

Implementing

Access to Information

A practical guide
for operationalising
freedom of information laws



Commonwealth Human Rights Initiative

Working for the practical realisation of human rights in the countries of the Commonwealth

Commonwealth Human Rights Initiative

The Commonwealth Human Rights Initiative (CHRI) is an independent, non-partisan, international non-governmental organisation, mandated to ensure the *practical* realisation of human rights in the countries of the Commonwealth. In 1987, several Commonwealth professional associations founded CHRI. They believed that while the Commonwealth provided member countries a shared set of values and legal principles from which to work and provided a forum within which to promote human rights, there was little focus on the issues of human rights within the Commonwealth.

The objectives of CHRI are to promote awareness of and adherence to the Commonwealth Harare Principles, the Universal Declaration of Human Rights and other internationally recognised human rights instruments, as well as domestic instruments supporting human rights in Commonwealth member states.

Through its reports and periodic investigations, CHRI continually draws attention to progress and setbacks to human rights in Commonwealth countries. In advocating for approaches and measures to prevent human rights abuses, CHRI addresses the Commonwealth Secretariat, member governments and civil society associations. Through its public education programmes, policy dialogues, comparative research, advocacy and networking, CHRI's approach throughout is to act as a catalyst around its priority issues.

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Implementing Access to Information:

A practical guide for operationalising freedom of information laws

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Foreword

In 1946, more than fifty years ago, the United Nations General Assembly recognised that “Freedom of Information is a fundamental human right and the touchstone for all freedoms to which the United Nations is consecrated”.¹ Soon after, the right to information was given international legal status when it was enshrined in Article 19 of the International Covenant on Civil and Political Rights. Since that time more than 65 countries have passed national legislation entrenching the right in domestic law.

While a law on access is essential however, it is not enough. By itself, legislation will do little to transform a closed governance environment into an open democracy. Entrenched bureaucratic cultures of secrecy, inconsistent legislation, process and systems constraints and lack of understanding of the law by officials are all hurdles which will need to be overcome on the road from secrecy to openness.

In practical terms, opening up government will require the review, amendment and harmonisation of all legislation, rules and guidelines to ensure that officials are clear on the duties of disclosure. Complementary legislation to open up meetings and protect whistleblowers, as well as rules clarifying procedural access issues may also need to be developed. ‘Information champions’ within and outside of government – most notably, government implementation units and/or Information Commissions – also need to be supported. Effective processing and monitoring systems will also need to be created, as will training and guidance resources for officials responsible for implementing the law.

Experience has shown that change happens only when there is unequivocal political commitment to tearing down all barriers to access and well-crafted and deliberate strategies are developed that support each element of a new access regime. Upholding transparency, accountability and participation requires governments to send a strong message of openness to all officials. Strong and engaged leadership can make all the difference, particularly in the early days of implementation.

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“The right to access information [is] an important aspect of democratic accountability and promote[s] transparency and encourage[s] full participation of citizens in the democratic process.”²

Commonwealth Law Ministers, 2002

Entrenching a culture of openness

Entrenched cultures of secrecy in the political and bureaucratic hierarchies can slow down the drive towards openness. The instinct towards withholding information, which is often deeply rooted in environments where secrecy has allowed officials to remain unaccountable, can be difficult to overcome. Nonetheless, if an access law is to be effective, ways will have to be found to encourage bureaucrats to implement the law in the spirit of openness and accountability. At the very least, innovative ways will need to be developed which ensure that officials comply with the letter of the law.

Keeping political will strong

Experience has shown that one of the important issues to tackle in the early stages of implementation is uncertain or ambiguous political will. Even where a freedom of information law has been enacted by parliament, there may still be only a weak commitment amongst senior political and bureaucrat leadership to its effective functioning. In practice, lack of genuine political commitment to openness will undermine the law by sending conflicting messages to those responsible for administering the new legislation.

Unless clear statements are made by leadership, and proper systems which reward openness are put in place, bureaucrats may well doubt that facilitating access to information is an activity they should prioritise in their daily work. It is therefore vital that ministers, parliamentarians and senior bureaucrats are encouraged to actively take up the issue of right to information proactively and consistently pledge their unequivocal support for a new openness regime.

The first step – developing a plan of action

An immediate way of signaling the government's commitment to implementing a new access law is by developing and publishing a detailed plan of action identifying key implementation tasks, the agency or agencies responsible for actioning them and strict timelines for completion. Experience has shown that it is most efficient for a whole-of-government action plan to be developed by a lead agency given overall responsibility for implementation (commonly referred to as the nodal agency). This ensures that implementation activities are consistent across the government. It will also ensure that the bureaucracy cannot "pass the buck" on their responsibilities for implementation because the nodal agency will be responsible for monitoring all government implementation activities.

The nodal agency usually takes the lead in developing an action plan. However, any action plan needs to be developed participatorily, to promote whole-of-government ownership of the final plan and its activities. Key ministries – particularly ministries which may be resistant to openness, such as the Cabinet Office, the Home Ministry and/or the Police Ministry – should be deliberately brought into the process so that they are on-board from the outset and their concerns can be specifically addressed and overcome early on. One of the most important elements of any plan is *deadlines*. Clear dates need to be included for completion of various implementation steps. The nodal agency must then monitor these deadlines and ensure that any slippage is queried, explained and if necessary, sanctioned.

Government delay in putting laws into practice is a common way of sending mixed signals to bureaucrats who are then less inclined to give priority to their new duties. Delay is often justified on the ground that time is needed to put in place systems that enable efficient information disclosure. However, too often delays mask a more serious battle against openness being waged within the bureaucracy. Delays in implementation can range from the reasonable – such as in Australia and Canada which operationalised their laws within a year of enactment – to the unreasonable, such as the United Kingdom, which insisted on a five year gap following enactment to get its house in order. To counter the problem of delay, it is important that the law itself sets down clear timelines for implementation. In Jamaica, for example, because the Government believed that full implementation could take time, their legislation incorporated a phased approach which required key ministries to implement in the first year, and other agencies to implement twelve months later.

Whether the law is to be implemented immediately or within a set period, it is always important the department responsible for administering the law and key oversight agencies (such as the Ombudsman or an Information Commissioner) to monitor implementation carefully, especially in the early stages, to ensure that bureaucrats do not simply ignore their obligations and delay operationalising the right to information. It is also important that good precedents are set in the early days of the legislation. Continuous oversight is an important mechanism for bolstering political will.

Creating and supporting ‘information champions’

Although effective operationalisation of the law requires the commitment and engagement of the entire government and bureaucracy, nonetheless experience has shown that the identification – or even the creation – of ‘information champions’ both inside and outside of government can be a useful means for overseeing the process of change, evaluating the performance of public bodies and promoting bureaucratic and public knowledge of the law. Information champions will be seen by both the bureaucracy and the public as people or bodies who are specifically tasked with promoting open government. Specific positions can be created to fill this role or existing agencies can be given these responsibilities. Such bodies ensure that sufficient attention is given to developing a well-considered plan of action; they can promote consistency; and they ensure that someone oversees the activities of all of the different agencies which have duties under the law.

Information officers

Information laws often require the nomination of information officers who are responsible for receiving and processing applications. Additionally, information officers can be utilised as a central contact point to promote the law within their organisation and as a resource which officials can draw on if they have questions regarding the law. Designating specific officials as contact points is a useful strategy – not only because they can be specially targeted for training so that their expertise is developed and strengthened, but because they can then be used as an embedded resource to promote transparency within their organisation.

Rather than outsiders from other departments or oversight bodies trying to explain the law to sceptical officials, information officers – who have the trust of their colleagues and understand the intricacies of the organisation and its information needs – can perform this role. To do so effectively however, governments need to ensure that information officers have sufficient time and resources to discharge their duties, and that their new role is recognised within the promotions and rewards systems of the bureaucracy.

Nodal agencies

Commonly, governments also designate a specific ministry to manage implementation activities. In the United Kingdom, this role was performed by the Department of Constitutional Affairs. In Uganda, the Ministry for Information is taking the lead. It is important that any nodal agency is properly resourced to discharge their new duties. Additional staff may need to be seconded, at least in the intensive early stages of implementation, when new guidance materials may need to be published, training curricula created and information systems developed. New staff need to be committed to openness and should be recruited on the basis of the skills they can bring to the job rather than being seconded randomly from within the bureaucracy. For example, staff should have a proven track record of promoting transparency themselves, and would ideally have experience in training, change management, e-governance or records management. Sufficient funds will also need to be allocated, if existing departmental budgets are already allocated to current programmes.

Implementation units

Sometimes special units are created by governments to monitor departmental compliance, identify roadblocks to access, make assessments of the best and worst practices, provide guidelines and training, disseminate judgments clarifying the parameters of the law, make recommendations for reform, create literature for public education and/or run public education campaigns. For example, the South African Human Rights Commission has the duty to create user guides on access to information, train public officials, act as a repository for the manuals containing lists of records and information held by public and private bodies - which are required by law - conduct educational programmes, assist members of the public with requests, monitor the implementation of the law and report to parliament.³ Unfortunately however, these duties were made subject to “resources being available”, and the lack thereof has been a significant constraint.

