



Legislation on freedom of information: trends and standards

“Knowledge is power.”

—Francis Bacon

Coined at the dawn of the scientific age, Bacon’s aphorism has taken on new meaning today, when government agencies have at their disposal massive amounts of information about nearly every aspect of modern life. Striking an appropriate balance between the power of government and of citizens to control it demands widespread access to government-held information. As a result there is growing consensus that the right to information is a crucial element of democratic, accountable, responsive government.

Recognition of this right has come swiftly. Just over a decade ago it was guaranteed in only a handful of countries. Now more than 50 countries have freedom of information laws, and 15–20 more are considering them. Moreover, a growing number of intergovernmental bodies—including the World Bank, European Union, and United Nations Development Programme—have such policies.

The right to information derives from the Universal Declaration of Human Rights, which states that everyone should enjoy freedom of opinion and expression, including the right to “seek, receive, and impart information and ideas”—a guarantee now considered to include openness on the part of government. Freedom of information laws are driven by the democratic notion that public bodies hold information not for themselves but as custodians of a public good, and that this information must be accessible to the general public (absent an overriding public interest in secrecy). Such laws reflect the basic premise that government is meant to serve the people.

Such laws also provide practical benefits, such as fostering democratic participation, controlling corruption, enhancing accountability and good governance, and promoting efficient information exchange between government and the public, including businesses. Thus a powerful range of reasons support the adoption of such legislation.

These theoretical reasons are matched by many examples of the need for such legislation. China’s recent Severe Acute Respiratory Syndrome (SARS) crisis showed how lack of openness can exacerbate social problems. Similarly, a campaign for freedom of information in Rajasthan, India, showed how openness can combat corruption. A grassroots campaign by the Mazdoor Kisaan Shakti Sangathan (MKSS), using government data, showed that public officials had skimmed money from the wages of laborers and denied food aid to the poorest of the poor.

Freedom of information laws are promoted in many ways, from top-down examples (as in Mexico, where a regime change led to excellent freedom of information legislation) to grassroots approaches (as in Rajasthan). Most recent laws have been driven by civil society advocacy, international pressure, and official commitment to openness. Once public campaigns begin, it is difficult for even undemocratic governments to resist passing such laws—showing the power of the idea.

Despite success in getting freedom of information laws passed, not all are good: the devil is in the details. A freedom of information law should be based on the principle of max-

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imum disclosure, which calls for all information held by authorities to be available to the public, subject only to narrow exceptions to protect legitimate concerns. Maximum disclosure also implies that systems and processes are in place that enable members of the public to access information, and that public bodies make all reasonable efforts to facilitate such access.

Scope

The scope of a freedom of information law is important in terms of both the information and the public bodies it covers. Access should apply to all information held, regardless of form, source, date of creation, official status, whether it was created by the body that holds it, and whether it is classified. Some laws limit access by applying only to information related to public functions or information of public importance, or by requiring requesters to give reasons for wanting the information.

The question of which bodies should be covered by the law is more complex. All entities that are part of the executive branch, no matter at what level, should be covered. Many freedom of information laws also include the legislative and judicial branches, subject to certain exceptions. Constitutional and statutory bodies should also be included, as well as bodies owned, substantially financed, or controlled by government. More controversial is whether anyone conducting a public function should be covered. South African law even covers private bodies, where this is necessary for the “exercise or protection of any right.”

Duty to publish

Freedom of information is usually associated with the right to request and receive information. But it is now commonly understood as requiring public bodies to actively disseminate key types of information even in the absence of a request. This includes, for example, information about the public body’s structure, finances, services, rules and regulations, decisions, and policies, as well as a guide to the information it holds and mechanisms for public participation.

Different laws take different approaches to meeting this obligation. The standard approach is to list the types of information that must be published. With the growing popularity of the Internet, this information should also be made available on Websites. Variations include Thai and U.S. laws providing for some information to be published and for other information to be routinely available for inspection. Bulgaria’s law is innovative, requiring publication of information that may prevent a threat to life, health, security, or property. Mexico’s law even requires public bodies to make computers available to the public to facilitate access.

