's ability to appropriately respond and the ability of the Commissioner's Office to accurately and efficiently investigate within a reasonable time frame. I will deal with each of these issues individually.

Volume of Electronic Records

I have already alluded to the ability to generate significant numbers of electronic records quickly and easily. While this in many cases may create "mother lodes" of information, it also creates capacity issues for public bodies and for Commissioners. Many of the email programs in use today by public bodies were developed purely as communication tools, rather than records management systems. As a result, the volume of e-mail generated by such bodies is far in excess of the amount of paper correspondence being sent and received, which now tends to be used for more formal communications. In fact, I would hazard a guess that many of the communications which take place over e-mail would at one time have been accomplished on the telephone or in person, perhaps never leading to the creation of a record.²¹ It is also interesting to note that the volume of e-mails in the United States surpassed the number of letters delivered by the postal service for the first time in 1996.²²

In this case, the applicant was seeking access to all e-mails which reference him or his spouse in any way. This resulted in the generation of large volumes of responsive records which had to be searched and severed by the public body. Once the applicant filed a Request for Review with the Commissioner, these records then had to be printed and sent

to the Commissioner's Office for review. In one particular investigation, the Commissioner's Office received printed copies of over 4,300 e-mails and attachments, sent to the Office in approximately 35 4-inch ring binders. It is interesting to note here that the public body in question originally sent these records to the Commissioner's Office in electronic format. However, the public body was using an e-mail system that was not compatible with the Commissioner's system and it was not possible to open the files. Once again, paper was the most feasible solution.

The potential capacity problems associated with electronic records is partially dealt with in some jurisdictions in Canada by the access to information statute itself. For example, section 10 of Newfoundland and Labrador's *Access to Information and Protection of Privacy Act* provides as follows:

- 10. (1) Where the requested information is in electronic form in the custody or under the control of a public body, the head of the public body shall produce a record for the applicant where
 - (a) it can be produced using the normal computer hardware and software and technical expertise of the public body; and
 - (b) producing it would not interfere unreasonably with the operations of the public body.
- (2) Where a record exists, but not in the form requested by the applicant, the head of the public body may create a record in the form requested where the head is of the opinion that it would be simpler or less costly for the public body to do so.

This provision obviously provides a public body with the ability to limit its efforts in responding to access requests for electronic records which "unreasonably" interfere with its operations. I think it is understood that the whole concept of access to information involves some degree of interference with the normal operations of public bodies, but that this interference is warranted and justified in the name of the higher public good which is established as the basis for legislation such as the *Access to Information and Protection of Privacy Act*. For this reason, I would see the bar as being set fairly high in

order to prove that responding fully to a request for electronic records would constitute an unreasonable level of interference. It is therefore important that public bodies are aware of and can utilize the full extent of capabilities of the "normal computer hardware, software and technical expertise" at their disposal.²³

The Commissioner in this jurisdiction has in certain limited cases accepted a public body's reliance on section 10. In each of these cases, the applicant was seeking access to significant numbers of e-mail records and the Commissioner felt that the test of unreasonable interference warranted denial of the records. One particular request by the applicant in this situation was one of those cases. However, the applicant did an interesting thing in order to limit the effect of section 10. He began splitting his requests into smaller "chunks" and submitting numerous access to information requests. The public body, therefore, was required to respond to each of these requests on an individual basis such that it could not rely on section 10. The public body argued that the result was effectively the same, but the Commissioner did not accept that a public body could treat all requests from a single applicant collectively and, as such, each request must be treated on its own merits. As a result, the public body ended up with significantly more access to information requests and the Commissioner with significantly more investigations. This was considered a more acceptable alternative to singling out an applicant and prejudicing his or her statutory right of access.

Once again, the importance of good records management practices must be emphasized. As I have previously indicated, the growth of electronic records has created challenges in this area, but it is important from an access to information perspective to address and overcome these challenges. If organizations fail to do so, should an applicant be the one to suffer the consequences? I for one do not believe that a poor records management protocol is an appropriate enough reason to deny an applicant access to information that he or she is rightfully entitled to. This highlights the importance of handling all records, both electronic and paper, in a manner that is conducive to appropriate access, security and conservation.

Management of Electronic Records

As the volume of electronic records has increased dramatically, so has the power and capacity of personal computers and other storage devices, such as flash drives. This has provided individual office workers with virtually unlimited storage capacity on their

computers. In the recent past, capacity limitations often restricted the amount of information that employees could store thereby forcing them to control the amount of information stored on their individual hard drives. In today's computing environment, however, where 160 gigabyte hard drives are standard and portable hard drives have moved into terabyte territory, capacity is quickly moving into the stratosphere. Also, most office environments are networking, such that large amounts of data are now stored on shared servers. People now tend to store more and more information because they can. Not surprisingly, the ability to control and manage this information is a significant challenge.

With respect to electronic mail, employees are responsible for their own account and, as such, have full control over the number of records they create and the content of those records. In many cases, these employees are also responsible for managing their own email records, which inevitably leads to inconsistencies in records management within a particular organization. For example, some employees create an e-mail archive, some employees simply keep them in their e-mail accounts, while other employees print their e-mails and then delete the electronic version. Still others use some combination of these options.

There is also considerable inconsistency in the treatment of transitory e-mails. While some people have no difficulty in deleting particular e-mails that have no business or organizational value, my experience has shown that many of us simply cannot delete anything. In the case at hand, the applicant worded his request in such a way as to ensure that the entire record was responsive, even if most of the record did not appear to be relevant to him. As such, the Commissioner's Office ended up sifting through numerous e-mails dealing with meeting dates, social events, and other issues completely unrelated to the applicant's original request.

On a similar note, there is also a tendency for many of us to combine an organization related e-mail with a personal e-mail. When dealing with an access to information request, the organization is then forced to spend more time reviewing and severing. Again, in the case at hand, the Commissioner's Office had to determine which portions of numerous e-mails were responsive and which portions were not, whenever the public body failed to do so accurately.

Another significant issue with the management of e-mail records is the considerable duplication inherent in an electronic environment. E-mail allows a single sender to instantaneously send a message, often including one or more attachments, to multiple receivers, thereby creating several electronic copies in numerous locations. These receivers can then forward these records on to others creating a snowball effect that can easily spiral out of control. In this case, the Commissioner's staff spent a significant amount of time cross-referencing the records in order to identify and remove duplicate copies of the same record. This involved quite literally spreading the printed copies of the e-mails on a boardroom table and identifying all of the duplication. Further complicating this process is the tendency, again inherent in e-mail, to reply to the sender thereby creating threads of e-mail messages. I will discuss the issue of e-mail threads later.

Notwithstanding the convenience and necessity of e-mail, it is important for organizations to recognize that e-mails, like any other record, must be categorized and filed in a manner that is conducive to a proper records management protocol. If an organization fails to appropriately address this issue, it will quickly lose control and will be faced with considerable challenges when responding to an access to information request or dealing with the Commissioner's Office. In the case at hand, the public body was required to extensively search the electronic records of each employee named in the request, as well as archives stored on servers. This included thousands of e-mail messages stored in various locations. Not surprisingly, errors were made and records were missed resulting in several recommendations from the Commissioner's Office. The public body in this particular case decided that these challenges warranted the implementation of new technology to help in its ability to search e-mail archives, including a trained computer support person.

Search Criteria

I had earlier indicated that one of the advantages of electronic records is the searching capability. Large amounts of information can be electronically searched in a very short period of time. On its face, this appears to be a significant advantage in terms of an access to information request. A public body is able to easily scan large volumes of records electronically and quickly identify information responsive to an applicant's request. In this jurisdiction, a large portion of our work has been about how a public body searches for electronic records, rather than decisions made by public bodies about

disclosure of the records. Despite the apparent advantages, our experiences in this regard have raised some concern, the most important being the actual criteria used in these electronic searches.

Conducting an electronic search, in its most simplistic form, involves the input of a key word or combination of key words. The system then scans the target database and identifies records or portions of records containing those key words. Unlike a manual search by an individual who is able to think, the output of an electronic search is directly dependent on those specific key words. For example, if I were to submit an access to information request for all e-mails which reference me, as did the applicant in this case, the public body may electronically search the e-mail archives using the key words "Sandy" and "Hounsell." However, the search would not likely return documents wherein I may have been referred to as the "Assistant Commissioner," as "Alexander" (Sandy is an abbreviated version of Alexander), or terms like "him" or "his." In addition, the search may not return documents wherein my name was misspelled. In the case I am reviewing here, the applicant had a surname that was often misspelled and, as a result, a number of records that were clearly responsive were not identified originally, leading to much frustration on the part of the applicant and embarrassment on the part of the public body.