Working to make openness a reality: establishing an FOI unit

In Jamaica, the Government created an Access to Information (ATI) Unit attached to the Prime Minister’s Office with a mandate to spearhead and guide implementation and administration of the law. Unfortunately though, the Unit suffered from under-resourcing and a lack of staff, which has severely restrained its ability to perform its role effectively. Nonetheless, one of the Unit’s most unique innovations was to set up an ATI Association of Administrators, which brought together information officers from various agencies to regularly discuss the challenges they were facing and share lessons learnt and good practice. Likewise, in Scotland, the Scottish Executive set up the FOI Implementation Group, which consisted of senior officials from the Executive as well as a cross section of Scottish public authorities. The Group was set up in 2001, four years before the Scottish Act came into force, and was tasked with preparing for and assisting with implementation.

Established in 2001, the Trinidad and Tobago Freedom of Information Unit facilitates the implementation process by educating members of the public about their rights and public authorities about their responsibilities under the Act. The Unit has:

- ❑ Conducted seminars for key officials;
- ❑ Established a freedom of information website;
- ❑ Produced a manual on CD for public authorities;
- ❑ Distributed brochures explaining the law to households by post;
- ❑ Produced radio and television features, newspaper advertisements on various aspects of the law and posters for members of the public (on rights and responsibilities) and officers in public authorities (on responsibilities);
- ❑ Undertaken community outreach through the “FOI Caravan”: with assistance from the Ministry of Community Development, the Unit conducted sessions to sensitise members of the public in communities throughout the country; and
- ❑ Conducted sensitisation sessions for management/staff members at public authorities (more than 90 sessions have been carried out).⁴

Information Commissions

Information Commissions, which are required to be newly established under many access laws, are often given a specific role as ‘information champions’ within the new access regime. In India for example, the new Central and State Information Commissions are tasked with dealing with complaints and appeals in relation to any matter “relating to requesting or obtaining access to records”⁵, which includes a failure to implement proactive disclosure requirements, or to appoint information officers, as well as appeals against non-disclosure. The new United Kingdom and Scottish Information Commissioners have been heavily involved in training officials and producing comprehensive guidance materials for use by bureaucrats.

Information Commissions set openness precedents

As a new appeal body which reviews the decisions of public bodies to withhold information, Information Commissions have an enormous responsibility to decide cases in a manner which upholds the spirit of openness enshrined in the law. In the early days in particular, they have an important role in setting precedents which clarify ambiguities in the drafting of the law. In India for example, there was considerable controversy over whether the new Act allowed the public to access ‘file notings’ made by officials in the margins of official documents.

The Department of Personnel and Training, the nodal agency in India, advised on its website that file notings were not accessible. However, when a complaint was sent to the new Indian Central Information Commission, the Commission held that file notings were in fact covered and ordered the release of such information. This decision sent a strong message to the bureaucracy, not only that they had to take their new openness duties seriously, but also that the Commission intended to make its decisions independently of government influence and was prepared to disagree with senior bureaucrats who favoured secrecy.

Information Commissions usually produce annual reports, which include recommendations for improving implementation. These are all key activities, and it is therefore essential that bodies such as Information Commissions are properly supported to discharge their duties. Unfortunately, in India for example, in the first six months of implementation many states simply did not set up the required Information Commission, while in other states, Information Commissions are attempting to function with only skeleton staff, a handful of computers and insufficient office space.

Encouraging openness through training and incentives

Promoting transparency is the responsibility of *all* officials. However, in practice, even when political leadership supports change, the steel frame of the bureaucracy can inhibit the sure transition toward openness. Even in countries which have had laws for years, bureaucratic resistance can be a problem. For example, 13 years after the enactment of the Australian *Freedom of Information Act*, the Australian Law Reform Commission found that, “it is clear that the Act is not yet accepted universally throughout the bureaucracy as an integral part of the way democracy in Australia operates...[T]here still appears to be a certain level of discomfort within the bureaucracy with the concept of open government. Some observers consider it may well take a generational change before there is a good working relationship with the FOI Act in the public sector generally.”⁶

Since every request for information has the potential to cause a disruption in a process, expose a scam or put a roadblock on a possible policy direction,⁷ the response of public servants can range from proactively providing information, to blaming poor implementation on technical constraints, such as poor record-keeping and inadequate resources, to avoiding requests through harassment. Sometimes bureaucrats even cross the line of what is legal, removing information from files, manipulating information, and destroying records. Canada, in fact, has had to amend its access law to deal with such activities and now imposes penalties for officers caught destroying, mutilating, falsifying, altering and concealing records.⁸ Bureaucrats can be passively aggressive in their refusal to comply, employing tactics such as waiting for the last possible moment to provide information, rejecting requests on flimsy grounds and relying on endless appeals or court approaches to block disclosure.

Timely training lays strong foundations

The Jamaican *Access to Information Act* was passed in 2002. Even before the legislation came into force, the Jamaican Government created an Access to Information Unit. The Unit’s training agenda includes exposing officials to the fundamentals of change management, the details of the law and information management. The first phase of training of about 400 officials to prepare them to handle requests for information efficiently and effectively began in early 2003 and included NGOs as resource people.⁹ Although India’s right to information law is relatively new, there is already some experience in developing and implementing effective training programmes for officials. The Maharashtra administrative training institute, YASHADA, was very active in training officials in relation to the old state law. They trained all PIOs and Appellate Authorities and then rolled out training for other officials throughout the State. Overall, they trained more than 4000 officials in three years. YASHADA is now partnering with the Central Government to develop a national training curriculum in respect of the new Act.

One of the most important practical ways of tackling bureaucratic resistance is to undertake training programmes to ensure that all officials understand their duties and are committed to openness. Beyond the mechanics of knowing what the law says, what records management systems hold and how information is to be provided, holistic training emphasises the role of public servants in implementing 'openness' as a core value of public service.¹⁰ Training needs to focus on changing the attitudes that distance government from people and must aim at mitigating the disquiet that changes in institutional culture always create.¹¹

There can be no significant and lasting improvement of access to information without the...understanding, co-operation and support [of public servants]. Prescriptive legislation and coercive measures are useful for defining rights and deterring non-compliance. They are less effective, however, in encouraging public servants to act, day in and day out, in ways that further the objectives of the [Freedom of Information] Act. This should be the ultimate goal.¹²

Since access laws are meant to bring about a radical change in prevailing norms, capacity-building needs to be provided to public officials in all departments and at all levels. As a priority however, all information officers who are responsible for dealing with applications and all appellate authorities who are responsible for handling appeals need to be fully trained on how to manage applications/appeals and how to apply and interpret the law. Information officers, who are the front-line officers responsible for implementing the law, need to be comfortable with the detail of the legislation so that they can answer questions from both the public and other officers. Appellate authorities also need training because they are responsible for overseeing the work of information officers and ensuring proper decisions are made. Consequently, they need in-depth training on the specific nuances of the law, in particular the exemptions provisions, because they are the first ones who will be called on to settle disputes. They need to understand when the exemptions can and cannot be applied to make sure that information officers are not improperly rejecting applications.

Training begun even before an access to information law is enacted demonstrates government commitment to openness. For example, before the law came into force in Trinidad and Tobago in 2001, sensitisation sessions were held for the Cabinet, Permanent Secretaries, Heads of Divisions of Ministries and the media. However, training should also be ongoing. While new staff should have openness training included in their induction courses, there should also be mid-career training programmes on the content of right to information legislation. Administrative training institutions should be required to include sessions on right to information duties in their training curricula. Over time, staff might become unclear about their duties under the Act or have questions about implementation, so they should be given regular refresher training to make sure they all know what to do. As the law is implemented, problems will be identified and these will need to be discussed with staff and solutions found. Any training programme should be regularly reviewed to ensure that it takes into account suggestions from the public and staff. New precedents from the Information Commission or courts will also need to be incorporated.

Harnessing government-community partnerships

To be practically effective in facilitating the public's right to information, it will be important for implementation approaches to take account of the local needs of the community. To do this, experience has shown that governments would do well to develop strategies which promote government-community implementation partnerships. For example, in India, some state laws required the creation of a Right to Information Council, comprised of officials as well as members of the community. The Right to Information Councils were tasked with monitoring implementation and making recommendations to the government for removing obstacles to access.¹³

In Jamaica, the Government's Access to Information (ATI) Unit set up an ATI Advisory Committee of Stakeholders, which drew together representatives from civil society, the private sector and the media. The Committee met monthly with the Director of the ATI Unit – and even the Minister at times – to promote non-governmental monitoring of the ATI Programme, the provision of recommendations to the Government on best practices and to provide assistance to the ATI Unit that its individual members were in a position to render. Notably though, for such monitoring bodies to be effective, they require strong commitment from government representatives, who need to be active in listening to civil society representatives and acting on their recommendations.

