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The irresistible rise of a right

In the past ten years, there has been a global movement towards freedom of information at national levels, largely as the result of campaigning by civil rights activists and organizations. The fall of the Iron Curtain led to a rush of laws, starting with Hungary and the Ukraine in 1992 and ending with Serbia in 2004; much progress is still to be made in Asia, central Asia, and Africa. The US FOIA has been the most influential model for most countries, allowing any individual or organization to demand information from public bodies without having to show a legal interest. Now international organizations, which are increasingly taking over the roles of governments, must subject themselves to the same standards they demand of others.

Early this year, while New Year hangovers still quieted the country, a not unexpected but still dramatic change came over the UK government. From 1 January, every public body from the local doctor's office in the Outer Hebrides to the Cabinet Office began to receive letters, emails, and faxes from individuals who were demanding information. Thousands of requests flooded in to find out about nuclear accidents, bad blood used in transfusions, GM crops, speeding cops, and dirty restaurants. And government bodies responded! After years of fighting, prodding, encouraging, and delay, the Freedom of Information Act finally came into effect.

The UK is one of many governments that have recently adopted such a law. Over the past ten years, there has been a global movement towards opening up governments. The right of individuals to obtain information from their governments about what they are doing has rapidly become common practice. From just a handful in the 1980s, today more than 60 countries have adopted similar laws; another 40 are currently reviewing bills or proposals. At the same time, the right is also being rapidly incorporated into international law through a growing body of international agreements and declarations and is on the brink of becoming customary international law.

This remarkable explosion is a positive example of policy transfer. Unlike other areas in which policies are being developed and agreed at closed meetings of governments and then forced on reluctant domestic publics in the name of global cooperation, the force behind the move to greater transparency is civic activists at the international, national, and local levels fighting corruption, promoting good government, press freedom, and accountability. They, in turn, have the support of foundations and international development organizations; even bodies such as the World Bank and IMF are promoting transparent budgeting.

NGOs such as Article 19 and Transparency International have emerged as global players. Networks of experts use Internet websites and mailing lists, and

meet regularly at seminars and conferences to exchange ideas and news. Ideas proposed and adopted in one jurisdiction by local activists become the basis of guidelines and recommendations in other jurisdictions. Governments adopt the laws as a sign — not always in good faith — that they are committed to improving their democratic systems, extending media freedoms, and reducing corruption. Often, such laws become international standards proposed by intergovernmental organizations and may eventually reach treaty status.

The idea that citizens have the right to the information that will enable them to hold governments to account is not new. It was born in the revolutionary philosophies of the Age of Enlightenment. Sweden's Freedom of the Press Act, adopted in 1766 during the countries' "Age of Liberty", was the world's first freedom of information act. It established the principle that government records were, by default, open to the public, and it granted citizens the right to demand documents from government bodies. It has been in force more or less constantly since then.

The virus of openness spread to revolutionaries elsewhere on the European continent. The French Declaration of the Rights of Man called for access to budget information to be made freely available:

All the citizens have a right to decide, either personally or by their representatives, as to the necessity of the public contribution; to grant this freely; to know to what uses it is put.

The founding fathers of the United States also recognized the power of the executive to control information as a means of limiting participation. In the Declaration of Independence, one of the complaints against British rule recognized that the restrictions on open government and meetings undermined democratic activities. Patrick Henry, representative for Virginia in the first Continental Congress, railed against the secrecy of the Constitutional Congress, with:

The liberties of a people never were, nor ever will be secure when the transactions of their rulers may be concealed from them.

But for over 100 years, Sweden remained virtually alone among nations. It was not until the end of World War II, the creation of the United Nations and the adoption of international standards on human rights, that the right to information began to spread and countries to enact comprehensive laws for access to government-held information. Article 19 of the Universal Declaration of Human Rights called for all persons to have a right to seek and receive information. Many countries, especially the Nordic nations, looked to the Swedish model; Finland enacted its law in 1951; the US in 1966; Norway and Denmark in 1970; France and the Netherlands in 1978; Australia and New Zealand in 1982; and Canada in 1983. These were mainly a result of extended media campaigns, backed in varying degrees by governments, and many took decades to achieve.

Today, the pace of change has accelerated and most European countries have now adopted laws. Germany overcame its resistance and adopted a law in July 2005, only Luxembourg, Malta, and Cyprus remain without laws in the EU states.

The fall of the Berlin Wall and the subsequent crumbling of the USSR led to a rush of laws in the former communist world, starting with the Ukraine and Hungary in 1992 and moving through the region to Serbia in 2004. George Soros's Open Society Institute funded national and international organizations across central and eastern Europe and took the lead in promoting transparency as an essential component in the development of democracy. Other foundations, and many governments through their aid agencies, embassies, and organizations such as the National Endowment for Democracy and the British Council, made transparency an essential element in their sponsorship of anti-corruption and democracy building. Since 1979, the Council of Europe has also contributed with its recommendations on the adoption of freedom of information laws; it is currently developing a treaty on FOI. The European Court of Human Rights, however, has failed to uphold the right.

