

# The Right to Information – Information, Public Awareness and Public Records

*Knowledge is the true organ of sight, not the eyes.*

*Panchatantra (c. 5<sup>th</sup> century)*

The public, it is often said, has a “right to know.” But does it have such a right? And if it does, *should* it? If it should, how would such a right be recognised, protected and given effect?

The argument in favour of the public’s right to know was succinctly put forth by James Madison, one of America’s constitutional fathers: “A popular government without popular information or the means of acquiring it is but a prologue to a farce or a tragedy, or perhaps both. Knowledge will forever govern ignorance; and a people who mean to be their own governors must arm themselves with the power that knowledge brings.”<sup>1</sup>

The fight for information takes place between the public who want it and those in power who do not want them to have it.<sup>2</sup> Madison’s philosophy suggests:

- that secrecy impedes the political education of a community so that electoral choices are not fully informed;
- that opportunities for individuals to respond meaningfully to political initiatives are blunted; and,
- that a political climate is generated in which the citizen views government not with responsibility and trust, but with malevolence and distrust.

According to another observer, “Just as the middle and working classes sought power and were given the vote, so today’s professional classes seek power and are given information. The process is called participation, and the result is called accountability.”<sup>3</sup> The fight is, in many ways, a costly and unnecessary one for there are clear advantages to all concerned for an administration being open with information:

- a better informed public can better participate in the democratic process;
- Parliament, press and public must be able properly to follow and scrutinise the actions of government and secrecy is a major impediment to this accountability;
- public servants take important decisions which affect many people, and to be accountable the administration must provide greater flows of information about what they are doing;

---

1 Quoted in Freedom of Information Legislation, by John McMillan (Office of the Australian Ombudsman) presented to the 1980 Meeting of Commonwealth Law Ministers, Barbados (Commonwealth Secretariat, London, 1980) from which this chapter draws in part.

2 The freedom of information legislation presently under consideration in the United Kingdom is an excellent example of this.

In opposition, Labour were strong supporters of wide-ranging rights to public information, only to reverse their stand abruptly on being elected into government.

3 Robert Gregory, “Knowledge as Power? An Overview” in Robert Gregory (ed.) *The Official Information Act: A Beginning*, (NZ Institute of Public Administration, Wellington, 1984).

- better information flows produce more effective government and help towards the more flexible development of policy; and,
- public cooperation with the government will be enhanced by more information being available.<sup>4</sup>

The right to know is linked inextricably to accountability, the central goal of any democratic system of government. Informed judgement and appraisal by public, press and Parliament alike is a difficult, even fruitless task if government activities and the decision-making process are obscured from public scrutiny. Where secrecy prevails, major resource commitments can be incurred, effectively closing the door to any future review and re-thinking in the light of an informed public debate. There are, of course, other mechanisms within government such as the Legislature, the courts or an Ombudsman that act as a check on the abuse of power by an Executive. However, for these to be effective, their own access to information is an imperative. Given that such a right is worthy of recognition, how best can it be guaranteed?

### A Freedom of Information Act?

If governments simply behaved in an open fashion, making information widely available to the public and affected individuals, there would be no problem. This approach has been tried, most recently in the U.K., but has generally failed to make much headway. Providing information that reflects well on an administration presents little difficulty; however, when the information reflects the opposite, the voluntary approach is most vulnerable. Where the release of information is a matter of discretion, be it of politicians or of administrators, the temptation to give themselves the benefit of the doubt when the information is embarrassing is too often irresistible.<sup>5</sup>

That should not stop a government from making a concerted effort to encourage attitudinal changes which would relax restrictions on disclosures and increase the accessibility of decision-makers to press and public alike. But the problem with administrative guidelines will always be that, at the end of the day, discretion remains. And discretion, it is argued, runs counter to the fundamental principle of natural justice - for the administration is the judge in its own cause. The same argument stipulates that any dispute over access to information should be determined by a third, and neutral party.

Legislation is therefore the only alternative.<sup>6</sup> Hence the demand (which seems to be growing) for Freedom of Information (FOI) legislation.<sup>7</sup> Not only can FOI legislation establish a right of review (e.g., by the Ombudsman), it can also establish practices which must be observed, even by those least willing to do so. It can reverse the usual presumption in favour of secrecy. Citizens are given the legal right of access to government documents without having to first prove special interest, and the burden of justifying non-disclosure falls on the government administration. Time limits within which the administration must respond to requests can be imposed and an unimpeachable right of access to certain categories of information can be conferred.<sup>8</sup>

4 Towards Open Government, the report of the Danks Committee (Government Printer, Wellington, 1980) as summarised by Geoffrey Palmer in *Unbridled Power: An Interpretation of New Zealand's Constitution and Government* (Oxford University Press, Auckland, 1979, 1987).