Also in this case, the applicant's spouse was named in many of the records. As such, the applicant was sometimes referred to as the "spouse" or "husband." All searches using the applicant's name as the search criteria, therefore, missed these references, whereas a person doing a manual search would have identified these as responsive records. The question then becomes how exhaustive should the search criteria be when responding to a request for access to electronic records? For example, there are other potential synonyms for spouse, such as "partner" or "mate," as well as more colloquial terms such as "significant other" or "better half." No matter how exhaustive the public body may be in attempting to utilize every synonym, some possible references to the applicant as the spouse of another individual may be missed.²⁴

Another important question posed by this issue is the manner in which the search criteria is originally set. In many cases, an electronic records search might be quite straightforward, but when there are a number of possible search terms and combinations of search terms, there should be a process of defining and limiting the search criteria

involving both the applicant and the public body. In an electronic records search such as in this case, where there is some question as to what search criteria to use, it is incumbent upon the public body to contact the applicant to try to fine-tune the search in question by clearly defining the search criteria. In my opinion, the legislators, in drafting the *Access to Information and Protection of Privacy Act*, envisioned some circumstances in which there was an onus on the applicant to cooperate in such a process. For example, the legislation allows a public body to extend the time limit for a response "if the applicant does not give sufficient details to enable the public body to identify the requested record." Clearly, it is important that the applicant give sufficient details to enable the public body to perform a search for records, even if no extension of time is warranted.²⁵

The scenario here, however, is a two-way street. Applicants cannot be expected to determine the process used by a public body in undertaking a search, so it is not necessary for an Applicant to set out key words to be used in an electronic search when making the access request. Some searches can be conducted through either electronic or physical means, and it is the public body which must determine the most appropriate method. However, if the public body determines that an electronic search must be conducted, it should contact the applicant to explain what is involved, and that an electronic records search means that exact terms and combinations of terms must be used. Sometimes even alternate spellings can be necessary for commonly misspelled words and names. The public body should solicit the input of the Applicant in defining the search criteria and a record should be kept of the criteria used.²⁶

Based on our experiences in this regard, the quality of the input is crucial to the usefulness of the output. Searching for e-mail records can be as precise as a mathematical equation, but also can be as elusive as grains of sand slipping through your fingers. While electronic searching is very efficient in many respects, it is important to understand the limitations from an access to information perspective, even in situations where proper policies and procedures with respect to the management of electronic records are in place. In many cases, despite the best technological efforts of an organization, it may be necessary to conduct multiple searches using a variety of search criteria in order to ensure an accurate and complete response to an applicant. Otherwise, how can the Commissioner's Office be assured that an appropriate search has been conducted and that all responsive records have been provided for the Commissioner's review? Indeed, in this particular case, the Commissioner's staff expended considerable

time and effort in dealing with situations where particular responsive records had been missed in the original search due in part to these types of limitations.

E-Mail Threads

During my discussion of the management of electronic records, I made reference to e-mail threads. The nature of e-mail is such that any message that is received can be replied to or forwarded with a simple click of the mouse. The simplicity and the convenience of this has had a significant impact on the manner in which we now communicate with co-workers and other colleagues. E-mail allows us to have a complete work-related conversation without ever speaking to each other. The result from a records management perspective is the creation of numerous e-mail threads, or strings, which essentially reproduce a conversation in a recorded electronic format, a process I refer to as the "reply phenomenon." This phenomenon increases exponentially when more than one individual is involved in this electronic conversation. During the Commissioner's review of e-mail records in this case, threads of e-mails involving numerous replies extending over several pages were not uncommon.

The reply phenomenon also creates a tendency to change the topic, thereby adding new and unrelated information to a particular thread of e-mails. Rather than create a separate e-mail, people often prefer to simply hit reply when they wish to raise a new issue with an individual or group of individuals which they previously communicated with. As a result, if an applicant were to submit a request for access to records associated with the new topic, the records search will return the information associated with the original topic. This raises an interesting question: When does a particular e-mail record become another record? For example, if an e-mail thread includes two completely unrelated issues, is it considered a single record or two separate records? In the case at hand, the applicant was seeking access to all e-mail records which reference him. The clear intent of the applicant was to seek access to the entire e-mail, given that it is a continuous record, despite the fact that it may include different topics which may not have anything to do with the applicant. The public body in this case sent all e-mail threads to the Commissioner's Office for review. The Office, therefore, was forced to sift through long strings of e-mail exchanges (large portions of which the public body had wished to withhold under one or more exceptions), which in many cases were unrelated to the applicant. Further complicating the review process was the fact that many of these exchanges were shared among several individuals within the public body, thereby creating numerous copies of the same e-mail threads.

Attachments

Attachments are a common feature of many e-mails. This too has created some challenges for the Commissioner's Office. First, there is no question that attachments are records under the legislation and must be searched along with the e-mail message itself. I believe it is fair to assume that a reasonable person, in requesting a search of e-mail records, would intend that attachments to those e-mails are part of the request.

In this case, the e-mail system in use by the public body (Microsoft Outlook) was configured in such a way that would allow electronic searching, but was technically unable to search the text contained within an attachment, making it impossible to conduct a complete search of e-mail records using purely electronic means. The public body acknowledged that it was technically possible to reconfigure the Microsoft Outlook system to allow more thorough searching capability, but the risk to its current system and the cost involved has meant a significant delay in the implementation of this feature.

In the meantime, in order to account for this technical complication, the public body conducted a key word search of the e-mails themselves and then manually checked each of the e-mails containing one or more of the key words to determine if it contained an attachment. If so, the attachments were searched manually to determine if they were responsive. While this method proved fairly effective, it was not foolproof. As I indicated, the electronic search would only identify the key word in the e-mail message itself and not in the attachment. As such, if an e-mail message did not contain a key word, yet the attachment did, that attachment would be completely overlooked by the search. For example, if the e-mail message read simply "see attached" and the attachment was in fact responsive, that record would not be identified.

This situation has proven to be a barrier to the applicant's right of access, but has also proven to be a significant difficulty for the public body, not only in performing difficult and time consuming manual searches, but in dealing with displeased applicants, analyzing and diagnosing the problems and capabilities of its e-mail system, and also absorbing significant time and energy in responding to Reviews by the Commissioner's Office.

During our analysis of this particular issue, we were advised by the provincial Office of the Chief Information Officer that the Microsoft Exchange/Outlook system does have full attachment searching functionality for all "recognized document formats." As such, any document that has been attached to an e-mail message that does not fall within Microsoft's definition of a "recognized document format" may not be searchable. While most common file formats will likely be recognizable, there will be others that may not be identified by an electronic search. It is important, therefore, that governments and other organizations develop a strategy for accommodating requests for these types of records.²⁷

It has also been suggested that public bodies which lack the ability to search attachments electronically may be inclined to use this specific technical deficiency to intentionally shield records from an applicant. For example, by creating a record in the form of an attachment while at the same time ensuring that any key word that would likely be used in a search, such as a name, did not appear in the e-mail message, this record may not be identified during the normal searching process. While the Commissioner's Office has not encountered any clear evidence to suggest that this is indeed happening on an intentional basis, we did receive a copy of one particular e-mail with an attachment containing the personal information of a particular individual. The e-mail message itself continuously referred to the individual as "he," "his" or "the author." While the individual was identified in the attachment, his name did not appear anywhere in the message. An electronic search using the name of the applicant, therefore, would not have identified this record.

Another issue encountered by this Office involves the review of the records. During the course of an investigation by the Commissioner's Office, all responsive records are printed and forwarded to the Office in a hard copy format. When forwarding printed versions of e-mail and attachment records, however, the attachment is sometimes separated from its accompanying e-mail. This creates considerable difficulty in determining which attachment goes with which e-mail. As such, this Office has tended to treat the attachments as separate records.

