

Parliament and Access to Information: Working for Transparent Governance

Toby Mendel

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Parliament and Access to Information: Working for Transparent Governance

*Conclusions of a Commonwealth Parliamentary Association –
World Bank Institute Study Group on Access to Information, held in
partnership with the Parliament of Ghana, 5-9 July 2004*

Toby Mendel

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Toby Mendel

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Foreword

Between 2000 and 2003, the World Bank Institute (WBI) and the Commonwealth Parliamentary Association (CPA) collaborated on a series of projects to foster a better relationship between Parliament and the media as a crucial component of any functioning democratic society. Meetings between Commonwealth Parliamentarians and media practitioners arranged by our organizations agreed that it is essential to a country's good governance that its citizens are as well informed as possible as about the activities of the state and its agencies. Parliamentarians and journalists, so often diametrically opposed to each other elsewhere, found here that they shared common ground on the need for their institutions to work better together, and for Parliamentarians, journalists and all members of civil society to have a recognized right to full and free access to government information.

As part of its governance program, the Poverty Reduction and Economic Reform Division of WBI has sought to improve both the information availability to society at large and to improve the legal environment within which the media operates. The CPA has also recognized the need for such an approach, given that great variations still exist from one jurisdiction to another in the degree of access to information available to citizens and that Parliamentarians play a leading role in ensuring that the progress made in many countries in recent years is emulated throughout the Commonwealth.

The WBI and the CPA therefore organized a Study Group on the topic of Access to Information in July 2004, hosted and supported by the Parliament of Ghana. The Group, composed of seven Commonwealth Parliamentarians who heard input from relevant non-governmental organizations, agreed a number of recommendations on how governments and Parliaments can work towards transparent governance. Their proposals and the summary of the discussions that led to them are valuable guides for the Commonwealth, and all countries, to implement effective freedom of access to information regimes based on proven legislation and practices. As the Group's report says: "Recognition of this key right is essential to empowering all members of society, including Parliamentarians, to strengthening parliamentary democracy, to reversing practices of government by the few and to improving the relationship between Parliament and the media."

The views expressed in this report are entirely those of the Study Group. Their specific proposals were drafted not to reflect the policies of the World Bank Institute or of the Commonwealth Parliamentary Association, but to present a picture of what actually works based on the practical experiences of people who are at the same time recipients and providers of information and overseers of the systems which govern the flow of that information. The Group's work will help to increase the flow of information to the people, improve the performance of Parliaments and media outlets in their respective democratic duties and strengthen the societies in which we all live.

Roumeen Islam
Manager
Poverty Reduction and
Economic Management Division
World Bank Institute

Hon. Denis Marshall, QSO
Secretary-General
Commonwealth Parliamentary Association

Recommendations for Transparent Governance

The right to access information held by public bodies is a fundamental human right, crucial in its own right and also as a cornerstone of democracy, participation and good governance. Recognition of this key right is essential to empowering all members of society, including Parliamentarians, to strengthening parliamentary democracy, to reversing practices of government by the few and to improving the relationship between Parliament and the media. It is essential that legislation be adopted to give proper effect to this right and countries around the world, and within the Commonwealth in particular, have either adopted, or are in the process of adopting, such legislation.

The Commonwealth Parliamentary Association (CPA) Study Group on Access to Information urges Parliaments to play a leading role in promoting access to information in accordance with these Recommendations. The Group notes international standards in this area, including Article 19 of the United Nations Universal Declaration of Human Rights, the Declaration of Principles on Freedom of Expression in Africa, the Inter-American Declaration of Principles on Freedom of Expression, Recommendation (2002)2 of the Committee of Ministers of the Council of Europe to Member States on Access to Official Documents, the recommendations of the UN Special Rapporteur on Freedom of Opinion and Expression, the access to information standards developed by the Commonwealth and the ARTICLE 19 publication, *The Public's Right to Know: Principles on Freedom of Information Legislation*. It also notes the Principles for an Informed Democracy drawn up by the CPA Study Group on Parliament and the Media in Perth.

The Group notes the central role of Parliament and its Members in giving effect to the right of access to information, as well as the importance of access to information to Parliamentarians in the performance of their duties.

(1) Right of Access

(1.1) Parliaments should pass as a priority effective access to information legislation, in accordance with these Recommendations, giving everyone a right to access information held by public authorities.

