

# **THE CHALLENGE OF IMPLEMENTATION: HARMONISING INFORMATION SUPPLY AND DEMAND**

*by Charmaine Rodrigues*

***“Effective implementation is a two-way deal: between the holders of information (government or the private sector) and the requesters (citizens and civil society organisations). Recognising that there is a dual responsibility helps us understand the nature of the challenge and contributes to the design of viable solutions”***

**Richard Calland, Open Democracy Advice Centre South Africa, 2003**

In the heyday of the 1990s, when national democratic movements swept across the world and good governance and transparency were the catch-cries of many new governments, right to information legislation was seen as a key step towards entrenching open government in practice. With the hindsight of years however, experience round the world has demonstrated that the passage of a good access law is merely the first step on what is usually a very long – and too often, winding – road towards effective implementation. Faltering political will, bureaucratic resistance, poor infrastructure and information systems often combine to cause supply blockages, while demand from the public is often limited to elites in the community with the practical benefits of access bypassing the common person.

At the outset of the law-making process, civil society needs to be fully aware of the many challenges implementation poses – so that strategies can be developed to tackle them head on. Legislation should include strong provisions designed specifically to support implementation. Targeted action plans then need to be drawn up which specifically identify likely problems and attempt to address them pre-emptively. With Kenya on the brink of taking up the issue of right to information in earnest, this article seeks to discuss some of the implementation issues common to many of the right to information campaigns and some of the strategies that have been developed for dealing with them.

There are no simple solutions to the problem of political will. But at the very least, the civil society needs to be ware of the issue so that it can exploit political opportunities when they arise. Thus, if there is a single minister or senior bureaucrat who is supportive of openness, they need to be targeted and supported in their efforts. Likewise, the media can be a useful tool for maintaining pressure on the government after the law has been passed. The key is to remain vigilant and not to allow the leadership off the hook once legislation has been enacted.

## **Strong Political Will and Leadership**

It is obvious but important to recognise that an access to information regime will only be fully effective if there is strong political leadership leading the charge towards open government. Thus, in countries where leadership has been strong, great strides can often be taken within a very short time in terms of implementation. In Mexico for example, where the President appears to have taken a strong and committed stance on open government, all reports indicate that implementation has exceeded all expectations. Approximately 27,000 applications were received in the first six months the Act was in force and almost 24,000 of these were disposed of. Conversely, in Pakistan it has taken more than 18 months just to promulgate rules in support of what is anyway a very weak Freedom of Information Ordinance, while in India rules have still not been notified though the Act was passed in December 2002.

## **Overcoming Bureaucratic Resistance**

Even where there is political will, breaking down bureaucratic resistance can take time. As the Canadian Information Commissioner has noted, more than twenty years after the enactment of Canada's Access to Information Act, "there remains a deep nostalgia in the bureaucracy for the days when officials controlled information and the spin of the message"<sup>1</sup>. Bureaucrats often resent opening themselves up to scrutiny, believing that they serve not the public, but the government. Considering that these officials are responsible not only for releasing information, but also for collecting and managing it in the first place, it is important to overcome this resistance to avoid the subtle undermining of access legislation in practice.

At the outset, public service rules and regulations as well as any Official Secrets Act covering government officials need to be reviewed to ensure that they reflect the new commitment to transparency and accountability. There is no use having one law that promotes openness and another that entrenches secrecy. Even if the access law specifically states that it will override inconsistent laws, officials may understandably remain wary about disclosing information while the secrecy laws – and their often draconian penalty provisions – are still in the books.

Training is also a useful method for breaking down resistance and re-engineering the mindset of the bureaucracy. Right to information, although a simple concept at its core, can be complex to implement, such that training is important to ensure that officials are clear on what their duties are and are confident of discharging their obligations effectively. Training can inculcate new norms of openness and to teach officials about how the new law works and what they can do to support its implementation. For example, officials may need to be re-trained on how to properly keep records and maintain a file. Training can also provide a key opportunity to reassure bureaucrats of the government's commitment to openness and to make sure they understand that they will not be penalised for disclosing information to the public.

## **Overhauling Systems and Structures**

As bureaucratic norms are being re-engineered, bureaucratic policies, systems and structures will also likely need to be reviewed and overhauled. Thus, although the law provides the overarching framework for providing access, supporting guidelines and policies will likely need to be developed to provide practical guidance to officials on how to implement the law's provisions in practice. In England and Scotland, which are currently preparing for implementation in 2005, most of these papers have been developed by the newly established Information Commissioners. For example, guidance notes have been prepared explaining how to apply exemption clauses, a code has been developed to provide direction on records management and model publications schemes have been designed.

More specifically, considerable preparation will likely be needed to ensure that the proactive disclosure clauses in any access law are properly implemented. Collating the required information and ensuring it is in a form that can be easily disseminated will take time. Use of the internet can be an effective tool in this context, but if information and community technologies are to be effectively utilised, proper planning will need to take place. Likewise, record-keeping, records management and archiving processes will need to be reviewed and overhauled where necessary. Information cannot be provided if it cannot be found and/or accessed in a timely manner. Although this work will result in efficiency/cost savings in the long-term, in the initial stages it

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<sup>1</sup> Reid, J. (2003)

*Annual Report: Information Commissioner 2002-200*, Ministry of Public Works and Government Services, Canada

will require considerable inputs of time and money. This observation draws attention to another practical manifestation of lack of political will – under-resourcing. Shortage of funds can pose a serious problem for implementing agencies, which will need to be proactive in lobbying for additional funds from government at least in the initial years when systems are overhauled.