5 See, for example, "Ministers to defer truth on nuclear power stations", *Guardian* (UK), 21 August 1995: Sensitive financial information about the country's oldest and dirtiest nuclear reactors is being kept under wraps by the Government until it has privatised the industry's more modern atomic power stations.

6 Sweden 1766; USA 1966; Denmark 1970; Norway 1970; Holland 1978; France 1978; Australia 1982; New Zealand 1982; Canada 1983; Hungary 1992; Belize 1994; Ireland 1997; Thai-

land 1997; Korea 1998; Israel 1998; Japan 1999; South Africa 2000.

7 The issue is not one only for developed countries as is shown by the list of countries given in the footnote above which have such legislation.

8 In many countries the principles of freedom of expression and free exchange of information are enshrined in the Constitution. However specific freedom of information legislation is required for citizens to exercise these rights. For example, the 1996 Constitution of South Africa contains provisions for the rights of access to information, requiring that these rights be enabled by specific legislation. The Promotion of Access to Information Act was passed in February 2000.

The earliest legislation governing open records dates back to 1776 in Sweden. That country's present law<sup>9</sup> is unique in that it is one of the four laws which together comprise the Constitution of the country. The law outlines the main principles of the open records scheme, but the detailed provisions are contained in an ordinary Act, the Secrecy Law. Similar, but nowhere near as rigorous systems were introduced in Norway and Denmark in 1970, and in Finland in 1971. Since then, the concept of open records legislation has started to emulate the Office of Ombudsman, and spread across the world.

Access to information legislation provides citizens with a statutory "right to know". In practice the specific provisions of the legislation will determine the extent to which citizens are able to obtain access to records of government activities. The intention is to provide access whenever disclosure is in the public interest, not for public officials to use the legislation as a secrecy law.

Key points of freedom of information laws are that they:

- confer legal rights on citizens that can be enforced;
- seek to change the culture of secrecy within the civil service;
- provide access to records not just information;
- define exemptions; and,
- define rights of appeal.

FOI laws can, but do not have to, be applied retrospectively. Many countries have adopted a non-retrospective law, adopting a progressive "rolling back" approach. This means that only records created after the date the Act becomes effective fall under the jurisdiction of the Act. Others, such as, South Africa, have adopted fully retrospective Acts.

Freedom of information legislation not only establishes the citizen's legal right of access to information, it also confers on government the obligation to facilitate access. The law should include provisions requiring agencies subject to the law to publish information relating to:

- their structure, functions and operations;
- the classes of records held by the body;
- arrangements for access; and,
- the internal procedures used by the agency in the conduct of its business.

Monitoring the extent of compliance with these requirements should be part of the remit of the Ombudsman. Governments should be required to actively inform citizens of the rights conferred on them by FOI and privacy legislation. This will demonstrate their real commitment to openness and increased accountability.

The coverage of FOI legislation varies a great deal, and it needs to be determined by the structure of government in each country.<sup>10</sup> In Ireland, as in some other countries, the Freedom of Information Act applies not only to the Executive but also to local government, companies that are more than 50 per cent state-owned and even to the records of private companies that relate to government contracts (the last particularly useful for a civil society group keen to monitor a public procurement exercise). The rationale behind applying the provisions to a state-owned enterprise is that they are owned by the public and the "hybrid" nature of their

#### Access to information and Sweden's constitution

Under the 1975 Swedish Constitution, "freedom of expression, freedom of information, freedom of assembly, freedom to demonstrate, freedom of association, and freedom of worship" are bracketed together in the same phrase as fundamental human rights.

Moreover, limitations on these rights are only permitted in defined circumstances, provided for in Article 11. "5 (1) Freedom of expression and freedom of information may be restricted having regard to the security of the realm, the national supply, public safety and order, the integrity of the individual, the sanctity of private life, or the prevention and prosecution of crime. Freedom of expression may also be restricted in economic activities. Freedom of expression and freedom of information may otherwise be restricted only where particularly important reasons so warrant.

(2) In judging what restrictions may be made by virtue of paragraph (1) particular regard shall be paid to the importance of the widest possible freedom of expression and freedom of information in political, religious, professional, scientific and cultural matters."

<sup>9</sup> Freedom of the Press Act 1949.