Using incentives to encourage a commitment to openness

Ideally, any training programme will be positioned as part of a broader openness drive within public bodies. To demonstrate to officials the importance of the new transparency duties under the law, experience in other sectors has also shown that undertaking training could be a performance criteria built into officials' employment contracts. In fact, performance incentives can be a very effective mechanism for ensuring that officials prioritise their new responsibilities. At a minimum, it is important that information officers and appellate authorities have their new duties reflected in their employment contracts so they can be rewarded for good performance and can feel confident to dedicate work time to fulfilling their obligations under the law. Departments should also be rewarded for promoting openness. For example, performance bonuses could be provided to department heads to ensure that their organisation meets all its duties under the Act. Departments could also personally reward officers who promote openness, for example by handing out annual openness awards. Combined with legislative sanctions for non-compliance, rewards and incentives can be a key tool for encouraging officials to prioritise their new duties and discharge them effectively.

Using NGOs as training resources

In India, government-NGO partnerships have been particularly evident in the training programmes being undertaken by State and Central Governments. In the State of Maharashtra, individual activists were commonly called on to support training undertaken by YASHADA, the administrative training institute responsible for training officials on the old State law. Activists were able to share their personal experiences with officials and explain in real terms the problems they had encountered and their expectations of officials. More recently, the Commonwealth Human Rights Initiative (CHRI) held a National Implementation Conference in May 2005 which drew together government officials and civil society representatives from throughout India, with international right to information officials. Consequently, CHRI has been invited to conduct training programmes by the Government of India and the State Governments of Uttaranchal, Meghalaya, Nagaland, Tripura, Mizoram, Gujarat, Madhya Pradesh, Chhattisgarh, Karnataka, Tamil Nadu, Delhi and Uttar Pradesh. Already, more than 2800 officials from government, as well as public sector undertakings, have been trained by CHRI.

Experience has shown that government implementation activities can sometimes be supported, enhanced or delivered in collaboration with community representatives. For example, in South Africa, training of information officers and deputy information officers has been carried out by various organisations including the South Africa Human Rights Commission, the Justice College and the Open Democracy Advice Centre (an NGO). In Jamaica, the Government ATI Unit conducted a series of training workshops in conjunction with the Records and Archives Department of Government and their Management Institute for National Development. Article 19 (an NGO working on freedom of expression issues) has also produced a Model Handbook on Right to Information Training for Public Officials, which can be used as a basis for developing local training modules for bureaucrats.

Crafting a supportive legislative regime

Access laws do not exist in isolation. Rather, they are part of a suite of legislative and policy measures designed to secure openness. It helps the cause of openness when the main legislation makes it plain that it will override all other contrary laws. But in practice, the primacy of this legislation has to be ensured by sending out clear signals to the government machinery that it is not business as usual any more. Thus, it is imperative that all inconsistent legal provisions are repealed or, at the very least, amended to comply with the spirit of open government. Powerful older laws, like official secrets acts in particular, need to be done away with or completely overhauled. Supplementary laws and regulations may also need to be enacted.

Overriding inconsistent legislation

The uncertainty created by the continued existence of restrictive legislation sometimes makes it hard for public officials to know exactly how much to disclose under the new access law. If one law tells them to release information but another tells them they will be prosecuted for any unauthorised disclosures, officials will most likely err on the side of caution and continue to withhold information. In today's world, many restrictive laws which remain in operation cannot withstand scrutiny. However, while they remain on the books, they cumulatively create a level of chill that freezes out information-sharing as a routine bureaucratic activity.

Old official secrets acts undermine openness

Many countries still have official secrets acts which are designed to keep government closed. They often contain sweeping clauses that appear to forbid the disclosure of every kind of information. They allow for presumptions of guilt, often cover a multitude of bewildering circumstances in which any communication could be punishable and create serious offences that can ground accusations of traitorous behavior and espionage that bring down harsh prison sentences. The basis on which documents are categorised as 'public', 'restricted', 'confidential' or 'top secret' is often left to the discretion of officials, and how classification criteria are developed and applied is neither well-known nor questioned.

Whilst it is recognised that some government secrecy may still be permissible within an access regime, best practice requires that the new law should override all other secrecy laws. Any secrecy provisions which remain on the books must be tightly drafted to ensure that they are invoked only sparingly, in specifically-defined circumstances. Unfortunately, in many jurisdictions, old official secrets acts remain largely unaltered in most post-colonial jurisdictions in the Commonwealth. Laws

The continuing tussle between secrecy and access

When the Jamaican Government passed its *Access to Information Act* in 2002, it still refused to repeal the ancient *Official Secrets Act* of 1911 that gags public servants from disclosing government-held information. The Attorney-General specifically clarified that the new law overrode the *Official Secrets Act* and that any disclosure made under the new law would not be an offence under that Act. However, the decision to retain it runs counter to the spirit of the new access legislation and may well stifle the system of open government that is struggling to be born. The resistance to scrapping a law well-known to be anachronistic demonstrates once again the difficulties of changing deeply rooted government attitudes.¹⁶

that are meant to cover only documents that contain 'official secrets' are stretched to cover any 'official' document. In Bangladesh, newspaper editors have been arrested under the *Official Secrets Act* for nothing more than reproducing already 'leaked' secondary school examination questions which were published to expose corrupt officials who routinely sold such questions before the examination period.¹⁴ In Malaysia, an opposition politician was jailed in 2002 for two years after being found guilty of revealing to the press the contents of two anti-corruption agency reports on a minister and a chief minister.¹⁵

Governments also still routinely require ministers and officials to take pledges of loyalty or oaths of secrecy. Though there is value in a proper level of confidentiality in the workplace, a blanket ban on information disclosure can confuse public officials about their duties: is their duty solely to their superiors or are they governed by an overriding duty to serve the public interest? In modern democracies, oaths of secrecy to government need to give way to oaths of openness to the public. Otherwise, the very existence of an oath to maintain secrecy reinforces the message that public officials are expected to resist all disclosure.

Civil service rules can inhibit bureaucrats

Myriad rules that curb disclosure by prohibiting government servants from 'unauthorised' communication of information are also often found buried in civil service manuals. These are sometimes so widely cast that it is not entirely surprising that many bureaucrats decide it is safer to err on the side of discretion than disclosure. In Malaysia, administrative guidelines prevent officials from revealing any information in any form to the public or the media without prior written approval from their superiors. At the same time as an openness law is passed, civil service rules will also need to be reviewed and should be revised to bring them into line with the new access regime. Otherwise, if contradictory rules are left in place, officials may be confused as to which official regulations they must follow. In many countries, civil service conduct rules prohibit officials from communicating any information of an official nature to non-officials and the press. Such secrecy provisions cannot be left on the books if a right to information law is enacted.

All other laws need to be consistent

Difficulties in harmonising data protection, privacy and access regimes can also create an opportunity for resistant or confused bureaucrats to unjustifiably refuse requests. For example, data protection and privacy laws, which are designed to protect information held about individuals, may at times compete with public

disclosure rights. Ideally, the challenge of balancing these interests should be considered and addressed at the time the laws are drafted. But where they conflict, the pros and cons of disclosure and the competing merits of the public and private rights need to be balanced according to the public interest. Unfortunately though, privacy laws are too easily invoked to deny information on the ground that the information is protected and may not legally be released. In this vein, the Privacy Commissioner for New Zealand has received complaints that government unjustifiably refuses requests “because of the Privacy Act.”¹⁷

Provisions in evidence laws also sometimes protect “unpublished official records relating to any affairs of State” and can leave a wide discretion with officials “who shall give or withhold such permission as [they] think fit”. In many cases, public officers can also not be “compelled to disclose communications made to them in official confidence, when they consider that public interests would suffer by the disclosure.”¹⁸ Where such provisions remain on the books after an access law is in place, they should be amended or repealed to ensure that there is a consistent approach towards openness of government information.

Enacting supporting laws which promote openness

Access laws focus primarily on getting information out of government. They are not always entirely comprehensive, such that other aspects of open government may need to be addressed through separate legislation. This can be beneficial, as it can ensure that the issues are given proper treatment and due importance. It also allows public participation in the legislative process to be more targeted and avoids disparate issues being combined by government and pushed through parliament without sufficient research and input.

Effective subordinate rules

Practice shows that a resistant rule maker can defeat the purpose of access laws by developing regulations which narrow the right and/or create administrative hurdles which are a disincentive to requesters. While parliament may pass a strong access law, bureaucrats can effectively undermine its impact by promulgating regulations or implementing internal rules which restrict its ambit. For example, in the state of Karnataka in India, the application forms developed under the now-repealed state legislation asked for the “purpose for which information is being sought” – even though there was nothing in the law that required this. Both implementing and oversight agencies need to be vigilant to ensure that subordinate regulations do not conflict with the more user-friendly requirements of the main law.

The promulgation of rules setting exorbitant fees is a particularly problematic method for bureaucrats to discourage applications. For example, despite the new national

Indian access law requiring fees to be set at a reasonable limit, some states have imposed fees of up to Rs.50 for applications – the equivalent of more than US\$1 in a country where for more than 40% of people that constitutes their entire daily expenditure. This is compared to Central Governments fees of Rs.10. Some states have even imposed Rs.50 fees for appeals, despite such fees not even being permitted under the primary legislation! Such practices are not oversights, but deliberate attempts to sneak in restrictions on access through the backdoor.

