The Need and Value of Access to Information from Non-State Agencies

Background paper prepared for the
Commonwealth Human Rights Initiative publication
"Open Sesame: Looking For the Right to Information in the Commonwealth"

2003

New Delhi, India

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[1] Douglas Lewis was commissioned to write this article for the Commonwealth Human Rights Initiative's report, *Open Sesame: Looking for the Right to Information in the Commonwealth,* that was presented to the Commonwealth Heads of Government Meeting (CHOGM).

The Duty to Disclose Information

State bodies should clearly be under an obligation to disclose all information which citizens require, save for strict exemptions such as state security and personal information that might intrude on the right to privacy. Even so, such exemptions should be strictly interpreted with the courts, an information commissioner, or ombudsman that have the right to overrule the decisions of state agencies. Perhaps New Zealand offers the best example of such openness in all Commonwealth countries. The Information Commissioner, who is also the Ombudsman, has an admirable record of exposing the workings of government and has taken an extremely bold and radical interpretation of its brief. The UK has introduced the Freedom of Information Act 2000, which will not come into full effect until 2005 but is nowhere near as liberal as the New Zealand model.[2] In democracies government should be acting for and on behalf of the people so that it goes without saying that citizens should, in the ordinary course of events, have access to information which has been collected on its behalf.

What Constitutes a Public Body?

There is, of course, a history of dispute over what precisely constitutes a public or state body.[3] At one level, the issue seems straightforward. Clearly parliaments and government departments constitute the core of the state apparatus, but over the last century or so, public functions have been consistently delegated to para-state bodies. Leaving aside local or territorial government, which is clearly part of the public arena and which therefore must also be subject to strict duties of disclosure, other agencies have increasingly been charged with undertaking public responsibilities. In the United States, for example, where there has been a traditional hostility to state enterprise there is a long history of federal agencies which have been established to regulate the conduct of private business which might impinge on the rights of citizens.[4] These agencies are, naturally, subject to the Freedom of Information Act requirements of a duty to disclose all relevant information. In the UK Schedule 1 of the Freedom of Information Act lists those who are regarded as public bodies while section 5 empowers the Secretary of State to designate as a public authority any agency which appears to him to exercise functions of a public nature. From at least the 19th century in the UK agencies or commissions performing essentially public functions were established and during the following century QUANGOS (quasi-autonomous non-governmental organisations) were set up to administer public services in a manner which is disinterested and not subject to the direct instructions of the government of the day. Such bodies are as varied as the British Broadcasting Corporation, the Housing Corporation and the Gaming Board.[5] It is clearly necessary that such bodies are subject to the same duties of disclosure of information as the government itself.

Not just in the UK, but across the world,[6] it has become increasingly common for governments to contract out public functions either to the private sector or to the voluntary sector. Thus the private sector frequently operates computer facilities on behalf of the government as well as performing a wide range of other functions. The voluntary sector undertakes work with ex-prisoners, old people, runs housing agencies and the like. It is clearly crucial that such bodies are subject to the same disclosure regime as purely public

[2] Outside the Commonwealth, Sweden has the most admired freedom of information regime.
[3] See e.g. *Administrative Justice*, Diane Longley and Rhoda James, Cavendish 1999 pp.129-139
[4] *Ibid*. pp.237-42
[5] See *Public Bodies*, Cabinet Office 2002
[6] D.Osborne and T.Gaebler, *Reinventing Government*, Addison Wesley 1992

bodies[7] and indeed the UK FOI Act 2000 provides that the Secretary of State may designate as a public authority anyone who

> is providing under a contract made with a public authority any service whose provision is a function of that authority.[8]

Section 3 defines a public authority and interestingly says that information is held by a public authority if it is held by another person on behalf of the authority. The significance of this is that across the Western world, and especially in the UK, public functions are contracted out. Although the FOI Act appears to cover contractees it is extremely doubtful that the apparent attempt will succeed given the obsession of private enterprise, in particular, with issues of commercial confidentiality. Most FOI legislation across the world contains an exemption which attempts to protect commercial confidentiality, some more successfully than others. In the UK so far too much respect has been paid to the demands of industry in this respect while in New Zealand the Information Commissioner does not simply accept industry's claims but investigates to see whether real damage to the confidences of industry is likely to occur as a result of disclosure.[9] It is clearly vital that those acting by or on behalf of the state should be subject to as rigorous a disclosure regime as the state itself. What also falls to be considered is the increasing practice of governments to set up advisory committees or taskforces to investigate and recommend new policies or practices or, in some cases, of practical means of implementing policies already decided upon.[10] Given the significance of these bodies it is vital that they too be subject to an effective FOI regime, which, for the most part they are currently not.