(2) Scope of Application

(2.1) The obligations set out in access to information legislation should apply to all bodies that carry out public functions, regardless of their form or designation. In particular, bodies that provide public services under public contracts should, to that extent, be covered by the legislation. The Group commends the situation in South Africa, whereby even private bodies are obliged to disclose information where this is necessary for the exercise or protection of any right.

(3) Routine Publication

(3.1) Public bodies should be required by law to publish and disseminate widely a range of key information in a manner that is easily accessible to the public. Over time, the amount of information subject to such disclosure should be increased.

(3.2) Public bodies should be required to develop publication schemes, with a view to increasing the amount of information subject to automatic publication over time.

(3.3) Public bodies should make use of new information technologies so that, over time, all information that might be the subject of a request, and that is not covered by an exception, is available electronically. This will not only significantly promote public access to this information but also

result in considerable savings for public bodies due to the drop in the number of requests that this will occasion.

(3.4) Where information has been disclosed pursuant to a request, that information should, subject to third party privacy, be routinely disclosed.

(4) Processes to Facilitate Access

(4.1) No one should have to state reasons for their request for information.

(4.2) Public bodies should be required to respond to requests within set time periods. A failure to respond to a request within that time period should be deemed a refusal of the request.

(4.3) Any refusal to provide information should be accompanied by the reasons for that refusal, including which provision in the legislation is being relied upon, as well as information detailing any right of appeal the requester may have.

(4.4) Requesters should have the right to appeal any refusal to provide information to an independent administrative body. A final appeal should also lie to the courts.

(4.5) Wilful obstruction of the right of access, including by destroying or damaging information, should be a criminal offence.

(5) Costs

(5.1) Costs for access to information should not be so high as to deter requesters. When putting in place statutory fee systems, consideration should be given to the following:

(5.1.a) requesters only have to pay for the cost of reproducing the information;

(5.1.b) requests for certain types of information – such as personal information – are free or very low cost;

(5.1.c) requesters cannot be subject to higher charges simply because public officials do not maintain their records in a sufficiently accessible format;

(5.1.d) if the information is not provided within a set time period after the fee has been paid, the money will be returned and the request will be free of charge;

(5.1.e) costs are charged only where requests go beyond a certain size or complexity; and

(5.1.f) costs be waived for requesters who are unable to pay.

(6) Exceptions

(6.1) The right of access should be subject to a narrow, carefully tailored regime of exceptions to protect certain overriding public and private interests. Exceptions should not be phrased in vague or subjective language but should, as far as possible, be set out in clear and objective terms.

(6.2) Exceptions should apply only where there is a risk of substantial harm to the protected interest, and where that harm is greater than the overall public interest in having access to the information. The practice in Scotland in this regard is commended.

(6.3) No public body should be completely excluded from the ambit of the legislation; rather, exceptions should be applied on a case-by-case basis in light of specific information requests.

(7) Inconsistent Legislation

(7.1) Where there is a conflict between the access to information law and any other legislation, the access to information law should, to the extent of that inconsistency, prevail.

(7.2) Urgent steps should be taken to review and, as necessary, repeal or amend, legislation restricting access to information.

(8) Records Management

(8.1) Effective systems of record management are key not only to the effective functioning of an access to information regime but also to good governance. The introduction of such systems, where they do not already exist, should be a part of the access to information legislation.

(8.2) Codes of practice relating to record maintenance can help promote a consistent approach across public bodies and can be used to ensure the highest possible standards in this area. Access to information legislation should require such codes to be developed in consultation with public bodies and then laid before Parliament.

(8.3) Assistance for improved record management should be provided, for example in the form of training and guidance, to public bodies to ensure that records are maintained in an appropriate manner.

(9) New Information Technologies

(9.1) New information technologies, and in particular the Internet, have the potential to make a very important contribution in the area of access to information and open governance in general, and should as a result be promoted. New technologies can significantly facilitate record management, promoting better record maintenance practices.

(10) Addressing the Culture of Secrecy

(10.1) There should be a concerted effort by government and public bodies to address the problem of a culture of secrecy. This should include comprehensive training programmes on implementation of the access to information regime, as well as the importance of openness in society. Such training should also seek to promote an understanding among civil servants of the benefits of openness to them, including through a better two-way flow of information that can enhance policy development.