Whistleblower protection

A properly functioning open governance regime is also aided by complementary legislation that makes it safe and acceptable for people to raise concerns about illegality and corruption plaguing organisations with which they are involved. Honest folk, constrained by employment contracts or public service secrecy rules and without legal protection or clear pathways through which to raise concerns, are often legally unable or too intimidated to disclose information, speak out or ‘blow the whistle’ on wrongdoing.

Public interest disclosure laws, also known as ‘whistleblower protection’ laws, are designed to encourage reporting of official wrongdoing and provide protection from subsequent victimisation. Whistleblowing is a means to promote organisational

Limiting the negative impacts of ministerial certificates

Some access laws in the Commonwealth permit the use of “ministerial certificates” which permit a minister to issue a conclusive certificate certifying that a document is secret. Usually, the certificate cannot be questioned, even by the independent appeal bodies or the courts. The use of ministerial certificates is entirely contrary to international best practice and reflects outdated approaches to information disclosure. In Australia, the law – which is more than 20 years old – allows such certificates. However, their use has often been attacked by parliamentarians and civil society alike, as being contrary to good governance because they allow the minister to remain unaccountable. In 1994, officials from the Attorney General’s department concluded that:

“The provisions for conclusive certificates are now anachronisms with little if any relevance to the contemporary world of FOI decisions. Time has proven that the substantive exemption provisions, without the added strength of certificates, are in fact more than adequate to the task of the exemption of genuinely sensitive documents.”¹⁹

In a law which is specifically designed to make government more transparent and accountable, the use of ministerial certificates cannot be defended. Where laws permit such certificates, they should at least include strict criteria to justify their use, namely that “the disclosure of the document would be contrary to the public interest”. Additionally, to prevent abuse, certificates should only be permitted to be issued by a Cabinet Minister or the Attorney General. This is the approach adopted in the United Kingdom. In that jurisdiction also, any ministerial certificate issued must be tabled in parliament along with an explanation.

accountability, maintain public confidence and encourage responsible management. Australia does not have a federal public interest disclosure law, but most of its states do and these laws protect all persons reporting wrongdoing, not just employees or workers. South Africa passed whistleblower legislation simultaneously with its access law.²⁰ The United Kingdom passed legislation prior to its access to information law after a number of investigations into disasters showed that early disclosure might have had a preventive effect.²¹ For example, investigations into the collapse of the Bank of Credit and Commerce International found that a corporate climate of fear and intimidation stopped employees from saying anything about corrupt practices. Similarly, after the Clapham rail disaster that killed 35 people in the United Kingdom, investigations found that workers did not feel safe voicing their concerns even though they were aware of the hazard posed by unsafe wiring systems.²²

Open meetings

To bolster open government, encourage informed participation and inspire confidence, progressive governments are putting in place laws that make participation and consultation with the public a legal requirement. South Africa values this so highly that it is mentioned in the Constitution²³ and New Zealand has had its so-called 'sunshine law' in place for more than 15 years.²⁴ Most sunshine laws cover only the 'official' convening of a public body. Small internal departmental meetings are not covered as, in practical terms, it would be impossible to notify the public in advance of all such meetings and would massively slow down bureaucratic operations. Public bodies are broadly defined, to include entities consisting of two or more people that conduct public business, for example, city councils, town boards, school boards, commissions, legislative bodies and (sub)committees.

Of course, not all portions of meetings will be open, because some discussions may concern genuinely sensitive information and decisions. Most sunshine laws therefore provide for closed or 'executive' sessions. However, strict criteria are laid down for the invocation of such sessions to prevent abuse. For example, a motion should be made during the open part of the meeting proposing to enter into executive session; the motion must identify the general area or areas of the subject or subjects to be considered; and the motion must then be carried by a majority vote of the total membership of the relevant body. Further, a public body must not be able to close its doors to the public to discuss whatever subjects it chooses. Instead, as with right to information laws, a limited lists of subjects must be specified in the law which will warrant secrecy. Good practice supports legislation which requires that a public body can never vote to appropriate public monies during a closed session.

Once the meeting is over, fulsome minutes should be published and accessible by the public. It is important that the law makes it explicit that the minutes include a

detailed voting record which identifies how individual members voted on every decision. Where a body holds a secret meeting or makes a decision during an executive session that should have been open, the law should permit any member of the public to bring a lawsuit and the courts should have the power to nullify action taken by a public body in violation of the law “upon good cause shown.”

Putting in place good systems

To ensure that the law is applied consistently by all officials across all bodies it is important that proper systems and processes are put in place. New information technology can provide opportunities for innovation, but at the same time, paper-based resources should not be overlooked. The key is to ensure that implementers put their minds to developing materials, systems, tools and processes which will make implementing the law as easy as possible for officials, and reduce the time and effort they need to invest. In turn, this will help reduce bureaucratic resistance while promoting better compliance. More tangibly, it will lead to efficiency dividends by reducing the time and resources spent on complying with the law.

Developing guidance resources for officials

Officials are not specialists in law, such that it can often be genuinely daunting for them to attempt to implement a piece of legislation with such wide-reaching impacts on their day to day activities. A new right to information law will require all officials to have at least a basic understanding of the new Act so that they know how to manage the information they deal with, and more specifically, so that they know what to do with an application if it happens to reach their desk. It will also require all information officers and appellate authorities to have a detailed knowledge of the law so that they can process requests properly, and correctly apply exemptions and comply with other procedural requirements. While training will assist with familiarising officials with the new legislation, nonetheless experience from other jurisdictions has shown that it is also useful to develop easy reference guides which officials can refer to when they hit a snag.

The Jamaican Access to Information Unit produced a step-by-step “Manual Providing Guidelines for the Discharge of Functions by Public Officers” which was disseminated to all government bodies as well as to stakeholder groups in hard copy and on the Unit’s website. The Manual gave detailed guidance on how to process applications and appeals, including clarifying issues like how to calculate time limits, how to deal with third parties, providing receipts, imposing fees and

Producing templates: Implementing proactive disclosure duties in India

Many new access laws impose extensive proactive disclosure responsibilities which require agencies to regularly publish a range of documents which facilitate public participation and promote accountability. In the initial stages, some government agencies may balk at these new duties, most commonly because they are concerned that the task of collecting and collating the information will be an onerous burden. However, if undertaken in the proper spirit, proactive disclosure can provide an opportunity for agencies to assess what information they hold, whether it is properly managed, and whether it could usefully be opened up to the public as a matter of routine. To assist agencies to decide how to most efficiently collect and collate the information required to be published under the law, it can be useful for the nodal agency responsible for administering the law to produce a guidance note or template for officials. In India for example, one state government outsourced this work to a consultant which produced a detailed template on proactive disclosure which was designed to help officials to identify: (i) what specific information needs to be collected; (ii) by whom; (iii) how often; (iv) from where/whom; and (v) how the information can best be disseminated, taking into account the different needs at different levels of government. The template was considered so useful that it was circulated to numerous state governments throughout the country. By producing a template, the Government reduced the amount of duplicated effort at department level that would have been wasted had each body developed their own system. The Government also ensured that all bodies would adopt a consistent approach to proactive disclosure.

applying exemptions. The ATI Unit also produced a “Road Map” which basically comprised a master list of all government bodies, their functions, principal officers, their location and contact information. The Road Map was disseminated to government officers in recognition of the fact that many government bodies have no idea what other bodies are doing or know contact details for key personnel. It was hoped that the Road Map would facilitate the process of transferring or jointly processing applications.

Prior to the United Kingdom *Freedom of Information Act 2000* coming into force, the UK Information Commissioner invested heavily in producing resource materials for officials. One of the most useful set of publications has been the Information Commissioner’s Guidance Series, where the Commissioner produced individual guidance notes explaining each of the exemptions in the Act, including examples of how to apply the exemptions in real life situations.²⁵ Guidance notes were also produced on tricky procedural issues, such as transferring applications and dealing with appeals. In the period between enactment and implementation of the new law, codes of practice were also developed on various topics like ‘publication schemes’ and ‘records management’.

Designing systems which promote compliance

In addition to ensuring that manuals and guidelines are produced to assist officials to meet the new demands of a right to information law, it is important to consider more broadly the systems that are in place to ensure that compliance with the law is consistent across all agencies. In this context, experience has shown that many governments have utilised government websites – and even an internal departmental website or intranet – to ensure that guidance materials are available to all officials equally. Governments have also utilised databases and other information systems to collect information from officials about implementation which can be used to assess and review departmental efforts, so that best practice can be distilled and copied, and areas for improvement can be identified and worked upon. This information can also be useful for the public. For example, in Canada, the Federal Government collects details of all applications submitted to all agencies and collates them into a single document. The information is regularly published on-line, and can then be used by the public to assist them to formulate their own applications, or by MPs to identify potential accountability issues they need to investigate or even by the media to highlight important public issues.