Adoption in the Americas is also strong. The US and Canadian laws are badly in need of updating and are weaker than many in the region. Mexico has taken the lead with one of the strongest laws in the world, overseen by a powerful information commission and an advanced information system called SISI that keeps track of all requests and ensures that they are answered on time. Curiously, Colombia, which first adopted a law in 1885, has allowed its current law, adopted in 1985, to go largely unused. Laws have also been adopted in Jamaica, Trinidad and Tobago, Belize, Panama, Peru, and, most recently, in Ecuador and the Dominican Republic. In many of these countries, the pressure for FOI has come from the World Bank and other lenders as part of anti-corruption measures. The Organization of American States has also taken a leading role, issuing recommendations in 2000 and 2003 on the adoption of FOI laws, and a draft bill in 2000.

The record in Asia is more modest. South Korea and Thailand both adopted laws in the 1990s but it is difficult to see what affect they have had in recent years. Japan adopted a national law in 2000 and nearly 3000 localities have their own laws. In India, following the adoption of FOI laws in a dozen states, a weak national law, adopted in 2002 but never implemented, was replaced this year by a stronger law that includes an independent information commission. Even in China, a few localities such as Guangzhou and Shanghai have adopted local FOIs as anti-corruption measures; Hong Kong has had a non-statutory code of practice since 1996. Civil society advocates are now pushing in Malaysia and Cambodia for the adoption of laws. Access remains largely impossible in the former Soviet republics in central Asia.

Africa still lags behind on FOI. Many development agencies have been exerting pressure on countries to adopt laws as part of anti-corruption measures but are stymied by the control still exercised by Official Secrets Acts stemming from colonial times. In South Africa, the Promotion of Access to Information Act (PAIA) has some of the most progressive features of any law in the world. It allows for access to records held by private bodies if it affects any individual's rights. However, it has been hamstrung by lack of funding and poor implementation. Angola adopted a law in 2002 largely based on the Portuguese law but it is unclear if it is in use. Most recently, the Ugandan parliament approved a FOI law in May 2005. The leaders of Kenya and Nigeria have also committed themselves to adopting laws in the near future. The African Commission on Human and Peoples' Rights adopted a declaration on Freedom of Expression in 2002 calling for countries to adopt FOI laws and has recently appointed a Special Rapporteur on Freedom of Expression.

The global push towards openness has led to a number of countries adopting FOI laws in name but not in spirit. The most egregious is the blatantly misnamed Zimbabwean Access to Information and Protection of Privacy Act. It sets strict regulations on journalists and has been used to shut down nearly all newspapers that do not toe the government line, and to imprison or expel all non-cooperative journalists. Its access provisions remain virtually a dead letter. "Freedom of information" Acts have also been adopted in Uzbekistan and Tajikistan with predictable results; freedom of information in countries that have no freedom of expression serves no purpose. In some places, the law has been less than successful following its imposition from on high. The law in Bosnia and Herzegovina, which was drafted by international experts and imposed on the country by the OSCE, is largely unused. In Kosovo, the ombudsman reported in 2005 that he had yet to receive an appeal for assistance from any person.

As international governmental organizations play an increasingly important role in setting policy, the right of access to information needs to evolve with them. Decisions that were once made on a local or national level, where the citizen had access and entry into the process, as well as legal rights under FOI laws to obtain information and attend meetings, are now being made in more secretive quasi-diplomatic settings. In New Zealand and Australia, for instance, government policy on food safety is now made by a special bilateral commission not subject to the national access laws. In Europe, prior to the crash of a flight in 2003, information on unsafe airlines banned by member countries of the European Civil Aviation Conference was being withheld.

Activists have been pressing organizations such as the WTO, the World Bank, and the IMF to release more information on the advice they offer to national governments with limited success. The EU, which is the most highly developed international organization, has one of the most developed access regimes of any IGO, but it is still more restrictive than those in most of its member countries.

It is not overly optimistic to believe that in a few years, perhaps a decade, more than 100 countries will have FOI laws. Some will be well written, broadly supported by government, and widely used by the public. Many will be mediocre, written only to satisfy outside pressures. What is most needed now is the establishment of international standards to ensure that access laws are properly implemented. The Council of Europe has started a process that would lead to a treaty but powerful resistance by Germany and France are holding it up. Similar efforts are needed in Africa, Asia, and the Americas. Another key challenge is to minimize laws on state secrecy, often the key barrier to access. Finally, as their functions increasingly replace those of national governments, international organizations must subject themselves to the same openness they demand of others.¹

¹ Some fundamental elements of freedom of information laws

Most national comprehensive FOI laws around the world are broadly similar. The US FOIA has been the most influential model and its structure of rights and exemptions has been widely copied. Canada's and Australia's national, provincial, and state laws have also been influential in countries whose legal base is the common-law tradition. The following elements can be found in nearly every FOI law:

- the right of an individual, organization, or legal entity to demand information from all public bodies without having to show a legal interest;
- the duty of the body to respond and provide information. This includes mechanisms for

handling requests and time limits for responding to requests;
–exemptions to allow the withholding of certain categories of information. These typically require that some harm to the subject of the inquiry must be shown before the information can be withheld. They include the protection of national security and international relations, personal privacy, commercial confidentiality, law enforcement and public order, information received in confidence, and internal discussions;
–an internal appeals mechanism for requestors to challenge the withholding of information;
–an external review of the withholding of information. This includes setting up an external body or referring cases to an existing ombudsman or the courts;
–a requirement that government bodies affirmatively publish some types of information about their structures, rules, and activities.

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