(10.2) Parliamentarians should play a leadership role in this area, sending a clear signal to public officials that they fully support openness and setting a positive example through their own openness. Parliamentarians should also seek to employ innovative strategies to address the culture of secrecy and to involve public officials in promoting openness. The Group commends in this regard the good practice in Trinidad and Tobago.

(10.3) Individuals who disclose information pursuant to the access to information law should be protected against sanction and victimization, including for defamation.

(10.4) Individuals who in good faith release information that discloses evidence of wrongdoing should be protected by law against sanction.

(11) Publicizing the Right to Information

(11.1) Public education campaigns should be undertaken to ensure that the public are aware of their right to access information.

(11.2) Parliamentarians have an important role to play in this process by making sure that their constituents are aware of their rights. A range of other bodies also have a role to play here, including the independent administrative body that is responsible for implementation of the law, human rights groups, the media (and the broadcast media in particular), public bodies themselves and civil society generally. Use should also be made of regular educational systems, including universities and schools, to promote civic understanding about the right to access information.

(12) Role of the Independent Administrative Body

(12.1) There should be an effective independent administrative body which should be allocated a range of statutory functions to ensure appropriate implementation of access to information legislation. This may be either an existing body or a body specifically created to serve that function. In either case, the body should be adequately resourced and protected against official or other interference, including through the appointments process, funding mechanisms and control over the hiring of its own staff.

(12.2) The independent administrative body should have the power to hear appeals from any refusal by a public body to provide information, along with all necessary powers to effectively exercise this role. This should include the power to mediate disputes, to compel evidence and to review, in camera if necessary, the information which is the subject of the request, to order the disclosure of information. and, where appropriate, to impose penalties.

(12.3) The independent administrative body should also play a role in ensuring that public bodies properly implement access to information legislation. This should include an obligation to keep the performance of public bodies under effective review, as well as the power to review the performance of any particular public body. The independent administrative body should be required to report annually, as well as on an ad hoc basis as necessary, to Parliament.

(12.4) The independent administrative body should also play a role in ensuring that other legislation is consistent with the access to information law. This should involve reviewing existing legislation and making recommendations for reform of any inconsistent laws, as well as being consulted on whether or not proposed legislation would impede the effective operation of the access to information regime.

(13) Parliamentary Oversight of Access to Information

(13.1) Parliaments have a key role to play in overseeing and reviewing access to information regimes and in ensuring the public's right to know is guaranteed. Parliaments should take these responsibilities seriously and actively pursue their oversight functions.

(13.2) The access to information legislation should be reviewed on a regular basis to ensure that it is effective in ensuring the public's right to know. We commend the practice whereby in some jurisdictions the law requires the legislature to conduct regular reviews, such as in British Columbia where it takes place every six years.

(13.3) All public bodies should be required to provide a full annual report, either to the responsible minister or to the independent oversight body, on the information requests they have received and how they have been dealt with. This information should then be laid before Parliament in a public document.

(13.4) Parliament's oversight role includes such mechanisms as questions to ministers and holding ministers to account for any failures to implement the access to information law in their ministries.

(13.5) Parliament should play a key oversight role regarding the independent administrative body responsible for implementation of the access to information legislation. Parliament should, in particular, play a leading role with respect to appointments to and funding of the body. Consideration should be given to an appointments process that requires either unanimous approval or a super majority vote. The appointments process should be conducted in a transparent manner. The body should, in addition, formally report to and be accountable to Parliament.

(13.6) Consideration should be given to regular parliamentary review, for example on a biannual basis, of implementation of the access to information regime.

(14) Parliamentary Openness

(14.1) Parliament should play a leadership role in promoting open government by opening up its own practices and procedures to the widest possible extent. Parliamentary debates should be televised and records of these debates should be made publicly available as soon as possible, including through the Internet.

(14.2) Constituency offices, as well as elected officials at all levels, should be used as a means of promoting parliamentary openness.

(14.3) There should be a presumption that committee meetings are open to the public, so that closed meetings are the exception rather than the rule. Where it is necessary to hold a meeting, or part of a meeting, in private, a decision to that effect should be taken in public and reasons for that decision should be given. The Group notes, in this regard, Recommendation 8.9 of the CPA Study Group on Parliament and the Media's Recommendations for an Informed Democracy, which also provides for open meetings.

(15) Promotional Measures

(15.1) The Group notes the importance of international assistance to implement a number of these Recommendations, including promoting awareness of the right of access to information, developing public educational materials, training public officials, addressing the issue of laws that are inconsistent with the right to access information and improving record maintenance. We therefore call on the international community to provide assistance to achieve these ends.