Severing (Electronic v. Manual)

When responding to an access to information request for electronic records, searching is simply the first step in a process. Searching only identifies potentially responsive records. These records must then be reviewed to determine whether they can or should be released to the applicant. Reviews of this nature are normally done on a line-by-line basis in order to identify words, sentences, paragraphs or pages of information that may fall within one of the exceptions set out in the access to information legislation. While programs exist that allow you to sever electronically, the vast majority of public bodies in this jurisdiction are still relying on the "black marker." As such, all electronic documents that are identified as responsive must be printed, reviewed line-by-line and then severed appropriately. Hard copies of the severed records are then provided to the applicant.

In the event that an applicant is not satisfied with the severed documents, they have the option of filing a Request for Review with the Commissioner's Office. In response, this Office will require a hard copy of all records, both in an unsevered format and in the same format as provided to the applicant. The records are again reviewed by the Commissioner's Office on a line-by-line basis to determine whether or not the exceptions to access were appropriately applied by the public body.

The Commissioner's Office has experimented with records in electronic format, but has not been able to justify any extensive use of such records. Due to the complexities of the review process, the sheer volume of records often submitted, the need to annotate the records, and the need to cross-reference, it is simply more effective to work with paper. Given the extensive creation and use of electronic records over the last few years, particularly e-mail records, the volume of printed records received at this Office is often extensive and the amount of time and effort necessary to appropriately review all of this information continues to grow significantly. This is particularly difficult in jurisdictions with relatively small oversight offices. For example, the Commissioner's Office in Newfoundland and Labrador required nearly a full year to appropriately review and report on the 35 binders of e-mail records referenced earlier in this paper. It is also important to note that the review of these records resulted from a single disgruntled former employee and his spouse, who is a current employee. To date, we have dealt with similar requests from other current and former employees. As people become more familiar with the potential "mother lode" of information available, particularly from e-

mail exchanges, we are likely to see a continued growth in demand for the services of the Commissioner's Office.

CONCLUSION

There is no doubt that the explosive growth and proliferation of the electronic record has had a significant impact on the way we do business, nor is there any doubt that this impact will continue into the foreseeable future. This paper has explored both the advantages and the challenges posed by the electronic record and, in particular, the impact on the access to information process. There has been a particular focus on the creation, use and storage of e-mail records and the unique challenges both from a records management perspective and an access to information perspective.

Notwithstanding these challenges, continued advances in technology and continued growth in the use of electronic media is inevitable and, in many respects, necessary and beneficial. In today's technological environment it is essential that governments throughout the world continue to conduct business in an electronic forum. However, it is equally essential that the public have access to these electronic records in order to maintain any meaningful ability to participate in the modern democratic process and to ensure appropriate accountability, as envisioned by the Supreme Court of Canada.

This paper has also explored the ultimate irony in electronic records management. In the not so distant past there was considerable consensus that technological advances in this area would steadily decrease our reliance on paper. However, the statistics have clearly shown the complete opposite. Our consumption of paper has in fact dramatically increased over the last number of years. While we now have the ability to create, use and share records at unprecedented rates, our tendency to print is a hard habit to break. Organizations, therefore, are faced with increasing volumes of electronic records *and* paper records.

Regardless of the medium on which records are created and stored, all organizations subject to modern access to information legislation must recognize the importance of such legislation and must ensure, in general, that appropriate records management policies and procedures are in place and, in particular, that appropriate systems are in place to allow timely, accurate and complete responses to access to information requests,

including requests for e-mails and other electronic records. These organizations must be prepared to explore all reasonable methods of responding to such requests, whether electronically or through some combination of electronic and manual functionality. Failure to do so will in all likelihood lead to considerable difficulties in dealing with individuals legitimately seeking access to information and will ultimately result in more investigations by the Commissioner's Office.

In addition to the need for effective policies and procedures in this area, it has become increasingly evident that an evolution of laws and standards is necessary in today's electronic world to control the delicate balance between records management and access to information. These laws and standards must be designed to maximize completeness, accuracy, integrity and preservation of information.²⁸ While there is considerable value in organizational policy development, the issue has become far too complex and important to rely on self-governance alone. There are fundamental rights at stake here and for this, we must encourage and support fundamental laws and standards.

With respect to the case study, there has been considerable frustration on the part of both the applicant and the public body which has resulted in numerous access to information requests being filed and, almost without exception each of these requests results in a Request for Review being filed with the Commissioner's Office. The applicant continues to believe that he has not been treated in an appropriate manner and that he has not received all information to which he is entitled. In fact, the applicant has gone so far as to accuse the public body of willfully misleading both him and the Commissioner's Office. The public body, on the other hand, continues to be frustrated with the challenges of searching and identifying responsive records, particularly given the significant volume of electronic records, primarily e-mail records, captured by the applicant's requests. The public body has acknowledged a number of errors, but continues to express a commitment to the process and to the rights of applicants under the legislation. In this regard, it has taken considerable action, including the creation of an access to information office with two full-time staff, designation of a Wide Area Network Administrator to handle e-mail searches and the implementation of e-mail archiving and journaling technology aimed at improving its ability to conduct electronic searches.

While I fully support advances in technology and the continued growth of electronic media, I believe that it is crucial to recognize the limitations and the challenges from an

access to information perspective. As is evident from the case study, if we are not fully prepared for these challenges, the repercussions may be significant and may lead to turmoil within an otherwise functional organization. We must be proactive in our approach to technology and not only try to keep up, but try to get ahead. This will not be easy, but in the face of increasing gigabytes and terabytes of electronic information and increasing mounds of paper, we have little choice.

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Notes:

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2	Loukidelis, 4.			

Knowledge is of two kinds:

We know a subject ourselves, or we know where we can find information upon it.

Samuel Johnson 1775

"The overarching purpose of access to information legislation...is to facilitate democracy. It does so in two related ways. It helps to ensure first, that citizens have the information required to participate meaningfully in the democratic process and secondly, that politicians and beauracrats remain accountable to the citizenry."

Justice Gerard LaForest
Supreme Court of Canada
Dagg v. Canada (Minister of Finance), 1997 2 S.C.R. 403

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Newfoundland and Labrador
Canada

Sandy B. Hounsell Assistant Commissioner

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Where Are We?

5th Floor, East Block Confederation Building P.O. Box 8700 St. John's, NLA A1B 4J6

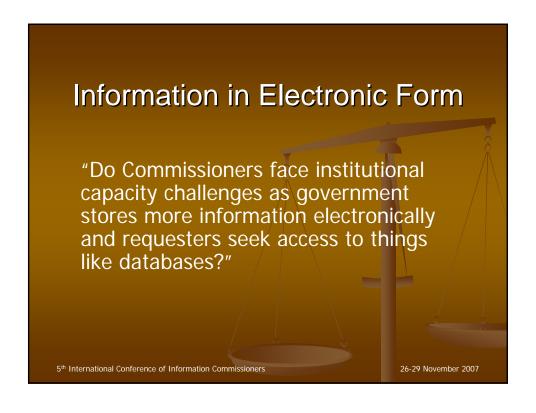
Telephone: (709) 729-6309

Facsimile: (709) 729-6500

E-mail: oipc@gov.nl.ca

Web Site: www.gov.nl.ca/oipc

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Electronic Records and Access to Information – Have We Revolutionized the Process or Are We Simply Killing More Trees?

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What is a Record?