Multilateral Agencies

Given the growing importance of multilateral agencies such as the International Monetary Fund (IMF) the World Bank (the Bank), the World Trade Organisation (the WTO), the United Nations (UN) and regional authorities such as the European Union, the North Atlantic Trade Association etc., it is crucial for development purposes that they too should be as open and transparent as possible. There is a growing trend toward openness and yet crucial decisions and the decision-making process are often shielded.[11]

300 interngovernmental organisations, 60,000 transnational corporations and 40,000 NGOs help shape the world we live in. However, let us start with the IMF, whose functions and purposes will be taken as read. Greater transparency in both economic policy and in data on economic and financial developments is critical for smoothly operating national economies and a stronger international monetary system. The IMF has taken a number of steps to provide more information on its own role and operations to its global audience. These include an expanded publication programme and development of an extensive internet site.[12] Most papers, whether on country matters or policy issues, are now

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[7] *The Private World of Government*, Douglas Lewis and Jeffrey Goh, Occasional Papers, Centre for Socio-Legal Studies, the University of Sheffield, UK, 1998

[8] Section 5(2).

[9] Section 43 of the UK FOI Act governs the exemption for commercial interests

[10] See, e.g., *Ruling by Task Force*, Tony Barker and others, Politico's 1999

[11] At the time of writing an important new document is appearing. It is *The First Global Accountability Report: Power without Accountability?*, One World Trust, London, December 2002. This is a pilot project on accountability across the board; IGOs, TNCs and NGOs. The two main dimensions of accountability used were member control and access to information. From time to time its findings will be mentioned. A note of caution is needed; first the sample was small and secondly access to information was judged purely by whether or not it was on-line

[12] www.imf.org

published. Internal and external reviews of IMF policies and operations - often conducted in consultation with the public - are also released.

In recent years the IMF has made more information available about IMF surveillance of members. For example, between January 2001 and August 2002 84 per cent of members published their Public Information Notices, - a key source of information on the IMF Executive Board's assessment of countries' macroeconomic and financial situations. Letters of intent for 94 percent of countries' requests were released during the same period and statements by the Chair of the Executive Board, newsbriefs and press releases are issued routinely following Board discussions of members' requests for loans.

In a recent review of the IMF's transparency policy, the Board endorsed the principle of "presumed publication" of policy papers and during 2001 21 of 26 papers on policy issues discussed by the Board were published. Also published are the following:

- Members financial data; timely information for every member country on its financial position with the IMF is posted on the website.
- Quarterly IMF financial statements, quarterly data on financial transactions, and monthly data on financial resources and liquidity are also posted on the site.
- Other information posted includes codes of conduct for IMF staff and executive directors, recruitment policy and procurement guidelines.

There has also, in recent years, been increasing consultation with the public on IMF activities and carrying out internal and external evaluations of IMF practices. Importantly, an independent evaluation office was established in July 2001 to provide objective evaluations on issues related to the Fund. Their reports are expected to be published save in exceptional circumstances.

In taking steps to enhance the Fund's transparency, the Executive Board has to consider how to balance its responsibility to oversee the international monetary system with its role as confidential adviser to its member. As part of its regular assessment of this balance, the Board completed another review of the IMF's transparency in September 2002.[13] The next review of transparency policy will take place in June 2003. The Fund also publishes a range of standards and codes in its areas of responsibility. It encourages developing countries to be more transparent since it believes that transparency and accountability are crucial for promoting good governance and essential for drawing more stakeholders and supporters into the development process.

The World Bank

The Bank's disclosure policy has broadened considerably over the past decade and revisions to the disclosure policy were approved by the Board of Executive Directors in 2001. Beginning January 2002, the revised disclosure policy has been implemented in phases. Since then, more documents are available to the public, including many in the Bank's archives. The procedures for releasing previously available documents have been clarified and updated. The Bank also has a Disclosure Help Desk providing ongoing guidance on the application of policy.

[13] See *The Acting Chair's Summing Up: the Fund's Transparency Policy-Review of the Experience and Next Steps, Executive Board Meeting* 02/93, *September* 5, 2002 (BUFF/02/302,9/23/02). See also *The Fund's Transparency Policy-Progress Report on Publication of Country Documents,* Prepared by the Policy and Review Departments, September 23, 2002

Information disclosure includes operational information, research and databases, financial information concerning the Bank itself, its administration and historical information.[14] There is a presumption in favour of disclosure, it has an *InfoShop* at local Bank headquarters and a Public Information Centre based at its centre in Washington D.C. Its Documents Site, previously known as World Development Sources contains 14,000 documents available to the public. They encompass country economic and sector work, project documents and research working papers. Nearly all documents are available on-line. Although there is a presumption in favour of disclosure many documents are released subject to a time delay while they are technically internal until approval conditions are met.

A couple of matters closely associated with disclosure of information should be mentioned. The first is that the Bank has **an Inspection Panel** which is a three-member body created in 1993 to provide an independent forum to private citizens who believe that they or their interests have been or could be harmed by a project financed by the World Bank. The Panel's method of functioning is laid out in *Operating Procedures* developed by the Panel members to implement the resolutions of the Bank's board of executive directors which created the Panel. The Panel began its operations in September 1994 and has received more than a dozen formal requests in the meantime. The texts of the Panel reports are publicly available.