<sup>10</sup> For example, in the USA the Federal FOI Act applies only to the Executive branch of the Federal government. Most US States

supplement the Federal law with their own "sunshine" laws, applying the principles of FOI to state and local government.

functions as well as their role in the community justify their inclusion in an FOI Act.

**Making "information" not just records available**

New Zealand has departed from comparable legislation elsewhere by making "information", not documents or records, the subject of access. The decision not to define the word "information" considerably broadens the scope of the Act. According to the Danks Committee: "for the purposes of [the Act] information includes not merely recorded data but knowledge of a fact or state of affairs by officers of the agency in their official capacity". One of the advantages of not restricting a freedom of information regime to documents or records is that there is less incentive to attempt to evade the regime by not recording information in some form. However, the effective operation of Government business requires records to be kept. In practice information released under the Act is in the form of written records. As an Ombudsman has noted "all memories are fallible and an investigation [of failure to release information] on that basis poses problems".

*Judith Aitken, "Open Government in New Zealand", in Open Government, Freedom of Information and Privacy, Andrew McDonald and Greg Terrill (eds.), (Macmillan, London, 1998).*

Whatever the scope of FOI legislation, there will always be arguments against it and for exemptions from it. The most frequent argument against FOI legislation is one of cost and efficiency. Some claim that it diverts resources and staff away from programmes that could actually make an impact on public welfare. Yet, one must consider the costs of failing to provide such legislation, a cost which includes a lack of accountability and transparency, and a fertile environment for corruption.

Defence, national security, foreign relations, law enforcement and personal privacy and, to some extent, the internal deliberative processes of a government agency may each have legitimate claims to protection or exemption from FOI legislation. The Swedish Secrecy Law, for example, has as many as 250 exemptions, some defined by their relation to protected interests and others by reference to categories of documents. Many exemptions contain a time limitation on the life of the exemption, which varies from as much as 70 years to as little as two. Still other exemptions protect documents only until a particular event has occurred. The options are many and varied, but the issue appears to be one of growing importance among civil societies around the world.

It is also said that too much openness can impede free and frank exchanges of opinion between public officials and that officials cannot operate efficiently in a "goldfish bowl". This argument has some merit, but it must be weighed against the alternative: secrecy and a lack of accountability. Can anyone seriously argue that decision-making which is not accountable is better than decision-making which is subject to scrutiny?

Perhaps the best known (but by no means the only) example of FOI legislation is that of the United States, where it has been demonstrated repeatedly that reports, studies and other documents can be taken into the public domain by the press and by community groups, to the benefit of public knowledge and understanding.

Equally remarkable as a demonstration of openness was the action of the Ugandan government in November, 1995, when it invited ten journalists to participate in (and report on) a meeting of its anti-corruption stakeholders, including senior law enforcement officials. The meeting was held to review progress in implementing the country's national integrity action plan. The exchanges at the meeting were open and crisp, and the eventual reporting was considerable and highly favourable.

Extraordinary, too, was the decision by President Mkapa of Tanzania to release the Warioba Commission Report to the press in 1996 before even his own cabinet had been able to see it - some of whom were named in the report as being complicit in corrupt activities. President Mkapa's decision was the more remarkable as his country had had, ever since independence in 1961, a culture of official secrecy and this was the first report of any significance to be shared with the public.<sup>11</sup>

The international reach of freedom of information laws, too, can be considerable. Information

<sup>11</sup> Efforts to build a more open bureaucratic culture continue there, with discussions being facilitated by the International

Records Management Trust (IRMT) and the TI national chapter. A similar initiative is being undertaken in Ghana.

censored in the United Kingdom, on occasion, becomes available to British investigative journalists when the same material is held in the United States and has been made accessible to the public at large there by the more liberal FOI United States legislation. Increasingly, investigative journalists are learning where to go to find the information that governments in their own countries deny them.

### Requests for copies of official records

Under Freedom of Information laws, citizens usually have the right to request copies of documents, not just the information contained within them. Many FOI laws provide that, where only a part of the information may be disclosed, agencies should provide a copy of the document excluding the exempt information rather than refusing access. Fees may be charged for the provision of information but they should not be prohibitive.<sup>13</sup>

Time limits for responding to requests and appeals should be set out in the FOI Act. These are legally binding. Failure to comply with these should constitute grounds for appeal to the Act's external monitors, as would the imposition of unreasonable charges.

### Appeals against refusals

The right of appeal against adverse decisions is one of the most important provisions of a Freedom of Information Act. It protects against undue secrecy by providing a mechanism for the independent review of decisions to deny people access to the information they need. Without this safeguard, the effectiveness of any FOI is minimised.