(15.2) The Group commits itself to active promotion of these recommendations, including by disseminating them widely to their fellow Parliamentarians, civil society, the media and their constituents.

(15.3) The Group notes the following specific areas of interest and we encourage the Commonwealth Parliamentary Association, the World Bank Institute, the Commonwealth Human Rights

Initiative, the Commonwealth Secretariat, NGOs and the international community to provide assistance for the following:

(15.3.a) Certain jurisdictions, such as small states, countries in transition and specific regions face greater challenges and needs for technical and expert assistance in the field of access to information and, therefore, the above bodies should give prompt attention to their requests for activities, information, targeted meetings and advice;

(15.3.b) The Group recognized the need for better information on access and, as a result, recommended that Commonwealth-wide comparative studies be conducted in key thematic areas; and

(15.3.c) The Group supported the idea of developing a code of record maintenance practice for the Commonwealth.

Conclusion

The Group recognizes the enormous variety that exists within the Commonwealth and that the implementation of these Recommendations for access to information will vary from country to country. At the same time, we believe that these Recommendations represent a foundational set of standards to which all Commonwealth jurisdictions should aspire. We call on all Commonwealth Parliaments and their Members to take effective measures, as soon as possible, to implement these Recommendations in practice.

Introduction

Transparent governance is now recognized as a cornerstone of democracy and as an essential obligation for Parliaments, the executive, public bodies and others carrying out official functions and roles. In the absence of transparency, fulsome participation, good governance and accountability will be hindered, while corruption and inefficiency will thrive.

A Commonwealth Parliamentary Association/World Bank Institute Study Group on Access to Information, meeting in Accra, Ghana, from 5 to 10 July 2004, hosted by the Parliament of Ghana, recommended the adoption of comprehensive access to information legislation, as well as a series of other measures designed to promote transparent governance. The Study Group highlighted the particular role of Parliament, not only as the body that passes legislation, but also in terms of the need for it to be transparent itself, its role in promoting broader transparency in society and its oversight role in relation to the legislation.

The meeting took place in the context of a global movement towards recognition of the right to access information held by public bodies, as well as other openness trends. This is reflected in the numerous statements that have been adopted recently by authoritative international bodies recognizing this key right, the recent proliferation of constitutional provisions guaranteeing the right of access to information and the many countries which have recently adopted access to information laws or are in the process of doing so. Indeed, all of the jurisdictions represented on the Study Group have either adopted or are considering the adoption of such legislation.

The Study Group noted that access to information is also important for Parliamentarians. The importance of this to opposition Parliamentarians is obvious. Given the changing role of Parliament in many countries, and trends whereby the locus of power is shifting more towards the executive, access to information is becoming more and more relevant to Parliamentarians from governing parties as well.

Notwithstanding the very positive developments towards openness outlined above, much remains to be done to ensure effective transparency within the Commonwealth. Countries that do not yet have access to information laws need to take the necessary measures to adopt them. Countries that have recently passed access legislation need to put in place the structures and processes to ensure effective implementation of that legislation. While many of the access laws adopted by Commonwealth countries are very progressive, practically all could be further improved and some are in need of serious revision.

In addition, secrecy laws remain in place in most Commonwealth countries. While these are of varying degrees of scope and intrusiveness, practically all run counter in some way to modern notions of democracy and openness. The recent case of Katherine Gun, the British intelligence officer who blew the whistle on spying at the United Nations by the United Kingdom and United States, illustrates this point well. Charges against her under the U.K. Official Secrets Act 1989 were ultimately withdrawn. Although she was almost certainly in breach of the Act, the government recognized the profound illegitimacy of prosecuting her – tacit recognition that this law lacks democratic credentials.