As an information regime becomes more entrenched, it can also be important to develop systems to capture precedents so that officials can learn from the clarifications issued by appeal bodies, including Information Commissioners. As more and more applications are processed and appeals heard, the interpretation of the law will be fine-tuned. In Canada, the on-line version of the *Access to Information Act 1982* has been annotated to provide section-by-section links to other useful documents, including court judgements. In the state of Queensland in Australia, all the decisions of the Information Commissioner are uploaded on the Commissioner’s website, and are broken down section-by-section, alphabetically, by date and by title (see annex 1). Even simple decisions made via letter, in addition to more detailed judgments, are uploaded.²⁶ The Scottish Information Commissioner also uploads all decision notices on his website.²⁷

Improving records management

At the core of the right to information are records – papers, documents, files, notes, materials, videos, tapes, samples, computer printouts, disks and a range of other things. Records are a government, as well as a public, asset. They contain the evidence that helps citizens understand the ‘how’ of governmental actions and the ‘why’ of official decisions. They are the means by which governments can answer queries ranging from a parent asking about the basis for their child’s examination results, to investigations by parliament, the auditor-general or the ombudsman about multi-billion dollar defence deals. Accurate records beget accurate answers.

Without an effective system for creating, managing, storing and archiving records, implementation of an access law will be more difficult. It will be harder to reply to applications within the time limits set by the law, if the information requested cannot be located in a timely manner. It will also undermine the law if information has been stored so badly that the records are no longer in a fit state to be inspected or copied. Unfortunately, financial constraints, insufficient hardware and filing systems, poor categorisation procedures and difficulties in information delivery are all common ills that bedevil governments’ efforts to open up their functioning.

Governments must have a proper system in place to create and maintain reliable records. Otherwise, even the most well-meaning officials can be defeated by their working environments. More troublingly, without proper systems, records can be manipulated, deleted or destroyed and the public can never be sure of their integrity. The methods of manipulations are as varied as human ingenuity but increasingly sophisticated technologies are making verification easier. In India, a highly-placed government official had to resign when forensic tests revealed he was guilty of fudging files and back-dating notes to cover up a scam.²⁹

Using IT systems to help monitor implementation

In order to ensure that the law is achieving the aims endorsed by the Government, it is important that implementation of the Act is supported by an effective ongoing monitoring and evaluation system. Heads of public authorities, nodal agencies and Information Commissions can then regularly assess whether authorities are meeting their obligations under the Act. In doing so, they can identify public authorities which perhaps require additional training or systems support – for example, because statistics show that they are regularly missing deadlines for disposing of applications or appeals. Over time, this will help streamline application processing and reduce costs in administering the law.

In order to be able to collect sufficient data to meaningfully assess compliance, it is essential for all public authorities to immediately put in place proper monitoring systems. The United Kingdom developed a simple computer-based monitoring system, which utilises Microsoft Access databases to enable officials to input data about every application and appeal they deal with.²⁸ The database captures information on who is applying, enables officials to track whether time limits are being met and even uses tick-box questions to help officials apply exemptions and any relevant public interest tests. The developer of the database has made it available on-line, to be downloaded and modified for other national contexts.

Of course, in many countries, applications will be processed by officers stationed at outposts which do not have access to computers. In such situations, some form of paper-based and e-based monitoring system will be a more appropriate model. For example, lower level officers could perhaps collect paper-based statistics which are collated and computerised at the district level and then fed into a broader departmental monitoring system. The Information Commission or nodal agency could then easily interrogate such a database in order to produce an annual report. They could also ensure monthly publication of such statistics on their websites.

Any Freedom of Information legislation is only as good as the quality of the records to which it provides access. Such rights are of little use if reliable records are not created in the first place, if they cannot be found when needed or if arrangements for their eventual archiving or destruction are inadequate. *Draft UK Code Of Practice On The Management Of Records.*³⁰

Both the Indian and Pakistani right to information laws specifically require that records should be managed in a way that facilitates access and go further to require that records should be computerised and networked.³¹ Although this may take time, at the very least, at the outset of implementation the government will need to review current records management processes, not only in terms of collation and storage, but classification and archiving as well. Best practice requires that records are created and managed in accordance with clear, well-understood filing, classification and retrieval methods established by a public office as part of an efficient records management programme. With new technology being developed all the time, it is important that records management guidelines deal with how to manage electronic records as well.

Compounding poor departmental record-keeping is the fact that the laws that govern the national archives in many countries are inadequate to provide for good records management. The priority of archivists, which is to preserve historic documents, does not serve the aim of active record management, which is to ensure that records are systematically maintained through their entire life cycle and systematically destroyed. New legislative provisions – either in the access law itself or in a separate act – that mandate the use of uniform procedures and systems to manage a variety of records, whether paper-based or electronic, help ensure the public's information needs are met.

The challenges of electronic record-keeping

New technology poses opportunities for managing records well and making information readily available to larger numbers of people than ever before, but electronic record-creation and storage also throws up complex challenges. Paper-based systems are tangible and relatively easily centralised. Increasingly though, official communication is becoming virtual and being done via email. Communication is faster, but more records are created and more are stored in personal spaces rather than common work areas. Details of sequencing, opinions and decisions can be easily distorted or lost unless modern systems of storage and retrieval are in place.

The authenticity of records can be seriously compromised if electronic records and paper records do not correlate. If not managed carefully, institutional memory will be severely harmed and governments' ability to remain accountable to the public can disintegrate. Electronic records are increasingly being accepted in courts as evidence. Therefore, if systems are not in place to guarantee integrity of these documents, justice could be the casualty.

In poorer countries, installing comprehensive record-keeping systems is seldom a priority and often appears financially unviable. Lack of equipment, space, staff and know-how are common concerns. In particular, many governments fear that electronic systems are beyond their reach, because installing hardware is seen as expensive, requiring frequent upgrading and needing specialist personnel for maintenance and operation. Yet, equipment is becoming cheaper over time, and today there are a number of international programmes directed at ensuring that poorer countries can affordably access the benefits of information technology.

Meeting the challenge of information delivery

The very volume of information generated in a modern world, low literacy rates, a proliferation of languages and remote habitations pose challenges to information delivery, even where there is a right to access it. In poorer countries in particular, ensuring that information reaches the masses can be difficult. For example, important government information is often in writing, but this form of communication is inaccessible for unlettered citizens for whom verbal communications are their main source of information. Information must be made easily digestible. It must also be comprehensible to populations that are linguistically diverse.

Countries have innovated to meet challenges of remoteness and illiteracy by: holding regular community level meetings in rural areas; using wall newspapers posted at local council centres, schools, post offices and community centres to disseminate key messages; using the official 'beating of drums' through villages to inform citizens of development projects in their local area; driving vans with loud speakers through the countryside; and even sending up smoke signals to keep people abreast of important happenings.

Mass media, of course, provides a singularly effective means for information dissemination. Accurate reliable broadcasting bridges the distance between government and citizenry. However, in some countries, modern information technology, a high level of connectivity and the reach of mass media usually ensures that well-targeted messages regularly get out to the vast majority of people. In a great many countries, large portions of the media are under government control; this imposes a greater responsibility on government to maximise the use of media for sending useful information to the public in a timely fashion. Talk back radio shows in Jamaica, for instance, have helped educate citizens about regulatory systems.³³ In South Africa community radio is bringing unprecedented amounts of information to remote areas.

In countries where there is little money available to develop new information infrastructures., existing radio systems can be a cheap but effective method for disseminating government information. For example, in many countries, particularly in the Pacific and Caribbean, where the distances between islands has inhibited the development of more sophisticated communication infrastructures, radio continues to be the quickest and most reliable way of getting messages through from one village to another. Accordingly, government departments have often heavily invested in developing and maintaining radio networks. These networks could be harnessed to promote more systematic information disclosure.³⁴ For example, radios used by local health centres to coordinate with their headquarters could be used in non-peak periods to disseminate more general government information. In fact, health clinics could be developed as "information hubs" as they often constitute a village meeting point, where parents meet and share information. Likewise, local schools could double up as information hubs, where important information could be pinned to noticeboards or sent home to parents via their school children.

Harnessing the media and local networks to disseminate government information³²

Despite increased expenditure in the 1990s, an expenditure tracking survey revealed that during a five-year period 87% of all funds meant for primary schools in Uganda went into the pockets of bureaucrats while enrolment remained less than 50%. Astonished by these findings, the national government began giving details about monthly transfers of grants to districts through newspapers and the radio in a bid to curb the siphoning of funds. At the other end, primary schools were required to post public notices on receipt of all funds. Parents therefore had access to this information and were in a position to monitor the educational grant programme and demand accountability at the local government level. In five years, the diversion of funds dropped phenomenally from 80% to 20% and enrolment more than doubled from 3.6 million to 6.9 million children. Schools with access to newspapers were able to increase their flow of funds by twelve percentage points over other schools. Information dissemination, though a simple and inexpensive policy action, enforced greater accountability in local government and ensured proper use of the taxpayer's money.