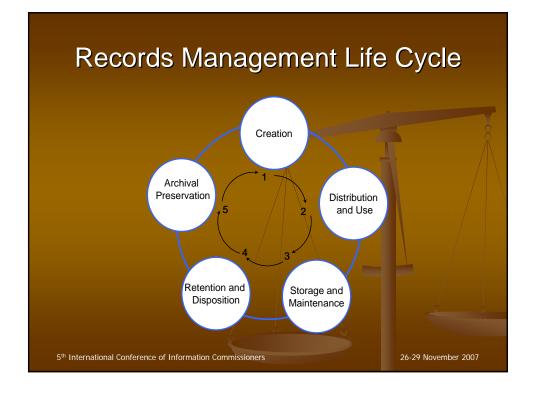
- Access to Information Act, R.S. 1985, c. A-1 (Federal)
 - "record" means any documentary material, regardless of medium or form
- Access to Information and Protection of Privacy Act,
 S.N.L. 2002, c. A-1.1 (Provincial)
 - "record" means a record of information in any form, and includes information that is written, photographed, recorded or stored in any manner, but does not include a computer program or a mechanism that produced records on any storage medium

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Records Management

- Cornerstone of accountable government
- Accurate and secure preservation of information fundamental to the right of access
- Records have a "life cycle"

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Electronic Records

- Significant advances in information and communication technologies
- Records being created, analyzed, stored, retrieved and destroyed electronically
- Explosion of digitized information word processing, spreadsheets, databases, digital photographs, e-mail, CCTV, etc.
- "The stockpile of government information has been liquified..." (Alasdair Roberts)

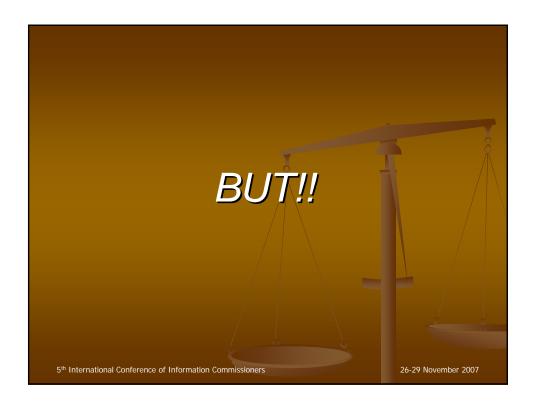
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Advantages

- Information is easier to get at (storage and searching capabilities)
- There is more of it (good or bad?)
- Easy to cut and paste, update, manipulate, automate, etc.
- Can be e-mailed
- Security and audit trails
- Takes up less space

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Challenges of Electronic Records

- Sheer volume and variety difficult to catalogue, organize and preserve while still maintaining accessibility
- Many versions of the same record which one is the authentic original?
- Hardware, software and storage media become obsolete over time
- Lack of laws and standards
- E-mail is particularly challenging

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The "Paperless Office"

- Electronic records are official records no different from paper records
- Ironically, there has been a steady increase in paper consumption
- Still a tendency to print electronic records
- The US federal government
 - 1996 97,000 tons of office paper
 - 2004 109,000 tons
 - 2008 114,360 tons (72,000 Toyota Camrys)

(Source - GovernmentExecutive.com)

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E-Mail

- 2002 6 million e-mail exchanges within the Canadian government every day (CIO)
- E-mail provides "mother lodes" of revealing information (Alasdair Roberts)
- Driven in part by its spontaneous nature
- Replaces large numbers of telephone calls, memos, letters and face-to-face meetings

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E-Mail as a Record

- Any e-mail created or received in connection with the transaction of Government business is a "record"
- Transitory e-mails ("copies of convenience" or "reference copies") – may be deleted
- E-mails are often overlooked as a record
- 2002 Number of investment firms were fined \$1.65 million (U.S.) each by securities regulators for improper e-mail storage (globeandmail.com)

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Office of Chief Information Officer Government of Newfoundland and Labrador, Canada

- E-mail Policy
- E-mail Guidelines
- Using E-mail Effectively
- E-mail Acceptable Use Practices
- Managing E-mail Quick Reference Guide
- OCIO TRIM ContextTM E-mail Integration Quick Reference Guide
- Frequently Asked Questions

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Case Study

- Individual had been terminated by a public body
- Has filed numerous access to information requests over the last 3 years
- Requesting all information that references him, including all e-mails
- Each request involves specific individuals and specific time frames

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Issues

- Volume of electronic records
- Management of electronic records
- Search criteria
- E-mail threads
- Attachments
- Severing (electronic v. manual)

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Volume of Electronic Records

- Due to ease and convenience, tens of thousands of e-mails created, sent, received and cc'ed
- Many of these e-mails have attachments
- In one investigation, our Office was required to review over 4,300 e-mail records and attachments
- All records were printed and sent to our Office in 35 4-inch binders!

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Management of Electronic Records

- E-mails and other electronic records often stored on individual computers
- Individuals responsible for managing their own e-mails - lack of consistency
- Considerable duplication (one sender but may have multiple receivers)
- Improper management of transitory e-mails
- Individuals often combine official e-mails with personal messages
- Commissioner left to sort through the "mess"

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Search Criteria

- Electronic searching is fast and convenient, but will only return what you ask
- Output is only as good as input
- For example, if searching "Hounsell," an electronic search will not identify references to "Assistant Commissioner" or "Alexander" or terms like "he," "him" or "his"
- In this case, applicant was sometimes referred to as "husband" or "spouse"
- Electronic search missed all of these

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Search Criteria (con't)

- Who sets the search criteria?
- When do the options become unreasonable?
- Misspelling is also a concern
- Multiple searches using a variety of criteria are often necessary
- All is not what it appears!

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E-Mail Threads

- Nature of e-mail continuous strings of messages – the "reply phenomenon"
- Topic often gets changed
- When does a particular e-mail record become another record?
- Applicant asked for all e-mail records referencing him – expands the responsive record
- Commissioner's Office ends up sifting through long strings of e-mail exchanges
- Often unrelated and/or repetitive

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Attachments

- Some e-mail systems not configured to perform a key word search of attachments – responsive records "hidden" in attachments
- Example e-mail message "see attached"
- Microsoft Exchange/Outlook system will search e-mail attachments that are in "recognized document formats"
- When printing, an attachment often gets separated from its e-mail message

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Severing (Electronic v. Manual)

- Searching only identifies responsive records
- Many organizations do not have the ability to sever electronically
- Must print, read and sever appropriately, using the "black marker"
- Commissioner's Office requires hard copies of all responsive records
- Requests for electronic records generate large volumes of paper records

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Access to Information and Protection of Privacy Act, SNL 2002, c. A-1.1

- 10 (1) Where the requested information is in electronic form in the custody or under the control of a public body, the head of the public body shall produce a record for the applicant where
 - (a) it can be produced using the normal computer hardware and software and technical expertise of the public body;
 - (b) producing it would not interfere unreasonably with the operations of the public body.

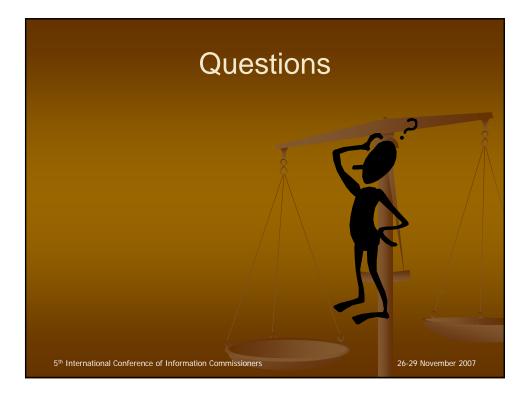
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Final Comments

- The explosive growth of the electronic record has a significant impact on the way we do business
- As a communication tool, e-mail is fast, convenient and often invaluable
- From an access to information perspective, the results are mixed
- We are seeing more and more requests with specific reference to e-mail and other electronic records
- Commissioners must keep up and adapt as requestors and public bodies continue to battle in the same arena, but use more and more advanced weaponry

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Thomas M. Susman Ropes & Gray LLP Washington, DC

 ${\bf Paper\ delivered\ at\ the}$ ${\bf 5^{th}\ International\ Conference\ of\ Information\ Commissioners}$

Access to Information in Electronic Form: The U.S. Experience Under the Freedom of Information Act

I. INTRODUCTION

The United States Congress in 1996 enacted the Electronic Freedom of Information Act Amendments of 1996¹ (eFOIA) to resolve some of the problems that had arisen in the course of applying the 1966 Freedom of Information Act² (FOIA) to information maintained in electronic formats. The new statute addressed three issues that had been subject to dispute by explicitly requiring records maintained in electronic format to be made available under FOIA; by requiring agencies to make a "reasonable effort" to comply with requests to furnish records in formats selected by the requesting party; and by requiring agencies to note the location and extent of deletions made on an electronic record when released with redactions made of exempt material.³

¹ Public Law No. 104-231, 110 Stat. 3048.

² 5 U.S.C. § 552 (2007).

[.]

³ The amendments also imposed requirements on agencies regarding expedited and multitrack processing of FOIA requests, attempted to reduce delays due to agency backlogs, extended the initial deadline for responding to requests from 10 to 20 working days, and expanded reporting and electronic dissemination requirements.