The need to campaign for freedom of information in tandem with other rights has been recognized by the Commonwealth. The Commonwealth Human Rights Initiative (CHRI) was founded in 1987

as an independent non-governmental organization, mandated to ensure the practical realization of human rights in the countries of the Commonwealth. Part of its mission is to promote the right to information as one that is fundamental to the achievement of economic and social rights as well as civil and political rights. CHRI works in collaboration with civil society organizations as well as governments to raise awareness about the value of the right to information and to advocate that this right be guaranteed by strong legislation and a participatory legislative process. It has provided legislative drafting support to governments and NGOs, as well as tracking implementation issues. (In 2003, CHRI published *Open Sesame: Looking for the right to information in the Commonwealth*, which concluded with a set of recommendations that can be found in Appendix 8)

There remain a number of obstacles to transparent governance over and above those relating to legislation. In many Commonwealth countries, a strong culture of secrecy persists within government and, indeed, at the level of Parliament, it is often derived from a long history of secret practices and a paternalistic approach to governance. Poor record maintenance and a lack of public awareness of the right of access are other obstacles to openness.

The trend towards greater transparency has also been affected by the terrorist attacks of 11 September 2001 and the global response to them. National security has been highlighted as a leading concern in many countries and governments have often sought to take advantage of this to continue and even extend practices of secrecy. New secrecy rules, often layered on top of already excessively broad secrecy laws, have been adopted and the adoption and/or implementation of access legislation has been delayed in a number of countries.

It may be noted that official transparency is only one component of the broader notion of the free flow of information and ideas in society. This broader notion depends on a range of factors such as actors like the media and other social communicators being able to operate free of government interference, the creation of conditions in which a pluralistic media can flourish and the absence of unduly harsh content restrictions, such as defamation laws. These issues are beyond the scope of the present report but they have been addressed in some detail in the report of another Study Group organized by the Commonwealth Parliamentary Association and the World Bank Institute, *Parliament and the Media: Building an Informed Society*.

Overall, despite some setbacks, the trend towards greater openness is still strong and numerous access to information laws have been adopted, including in Commonwealth countries, in the past few years. These complement a number of standard-setting initiatives in this area, including at the Commonwealth, detailed below. The present report, along with the Recommendations for Transparent Governance which it includes, are intended as the Study Group's contribution to the movement towards greater official openness.

This report highlights, in particular, the ideas of the Study Group regarding the unique contribution Parliamentarians can make to transparent governance. Parliament is a key stakeholder in promoting open governance and there are a number of ways in which both Parliaments should themselves operate transparently and Parliamentarians should play a larger role in ensuring openness.

This report focuses to some extent on access to information legislation, as well as practical measures to implement such legislation and more generally to promote open governance. It should be noted that in most countries there is, or should be, a number of other pieces of legislation that promote openness, for example in relation to environmental matters or consumer protection. Food la-

bellings, now required around the world, is an example of this. These measures are central to the broader notion of openness.

The Study Group spent some time discussing different standards relating to access to information and the legislation that should implement this fundamental right. It endorsed, in this regard, the ARTICLE 19 publication, *The Public's Right to Know: Principles on Freedom of Information Legislation*, which sets out in some detail the relevant standards in this area and which has been endorsed, among others, by the UN Special Rapporteur on Freedom of Opinion and Expression.

Global Transparency Trends

The past 15 years have witnessed a massive trend towards recognition of the right to access information held by public bodies, as well as to other forms of transparent governance. Numerous authoritative statements have been adopted by inter-governmental organizations recognizing this key right. Many of the new constitutions adopted during this period have included specific guarantees of the right to access publicly-held information, while courts in some countries have read this right into more traditional guarantees of freedom of expression. Perhaps most importantly, countries in all regions of the world have adopted or are in the process of adopting legislation implementing this right.

The Commonwealth has formally recognized the fundamental importance of access to information on a number of occasions. As far back as 1980, the Commonwealth Law Ministers declared in the Barbados Communiqué that, “public participation in the democratic and governmental process was at its most meaningful when citizens had adequate access to official information.”

More recently, the Commonwealth has taken a number of significant steps to elaborate on the content of that right. In March 1999, the Commonwealth Secretariat brought together a Commonwealth Expert Group to discuss the issue of access to information. The Expert Group adopted a document setting out a number of principles and guidelines on the right to know and access to information as a human right, including the following:

Freedom of information should be guaranteed as a legal and enforceable right permitting every individual to obtain records and information held by the executive, the legislative and the judicial arms of the state, as well as any government owned corporation and any other body carrying out public functions.

These principles and guidelines were adopted by the Commonwealth Law Ministers at their May 1999 Meeting in Trinidad and Tobago. The Ministers formulated the following principles on access to information:

1. Member countries should be encouraged to regard freedom of information as a legal and enforceable right.
2. There should be a presumption in favour of disclosure and Governments should promote a culture of openness.
3. The right of access to information may be subject to limited exemptions but these should be narrowly drawn.
4. Governments should maintain and preserve records.
5. In principle, decisions to refuse access to records and information should be subject to independent review.