The other related issue is the Bank's relationship with NGOs, which has prospered considerably in recent years. Indeed, the increase in interaction and collaboration has been remarkable over time. Through enhanced policy dialogue and operational collaboration, the relationship has developed into a complex and important one for both parties. Between 1973 and 1988 only 6 per cent of Bank-financed projects involved NGOs. In 1993 over one third of all approved projects involved some form of NGO involvement and in 1994 the percentage increased to one-half. The trend is still upward.

The One World Trust (OWT) research found that "information on the World Bank's lending activities is good... However, conditions attached to lending are not always readily available despite this being a highly contentious issue amongst civil society groups.

The availability of evaluation material is also patchy."[15]

OWT also remarked that the Bank is less transparent in terms of access to its decision-mkaing. It releases a summary of key decisions taken at its governing body meetings, but no agenda, draft papers or minutes are available. However, the Bank does now release a bimonthly calendar for its executive meetings.

The World Trade Organisation (WTO)

Although formally WTO decisions are taken by the whole membership, it is clear that a handful of countries are the engine which drives the decision-making process. In Seattle, for example, Caribbean and Latin American countries took unprecedented steps to register their frustration at being excluded from the decision-making process.

The WTO Dispute Settlement System (DSS) ought to strengthen and protect the interests of economically weaker Members which are less capable of exercising informal, diplomatic means for ensuring enforcement of trade rules. However, it is clear that participating in the

[14] See its website. www1.worldbank.org/operations/disclosure/policy11.html
[15] P.39

DSS requires significant human and technical resources that are beyond the means of many developing country Members.

Oxfam has argued that options for improving the external transparency of the WTO and help to increase public confidence that decisions taken there reflect the widest possible range of affected interests include:

- de-restricting WTO documentation to provide real-time public access
- increasing national parliamentary scrutiny of WTO policy-making
- establishing an accreditation scheme for and increasing the level of informal dialogue with civil society groups and
- allowing civil society representatives to contribute arguments relevant to WTO disputes[16]

It is not therefore so much a problem of disclosure of WTO information when decisions have been taken that causes the problems, but the closed meetings and bargaining of the crucial "insider" Members that constitutes the main problem of accountability, and therefore of transparency. The WTO is a rare exception in large, rule-based institutions, to have no formal Executive Board of limited Membership. Even its General Council, which is intended to run the institution on a day-to-day basis, is open to all Members. This tends to force decision-making down to non-transparent bargaining between the most powerful interests - and not just the most powerful trading countries. It is not possible in a work of this kind to exhaust the range of these networks, but one of the most significant deserves special mention.

Transatlantic Business Dialogue

The Transatlantic Business Dialogue (TABD) was launched in 1995 in Seville, Spain at a conference attended by Chief Executive Officers from more than 100 US and EU companies and by top government representatives led by European Commissioners for Trade and Industry and by the US Secretary of Commerce. TABD, according to the official position, offers a practical framework for enhanced co-operation between the transatlantic business community and the governments of the European Union and United States. It maintains offices in both Brussels and Washington D.C.

TABD has a dual chairmanship drawn from top US and EU companies, a Leadership Team for Priority Issues and an Experts Group. It has easy access to the EU Commission and to the US Department of Commerce as well as twice yearly meetings with top officials and politicians of the two blocs. It works throughout the year to produce an Annual Report for its Annual Conference on trade and commercial issues. It adopts a general position of 'liberal' economics dedicated broadly to free trade in both goods and services. Its credo is that "the strengthening of EU-US economic relations should be seen within the context of world-wide multilateral co-operation. The TABD fully supports the rules and principles of the World Trade Organisation".[17]

There is little doubt about the influence of TABD on the EU and US's approach to the World Trade Rounds, nor on the dominance of the two groups on WTO deliberations. The general public is unable to pierce the web of relations both within TABD working arrangements or between it and the two most formidable political and trading groups. On the other hand, much information is made publicly available by TABD, both about its organisational arrangements and crucially on the Annual Report approved by its

[16] Oxfam Policy Papers Oxfam GB Discussion Paper 3/00, *Institutional Reform of the WTO*
[17] See www.tabd.com/about

Conference. Its offices are constantly helpful and its Chairs agree to make themselves available for discussion to genuine researchers. It is a source of influence and information crucial to those who wish to follow or impact on the decisions of the WTO.[18]

The European Commission, for its part, has recommended a number of reforms of the WTO which might advance transparency. They include holding an annual general meeting of the WTO, aimed at highlighting for the public and parliamentarians, policy issues affecting the world trading system; holding an annual general meeting of parliamentarians to increase awareness of members' trade policies and developing best consultation procedures to foster consensus in a manner that is transparent and participatory.

At the time of writing over 150 NGOs worldwide have criticised the failure of the WTO to adhere to democratic principles. This was spurred by the Sydney Mini-Ministerial WTO meeting which claims to be a private "unofficial" meeting. In fact Australia invited 25 WTO members from all regions of the WTO plus Secretariat staff to discus the most contentious issues currently facing the membership; TRIPS and Health, Market Access and the Singapore issues.[19] Several members have also expressed their frustration with the Sydney meeting:

> Unless we change the manner in which Ministerials (and the preparation for these materials) are conducted, we are wasting our time holding negotiations in Geneva. As deals are done and positions reached when the chosen few meet amongst themselves, and the rest of the membership will be persuaded and coerced to accept such positions and deals.[20]

Invited members say such meetings are necessary to achieve consensus in the WTO. However, NGOs challenge such notions as a violation of the very democratic principles contained in the constitutions of the most powerful nations. The meetings are fundamentally flawed because the criteria of countries selected is unknown, no written record is kept of the discussion and decisions are taken which affect the entire membership and the agenda is set on their behalf and in their absence.