Ways of facilitating access

A freedom of information law should meet several international standards:

- The right to make oral requests.
- An obligation for public bodies to appoint information officers to assist requesters.
- An obligation to provide information as soon as possible and, in any case, within a set time limit.
- The right to specify the form of access preferred, such as inspection of the document requested, an electronic copy, or a photocopy.
- The right to written notice, with reasons, for any refusal of access.

Fees are a contentious issue. Four main costs are involved in responding to individual requests for information: searching for the information, preparing or reviewing it, reproducing or providing access to it, and sending it to the requester. Some laws charge citizens only for some of these expenses or waive them in certain cases. Examples include requests for personal information and those aimed at serving the public interest, such as when the information is sought with a view to publication. Mexico’s law restricts fees to the cost of reproducing the information, and access to personal data is free. The U.S. law has complex rules on fees, with most requesters benefiting from a waiver for the first two hours of search time and the first 100 pages.

Ideally, there should be a centrally set schedule of fees to avoid a patchwork of prices among public bodies.

Exceptions

What exceptions should be made to a freedom of information law is a complex and controversial issue, and an area where some otherwise progressive laws fall short. Exceptions should meet three conditions. First, the law should include a comprehensive list of clear, narrow, legitimate aims that justify a refusal to disclose information. Often this is not the case. It is common to find an exception for internal working documents, often phrased broadly and in a way that could significantly undermine openness. South Africa's law, in contrast, allows information to be withheld only where disclosure of that information would inhibit the free and frank provision of advice within government or when premature disclosure would frustrate the success of a policy.

Second, access should be denied only when disclosure would pose a serious risk of harm to a legitimate aim. Most exceptions meet this standard, but many laws include exceptions not subject to harm—often referred to as class exceptions. In the U.K. law class exceptions outnumber those for which harm is required, and include information about security bodies and communications with Her Majesty.

Third, even if disclosure would pose a risk of harm to a legitimate aim, the information should still be disclosed if the benefits of disclosure outweigh this risk. Known as the public interest override, this might be applicable where personal information disclosed evidence of corruption or other wrongdoing.

A key issue here is the relationship between freedom of information and secrecy laws. Some laws—such as India's—state that in cases of conflict, the freedom of information law takes precedence over secrecy laws. But in most cases secrecy laws are listed as an additional general exception, effectively overriding the freedom of information law. This is contrary to good

practice because in most countries secrecy laws were not drafted with openness in mind and so fail to respect the three-part test outlined above.

Appeals

Three levels of appeal should be available in freedom of information laws. Most provide for an appeal to the courts, and many also provide for an internal appeal to a higher official in the public body holding the information. Strong laws also provide for an appeal to an independent administrative body. This level of appeal has proven crucial to the effective functioning of freedom of information regimes, because courts are too time-consuming and expensive for all but a small minority of requesters.

Promotional measures

It is not sufficient for a freedom of information law simply to set standards for disclosure. It must also incorporate certain implementation measures to overcome the culture of secrecy often found in the public sector and to ensure broad public awareness of this key right. Ideally, an independent administrative body should be given broad promotional powers, along with a budget with which to fulfill this responsibility.

Different freedom of information laws provide a range of promotional measures. Many laws promote better record maintenance—clearly important to effective information disclosure. Other key measures include a mandatory reporting system detailing implementation of the law, training for public officials, protection for whistleblowers and good faith disclosures under the law, and sanctions for obstruction of access.

International experiences show that it can take time for a freedom of information regime to become fully effective. In South Africa the 30-day limit for responding to requests was extended to 90 days for the first year of the law's operation and to 60 days for the second year. Where government capacity is low, the law might begin by imposing a duty to publish key information about different agencies, their rules, and their per-

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sonnel, and then gradually increase the duty to publish. In the meantime, technical assistance might be needed to upgrade standards for record maintenance so that government is prepared to comply as various sections of the law become effective. In the United Kingdom public bodies are required to develop publication schemes that increase the amount of information provided under each successive scheme.

Although Francis Bacon was thinking about more traditional forms of acquiring information when he equated knowledge with power, today's notions of access to information are framed around ideas about human rights and democracy rather than power. But what are these, if not modern means of moderating and distributing power?

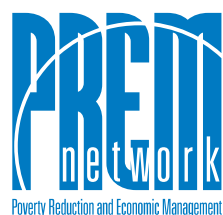
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