A 1989 Conference on Electronic Public Information⁴ and a 1988 recommendation of the Administrative Conference of the U.S.⁵ had identified a number of other areas of controversy regarding application of FOIA to electronic information: whether software, electronic mail, and databases are records subject to FOIA; what constitutes a reasonable search of electronic information under FOIA; and whether programming involves the creation of new records and is therefore not required by FOIA. E-FOIA left many of these issues unresolved; some of them remain so today. The controversies over programming and searching have receded: retrieval of data from electronic files and databases has become routine, and whether a search is reasonable can ordinarily be addressed without resort to parsing fine lines surrounding computer programming. This paper addresses the three other areas that continue to prove vexing to requesters and agencies alike: access to entire databases, access to e-mail, and access to software. The discussion of databases occupies a large portion of this paper because it is drawn largely from the author's participation in an on-going FOIA case on this subject.

II. ACCESS TO ENTIRE DATABASES

A case currently pending in the U.S. federal court in New York demonstrates many of the difficulties encountered by persons requesting data from electronic databases under FOIA. In this case, the plaintiffs are two professors from Syracuse University who direct the Transactional Records Access Clearinghouse (TRAC). TRAC is a data-gathering, data-research, and data-distribution organization whose purpose is to make information about the federal government's civil enforcement and regulatory efforts, along with information on related staffing and spending, accessible and understandable to the public. It accomplishes its purpose principally using FOIA.

TRAC is seeking to obtain information from a case management database, known as "CASES," maintained by the Civil Division of the Department of Justice (DOJ). ⁶ The CASES database tracks all cases involving that Division. For example, the database

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⁴ HENRY H. PERRITT, JR., ELECTRONIC PUBLIC INFORMATION AND THE PUBLIC'S RIGHT TO KNOW (1990) (reporting on the proceedings of a Washington, DC conference held October 23-24, 1989).

⁵ "Federal agency use of computers in acquiring and releasing information," 1 C.F.R. § 305.88-10 (1988). The first effort to address this subject in a comprehensive manner appears in "Electronic Collection and Dissemination of Information by Federal Agencies: A Policy Review," H.R. Rep. No. 560, 99th Cong., 2d Sess. (1986).

⁶ Long v. Department of Justice, Case No. 5:06-cv-1086 (N.D.N.Y. 2007).

includes records containing various case identifiers and descriptors, names of plaintiffs and defendants, client federal agencies, assigned attorneys, case dispositions, monetary relief sought and awarded, and the time expended by DOJ staff, as well as a copy of the physical case files available for the case. CASES is used by the Civil Division to manage its litigation workload and to generate statistical, management, and budget information.

In 2004, TRAC requested an electronic copy of the records in CASES pertaining to the DOJ's civil court cases filed or pending since October 1, 1999. TRAC also requested descriptive information about the database, including table schema and definitions of codes used, records describing the scope of cases included in the database, changes to the database during the designated period, current data input and users' manuals, descriptions of reports regularly prepared using the database, and records describing procedures used to ensure data quality.⁷

Three years later a lawsuit was filed, and there have been lengthy discussions between the parties resulting in releases of a large portion of the requested data. However, numerous issues still remain, highlighting several issues common to FOIA requests for to electronic databases. First, government agencies' procedures and personnel are often illequipped to respond to FOIA requests involving large, complex, electronic databases. Second, FOIA requires agencies to conduct a reasonable search for responsive records, but databases create a unique challenge in this area because sometimes agencies are not fully aware of the scope of their own databases and are unable or reluctant to provide the requester with an "audit trail" explaining their search parameters and methods. Third, many common exceptions to disclosure under FOIA take on new meaning in the context of an electronic database. Finally, technical difficulties often arise related to the form and formatting of the data.

A. Constraints on Agency Responses to FOIA Requests for Databases

1. Lack of procedures specific to electronic requests

The TRAC request was processed by the Freedom of Information and Privacy Acts
Office of the Civil Division, which handles all FOIA requests for Civil Division records.
The TRAC requesters were never permitted to communicate directly with the technical

⁷ As a nonprofit organization with a history of widespread dissemination of information relevant to government administration, TRAC was granted a waiver of fees ordinarily imposed under FOIA.

staff of the Office of Management Information (OMI), which maintains the CASES system, to discuss the best approaches for responding to their request and for providing the results in the most suitable format for delivery. This resulted in years of delay, as the technical staff wrote programs to extract data that did not respond to what the requesters were seeking. The requesters, who are database experts, could have assisted in streamlining the data extraction process but were never allowed to do so. This experience demonstrates that, at least in the case of highly technical electronic requests, the earlier the requester is involved in or at least fully informed about the process of data extraction, the better the long-term benefit in terms of cost, time, and accuracy for both parties.

2. Personnel constraints

Limitations on agency personnel may result in an inadequate response to a FOIA database request. OMI is understaffed and often contracts much of the search work to outside companies, leading to further confusion. Additionally, the limited OMI staff may not always be qualified to handle the request. OMI made an initial attempt to extract data from CASES in March 2006. After this was completed, OMI realized that the programming code identified only selected closed cases, whereas the requester was seeking both closed and open cases. OMI then needed to rewrite the code, but by that time the technical staff person who had written the code for the March 2006 production was no longer employed in OMI and had left no record of the code used the first time. The new staff had to start from scratch to write new code and process the results, which took an OMI employee working with a contractor and another staff person from July until November 2006 to complete. Yet, even on that try, OMI failed to create a code that would identify the records that had been redacted, so in January 2007 OMI started writing a third code to show redactions. This pattern of understaffing (and underqualified) staff only resulted in more wasted time for everyone involved in the process.

3. Computer system constraints

Another problem encountered in by TRAC has been the limitations of the database itself. The CASES database requested by TRAC was outdated, poorly managed, and not

⁸ These discussions did occur through a very helpful Civil Division litigator staffed on the civil suit filed in the Northern District of New York. However, even the most lucid game of information telephone (requester speaks with attorney, attorney speaks with DOJ litigator, DOJ litigator speaks with OMI technical staff) is no substitute for a direct conversation between requester and technology staff.

designed to be responsive to the types of searches necessary to respond to FOIA requests. In the course of responding to TRAC's request, the Department of Justice has had to review and significantly revise the database to address many of its shortcomings. However, there are obviously limits to what an agency will and should be required to do to remedy the shortcomings of its database. In these situations, the agency may respond that it is unduly burdensome to respond to the request if it would involve conducting a search that is not reasonably possible in the given database.

For example, in People for the American Way Foundation v. Department of Justice.9 the plaintiff sought documents from the Executive Office for the United States Attorneys pertaining to sealed cases relating to post-9/11 immigrant detainees. The agency informed plaintiff that the search was unreasonably burdensome, as the databases used to manage cases did not identify sealed cases nor immigrant status, so any search would have to be done by hand in each U.S. Attorney's Office. In short, the limitation of the database made a straight-forward electronic search impossible. The database simply did not track the relevant terms to enable responses to FOIA requests. Since sealed cases will almost always be subject to a FOIA exemption, tracking the sealed status of a case would inevitably make it easier to respond to FOIA requests; unfortunately, most agency databases are not designed with FOIA in mind.

As a result, the requester must find a creative way to get around the limitations of the database. In <u>People for the American Way</u>, the parties engaged in settlement negotiations to try to frame a database search that would yield the relevant records or limit the scope of the hand search. Searches of the database were conducted using specific terrorism-related identifiers and habeas corpus codes, which yielded 69,000 potentially responsive files. The plaintiff then agreed to remove 25,000 habeas cases and proposed that the agency screen the remaining 44,000 using PACER, an online system containing information about all public cases in federal courts, which would enable the agency to identify those cases that were not listed on PACER. A hand search would then be conducted of the cases not listed in PACER to determine if they were sealed. The agency said this would be too burdensome and also rejected other proposals to limit the search. The court agreed that a manual search of all 44,000 records would be unduly burdensome, but found that a PACER search of those records to identify which cases had

⁹ 451 F. Supp. 2d 6 (D.D.C. 2006).

been sealed would not be burdensome. The court reserved judgment on whether a subsequent manual search of the files identified by PACER would be burdensome since it did not know how many files would be found. It thus proposed that the parties return to court if they disagreed over the reasonableness of the manual search.