Instances which should not constitute valid reasons for withholding information include that its release:

- would be inconvenient to the Minister (or the department);
- might show the department in a bad light;
- might embarrass the Minister politically;
- is no business of the requester; or that it
- might be misunderstood by the requester, or by the media, (in which case the wisest course may be to provide an explanation or material that will set the information in its proper context).<sup>14</sup>

Where access to records is denied, the agency concerned should be required by law to notify the requester of the reasons for the refusal, citing the particular exemption that covers the records requested. Sanctions for non-compliance should be provided for in the legislation.

Most Freedom of Information legislation provides for a two-stage appeal:

- Firstly, there is an administrative appeal to the agency concerned. Citizens can lodge an appeal requiring the agency to conduct an internal review of the decision. This appeal should be heard at a more senior level than the original decision-maker. If the denial of access is upheld it is important that citizens then have recourse to an independent arbitrator.
- The second stage of the appeal process under most existing FOI Acts is to an inde-

#### Requiring the Executive to state its fiscal objectives

To create better informed public decision-making, to enable the private sector to make decisions against a deeper understanding of government policies and to encourage governments to take a longer term approach towards fiscal management, so reducing risk, New Zealand enacted its Fiscal Responsibility Act 1994. This requires the Executive publicly to state its fiscal objectives and to report progress towards achieving them.<sup>12</sup>

12 The Fiscal Responsibility Act is included in the Best Practice section on the Internet version of this Source Book: <http://www.transparency.org>.

13 For example, in the USA many government bodies provide a

great deal of information for free. Charges are then levied for more lengthy requests but these are usually restricted to cost-recovery.

14 Guidance notes, NZ State Services Commission, 1995.

pendent Ombudsman or Information Commissioner.<sup>15</sup>

- Alternatively the second appeal stage could be for judicial review, as is the case in the US.<sup>16</sup> In some countries the Ombudsman could also take the complaint to the courts.

In New Zealand, the Danks Committee,<sup>17</sup> when assessing the options, came down firmly on the side of the Ombudsman being the sole appeal authority:

We believe that ... there are convincing reasons not to give the courts ultimate authority in such a matter. The system we favour involves the weighing of broad considerations and the balancing of competing public interests against one another, and against individual interests. If the general power to determine finally whether there should be access to official information was given to the courts, they would have to rule on matters with strong policy and political implications.<sup>18</sup>

Whichever option is chosen, the key point is that there is an effective provision for impartial review of contested decisions.

### Privacy laws

FOI legislation should not, of course, be used to invade the personal privacy of individuals. Some Freedom of Information legislation incorporates provisions for accessing records held on individuals. Alternatively this aspect may be dealt with separately in a Privacy Act, as is the planned approach in South Africa.

Unlike the access provisions for general records of government in many FOI laws, access to personal records held by government agencies is usually applied retrospectively. However legislation is structured, access to personal information is usually restricted to records held within a system of filing and are retrievable by a form of personal identifier, i.e. personal name, number, index, etc. Along with the right of access to these personal files, a key provision of privacy laws is that citizens have the right to have incorrect information amended.<sup>19</sup>

### A culture of secrecy

Many countries that have introduced FOI are seeking to replace the “culture of secrecy” that prevails within their public service with a “culture of openness”. FOI laws are intended to promote accountability and transparency in government by making the process of government decision-making more open. Although some records may legitimately be exempt from disclosure, exemptions should be applied narrowly as the intention is to make disclosure the rule, rather than the exception.

It is one thing to confer a right to information on a citizen, and quite another when it comes to servicing his or her requests. In Tanzania, for example, every citizen has the right to be

15 In New Zealand, the relevant Cabinet Minister was empowered to overturn a recommendation of the Ombudsman in respect of any particular request for information. A pattern quickly developed of this power being exercised. In response to criticism, the arrangements were changed in 1987. Thereafter it required a veto of the full Cabinet to overturn a recommendation by the Ombudsman, not just that of an individual Minister. The result was dramatic. The power of veto has never to date been exercised under the new procedures. Judith Aitken, “Open Government in New Zealand”, in *Open Government, Freedom of Information and Privacy*, Andrew McDonald and Greg Terrill (eds.), (Macmillan, London, 1998): <http://www.ero.govt.nz/speeches/1997/jas130397.htm>.

16 In the US, if an administrative appeal fails, complainants can

apply to the district courts. This is made easier by allowing the individual seeking access to file their suit either in the district in which they are resident, or in the district in which the records are lodged.