### **Widespread Public Education**

Even where the so-called “supply side” of the information equation functions adequately, an access regime will make few inroads into government accountability and transparency if the public do not exercise their rights and “demand” information. The value of the law is in its utilisation to scrutinise and oversee government and expose mismanagement and corruption. Experience has shown that, for right to information legislation to be effectively utilised, it needs to be respected and ‘owned’ by both the government and the public. Public ownership of the law is most likely where legislation has been developed participatorily and the public are aware of the law and its benefits during the law-making process, as well as afterwards.

More concretely, in recognition of the importance of active public engagement with the law, new access laws are increasingly including specific legislative provisions which place responsibility for public education on a government body. Thus, in South Africa, the National Human Rights Commission has the duty “to the extent that financial and other resources are available [to] develop and conduct educational programmes to advance the understanding of the public, in particular of disadvantaged communities, of this Act and of how to exercise the rights contemplated in this Act”.

In the same vein, in Trinidad & Tobago the newly formed Government Access to Information Unit has been very active in undertaking public education programmes on the new law, including maintaining a dedicated FOI website, distributing more than 200,000 brochures to national households by post, producing radio and television features, and newspaper ads on the Act.

### **Independent Monitoring & Sanctions**

With habits of secrecy often so deeply entrenched, implementation should be monitored by an independent body, which can evaluate the performance of agencies under the Act and has the power to impose sanctions for poor performance and/or non-compliance. Access laws are increasingly including specific provisions requiring regular monitoring and reporting to Parliament. The most effective way is to place monitoring responsibilities on an impartial body such as an Information Commissioner, National Human Rights Commission or Ombudsman.

In Canada, the Information Commissioner’s Annual Reports to Parliament are highly regarded and contain detailed analysis regarding implementation as well as recommendations for improvements. The Information Commissioner is even credited with introducing a novel “report card” system designed specifically to measure the performance of specific departments.

While monitoring and reporting can be useful deterrents in terms of non-compliance by agencies, sanctions are an even stronger, more effective mechanism for encouraging effective implementation of the law. In this context, the first step is to ensure that proper penalty provisions are included in the law. The second step though, is to ensure that they are actually utilised. This has been an issue in India where, for example, in the State of Maharashtra, although individual fines can be imposed on officers for unreasonable delay, it appears that the sanctions

provisions have been used only a handful of times. Directives have now been issued by senior bureaucrats instructing officials to impose the fines strictly.

### **Active NGOs**

Civil society can, and often has, played an active role in supporting – and sometimes supplementing – the awareness-raising, training and monitoring activities of government bodies. While some might consider NGO involvement in implementation a symbol of government failure, in fact, government-civil society partnerships at the implementation stage can be an effective means of reducing the threat perspectives many officials have towards NGO activists. In South Africa, the Open Democracy Advice Centre has been very active in promoting the law, both to the public and within the bureaucracy. Likewise, in some Indian states, civil society activists have been invited to participate in government training courses to provide officials with a more realistic understanding of the needs of the public. Commonly, NGOs have also undertaken public education activities, either specifically or in support of other subject specific training (e.g. health records and the right to information).

NGOs have also been active in utilising the law strategically. At the most basic level, many NGOs have taken the initiative to submit requests exposing corruption in the early days of an Act so that the information can then be publicised by the media and public attention drawn to the usefulness of the new law. Other NGOs have submitted applications as a means of conducting an “implementation audit”. Thus, in the State of Karnataka in India, CHRI and another NGO organised volunteers to submit applications and track the responses from government. This information was then used to analyse how well government agencies were discharging their obligations under the Act and provided a strong base from which to encourage the Karnataka Government to put more effort into implementing the law more effectively.

In a novel approach, some NGOs have also used litigation as a means of improving the environment for ordinary people to access information. Thus in Bulgaria and South Africa, NGOs have engaged in litigation to clarify ambiguities in the law and ensure that government agencies are kept to account and not simply allowed to interpret the law at will. NGOs fill an important role in this context, particularly in countries which have no other independent appeal mechanism available other than the courts, because ordinary people can usually not afford to run such test cases.

Implementation of right to information laws is an ongoing challenge for civil society and the public. A good law is an important start, but experience has shown even once legislation is passed, politicians and officials can work to undermine the effectiveness of the law. Thus it is particularly notable that experience in jurisdictions with laws on the books for some time has shown that even where laws were enacted with much fanfare and a genuine commitment to openness, over time governments have grown frustrated with public oversight. Consequently, they have come to resent having their dirty laundry aired, such that they have begun to surreptitiously but deliberately pass amendments and impose policy guidelines narrowing the scope of the law. This is a stark warning which civil society and the public need to take heed of – without constant vigilance, laws can be ignored and over time they can be watered down. We need to be alert and remain active, or our right to information may become nothing more than a paper tiger.