The problem of technological constraints to responding to FOIA requests reached its zenith in a request and subsequent lawsuit by the Center for Public Integrity for data on Foreign Agents Registration Act (FARA) registrants from DOJ's Foreign Agents Registration Unit. The agency responded to the request that its computer system was so fragile that simply making a copy of the database could result in loss of data. (The requester dismissed its lawsuit when DOJ made a commitment that a new database would be installed in a reasonable period of time.)

The experience in TRAC and other cases revealing inadequate procedures, personnel, and computer systems raises the question whether FOIA obligates government agencies to make improvements in these areas to enable better responses to FOIA requests. This issue has not been decided by the courts.

B. Reasonableness of Search

Also at issue in the TRAC case is the reasonableness of DOJ's search for responsive records. FOIA requires agencies to conduct a reasonable search. To challenge the reasonableness of a search, a requester must identify specific problems with the search the agency has conducted. However, to do this, the requester needs information about the scope of the search, or audit trail.

For example, in <u>Servicemembers Legal Defense Network v. Department of Defense</u>, ¹¹ a nonprofit organization sought records from the Departments of Defense and Justice relating to alleged government surveillance of individuals and groups opposed to the government's policy on gays and lesbians in the military. The belief that this surveillance may have occurred was based upon press reports of a Defense Department document mentioning the surveillance. The agencies conducted searches and made limited releases of information, but the plaintiff believed that other documents existed, so

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¹⁰ See discussion at http://www.publicintegrity.org/report.aspx?aid=332.

¹¹ 471 F. Supp. 2d 78 (D.D.C. 2007).

it challenged the adequacy of these searches. The court granted summary judgment for defendants and dismissed the case after finding, based on the agencies' declarations, that although initial searches may have been inadequate, the agencies eventually agreed to use appropriate search terms and searched relevant databases and files that were "likely to possess the requested information." The court held that the agencies did not have to search every database possible, but only those likely to contain responsive information; the mere possibility that other responsive documents existed did not render the search unreasonable. This case demonstrates the need for plaintiffs to identify a concrete flaw in the way that an agency searched for requested information to succeed in challenging the reasonableness of a search.

A problem in database cases is how to obtain the search parameters used by an agency. In <u>Servicemembers</u>, the agencies disclosed simple keyword searches of databases in their declarations. Requesters should be provided access to an audit trail to be sure that an agency has extracted the entire database and not just a portion. For instance, in TRAC, DOJ was not even aware of the full scope of the database that had been requested. In January 2007, over two years after the initial FOIA, the agency discovered that the CASES database contained nearly 100 previously unreleased tables that were either in the core database or part of specialized modules used by particular branches of the Civil Division. These tables were hidden because the agency did not have an accurate and comprehensive catalog of all the tables and fields, which it has had to create in the course of responding to the FOIA request. The agency's own lack of awareness of the parameters of its database makes it difficult for the FOIA requester to evaluate whether the agency's search was reasonable, since to do so requires information about the scope of the search and the database being searched.

C. **Application of Common Exemptions to Database Requests**

Exemptions may apply to information contained in databases in the same manner as to other kinds of records subject to disclosure under FOIA.¹² If names and other personal identifying information appears, then the exemption protecting against unwarranted invasions of personal privacy may apply. Likewise, exemptions relating to law enforcement activities or to trade secret or other confidential commercial information may be applicable. FOIA also has an exemption that protects essentially trivial internal

¹² The 9 exemptions are contained in 5 U.S.C. § 552(b).

administrative matters (Exemption 2); while some agencies have attempted to use this exemption to protect databases on the theory that they were designed solely for internal use, the courts have rejected this claim.¹³

D. Form and Formatting Issues

1. Separability of exempt information

Another problem encountered in the database context is that information that should be released may be co-mingled with exempt information in the same database. Where there is both exempt and nonexempt information, an agency should separate or redact the exempt information, but this can be difficult in a database. In TRAC, a major problem has arisen with sealed cases. The Department of Justice sought to redact records for any case that had been sealed at any point; however, many cases are only partially sealed or are later unsealed and the agency had no reliable way of identifying which cases were still currently sealed in their entirety. This problem is similar to the one encountered in People for the American Way, discussed above, where the requester found a creative way around the database limitation, which the court in part endorsed.

In Los Angeles Times Communications LLC v. Department of Labor, ¹⁴ a newspaper sought information from government databases pertaining to civilian contractors who were killed or injured while supporting military operations in Iraq and Afghanistan. The agencies released some information but withheld: (1) names, addresses, genders, dates of death, and employers of the deceased contractors from the United States and countries other than Iraq and Afghanistan; (2) the names, genders, dates of injury, and employers of injured American contractors; and (3) the names, addresses, genders, dates of injury, and employers of injured foreign contractors from countries other than Iraq and Afghanistan. The basis for the withholding was Exemption 6, protecting personal information. The court found that the disclosure of identifying information as to contractors currently residing in Iraq or Afghanistan was not warranted given the risks to their personal safety that disclosure would create. While the court did not find that these risks applied to contractors residing outside Iraq and Afghanistan, it determined that there was no way to ascertain the current residence of the contractor from the database.

¹³ E.g., Abraham & Rose, PLC v. United States, 131 F.3d 1075 (6th Cir. 1998) (IRS database of federal tax liens).

^{14 483} F. Supp. 2d 975 (C.D. Cal. 2007).

The court therefore allowed the agency to withhold all of the identifying information for all contractors. This case demonstrates that without adequate information that perhaps should be integral to the database, an agency may be able to withhold all of the information, both exempt and nonexempt, since the latter cannot be reasonably segregated.

2. Identification of Redactions

Identification of redactions has also been an issue in the TRAC case. This has been a more practical problem, because the Department of Justice has agreed in theory (as required by eFOIA) to show asterisks to indicate redacted fields; however, agency responses have been elusive on this point. As mentioned above, the first two releases did not show redactions; it took a third effort to write a code that would show redactions.

III. ACCESS TO E-MAIL

E-mail is subject to disclosure under FOIA if it can be reasonably retrieved. Several issues arise related to access to e-mail under FOIA. First, an agency is only expected to disclose those e-mails in its possession at the time of a FOIA request. Thus, both agency and national archiving policies play an important role in determining whether e-mails are preserved for disclosure under FOIA and in what format agencies are permitted to maintain e-mail records and related metadata. The application of federal recordkeeping requirements for the preservation of e-mail also influences courts' analysis of whether an agency's search for documents in response to a FOIA request is reasonable. Lastly, government employees' use of public e-mail systems to transmit personal information and use of private web-based e-mail systems to conduct government business raise challenging issues under FOIA.

A. E-mail Preservation

1. Recordkeeping requirements

FOIA "does not impose a document retention requirement on agencies," but instead requires an agency to disclose only those documents that it possesses at the time of a FOIA request. Thus, in the United States, the National Archives and Records Administration (NARA) regulations related to document retention and destruction play a significant role in determining whether e-mails are preserved for disclosure under

¹⁵ Landmark Legal Found. v. EPA, 272 F. Supp. 2d 59, 66 (D.D.C. 2003).

FOIA.¹⁶ These regulations permit agencies to destroy electronic records "only in accordance with a records disposition schedule approved by the Archivist of the United States, including General Records Schedules."¹⁷ General Records Schedule (GRS) 20 permits agencies to delete e-mails from users' electronic mailboxes after copying them to a recordkeeping system that meets certain specifications related to accessibility, security, and accuracy.¹⁸ The time period for which the e-mail records must be retained in the recordkeeping system is governed by the applicable NARA-approved schedule and thus varies by agency and by type of record.

2. Format of recordkeeping systems

GRS 20 permits agencies to adopt either electronic or paper recordkeeping systems for the storage of electronic records.¹⁹ The recordkeeping system must capture certain metadata, including the names of the sender and recipient of an e-mail, as well as the date the e-mail was transmitted.²⁰ NARA adopted this metadata requirement in response to <u>Armstrong v. Executive Office of the President</u>,²¹ in which the D.C. Circuit held that certain agencies' policies of printing out e-mails as the sole method of preserving e-mail records violated federal records laws because such print-outs failed to preserve all important elements of electronic records.²²

3. Policy issues underlying recordkeeping requirements

In <u>Public Citizen v. Carlin</u>, the D.C. Circuit upheld GRS 20 against a challenge by Public Citizen asserting that "hard copy records are not satisfactory replacements for records in electronic format." This case highlights the policy issues that must be balanced when deciding in what format electronic records, including e-mails, should be preserved; the <u>Public Citizen</u> court categorized these issues as superiority issues and completeness issues.