The United Nations (UN)

The UN is too complex an organisation to be covered in its entirety in a document of this kind but a general outline will be offered.

When focusing upon the work of the General Assembly, Security Council and Economic and Social Council (ECOSOC) and the Trusteeship Council researchers have at their disposal a series of highly specialised indexes to facilitate their work. They are basically divided into two parts:

(1) a comprehensive subject index to all the documents (reports, letters, meeting records, resolutions etc.) issued by the body in question during a particular session/year, and
(2) an index to speeches delivered before the forum in question during a particular session/year.

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[18] And see 'Law and Globalisation: An Opportunity for Europe and its Partners and Their Legal Scholars, Douglas Lewis, 8 *European Public Law*, 2002 pp.219-239 and the other literature referred to there

[19] See www.corpwatch.org/bulletins 14 November 2002

[20] Ambassador Chidayausiku of Zimbabwe, *ibid*.

Over time these indexes have become highly refined research tools incorporating many enhancements which were not available in earlier years.

A subject entry in any of the indexes basically tells a bibliographic story, the story of an agenda item, or in the case of the Security Council, a matter considered by it. The story begins by cutting to the heart of the matter with a listing of the most significant documents: i.e. reports. General documents (usually letters in which governments exchange views) immediately follow. As the plot develops, we find a listing of proposals (i.e. draft resolutions or decisions), followed by a listing of meeting records reflecting when the item/matter was discussed. In most instances, the story concludes with the adoption of a document expressing the will of the body and constituting the end of the subject entry for the session/year. The document could be, for example a resolution setting policies and requesting follow-up at a future session or a decision taking note of a previously submitted report or deferring action on an item.

The Indexes to Proceedings have many additional features, among them:

(1) a voting chart (in the case of the General Assembly available since 1975; in the case of the Security Council since 1976)
(2) a table indicating the specific dates on which meetings were held and
(3) a numerical title (subject, in the case of the Security Council) listing of resolutions adopted during the particular session/year.

UNDOC/United Nations Documents Index

UNDOC and its successor, the United Nations Documents Index (online version UNBISnet), are global indexes of all UN documents indexed by the Dag Hammarskjold Library in Geneva since 1979. They provide broad subject access to an extensive category of documents issued world-wide by numerous UN organs and subsidiary bodies.

United Nations Official Document System (ODS)

The ODS a subscription-based retrieval system for United Nations documents and official records, offers two main search areas: *UN Documents* and *Resolutions*. The *UN Documents* area gives access to the formally published parliamentary documents of the United Nations in all six official languages. Not included are:

- sales publications
- United Nations Treaty Series
- press releases and press briefings, which are posted on the UN News website
- public information materials
- most informally published working papers

The *Resolutions* area provides access to the resolutions of the major UN organs (General Assembly, Security Council, ECOSOC and Trusteeship Council) back to 1946 in all official languages.

The European Union[21]

[21] And see the authoritative tome on FOI, both European and otherwise, *Freedom of Information: The Law, the Practice and the Ideal*, Patrick Birkinshaw, 3rd. edition. 2001, Butterworths.

Declaration 17, attached to the Maastricht Treaty stated that

> The [inter-governmental] conference considers that transparency of the decision-making process strengthens the democratic nature of the institutions and the public's confidence in the administration. The Conference accordingly recommends that the Commission submit to the Council no later than 1993 a report on measures designed to improve public access to the information available to the institutions.

In 1993 the Council and the Commission of the European Community/Union adopted a joint Code of Conduct on public access to documents, implemented through Council Decision 93/731 and Commission Decision 94/90.

Refusal of access to a document may be challenged under Article 230 EC/EU or by complaint to the European Ombudsman under Article 195.

The European Ombudsman also conducted own-initiative enquiries in 1996-97 and 1999 which led to other Community institutions and bodies adopting rules on public access to documents, including the European Parliament.

The Treaty of Amsterdam amended Article 1 of the Treaty on European Union (TEU) so as to include the principle that decisions in the Union should be taken "as openly as possible". It also added Article 255 to the EC Treaty:

> 1. Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to European Parliament, Council and Commission documents, subject to the principles and the conditions to be defined in accordance with paragraphs 2 and 3.
> 2. General principles and limits on grounds of public or private interest governing this right of access to documents shall be determined by the Council, acting in accordance with the procedure referred to in Article 251 within two years of the entry into force of the Treaty of Amsterdam
> 3. Each institution shall elaborate in its own Rules of Procedure specific provisions regarding access to its documents

The Public Access Regulation

In May 2001, Regulation 1049/2001 was adopted under Article 255(2) EC concerning public access to European Parliament, Council and Commission documents. Its provisions applied from 3 December 2001. Even before that date, the three institutions were acting under Article 255(3) so as to modify or replace their existing rules on access.