E-governance demonstrates the power of information-sharing

E-governance is also an increasingly useful tool for information-sharing. E-governance uses information and communication technologies to engage citizens in dialogue and feedback and thereby promote greater participation in the processes of governance. E-governance aids in streamlining procedures, standardising rules and improving service delivery to citizens.³⁵

Accessing land records

'eLandjamaica', a state-run service of Jamaica's National Land Agency, brings together in one place detailed information on a broad range of land-related issues previously scattered across various departments, including land titles, surveys, maps and land valuations. Basic information relating to volume and folio numbers for plots of land is freely available to the public, while more detailed information is provided at a cost. This data is particularly useful to land surveyors, real estate developers, planners, engineers, lawyers and buyers who can make sure of title and land usage all at one place.

Networking for development

In the Solomon Islands, which has nine different provinces comprised of many smaller islands scattered across almost 1,000 km, information technology is being harnessed for the benefit of remote populations to combat the tyranny of distance. The People First Network, set up in 2001, is a rural email network aimed at facilitating sustainable rural development and peace-building by enabling better information-sharing among and across communities.

Exposing corruption

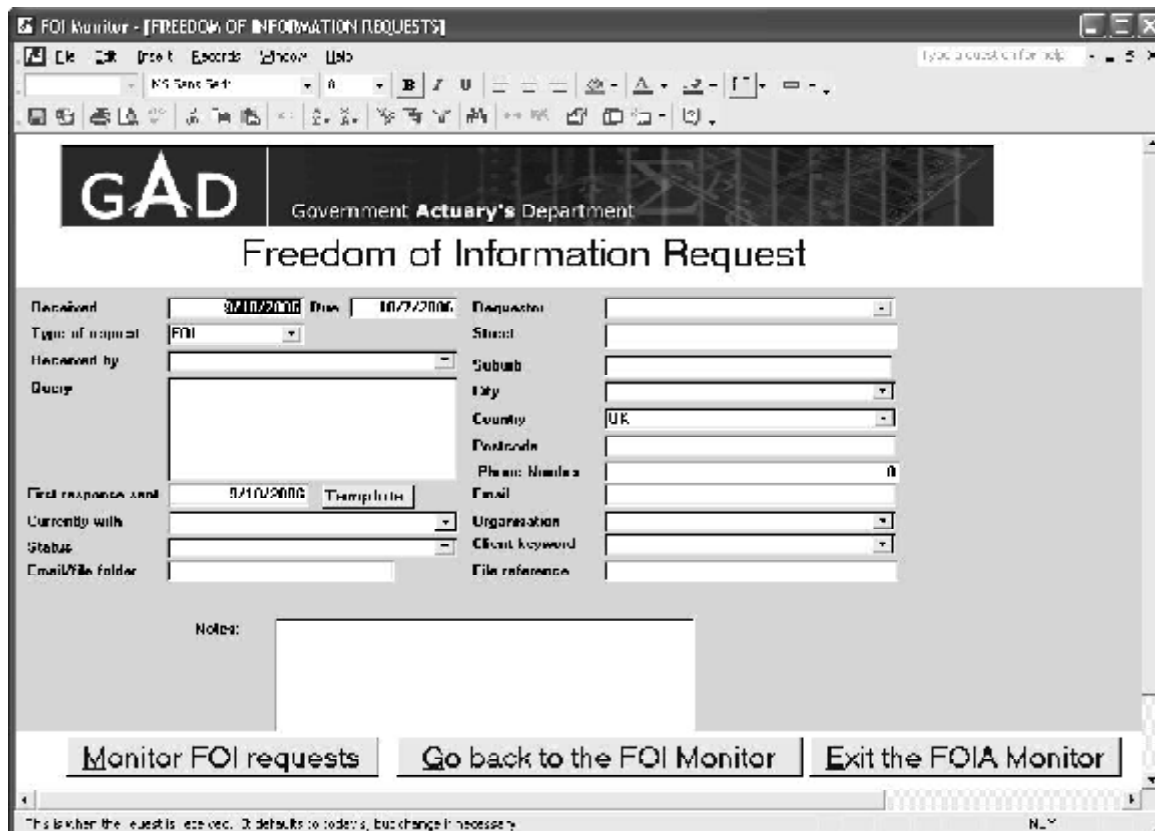
The Central Vigilance Commission of India is the watchdog set up to investigate corruption in public office. The website includes instructions on how a citizen can lodge a complaint against corruption without fear of reprisal. In an effort to focus media attention on corruption, the Chief Vigilance Commissioner uses its website to publish the names of officers from the elite administrative and revenue services against whom investigations have been ordered or penalties imposed for corruption. The media has picked up this information and used it to further highlight corruption. Newspaper polls report that 83% of respondents believed that publishing the names of charged officers on the website has a deterrent effect.³⁶

Monitoring implementation

It is increasingly common to include provisions in access laws mandating a body – commonly an Information Commission – to monitor and promote implementation of the Act, as well as raise public awareness about using the law. Monitoring is important – to evaluate how effectively public bodies are discharging their obligations and to gather information which can be used to support calls for improvements to the law and implementation activities. Ongoing monitoring and evaluation will enable implementation efforts to be continuously assessed, reviewed and strengthened, so that best practice can be distilled and copied, and areas still requiring more work can be identified and addressed.

Annual and ad hoc reporting to parliament

Annual reports on implementation, provide a holistic picture of the status of compliance with the Act. They can highlight areas of good and bad practice, lessons learned and innovations which could be replicated. They can also pinpoint areas for reform. Annual reports are often used to focus on specific topics of concern – for example, poor records management, more effective use of information technology or the need for ongoing training – or to highlight well or poor performing public authorities. They provide an important opportunity to draw parliamentary and public attention to right to information implementation problems, which can be particularly important after the Act has been in operation for a few years and the early excitement has died down.



The screenshot shows a web browser window titled "FOI Monitor - [FREEDOM OF INFORMATION REQUESTS]". The browser's address bar shows "http://www.gad.gov.uk/foi/monitor/". The page header features the "GAD" logo and the text "Government Actuary's Department". Below the header is the title "Freedom of Information Request". The main content area is a form with the following fields:

| | | | | | |
|---------------------|------------|----------------|------------|----------------|--|
| Received | 02/10/2006 | Date | 10/07/2006 | Requester | |
| Type of request | FOI | Street | | Street | |
| Handled by | | Suburb | | Suburb | |
| Query | | City | | City | |
| First response sent | 02/10/2006 | Country | UK | Country | |
| Currently with | | Postcode | | Postcode | |
| Status | | Phone Number | | Phone Number | |
| Count/Date folder | | Email | | Email | |
| | | Organisation | | Organisation | |
| | | Client keyword | | Client keyword | |
| | | File reference | | File reference | |

Below the form is a "Notes:" section with a text area. At the bottom of the page are three buttons: "Monitor FOI requests", "Go back to the FOI Monitor", and "Exit the FOIA Monitor". The footer of the page contains the text "This is when the request is received. It defaults to today, but change if necessary." and "NL".

Figure 1: The United Kingdom's computer-based monitoring system database.

Using annual reports to innovatively assess public authorities

In Canada, successive Information Commissioners struggled to battle the endemic problem of bureaucratic delays in responding to requests. Identified by the first Commissioner as a grave threat to the public's right of access, the second Commissioner called the propensity to routinely delay disclosure a "silent, festering scandal."³⁷ To address the problem, the Information Commissioner instituted a system of 'report cards' to measure the performance of specific departments, identify specific causes of delay, make suggestions for change and track action taken. In each Annual Report produced by the Commissioner, he randomly selects a number of public authorities and then issues them a "grade" from A to F, which depends on the percentage of access requests received which were not answered within the statutory deadlines.

The grading practice has forced public authorities to explain their poor performance to their ministers – and even to parliamentarians, as the Canadian Information Commissioner's Annual Report is not only tabled in Parliament but is also reviewed by the House Committee on Access to Information. This puts pressure on poor performing departments and ministries to review their performance and mend their ways. The grade is also an innovative performance standard which draws media interest because it can be easily understood by the public.

Annual reports are usually prepared by the Information Commission if there is one. Sometimes, the law requires the ministry responsible for administering the Act to produce an annual report, but this is not ideal because it is not good practice for a government agency to monitor government performance. An independent body should be tasked with preparing the report (including recommendations for reform).

In order to ensure that the reporting body has sufficient information to comment meaningfully on whether implementation is proceeding properly, it is essential that all public authorities have proper monitoring systems in place to ensure regular collection of the necessary statistics (see the section on "developing good systems" above). Ideally, the nodal agency responsible for implementation will develop a monitoring system, which will ensure that statistics collection is consistent across the bureaucracy. Guidance on how to collect and manage statistics needs to be issued to all information officers and appellate authorities, setting out the minimum requirements for ongoing collection and collation of statistics. At a minimum, basic processing statistics should be collected from all information officers and appellate authorities each month and collated and then sent to the nodal agency responsible for overall implementation of the Act. Implementation statistics should also be published every month on a government website, so that the public can have ongoing information on how effectively the Act is being implemented.