¹⁶ See 36 C.F.R. pt. 1234 (2007).

¹⁷ 36 C.F.R. § 1234.34 (2007).

¹⁸ NAT'L ARCHIVES & RECORDS ADMIN., GENERAL RECORDS SCHEDULE 20 (August 1995), *available at* http://www.archives.gov/records-mgmt/ardor/grs20.html; *see also* 36 C.F.R. § 1234.32 (2007).

¹⁹ NAT'L ARCHIVES & RECORDS ADMIN., *supra* note 18.

²⁰ *Id.*; see also 36 C.F.R. § 1234.32 (2007).

²¹ Armstrong v. Executive Office of the President, 1 F.3d 1274 (D.C. Cir. 1993).

²² Jason R. Baron, *E-Mail Metadata in a Post-*Armstrong *World*, Paper Presented at the Third IEEE Metadata Conference (1999), *available at* http://www.archives.gov/era/pdf/baron-email-metadata.pdf.

²³ 184 F.3d 900 (D.C. Cir. 1999).

(a) Superiority issues

Centralized electronic recordkeeping systems are superior to paper systems in terms of "searching, manipulating, and indexing information."²⁴ In addition, electronic systems promote efficiency because multiple users may search an electronic system at the same time. These values must be balanced, however, with administrative considerations. An agency's primary purpose in adopting recordkeeping systems is to "conduct Government business," not to preserve records for the use of future researchers or FOIA requesters, and some agencies may find that paper recordkeeping systems are "most appropriate to the business of the agency."²⁵ In addition, agencies may face operational constraints that make the adoption of centralized electronic recordkeeping systems infeasible. NARA has chosen to balance these policies by encouraging, but not requiring, agencies to adopt electronic recordkeeping systems, and the court in Public Citizen approved this approach. For FOIA requesters, this means that e-mail records often may not be available in electronic format.

(b) Completeness issues

Paper records may not adequately capture all information contained in an electronic record. In <u>Public Citizen</u>, the Archivist and court responded that the metadata requirement in GRS 20 adequately addresses this concern, as it requires that recordkeeping systems preserve "all relevant transmission data" from e-mails. The court observed that Public Citizen had failed to identify any "information that may not be transferred when [an e-mail] record is copied to paper pursuant to the requirements of GRS 20." Thus FOIA requesters should have access to relevant metadata associated with e-mails whether agencies maintain paper or electronic recordkeeping systems.

4. Consequences of wrongful document destruction

An agency is not liable under FOIA for failure to comply with federal record retention laws and regulations. Instead, if an agency wrongfully destroys documents that were in its possession at the time of a FOIA request and should have been disclosed, the agency may be required to pay the requester's attorneys fees caused by such destruction and to

²⁴ *Id.* at 908.

²⁵ *Id.* at 909-10.

²⁶ *Id.* at 910.

reconstruct the documents to the best of its ability.²⁷ In addition, if a court had previously ordered the agency to retain the documents, the agency may be held in contempt for destroying records.²⁸

B. Reasonableness of Searches for E-Mail Under FOIA

NARA regulations not only dictate the records that federal agencies must maintain and the format in which those records are preserved, but federal recordkeeping requirements have influenced the way courts assess the reasonableness of a search for e-mails under FOIA. Courts are unlikely to deem a search reasonable unless an agency has searched its e-mail recordkeeping system, as demonstrated in <u>Albino v. United States Postal Service</u>. In that case, an agency employee responded to a request for e-mails under FOIA by asking the individuals whom the requester had identified in his FOIA request whether they had records of the requested e-mails. The court held that this search was inadequate, explaining that the agency should have also "enlist[ed] the help of information technology personnel," who "would have access to e-mail message archives."

C. Application of FOIA to Personal E-Mails Sent Via Public E-Mail Accounts

At the federal level, agencies may withhold from disclosure personal e-mails under FOIA's Exemption 6, which exempts from disclosure records involving "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy." In <u>Yonemoto v. Department of Veterans Affairs</u>, the court upheld the Department of Veterans Affairs' decision to redact portions of e-mails sent via a government e-mail server that discussed the personal feelings of the author, a government employee, towards co-worker Yonemoto. To determine whether Exemption 6 applied, the court balanced the author's "personal interest in privacy against the public's interest in disclosure" to the extent that disclosure would further the primary purpose of FOIA – "contributing significantly to public understanding of the operations

²⁷ See, e.g., Landmark Legal Foundation v. EPA, 272 F. Supp. 2d 59, 66-68 (D.D.C. 2003).

²⁸ See generally Landmark Legal Foundation v. EPA, 272 F. Supp. 2d 70 (D.D.C. 2003).

²⁹ Albino v. USPS, No. 01-C-563-C, 2002 WL 32345674, at *6-7 (W.D. Wis. May 20, 2002).

³⁰ 5 U.S.C. § 552(b)(6) (2007).

³¹ Civ. No. 06-00378 BMK, 2007 WL 1310165 (D. Haw. 2007).

or activities of the government." The court found that the "public . . . ha[d] no legitimate interest in the redacted portions of the emails" because disclosure would not "contribute significantly to public understanding of the operations or activities of the government." However, where personal comments are inextricably intertwined with government business, or where they relate more significantly to government activities, Exemption 6 may not protect against disclosure.

State courts have also had to determine whether personal e-mails sent via government accounts qualify as "public records" under state public records laws. These courts have generally emphasized that the content of e-mails, rather than their physical location on public computers, should govern whether they must be disclosed. Thus, the Supreme Courts of Arizona and Arkansas have held that maintaining an e-mail on a government computer system is not determinative of its legal status.³⁴ In Pulaski County v. Arkansas Democrat-Gazette, Inc., Ron Quillin, the controller and director of administrative services of Pulaski County, Arkansas, was charged with embezzling government funds. During his time as controller, he entered into a romantic relationship with Jane Doe, an employee of Government e-Management Solutions (GEMS). At the same time, the city of Pulaski contracted with GEMS. The e-mails at issue in the case included romantic exchanges between Qullin and Doe. The Arkansas Supreme Court upheld the lower court's determination that these e-mails qualified as public records because "the romantic relationship between Quillin and Doe was indistinguishably intertwined with the business relationship between the County and GEMS."35 Both this and the federal case above demonstrate the need for FOIA requesters to describe a specific connection between requested information and government activities when challenging an agency's decision to withhold personal information.

D. Application of FOIA to e-mails sent via private e-mail accounts

Increasingly, government officials are using private e-mail accounts and handheld devices to conduct government business, and thus an emerging issue is whether e-mails

³² *Id.* at *3-4 (quoting U.S. Dep't of Def. v. Fed. Labor Relations Auth., 510 U.S. 487, 495 (1994)).

³³ *Id.* at *4.

³⁴ Griffis v. Pinal County, 156 P.3d 418, 419-20 (Ariz. 2007); Pulaski County v. Ark. Democrat-Gazette, Inc., No. 07-669, 2007 WL 2580466 (Ark. July 20, 2007).

³⁵ Pulaski County v. Ark. Democrat-Gazette, Inc., No. 07-669, 2007 WL 2874774 (Ark. Oct. 4, 2007).

transmitted privately are subject to disclosure under public records laws.³⁶ If courts take a content-based approach as they have in the case of personal e-mails sent via public accounts, then business related e-mails sent through private accounts should be disclosed under FOIA. At least one state court has required such disclosure. In <u>Dallas Morning News, L.P. v. City of Dallas</u>, a district court judge ordered the city of Dallas to produce e-mails sent or received from city officials' personal computers and handheld devices related to a multi-million dollar tax abatement given by the city to Hunt Consolidated.³⁷ The judge adopted the position that e-mails related to city business qualify as public records "no matter where or how transacted," even if the city does not own the device through which such e-mails were transmitted and lacks access to the e-mails.³⁸

This issue is sure to confront the federal government; not only do employees sometimes use personal e-mail accounts where agency systems are available, ³⁹ but employees at the Department of Interior did not have access to government e-mail for a number of years after a federal judge ordered the agency's e-mail system to be taken off-line in the context of a legal action against the government. ⁴⁰ Since FOIA requires that a record must be under the control of the agency to qualify as an agency record, the agency may well argue that these e-mails cannot be reached by a FOIA request. However, where a private e-mail account is used for government business and copies of communications are not retained by the agency, the agency should be required to retrieve requested e-mails from an Internet service provider.