The public access Regulation defines 'document' broadly so as to include any content, whatever its storage medium, concerning a matter relating to the policies, activities and decisions falling within the institutions sphere of responsibility.

The Regulation requires each institution to maintain a public register of documents which was to be operational no later than 3 June 2002.

The Exceptions

Article 4 of the public access Regulation lays down nine exceptions to the right of public access. If only parts of the requested document are covered by an exception, the remaining parts must be released.

If an initial application is refused, the applicant may make a confirmatory application, followed by the possibility of court proceedings under Article 230 EC, or complaint to the Ombudsman under Article 195 EC.

The nine exceptions all contain a harm test. Four of them are also subject to a test of overriding public interest in disclosure.

The first five exceptions relate to public security, defence and military matters, international relations, the financial, monetary or economic policy of the Community or Member State and privacy and the protection of the individual, in particular in accordance with Community legislation regarding the protection of personal data.

For these exceptions, the harm test is whether public access would undermine the protection of the relevant interest.

The next three exceptions relate to commercial interests of a natural or legal person, including intellectual property, court proceedings and legal advice and the purpose of inspections, investigations and audits.

For these exceptions, the harm test is also whether public access would undermine the protection of the interest concerned. Even if the harm test is met, however, access must still be granted if there is an overriding public interest in disclosure.

The final category of exception is intended to allow the institutions 'space to think'. The Regulation makes a distinction between cases where the institution has not yet made a decision on the matter to which the document relates and those where it has made a decision.

If the relevant decision has not yet been made, the exception applies both to documents drawn up by the institutions for internal use and to incoming documents.

If the relevant decision has already been made, the exception applies only to documents containing 'opinions for internal use as part of deliberations and preliminary consultations within the institution.'

In both cases, the harm test is that public access would 'seriously undermine' the institutions decision-making process. Even if the harm test is met the exception does not apply if there is an overriding public interest in disclosure.

The Regulation also contains special provisions for 'sensitive documents' These are documents which are classified are 'top secret', 'secret' or 'confidential' in accordance with the security rules of the institution concerned and which protect essential interests of the European Union, or one or more of its Member States, in the areas covered by the first four exceptions to the right of public access, notably public security, defence and military matters.

Documents Held Both by a Member State and a Community Institution

In many cases, Member States hold copies of documents drawn up by a Community institution and vice versa.

The question of whether a Member State could give access under its own laws to a document which the applicant could not obtain from a Community institution under the Community rules on access was left open by the Court of Justice in *Svenska Journalistforbundet v Council*.

Article 5 of the public access Regulation provides that, unless it is clear that the document shall or shall not be disclosed, the Member State shall consult with the institution concerned in order to take a decision that does not jeopardise the attainment of the objectives of the Regulation. Alternatively, the Member State may refer the request to the institution.

It seems therefore that a Member State can apply its own law on public access, after consulting the institution concerned in case of doubt. In applying its own law, the Member State must comply with the obligation under Article 10 EC, to 'abstain from any measure which could jeopardise the attainment of the objectives of this Treaty'.

As regards Member State documents held by the Community institutions, Article 4(5) provides that a Member State 'may request the institution not to disclose a document originating from the Member State without its prior agreement'.

Information and the Private Sector

It has already been noted that tasks formerly performed by the state sector have, in recent years, increasingly been farmed out either to voluntary organisations or to private business. The significance of this for the release of information now needs to be further addressed. Although the level of disclosure is patchy and changes from country to country, the position adopted here is that the right to information should be resolved by reference to its role in protecting the fundamental interests of citizens, and not by reference to the provenance or structural characteristics of the institution holding the contested information.

> The recent wave of public sector restructuring has been typified by a willingness to experiment with new forms of organisation as instruments for the delivery of public services. Large, multi-function government departments have been broken into many special purpose agencies that have a quasi-contractual relationship with political executives. Commercial functions within government have been transferred to government-owned corporations, which have later been privatised in some instances.[22]

The diffusion of this new doctrine has provoked fears about the erosion of popular control over the instruments by which public policy is formulated and executed. In particular, many public functions now are undertaken by entities that do not conform to standards of transparency imposed on core government ministries. The desideratum, however, is that

[22] Alasdair Roberts, *Structural Pluralism and the Right to Information*, Working Paper 15 School of Policy Studies, Queens University, Canada, 2001. Some of what follows is borrowed heavily from Professor Roberts's work

information rights should generally be recognised where organisational opacity can be shown to have an adverse effect on the fundamental interest of citizens.

Government Corporations

There is wide variation in the treatment of government-owned corporations. The Canadian government, for example, excluded its major corporations when it adopted its Access to Information Act 1982 and resisted later proposals by legislators and the Federal Information Commissioner to broaden the law by including all federal corporations. At the other extreme is the United States, which included all government-controlled corporations within its 1974 Freedom of Information Act. New Zealand also included state-owned enterprises under its Official Information Act 1982, a decision reaffirmed in subsequent reviews of the law.