The statistics collected in the annual report can be an important monitoring tool for heads of public authorities, nodal agencies and the Information Commissions to regularly assess whether authorities are meeting their obligations under the Act. They can also be used to identify any public authorities which perhaps require additional training or systems support – for example, because statistics show that they are regularly missing deadlines for disposing of applications or appeals. Failure to improve over time could also increase the frequency and severity of penalties on that department.

Best practice requires that all annual reports are tabled in parliament. This is an important mechanism for ensuring that annual reports do not simply sit on bureaucrats shelves gathering dust but are actually seriously considered by the policy-makers – and responsible ministers – who should then take action to address implementation problems identified in the annual reports. In Canada and the United Kingdom, annual reports must also be referred to a specific Parliamentary Committee for more detailed consideration and reporting back to Parliament. At the time the annual report is tabled in Parliament, a press release should also be issued summarising the highlights and setbacks in terms of implementation which are discussed in the report. Publicity is an important means of ensuring that action is taken to address implementation deficiencies. All annual reports also need to be published on the government websites, as well as being available in hard copy, and should also be available for inspection at every office of every public authority, so that all members of the public can easily find out how well the Act is being implemented.

Some right to information laws also permit the publication of ad hoc reports by Information Commissions pertaining to specific information topics or departments. For example, the Canadian Information Commissioner has the power to commence his own investigations, even in the absence of a complaint from the public, and to then publish a report on his findings if he chooses. This power recognises that oversight bodies should have the power to investigate patterns of non-compliance as well as individual complaints. In the Australian state of Victoria, the Ombudsman who oversees the state *Freedom of Information Act* actually had his powers extended to permit ad hoc investigations and reports, in response to public concern at the major delays being faced in processing applications under the Act. The first thing the Ombudsman did upon being so empowered was to initiate an investigation into delays.

Recommendations for reform

Many right to information laws specifically require that annual reports include recommendations for reform, for example, in respect of particular public authorities, for the development, improvement, modernisation, reform or amendment to the Act, other legislation or the common law, or any other matter relevant for operationalising the right to access information. In South Africa, the South African Human Rights Commission can make such recommendations, whereas in India and the United Kingdom, the Information Commissioners are supposed to include recommendations for reform in their reports to parliament, as appropriate. In South Africa, India and the United Kingdom, the national access laws also permit individual recommendations to be made to public authorities to improve their performance, where monitoring shows that the public authority's practices do not conform with the provisions or spirit of the law.

The power to make recommendations can be used to actively address implementation problems, at a whole-of-government level and at the level of an individual public authority. These provisions strongly empower oversight bodies to act as real champions of openness within the bureaucracy, by giving them a broad mandate to take up issues with key stakeholders with a view to strengthening the access regime. In the early days of implementation, when it will be important to set good precedents and champion transparency, recommendations powers should be utilised boldly to set in place high standards for compliance.

Periodic parliamentary review of the law

Experience has shown that major reviews of the law at certain designated intervals can be crucial to ensuring that the law remains current with developing international best practice and to prod officials into reconsidering their duties under the law and recommitting to the principles of openness enshrined in the legislation. In Jamaica, the *Freedom of Information Act 2002* actually includes a specific requirement that a parliamentary committee be constituted to review implementation after the first two years of implementation. The Committee was set up in late 2004, and received submissions from local officials, civil society groups and users of the law. Submissions identified practical problems in bedding down the Act as well as legislative drafting deficiencies which needed to be addressed.

Even if not required by law, it is quite common for governments to periodically establish a parliamentary review committee to examine how well legislation is being implemented. Other bodies involved in implementation or law reform may also be tasked with assessing the law's effectiveness. In Australia for example, the Senate Legal and Constitutional Legislation Committee reviewed the national *Freedom of Information Act* almost 20 years after it was passed.³⁸ Subsequently, the Australian Law Reform Commissions also reviewed the Act and published more than 150 recommendations for improving it.³⁹ Most recently, the federal Ombudsman who handles complaints under the law has also made recommendations for improving implementation, including suggesting the establishment of a national Information Commissioner.⁴⁰ In Canada, the Government set up a Task Force in 2002 to comprehensively review the law, but its recommendations were not actioned.⁴¹ In 2005, a Senate Committee again reviewed the Act. Notably, the Information Commissioner of Canada made numerous suggestions to the Committee regarding amendments to the law and even went so far as to submit a model law for their consideration.⁴²

Conclusion

The enactment of a comprehensive right to information law is a major step towards entrenching open government. However, without a strong political commitment to implementation, backed by proper resources and strategies to breakdown long-standing cultures of secrecy, the effectiveness of the law will be severely impeded.

Supply and demand are both essential parts of the information equation – and it is primarily the government’s responsibility to ensure that the supply side functions effectively and efficiently. If officials are still resistant to openness, applications will be processed poorly. If information is still not managed properly, applications will be processed slowly. If systems are not in place to track the handling requests and their disposal, applications may get lost and may simply not be dealt with at all. It is the responsibility of governments to ensure that all of these issues are handled at the outset of the implementation of any new legislation. It is important to set good precedents from the beginning.

The initial efforts to implement a new access law will require considerable financial and personnel commitments. However, proper investment in the system at the outset will reap its own rewards over time. Opening up government will streamline many governance processes, improve bureaucratic efficiency, reduce corruption, support economic growth and foreign investment and result in better-targeted development initiatives. All of these outcomes have tangible financial benefits – as well as contributing to the overall health of the national democratic polity.

Annex

Decisions index on Information Commissioner's website, Queensland, Australia

Information Commissioner - Section Index - Microsoft Internet Explorer

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HOW TO USE THE 'REVERSE' INDEX

All the provisions of the FOI Act which are included in the Index are listed below. Click on the section or subsection you want to use, to go directly to the decisions which consider that provision.

Please note, following 2005 amendments to the FOI Act some of the sections of the Act have been renumbered. For instance, the former section 28(2) has effectively become section 29 and the former section 20(1) has effectively become section 20.

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|--|--|---|---|
| <u>Sufficiency of search</u> | <u>s.5</u> Reasons for enactment of Act | <u>s.6</u> Matter relating to personal affairs of applicant | <u>s.7</u> Definitions |
| <u>s.8(2)</u> Meaning of 'agency' | <u>s.9(1)(a)</u> Meaning of "public authority" | <u>s.11(1)(b)</u> Application of Act to Parliament | <u>s.11(1)(c)</u> Application of Act to Courts |
| <u>s.11(1)(f)</u> Application of Act to Court registries | <u>s.11(1)(i)</u> Application of Act to commissioners of inquiry | <u>s.11(1)(k)</u> Application of Act to QIDC | <u>s.11(2)</u> Application of Act to documents in s.11 |
| <u>s.11A</u> Application of Act to GOC's | <u>s.12</u> Application of Act to Information Commissioner | <u>s.14</u> Act not intended to prevent other publication | <u>s.21</u> Right of access |
| <u>s.22</u> Documents to which access may be refused | <u>s.25(2)(b)</u> Applicant must provide sufficient information | <u>s.27</u> How applications processed | <u>s.20(1)</u> May refuse access to exempt matter. Please note, following 2005 amendments to the FOI Act, the former section 28(-) has effectively become section 28. |
| <u>s.28(2)</u> Substantial and unreasonable diversion of resources. Please note, following 2005 amendments to the FOI Act, the former section 28(2) has effectively become section 29. | <u>s.30(1)(e)</u> Access by creating document | <u>s.30(2)</u> Access to be given in requested form | <u>s.30(3)(c)</u> Access may be given in another form |
| <u>s.32</u> Dection of exempt matter | <u>s.34(2)</u> Notice of Decision | <u>s.35</u> Neither confirm nor deny | <u>s.36(1)</u> Cabinet matter |
| <u>s.37(1)</u> Executive Council | <u>s.38(a)</u> Relations with other | <u>s.38(b)</u> Relations with | <u>s.39(2)</u> Disclosure prohibited by |

Done Internet

Useful links

This list of links is not exhaustive. For more links, please visit CHRI's website.