17 *Supra*.

18 “Given the pivotal role of the Ombudsmen in the New Zealand system, the general approach and reputation for fairness of individual Ombudsmen have helped to create public confidence in the Act and been critical to the Act’s successful implementation [there.]” Judith Aitken, *supra*.

19 For example, the Canadian Privacy Act establishes the requirement that personal information be managed throughout its life cycle, that is from its creation through to its ultimate destruction or preservation in the National Archives.

informed, yet public servants have no obligation to provide information to them. The Constitution of the United Republic of Tanzania of 1977 states that<sup>20</sup>:

Every citizen has the right to be informed at all times of various events in the country and in the world at large which are of importance to the lives and activities of the people and also of issues of importance to society. The rights and freedoms enumerated in Part III of the Constitution are considered basic rights and are arguable before the courts.<sup>21</sup>

However, Tanzania is just one of many countries where there are few institutionalised mechanisms which require Government to facilitate the public's right to be informed. A Code of Ethics and Conduct for the Public Service Tanzania was issued by the Civil Service Department in June 1999. Section III, Part 5 of the Code addresses the issue of Disclosure of Information. It states that:

- A Public Servant shall not use any official document or photocopy such as a letter or any other document or information obtained in the course of discharging his/her duties for personal ends;
- Public Servants shall not communicate with the media on issues related to work or official policy without due permission;
- Official information will be released to the media by officials who have been authorised to do so according to laid down procedures.<sup>22</sup>

Although the requirements laid out by the Code are reasonable, there is no corresponding obligation for public servants to provide information. As a result, when citizens or their representatives ask public servants for information, their questions are often met with a defensive reluctance to provide answers.<sup>23</sup>

A culture of secrecy will not disappear overnight. Officials have to develop confidence in making information available, and understand that all information should be accessible by the public - unless there are strong countervailing reasons why a particular piece of information should not. Too often, officials claim that journalists misuse information or use information recklessly, making this a pretext for refusing to cooperate with them. Yet, if journalists do not have access to reliable information, it can hardly be wondered that their stories will, from time to time, be at odds with the real position. This is more the fault of the official than of the journalist.

Government departments should, in their own interests, be open to the media and have staff who are capable of handling requests in a cooperative manner and ensure that copies of major documents (e.g. reports to the Legislature) are printed in sufficient quantities so as to ensure

20 Article 18, clause 2 (Part III Basic Rights and Duties).

21 Information for Accountability Workshop: Tanzania, conducted by International Records Management Trust and TI-Tanzania, March 2000. There was agreement at the workshop that many citizens in urban areas are aware that Article 18 exists but few know how to exercise their right to obtain information. Mechanisms do not exist to provide guidance to citizens on accessing current government information. The National Archives Act provides for the right of citizens to consult public records that are over 30 years old. Legislation has been drafted to reduce the 30-year closure rule on public records in Tanzania to 25 years, but this legislation has not yet been passed. At the moment, the National Archives building is almost full and virtually nothing post-dating 1973 has been transferred to the National Archives. As a result, most public records that belong in the Archives are still held in the ministries and are, therefore, inaccessible to citizens. The report on the meeting is on the IRMT web site: <http://www.irmt.org>.

22 Ibid. Civil Service Department, The United Republic of Tanzania. Code of Ethics and Conduct for the Public Service Tanzania, June 1999. In many countries the claim is made that "only the Minister" can authorise the provision of information or the making of a statement. And as often as not, "the Minister" is either out of the country or "unavailable".

23 Ibid. Media professionals are expected to rely initially on information issued to them through press releases. Yet many press officers in the ministries are not trained journalists, and the general perception is that the information they produce is self-serving and not useful. If journalists want to pursue a matter further they are asked to submit a questionnaire on letterhead and wait for a response; often no reply is forthcoming. The need for the Government to reply is only an understanding, not an obligation. Media representatives can ask to interview officials and will often be given permission to do so. However, their success is likely to depend upon the strength of the informal networks they have cultivated within government.

that the media has reasonable access to them. Even with good informal networks, some information is still difficult if not impossible to obtain. In Tanzania the national accounts and the Auditor General's Report are common examples. There, although both documents are published for the benefit of the Legislature, it is difficult to obtain a copy, even from the government printing office. Budgetary information is perhaps the most sought after type of information. Civil society groups, too, need budgetary and financial information to assess government priorities and determine which problems are being ignored or undervalued.<sup>24</sup>