As to *quasi-governmental organisations* there is considerable uncertainty in their treatment. Many American laws are restrictive in their treatment of quasi-governmental organisations with courts determining that such organisations will only be subject to the federal Freedom of Information Act if there is substantial federal control over their day-to-day operations. On the other hand, several jurisdictions are less conservative. Their FOI laws typically allow one structural attribute - rather than a combination of attributes or other evidence of substantial government control - to determine whether an organisation is subject to FOI requirements. Kentucky law, for example, subsumes any organisation that derives at least one-quarter of its budget from state or local funds. Missouri law affects any organisation that exercises a statutory power to confer favourable tax treatment. Quebec law includes any body whose capital stock is publicly owned, while Manitoba includes any body whose board is appointed by Cabinet. Australia includes any bodies established by statute or regulation “for a public purpose” - which is broadly construed. Other laws make no attempt to define characteristics that would cause an organisation to be subject to FOI requirements. They rely instead on schedules that name organisations specifically. Even here, a sub-class of confidential information is typically withheld regardless of harm.

This statutory confusion is aggravated by the variation in governmental practices in negotiating contracts. Public agencies may choose to impose terms in tendering processes and contracts that oblige contractors to disclose information. The government of Western Australia recently boasted that it had achieved a world first by publishing a private prison contract on the internet.

There is also broad variation in the treatment of information held by contractors themselves, Older FOI laws generally exclude contractor records unless the contractor’s relationship with the contracting agency is so close that the records are effectively under government custody and control or are, in the words of the US FOI Act, “agency records”. Other laws take a more expansive view of contractor obligations. One method of encompassing contractor-held information, adopted in New Zealand and Irish law, is to deem contractor records to be held by the contracting agency and thus subject to FOI requirements. A second method treats contractors as if they were themselves public bodies, with an independent responsibility for complying with FOI requirements. The laws of two American states, -Florida and Rhode Island - extend to “any business entity acting on behalf of any public agency”. In 1999 the state of Western Australia expanded the definition of public bodies subject to FOI law to include all contractors and subcontractors.

The Private Sector Pur Sang

In the days of Transnational Corporations (TNCs) increasing dominance it is clear that individuals would greatly benefit from greater disclosure of information by private industry. Naturally, company law and requirements for disclosure vary dramatically from country to country and only by examining such legislation individually can a proper picture be perceived. The significance of disclosure by TNCs is underlined by the statistic that 29 of the world's biggest economic entities are multinational corporations according to UNCTAD. The field was led, ironically, by the US energy group EXON which is larger than all but 44 national economies.[23] Its estimated value is about the same size as the economy of Pakistan and larger than Peru's while Daimler-Chrysler, General Electric and Toyota are all comparable in size to the economy of Nigeria.[24] In addition, foreign direct investment does and will continue to outstrip by far development aid. The responsibilities of the private sector require a greater attention to openness in many respects.

In fact, jurisdictions vary substantially in their willingness to cause the private sector to disclose information. For example, many governments now recognise a citizen's right to access and correct personal information collected by private firms. This narrow piercing of corporate privacy is defended as a method of discouraging unfair treatment and unjustified intrusions in personal privacy, and is now permitted under data protection laws adopted throughout the European Union and, e.g., Canada. Some nations have also recognised broader rights of access to information held by private organisations. South Africa's Promotion of Access to Information Act, adopted in 2002, implements a guarantee in its 1996 Constitution that citizens will have a right of access to information held by another person "that is required for the exercise or protection of any rights". Unlike other access laws, the South African law requires citizens to identify the right that would be jeopardised by a denial of access to information held by private bodies. However it appears that courts are likely to be liberal in defining the range of rights whose imperilment would warrant breaching corporate secrecy.[25]

There are other requirements on non-government actors to disclose information. These are too numerous and diverse to specify here but, for example, health professionals in private practice have a duty to disclose information about a serious danger of violence by one person against another. So commercial enterprises, like government agencies, have an obligation to provide communities with information about the release of toxic chemicals by their facilities. Private employers also frequently have an obligation to provide their workers with information about hazardous materials used in their workplace, and manufacturers have an obligation to provide consumers about hazards posed by defective products. Health and safety is an area where generally there are heavy duties of disclosure.[26]

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[24] *Financial Times*, 13 August 2002

[25] See Gideon Pimstone, 'Going quietly about their business: Access to corporate information and the open democracy bill'. *South African Journal of Human Rights*, 15.1, 2-24. Famously, of course, it was a South African court which forced the giant pharmaceutical, fighting to protect their drug prices, to reveal the closely guarded secrets of their business practices, including pricing policies. In the end the companies were forced to abandon the case. See e.g. *The Guardian*, London 8 March 2001

[26] See e.g. Tom Tietenburg and David Wheeler, *Empowering the community: information strategies for pollution control*, Waterville, Maine: Colby College, Department of Economics, October 1998. The most celebrated duty of disclosure imposed on a TNC in recent years was that of the South African High Court in relation to 39 drug companies seeking to abolish a law permitting the government to import cheap versions of their medicines. See *The Guardian* newspaper, UK, 8 March 2001

Over and above these examples, there is an increasing interest in Corporate Social Responsibility (CSR). Given their far-reaching influence in a globalised market-place, TNCs are being pressed to honour human rights, including the social, economic and environmental. In order to deliver on these expectations disclosure of their practices and procedures are being demanded more and more frequently.