International

- ❑ Commonwealth Human Rights Initiative www.humanrightsinitiative.org
- ❑ Article 19 www.article19.org
- ❑ FreedomInfo.org <http://freedominfo.org>
- ❑ Freedom of Information Network www.foiadvocates.net
- ❑ International Records Management Trust www.irmt.org

National

- ❑ Attorney-General FOI Home Page (Australia)
www.ag.gov.au/agd/wwww/Agdhome.nsf/HeadingPagesDisplay/reedom+of+Information?OpenDocument
- ❑ Information Commissioner of Queensland (Australia) www.infocomm.qld.gov.au
- ❑ Information Commissioner of Canada (Canada) www.infocom.gc.ca
- ❑ Government of India Right to Information Site (India) <http://rti.nic.in>
- ❑ Central Government Information Commission (India) www.cic.gov.in
- ❑ Right to Information BlogSpot (India) <http://indiarti.blogspot.com>
- ❑ Access to Information Unit (Jamaica) www.jaid.gov.jm/ati/
- ❑ Jamaicans for Justice (Jamaica) www.jamaicansforjustice.org
- ❑ Office of the Privacy Commissioner (New Zealand) www.privacy.org.nz
- ❑ Open Democracy Advice Centre (South Africa) www.opendemocracy.org.za
- ❑ Freedom of Information Website (Trinidad & Tobago) www.foia.gov.tt
- ❑ Scottish Information Commission (Scotland) www.itspubliknowledge.info
- ❑ UK Information Commission (United Kingdom) www.informationcommissioner.gov.uk
- ❑ Department of Constitutional Affairs (United Kingdom) www.foi.gov.uk
- ❑ Campaign for Freedom of Information (United Kingdom) www.cfoi.org.uk

End Notes

- ¹ UN General Assembly, (1946) Resolution 59(1), 65th Plenary Meeting, December 14.
- ² Communiqué 02/88, Meeting of Commonwealth Law Ministers in Kingstown, St Vincent and the Grenadines, 18-21 November 2002, para.20, www.thecommonwealth.org/docs/communiques/News88.doc.
- ³ Thipanyane, T. (2002) "Implementation of Freedom of Information Legislation in South Africa", CHRI unpublished, p.9.
- ⁴ Email correspondence between CHRI and FOI Unit, Trinidad and Tobago. For more information, visit <http://www.foia.gov.tt>.
- ⁵ *Right to Information Act 2005* (India), s.18(1)(f).
- ⁶ Australian Law Reform Commission, (1995) *Open Government: a review of the federal Freedom of Information Act 1982*, ALRC 77, para.4.13, <http://www.austlii.edu.au/au/other/alrc/publications/reports/77/ALRC77.html> as on 26 August 2003.
- ⁷ Snell, R. (2001) "Administrative Compliance: Evaluating the Effectiveness of Freedom of Information," *Freedom of Information Review*, No. 93, p.28.
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- ¹² Access to Information Review Task Force, (2002) *Access to Information: Making it work for Canadians*, p.169, <http://www.atirtf-geai.gc.ca/accessReport-e.pdf>, as on 29 August 2003.
- ¹³ See: Delhi *Right to Information Act 2001*; Maharashtra *Right to Information Act 2002*.
- ¹⁴ Kitora, M. (2002) "Legal Frameworks Enforcing Right to Information: Right to Information in Bangladesh", CHRI unpublished, p.2.
- ¹⁵ Padmajan, P. (2003) "Malaysia: A Status Report on Right to Information, April 2003", CHRI unpublished, p.9.
- ¹⁶ Dhall, M. (2003) "Freedom of Information in the Caribbean", pp.29, CHRI unpublished.
- ¹⁷ Office of the Privacy Commissioner, (1998) "Sorry, We Can't Tell You That", *Private Word*, Issue 23, <http://www.privacy.org.nz/privword/mislead.html> as on 6 October 2003.
- ¹⁸ *Evidence Act 1872* (India), ss.123 and 124.
- ¹⁹ Campaign for Freedom of Information UK (2001) *The Ministerial Veto Overseas: Further evidence to the Justice 1 Committee on the Freedom of Information (Scotland) Bill*, <http://www.cfoi.org.uk/pdf/vetopaper.pdf>.
- ²⁰ *Protected Disclosures Act 2000* (South Africa).
- ²¹ *Public Interest Disclosure Act 1998* (UK).
- ²² Drew, K. (2003) "Whistleblowing and Corruption: An Initial and Comparative Review", Public Services International Research Unit, p.4, <http://www.psir.org/reports/2002-08-C-whistle.doc> as on 27 August 2003.
- ²³ *Constitution of the Republic of South Africa 1996*, s.160 (7).
- ²⁴ *Local Government Official Information and Meetings Act 1987* (NZ).
- ²⁵ See United Kingdom Information Commissioner website at <http://www.informationcommissioner.gov.uk/eventual.aspx?id=9183> as at 15 January 2006.
- ²⁶ See Queensland Information Commissioner website at <http://www.infocomm.qld.gov.au/?p=26> as at 15 January 2006.
- ²⁷ See Scottish Information Commissioner website at <http://www.itspubliknowledge.info/appealsdecisions/decisions/index.php> as at 15 January 2005.
- ²⁸ The Monitoring Tool can be downloaded at www.gad.gov.uk/Publications/FOI.htm and modified for local contexts.
- ²⁹ Express News Service, (2003) "First Delhi head rolls in Taj Dirt: Environment Secretary told to go and rest", *Indian Express*, September 12, http://www.indianexpress.com/full_story.php?content_id=31460 as on 5 September 2003
- ³⁰ Developed in accordance with s.46 of the *Freedom of Information Act 2000* (UK). See <http://www.pro.gov.uk/recordsmanagement/freedomofinformation.htm> for more information.
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- ³⁴ For more see Mistry, J. & Rodrigues, C. (2005) "E-Governance in the Pacific Islands: Entrenching Good Governance & Sustainable Development by Promoting ICT Strategies Based On The Right to Information", paper present at the IIDS Conference on Governance and Development, 1-4 December 2005, University of the South Pacific, Suva, Fiji.
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- ⁴¹ See <http://www.atirtf-geai.gc.ca/home-e.html> for details.
- ⁴² Canadian Information Commissioner (2005) *Recommended amendments to the ATI Act 1983*, http://www.infocom.gc.ca/specialreports/pdf/Access_to_Information_Act_-_changes_Sept_28_2005E.pdf as at 15 March 2006.

CHRI Programmes

CHRI's work is based on the belief that for human rights, genuine democracy and development to become a reality in people's lives, there must be high standards and functional mechanisms for accountability and participation within the Commonwealth and its member countries. In addition to its broad human rights advocacy programme, CHRI advocates for access to information and access to justice. It does this through research, publications, workshops, information dissemination and advocacy.

Human Rights Advocacy: CHRI makes regular submissions to official Commonwealth bodies and member governments and when needed, conducts fact finding missions. Since 1995, CHRI has sent missions to Nigeria, Zambia, Fiji Islands and Sierra Leone. CHRI also coordinates the Commonwealth Human Rights Network, which brings together diverse groups to build their collective power to advocate for human rights. CHRI's Media Unit also ensures that human rights issues are in the public consciousness.

ACCESS TO INFORMATION

Right to Information: CHRI catalyses civil society and governments to take action, acts as a hub of technical expertise in support of strong legislation, and assists partners with implementation of good practice. CHRI works collaboratively with local groups and officials, building government and civil society capacity, as well as advocating with policy makers. CHRI is active in South Asia, most recently supporting the successful campaign for a national law in India and provides legal drafting support and inputs in Africa. In the Pacific, CHRI works with regional and national organisations to catalyse interest in access legislation.

Constitutionalism: CHRI believes that constitutions must be made and owned by the people and has developed guidelines for the making and review of constitutions through a consultative process. CHRI also promotes knowledge of constitutional rights and values through public education and has developed web-based human rights modules for the Commonwealth Parliamentary Association. In the run up to elections, CHRI has created networks of citizen's groups that monitor elections, protest the fielding of criminal candidates, conduct voter education, and monitor the performance of representatives.

ACCESS TO JUSTICE

Police Reforms: In too many countries the police are seen as oppressive instruments of state rather than as protectors of citizens' rights, leading to widespread rights violations and denial of justice. CHRI promotes systemic reform so that police act as upholders of the rule of law rather than as instruments of the current regime. In India, CHRI's programme aims at mobilising public support for police reform. In East Africa and Ghana, CHRI is examining police accountability issues and political interference.

Prison Reforms: The closed nature of prisons makes them prime centres of violations. CHRI aims to open up prisons to public scrutiny by ensuring that the near defunct lay visiting system is revived.

Judicial Colloquia: In collaboration with INTERIGHTS, CHRI has held a series of colloquia for judges in South Asia on issues related to access to justice, particularly for the most marginalised sections of the community.

Since 1946, when the United Nations General Assembly recognised that "Freedom of Information is a fundamental human right and the touchstone for all freedoms to which the United Nations is consecrated," over 65 countries have passed national legislation entrenching the right in domestic law.

However, while a law on access is essential, it is not enough. Entrenched bureaucratic cultures of secrecy, inconsistent legislation, process and systems constraints and lack of understanding of the law by officials are all hurdles which will need to be overcome on the road from secrecy to openness.

CHRI's *"Implementing Access to Information - a practical guide to operationalising freedom of information"* provides a step by step guide on how to overcome these hurdles and ensure effective implementation through:

- crafting a supportive legislative regime;
- putting in place strong and effective administrative systems; and
- ensuring proper monitoring.

It is only when freedom of information laws are implemented in a correct and effective manner, that they can help streamline governance processes, improve bureaucratic efficiency, reduce corruption, support economic growth and foreign investment and result in better-targeted development initiatives - thereby fulfilling their potential to transform a closed governance environment into an open and vibrant democracy.



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