### Protection of sources

In some countries the mere possession of confidential information is a criminal offence if the individual is not authorised to have it. One illustration is the case of a part-time journalist, and small trader in Tanzania, who was found in possession of a confidential letter written by a Regional Commissioner. The letter contained instructions to refuse him a trading licence for spurious reasons. The journalist obtained this letter and took the Regional Commissioner to court on suspicion of corruption. However, because the document was classified, he was arrested for being in possession of a confidential document!<sup>25</sup>

Protection of sources is a core requirement for journalists to practise their profession freely. Journalists must know that they can print stories without risking fines or imprisonment for failing to reveal their sources of information. Individuals who provide journalists with information on an off-the-record basis need to have assurances that the journalists they confide in will not be intimidated by public authorities into revealing their identities. These assurances are essential if the media is to be an effective counterforce to the abuse of power by public officials.<sup>26</sup>

### Disclosure of sources and common law jurisdictions

If journalists cannot gather information on a confidential basis, their ability to carry information to the public can be severely circumscribed. Thus laws providing for the protection of their sources assume particular relevance.

A "weak" privilege not to disclose the identity of sources at the discovery stage of a libel action known as the "newspaper rule" (as in Australia), has been recognised by the courts in some jurisdictions, but rejected in others.

For example, a case in Ontario<sup>27</sup> clearly established that courts had a discretionary power, depending on all the circumstances, to refuse a request for disclosure during discovery, even where the evidence would otherwise be relevant. In another case from Ontario<sup>28</sup>, however, disclosure was ordered in the context of a highly uncomplimentary and admittedly false statement by the defendant about the plaintiff, a senior member of the Prime Minister's staff. The newspaper rule has been completely rejected in some provinces. The British Columbia Court of Appeal, for example, held that the liberal discovery rules in that province were inconsistent with such a privilege.

A limited privilege not to testify at a trial has also been recognised as part of the law of evidence. In *Slavutych v. Baker*, the Supreme Court of Canada (SCC) held that courts might recog-

24 Ibid

25 Ibid.

26 This section quotes the Briefing Paper on Protection of Journalists' Sources (Freedom of Expression Litigation Project) ARTICLE

19 and INTERIGHTS, May 1998, <http://www.article19.org/pubs/papsou.htm>.

27 Reid v. Telegram Publishing Co.

28 White v. MacLean Hunter Ltd.

nise a qualified privilege not to testify where four criteria were satisfied:

- the communication must originate in a confidence of non-disclosure;
- this confidentiality must be essential to the ongoing relationship between the parties;
- the relationship must be one which ought to be fostered; and
- the injury to the relationship from disclosure must be greater than the benefit it would bring to the litigation.

These criteria are applicable to all confidential relationships and hence might assist journalists wishing to protect the identity of their sources. The relationship between journalists and confidential sources would generally satisfy the first three conditions but satisfaction of the fourth would obviously turn on the circumstances of the case. In a subsequent case,<sup>29</sup> the Supreme Court held that the appellant, a journalist, did not come within the *Slavutych* criteria in respect of her claim of a privilege not to testify regarding information she had given to certain individuals. The fact that the information sought had passed from the journalist to the “source” rather than vice versa was clearly relevant, as disclosure would not have affected any expectation of confidentiality.

Judges may also have a general overriding discretion to exclude otherwise relevant evidence. In *Crown Trust Co. v. Rosenberg*, Saunders J. refused to force a journalist to disclose the identity of a source, requiring only disclosure of the substance of the communication. He based this holding on the public interest in preserving the confidentiality of sources and the fact that it might be possible to obtain the information in other ways.<sup>30</sup>

### Protection of sources and civil law jurisdictions

In France, prior to 1993, the duty of professional secrecy did not apply to journalists, who could be questioned regarding their confidential sources of information. However, in practice, at least in criminal cases, very few courts or investigative *magistrats* went so far as to require journalists to disclose their sources. Journalists are not entitled to any special protection in civil proceedings; the same law applies to all witnesses. In the few instances where disclosure was ordered, journalists generally declined to answer, invoking professional custom; the courts generally refrained from ordering sanctions. Journalists were sanctioned in only one or two cases in the decade leading up to 1993 when the criminal law was substantially revised.

In 1993 the Code of Criminal Procedure was amended, bringing legislation into line with accepted practice, at least as far as criminal proceedings are concerned.

Article 109(2) now provides that:

Any journalist who appears as a witness concerning information gathered by him in the course of his journalistic activity is free not to disclose its source.