Recent years have seen a proliferation of self-regulatory measures which expose what was previously confidential information. TNCs as diverse as IKEA, Kmart, Philips, Levi Strauss and Shell have produced Codes of conduct detailing workers' rights, environmental policies and ethical standards adhered to by the company wherever it operates.[27] The OECD Guidelines are probably the best known principles governing the activities of TNCs in the social and environmental sphere, although the Global Compact at the United Nations website is also important. However, the practice is less encouraging. A Report in 2001 indicated that nearly a half of the UK's largest companies have rejected government requests to disclose information about their environmental and social performance. A survey of the top 200 quoted companies found that 97 do not disclose any information on these issues whatsoever. Even so, a series of socially responsible investment indicators, known as the FTSEE4Good was launched in July 2001 by FTSE International, a joint venture between the Financial Times and the London Stock Exchange.[28], [29]

The UN Global Compact was launched by the Secretary General in July 2000 and encourages companies to build nine core human rights, labour and environmental principles into their business strategies for the developing world. Some progress has been made in the intervening period and there is independent auditing of that progress.[30] The OECD's Guidelines of Multinational Enterprises, although voluntary for business, do contain a follow up mechanism whereby concerns about the activities of multinationals can be brought to the attention of signatory governments.[31]

A word needs also to be said about the position of the European Union in these matters. In July 2001 the Commission presented a Green Paper, "Promoting a European Framework for Corporate Social Responsibility".[32] This was followed in July 2002 by a Communication from the Commission concerning Corporate Social Responsibility: A Business Contribution to Sustainable Development.[33] This latter presents a EU strategy to promote CSR. The Communication is addressed to the European institutions, Member States, Social Partners as well as business and consumer associations, individual enterprises and other concerned parties.

It is argued that the EU can make more effective the promotion of CSR at international level because it has a unique set of agreements with third countries and regional groupings, including the Cotonou Agreement with the African, Caribbean and Pacific countries. Since 1994 these have incorporated a clause defining human rights as a

[27] See e.g. Roger Blainpain (ed.) *Multinational Enterprises and the Social Challenges of the XXst Century,* Kluwer 2000

[28] See *The Financial Times*, 25 June 2001

[29] Interestingly British American Tobacco, much criticised by a range of NGOs launched its first social responsibility report in 2002; there was a rise in environmental reporting by UK companies in the same year, while in the light of corporate scandals in the USA new legislation importing extended flows of information has been introduced. The Sarbanes Oxley Act 2002 has signalled a serious intention to combat the corporate governance scandals exemplified by the collapse of public corporations such as ENRON and WORLDCOM. It is of course too early to assess its efficacy

[30] See www.globalcompact.org

[31] See www.oecd.org

[32] Com (2001) 366

[33] Com (2002) 347

fundamental element of the agreement, which serves as the basis for dialogue with a third country on human rights. The EU's approach in this area was set out in the Communications on the EU role in promoting human rights and democratisation in third countries[34], and on Promoting Core Labour Standards and Improving Social Governance in the context of Globalisation.[35]

Finally, the position of the UK Government is worth mentioning. It is a Government priority to promote and facilitate good practice in CSR internationally as well as in the UK. To drive this forward the Government is continuing to support the Ethical Business Initiative and other international work that brings benefits to business, communities and to disadvantaged people. These include Supporting Developments in Developing Countries, Addressing Flashpoints, Business Links Asia and Business Partners for Development.[36]

Reporting obligations on CSR by international business is increasingly a vital part of disclosure of information in both the developed and the developing world. However, we must not forget the voluntary sector which is increasingly influential in development projects, both in a free-standing way and in collaboration with governments and IGOs.

NGO's and Information

The voluntary sector, or civil society, is not exhausted by reference to NGOs but in terms of development issues it is sensible to single them out since some 20 per cent of all aid to developing countries is now channelled by or through NGOs. The problem of generalisation here, of course, is that the range, size, scope and function is so broad as to be meaningless. Nevertheless several issues are worth highlighting.

Some of the largest, internationally-based NGOs, such as Oxfam, Save the Children, Amnesty International, Friends of the Earth and the like are fairly well exposed. A great deal of information is available about their workings and large number of reports and publications emanate from them. Their websites provide a mass of information for the interested observer.