Since private e-mail accounts used to conduct government business avoid capture in government recordkeeping systems, this also reduces the likelihood that these e-mails will be preserved. In addition, persons seeking access to the e-mails must either rely on

³⁶ See, e.g., Jo Mannies, Government E-Mails Going Private, STLTODAY.COM, Nov. 13, 2007.

³⁷ Order Granting Partial Summary Judgment, Dallas Morning News, L.P. v. City of Dallas, No. 06-06607-J (D.C. Dallas County Oct. 26, 2007); Jennifer LaFleur, *Ruling: Dallas Officials' E-Mails Must Be Turned Over*, DALLAS MORNING NEWS, Nov. 2, 2007.

³⁸ See LaFleur, supra note 37.

³⁹ White House employees during the current Bush administration apparently extensively used nongovernmental e-mail services (provided by the Republican National Committee). *See* House Comm. On Oversight and Government Reform, "The Use of RNC E-Mail Accounts by White House Officials," *available at* http://oversight.house.gov/story.asp?ID=1362. This issue is discussed in the context of the CREW case below.

⁴⁰ Shane Harris, "Court-ordered blackout leaves Interior employees without Internet, e-mail," Gov't Exec. (Dec. 14, 2001), *available at* http://www.govexec.com/dailyfed/1201/121401h1.htm.

a government official to disclose the existence of the e-mails voluntarily or must know from outside sources that they exist.⁴¹ To address these concerns, some government bodies, including several presidential administrations and the Ohio Attorney General's Office, have adopted policies prohibiting the use of personal e-mail accounts or requiring employees to forward business e-mails sent on private accounts to a recordkeeping system.⁴² These policies may not be effective in eliminating these concerns.

Citizens for Responsibility and Ethics in Washington (CREW) and several media outlets have recently asserted that some Bush Administration officials have used personal e-mail accounts to conduct presidential business in violation of the White House's stated policy that use of personal accounts is prohibited.⁴³ CREW is raising this and other issues related to the Bush Administration's failure to adopt an adequate recordkeeping system for the preservation of e-mails generally in a lawsuit that has been consolidated with a similar case brought by the National Security Archive.⁴⁴ The judge issued a temporary restraining order on November 12 requiring the defendants to "preserve media, no matter how described, presently in their possess [sic] or under their custody or control, that were created with the intention of preserving data in the event of its inadvertent destruction."⁴⁵ While this order covers back-up tapes used to preserve e-mails transmitted through government accounts, it is unlikely that this will ensure the preservation of e-mails transmitted through private accounts. If the use of private e-mail accounts allows agencies to circumvent disclosure under FOIA, either because recordkeeping systems fail to capture these e-mails or because the e-mails are not treated by courts as public or agency records subject to disclosure, FOIA requesters' access to government information will be limited.

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⁴¹ CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, WITHOUT A TRACE: THE STORY BEHIND THE MISSING WHITE HOUSE E-MAILS AND THE VIOLATIONS OF THE PRESIDENTIAL RECORDS ACT (2007) [hereinafter CREW]; Mannies, *supra* note 36.

⁴² CREW, *supra* note 41; LaFleur, *supra* note 37.

⁴³ See CREW, supra note 41 (citing several news articles discussing this issue).

⁴⁴ Complaint, Citizens for Responsibility and Ethics in Wash. v. Office of Admin., No. 07-01707 (HHK), (D.D.C. May 22, 2007); Complaint, Nat'l Sec. Archive v. Executive Office of the President, No. 07-01577 (HHK), (D.D.C. Sept. 5, 2007).

⁴⁵ Order, Citizens for Responsibility and Ethics in Wash. v. Office of Admin., No. 07-01707 (HHK), (D.D.C. Nov. 12, 2007).

IV. ACCESS TO SOFTWARE

A. Application of the Definition of "Agency Record" to Software

Software can be an indispensable tool for a requester wanting to make meaningful use of other information disclosed under FOIA. However, requesters seeking access to software under FOIA face several challenges. First, agencies often contract with private parties to obtain software, and under these contracts the private party generally reserves certain intellectual property rights in the software. Where agencies do not have full intellectual property rights over software, several courts have held that agencies lack adequate control over the software, and thus it fails to qualify as an "agency record" under FOIA. Applying this principle broadly could undermine FOIA: it is a basic proposition that an agency cannot agree to maintain confidentiality if the statute requires disclosure, and yet contracts or licenses reserving private control over software are nothing more than just such agreements. The best resolution may be to make the agency data directly accessible to all, so that a requester would not have to acquire the software to access the database.

This issue arose in the context of the FARA database dispute mentioned earlier.⁴⁷ The requester had dismissed its lawsuit to obtain the outdated database when DOJ said it would provide a working copy of the new database when available. However, DOJ then said the new database could be provided only in a format that would require the requester to license the software at substantial expense, and even then the software would require extensive modifications to work with the new database.⁴⁸ This dispute was resolved when DOJ earlier this year made the database accessible to all through a dedicated FARA search site.⁴⁹

Second, one court has held that software is not an "agency record" under FOIA because it "does not illuminate the structure, operation, or decision-making structure" of an

⁴⁶ Gilmore v. U.S. Dep't of Energy, 4 F. Supp. 2d 912, 917-19 (N.D. Cal. 1998); Tax Analysts v. U.S. Dep't of Justice, 913, F. Supp. 599 (D.D.C. 1996), *aff'd without opinion*, 107 F.3d 923 (D.C. Cir. 1997), *cert. denied*, 522 U.S. 931 (1997).

⁴⁷ See discussion accompanying note 10.

⁴⁸ See discussion at http://www.publicintegrity.org/lobby/report.aspx?aid=735.

⁴⁹ http://www.usdoj.gov/criminal/fara/links/search.html.

agency.⁵⁰ In <u>Gilmore v. U.S. Department of Energy</u>, the requester sought disclosure of CLERVER software, conferencing technology "that allows people in different geographical locations to simultaneously collaborate on complex technical drawings and schematics using their desktop computers."⁵¹ The court held that the CLERVER software failed to illuminate the agency's operations or processes because it "was not designed to be unique or responsive to any particular database, nor does CLERVER contain any database of information about DOE's operations."⁵²

B. Software as Confidential Commercial Information

Even if an agency has sufficient control over software that illuminates the agency's operations or structure so that the software qualifies as an "agency record," software may often fall under FOIA Exemption 4, which protects trade secrets and other commercial information that is privileged or confidential. A record is confidential if disclosure would "cause substantial harm to the competitive position of the person from whom the information was obtained." Disclosure of software may possibly satisfy this test because making software available through FOIA could discourage persons from purchasing or licensing the software on their own. In addition, the <u>Gilmore</u> court raised concerns that fewer businesses would enter into agreements with government agencies to develop software if the software could be freely distributed under FOIA. ⁵⁴

V. CONCLUSION

While this paper highlights some of the challenges associated with the government's disclosure of electronic information under FOIA, it is not meant to suggest that agencies should be excused from responding fully to FOIA requests in the face of technological challenges or personnel constraints. To the contrary, technological advances present an opportunity to overcome what were previously insurmountable challenges associated with the extraction of data from databases, the preservation and retrieval of e-mails, and the protection of proprietary software.

⁵⁰ *Gilmore*, 4 F. Supp. 2d at 920.

⁵¹ *Id.* at 916.

⁵² *Id.* at 921.

⁵³ Id. at 922.

⁵⁴ *Id.* at 922-23.

Instead of continuing to rely on records maintenance and preservation systems that were designed without consideration of public access, government agencies should be expected to invest in systems that accommodate public access to government information. Instead of passively awaiting requests for electronic information, agencies should configure systems for direct public access, proactively providing searchable databases to meet public demands.

Government officials seldom view disclosure or dissemination as central to agency missions, and this has in turn led to hesitation, if not hostility, to devoting resources to FOIA administration. Public access to electronic information may pose some of the more complex problems, but it also holds some of the greatest promise for expanding government transparency.

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