Several points are worth noting. First, the right not to reveal sources is absolute, not qualified. Second, the law applies only to journalists called as witnesses; accused persons always have an unqualified right to refuse to testify. Third, the Act defines neither a journalist nor journalistic activity leaving areas of ambiguity.

In 1993, following the recommendation of the Committee of Enquiry in to the Press and Judiciary of 1984, the protection of journalists' sources was further indirectly reinforced by a new

<sup>29</sup> *Moysa v. Alberta* (Labour Relations Board).

<sup>30</sup> Briefing Paper on Protection of Journalists' Sources, *supra*.

clause relating to searches and seizures in media premises. Article 56.2 of the Code of Criminal Procedure now provides that the investigating judge or State prosecutor must be present to ensure that investigations, “do not encroach on the free exercise of the journalist’s profession.”

French law offers considerable protection to journalists’ sources. More significant than the letter of the law, perhaps, is the reluctance of the courts to sanction journalists who refuse to comply with an order to disclose their sources. This judicial rectitude perhaps reflects a wider consensus in the public at large that journalists should not be forced to divulge such information.<sup>31</sup>

### Libel (defamation) laws

Libel laws, too, can constitute a formidable barrier to the provision of information to the public by the media, and libel laws are universal. The need for laws to protect individuals against defamation is not disputed. Many countries make a distinction under law between the treatment by the press of holders of public office and the treatment of private citizens. Such distinctions should be made, as the public has a broader right to be informed on the actions of public office holders rather than private citizens. At the same time, it is important to distinguish between the information made public and the type of person who has made it public. Libel matters should first and foremost focus on the information disseminated by the media.

People who are libelled in the press should have opportunities for redress under law. The courts should be the arbiters of the standards of privacy relative to the freedom of the press, and provide a greater level of protection from the press for individuals who hold no public office, or are in no position to influence the lives of numerous other people. The penalties levelled by the courts must be balanced: they must weigh the need to punish those in the media who act irresponsibly as against the rights of a society to be informed and a media whose freedom is not curbed for fear of devastating libel judgements.

The United Kingdom laws of libel, which may be viewed as reasonable by many governments and lawyers, in fact tip the balance against freedom of the press. The American approach, which involves very explicit concepts of malicious intent, strongly favours the media. Finding the right balance is difficult, but it is essential. Developing this balance is a challenge for the courts and a further reason why only in a system with an independent judiciary can freedom of the press thrive. If the judiciary is the subject of political control, then public office holders may be tempted to use the threat of very substantial libel penalties as a means of intimidating the press and so undermining the ability of the media to keep the public informed.

Today, in numerous countries, libel penalties can be imposed by the courts that are so burdensome as to ruin all but the wealthiest of journalists and publications.<sup>32</sup>

### The impact of the Internet

The Internet has greatly reduced the ability of governments to control what their people can or cannot access, and affords individuals and organisations unrivalled opportunities to carry information into the public arena.

31 Briefing Paper on Protection of Journalists’ Sources, *supra*.

32 For example, in 1973-74, lawyers for a British newspaper were troubled by reporting from the publication’s Washington D.C. bureau on the Watergate affair. The lawyers argued against publishing many of the reports. They warned that President Nixon could sue for libel and that the costs of litigation could

be enormous. These threats were factors in editorial decision-making. To take another example, one reason why many publications in Britain did not pursue full investigations of the illicit business dealings of the late entrepreneur, Robert Maxwell, was that he was notorious for suing journalists for libel.

“Official secrets” banned in one country, perhaps more for political than for security or public interest reasons, can be quick to find their way onto the web. A court order suppressing a well-known person’s name in one country will quickly appear on a website outside it.

A country can, of course, continue to control people and web sites within its borders. China is among those who have tried to stop web sites from “leaking state secrets”.

The Internet, too, has struck a blow in favour of access to information and against the domination of news dissemination by a small group of media magnates. However, at the same time it has posed genuine problems for governments struggling to combat pornography and organised crime, which have been quick to seize on the opportunities the Internet presents for swift transmission of encrypted messages which are virtually untraceable, particularly if mobile telephones are used to establish links to service providers. We can therefore expect increasingly strenuous efforts by governments to enhance their ability to monitor transactions on the Internet.

The Internet has also opened up new possibilities for governments to interact with their citizens. Malaysia is one country at the forefront of using the Internet to conduct as many of its transactions with its citizens as are possible, and is in the process of developing “electronic government”. Obviously, this option is not open to countries where access to the Internet is limited, but it would seem to be the shape of things to come.