Beyond that, the picture is more confused. There is certainly a discernible movement towards urging greater transparency as an indicator of an organisation's effectiveness. By necessity, more and more filtering of information about an organisation's work is taking place. The result is that any public statement about the organisation's work with its clients is often substantially edited and may represent a partial representation of what is occurring on the ground. Until recently the possibility of donors to these organisations (and others) gaining access to the lower level documentation and accounts of what was taking place in the organisation's work with its clients was very limited. The main opportunity was during field visits to the site of the organisation's work. However, with the global expansion of access to the Internet the technical constraints on public access to field reports of aid organisations' achievements and progress are rapidly being removed. At the very least it should now be possible for many northern donor NGOs to allow the annual progress reports of their southern partner organisations to be publicly monitored by placing those reports directly on to the Web. Where those partners themselves have access to the

[34] Com (2001) 252
[35] Com (2001) 416
[36] *Business and Society, Corporate Social Responsibility Report 2002*, Department of Trade and Industry

Internet, including the Web, they in turn could place reports from their own offices directly on to the Web.[37]

The evaluation of NGO activities is closely associated with the amount of information available.[38] A great deal of recent work has become available which gives specific attention to assessing performance and the management of information.[39] Most of the impact studies so far have come to the conclusion that, in spite of a growing interest in evaluation, there is still a lack of reliable evidence on the impact of NGO development projects and programmes.[40] OWT stated:

> ...NGOs come close to the bottom in the access to information dimension. What is surprising is that they often fail to provide the information likely to be of sufficient use to stakeholders: how they are spending their money and how well they have been achieving their aims. Less than half of the NGOs within this study publish an annual report online and only the IFRC and Oxfam International provide financial information within their annual reports.[41]

Happily most of the large bilateral aid agencies are now making their evaluation reports publicly accessible on a global scale, via the Internet.[42] A small number of NGOs have done the same. The next step forward in transparency would be for those organisations to place their annual progress reports in the public domain as well via the Web. Another step forward, already taken by organisations such as Christian Aid is to provide hypertext links to their own southern partner NGO web sites, allowing outsiders more direct access to documented accounts of aid funded activities written by those closer to the action.

The Right to Information

Freedom of speech is entrenched as a human right in a whole raft of constitutional and international documents. It has been a bone of contention with despots for centuries and closely associated with freedom of the press. Traditionally it has been associated with freedom of religious opinion (now widely recognised as a human right) and the general criticism of public authority; both central planks of a democratic polity. In democracies at least religious contention has been largely overcome within recent memories while simpler societies made it relatively easy to use established customs to challenge authority. Nevertheless information is power and complexity has meant that large swathes of information have been concentrated in few hands. Thus the clamour for FOI legislation in the last forty to fifty years. Rather than changing constitutional formulae, FOI has normally been legislated for separately and has become almost a secondary constitutional principle.

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[37] And see www.mande.co.uk/archives

[38] And see *The Impact of NGO Development Projects*, Overseas Development Institute 1996. www.odi.org.uk

[39] See e.g., *Striking a Balance: A Guide to Enhancing the Effectiveness of NGO Organisations in International Development*, A. Fowler, Earthscan, London 1997 and *Information Management for Development Organisations,* M.Powell, Oxfam, Oxford 1999

[40] *Searching for Impact and Methods: NGO Evaluation Synthesis Study. A Report produced for the OECD/DAC Expert Group on Evaluation.* R.C. Riddell and others, Department for International Development Corporation, Ministry of Foreign Affairs, Helsinki, 1997. www.valt.helsinki.fi/ids/ngo

[41] P.6. The research also found that *all* of the groups studied limit access to information about their decision-making processes

[42] See www.mande.co.uk/sources.htm

A moment's thought will show that freedom of speech, let alone freedom of action (implicit in the right to life) often depends upon having access to information which impinges on individuals and groups. In logic then, FOI can easily be defended as a human right, while for others it is implicit in freedom of speech and can be logically inferred from it. One of the leading British scholars in the field of FOI has put it thus:

> Information is necessary to make sensible choice or wise judgement.(*sic)* Moral and ethical evaluation depends upon information acquired through our own and our predecessors' experience. Information in the form of facts constitutes the basis of order in our lives, of community, regularity and knowledge. Are 'facts' nothing more than the haphazard ascription of names or categories to phenomena impinging on our consciousness, however? And if there are no facts, is it possible to know anything? In order to think or make decisions we apply categories of thought such as quantity, substance and causality, or '*a priori* intuitions' such as space and time, to myriad phenomena which we encounter. These are categories or intuitions which, according to Kant, *inhere in the working of the mind itself*. They are the starting point, he argued, of our organisation of confused data. They are the most basic forms of information. Their existence, Kant reasoned, is a basic fact.[43]

The working of the mind says it all. It clinches the argument about FOI being a human right. This is not the place to discuss the necessary exceptions to any system of free flowing information. It is necessary only to say that, in the overwhelming majority of cases, FOI is central to purposive rational action by human beings. Where individual action is impinged upon or impeded by organised groups, whether the state, broadly conceived, commerce, civil society or otherwise, there must be a human right to access information. This is becoming increasingly the case in the developing world where decisions affecting the lives of countless of millions are made by TNCs, foreign governments, regional groupings (often networking with each other) and International Governmental Organisations.

[43] Patrick Birkinshaw, *Freedom of Information: The Law, the Practice and the Ideal* (3rd editn), Butterworths 2001 p.18. Emphasis added. At the same place he refers to Jurgen Habermas's influential work which similarly argues for a pure theory of communication.