## Records management

Even legally enforceable rights of access to information are meaningless if government records are chaotic. Although information may be available in principle, if it cannot be found then it cannot be made available to citizens. Not only does this limit government accountability and its credibility in the eyes of citizens, but it also has a serious impact on the capacity of government to discharge its duties efficiently.

Records management issues must be addressed by a FOI law and improvements implemented prior to its introduction. One of the provisions of most FOI laws is that agencies must publish lists of the records series that they hold. Therefore series must be organised and captured within a record keeping system.<sup>33</sup>

A nation-wide government records management policy is essential - not just to provide citizens with information but also to ensure that individual civil servants can be held accountable for their actions. If there is no paper trail, chances of errant civil servants being identified and sanctioned are slight. Not only must the records exist, but they must also be readily accessible by those who need them. Records should not be simply kept in a capital city and members of the public be required to travel from rural areas if they want to consult them. Furthermore, documents of general interest should be prepared in a form understandable to the general public, especially such major documents as those of the Auditor-General to the Legislature. These can also be placed on the Internet at little or no cost for the benefit of those with access to it.

### Curbs on news content were on the way...

Under rules published in the People’s Daily, web sites are required to undergo security checks.

The regulations appear to give authorities a powerful instrument of control over the Internet in the name of protecting sensitive government information.

China’s definition of state secrets is so broad it can encompass virtually any information not specifically approved for publication. The crime of leaking state secrets has been used to jail journalists and is often invoked against opponents of the Communist Party.

“All organisations and individuals are forbidden from releasing, discussing or transferring state secret information on bulletin boards, chat rooms or in Internet news groups,” the State Bureau of Secrecy announced in the rules carried in the Communist Party’s flagship daily.

“Any web site that provides or releases information on the World Wide Web must undergo security checks and approval,” the rules state.

*China Clamps Secrecy Rules on Internet, Reuters, 26 January 2000*

33 In Canada, in addition to the requirement that descriptions of records are published, there is a commitment to the introduction of policies, standards and best practice as well as systems

to ensure that information is managed through its life cycle. This is in recognition of the fact that without such procedures, FOI cannot be successfully implemented.

A sound records management policy will vest an agency with over-all responsibility for records management, usually in the form of a national archive. Such a central agency will provide guidance to departments on the creation, maintenance and disposal of files, and will itself serve as the ultimate custodian of documentation once it has ceased to be of use to a department. The national archive should conduct periodic records management audits of departments to ensure that the records management policy is being faithfully carried out.<sup>34</sup>

Improved access to information will not of itself enhance public participation in decision-making. Not everyone has access to technology, but all have a right to contribute to decisions which affect them. This places a heavy burden on the mass media to include more investigation and interpretation of the actions of government than ever before. They will have access to information on behalf of the public at large, and it is a central feature of the media's role for it to use this availability for the widest public benefit.

### Some indicators as to the effectiveness of access to information

- Is there a policy on the provision of information which favours access, unless the case against access in a particular instance meets prescribed and narrow grounds, justifying its being withheld?
- Do rights of access to information extend to information held by local governments and state-owned enterprises? Does it include records of private companies that relate to government contracts?
- Are there clear procedures and effective guarantees for citizens and journalists to access the official information they require?
- If access to information is refused by a government department, is there a right of appeal or review? Is this independent of government?
- Do courts award punitive sums in libel cases involving public figures? If so, do these serve as a deterrent to the media?
- Do the courts give appropriate protection to journalists' sources?
- Is training given to officials in the proper handling of records and the making of information available to the public?

### Public sector records

- Is there an official body with a legal duty for records maintenance (records tracking)?
- Are there clear administrative instructions on the maintenance of public records? If so, are these generally observed?
- Do citizens have a right of access to their personal files (other than those concerned with law enforcement) and the right to insist on corrections where these contain errors?
- Do public officials or others seeking information experience difficulties in obtaining it? If they do, what are the problems?
- What policies exist concerning the provision of information to the public (e.g. to service a complaint)?
- Can officials provide credible and timely audited accounts, and information about personnel numbers, etc?
- Does legislation cover the records of regions and districts (or their equivalents)?

34 The International Records Management Trust (IRMT) is an NGO which is working with a number of developing countries on aspects of their records management. The trust has carried projects throughout the world, including Cameroon, Egypt,

Grenada, Guyana, Kenya, Malta, South Africa, Tanzania, Uganda, Ukraine, Zambia and Zimbabwe. Details of projects since 1997 are available on its web site: <http://www.irmt.org>.