The Law Ministers also called on the Commonwealth Secretariat to take steps to promote these principles, including by assisting governments through technical assistance and sharing of experiences.

The Law Ministers’ Communiqué was considered by the Committee of the Whole on Commonwealth Functional Co-operation whose report, later approved by the Heads of Government, stated:

The Committee took note of the Commonwealth Freedom of Information Principles endorsed by Commonwealth Law Ministers and forwarded to Heads of Government. It recognized the importance of public access to official information, both in promoting transparency and accountable governance and in encouraging the full participation of citizens in the democratic process.

Freedom of information advocates within the Commonwealth, including CHRI, have been following progress in the implementation of regimes in countries as diverse as Jamaica, South Africa and the United Kingdom. At the same time, they continue to work for the legislative entrenchment of the right to information in Commonwealth countries without access laws. For example, the Media Institute of Southern Africa is conducting a campaign in seven countries of southern Africa, with a number of civil society draft Freedom of Information Bills already in circulation in target countries. In the Pacific, the Citizens Constitutional Forum in the Fiji Islands has taken the lead to launch a civil society Freedom of Information Bill and activists in the Solomon Islands seem likely to follow soon. In south Asia, a civil society Bill has been developed in Sri Lanka while the Indian government is currently considering civil society recommendations to make their Freedom of Information Act more effective.

These Commonwealth developments find their parallel in a number of other official statements. The right to access public information has repeatedly been recognized by the UN as an aspect of the right to freedom of expression. The UN Special Rapporteur on Freedom of Opinion and Expression has provided extensive commentary on this right in his Annual Reports to the UN Commission on Human Rights. In 1997, he stated: "The Special Rapporteur, therefore, underscores once again that the tendency of many governments to withhold information from the people at large ... is to be strongly checked." His commentary on this subject was welcomed by the UN Commission on Human Rights, which called on the Special Rapporteur to "develop further his commentary on the right to seek and receive information and to expand on his observations and recommendations arising from communications". In his 1998 Annual Report, the Special Rapporteur declared that freedom of information includes the right to access information held by the state:

[T]he right to seek, receive and impart information imposes a positive obligation on States to ensure access to information, particularly with regard to information held by Government in all types of storage and retrieval systems...."

In 2000, the Special Rapporteur set out in some detail the principles that should apply in this context:

- Public bodies have an obligation to disclose information and every member of the public has a corresponding right to receive information; "information" includes all records held by a public body, regardless of the form in which it is stored;
- Freedom of information implies that public bodies publish and disseminate widely documents of significant public interest, for example, operational information about how the public body functions and the content of any decision or policy affecting the public;
- As a minimum, the law on freedom of information should make provision for public education and the dissemination of information regarding the right to have access to information; the law should also provide for a number of mechanisms to address the problem of a culture of secrecy within Government;
- A refusal to disclose information may not be based on the aim to protect Governments from embarrassment or the exposure of wrongdoing; a complete list of the legitimate aims

which may justify non-disclosure should be provided in the law and exceptions should be narrowly drawn so as to avoid including material which does not harm the legitimate interest;

- All public bodies should be required to establish open, accessible internal systems for ensuring the public's right to receive information; the law should provide for strict time limits for the processing of requests for information and require that any refusals be accompanied by substantive written reasons for the refusal(s);
- The cost of gaining access to information held by public bodies should not be so high as to deter potential applicants and negate the intent of the law itself;
- The law should establish a presumption that all meetings of governing bodies are open to the public;
- The law should require that other legislation be interpreted, as far as possible, in a manner consistent with its provisions; the regime for exceptions provided for in the freedom of information law should be comprehensive and other laws should not be permitted to extend it;
- Individuals should be protected from any legal, administrative or employment related sanctions for releasing information on wrongdoing, viz. the commission of a criminal offence or dishonesty, failure to comply with a legal obligation, a miscarriage of justice, corruption or dishonesty or serious failures in the administration of a public body.

Once again, his views were welcomed by the Commission on Human Rights.

In November 1999, the three special mandates on freedom of expression – the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression – came together for the first time under the auspices of the non-governmental organization ARTICLE 19, Global Campaign for Free Expression. They adopted a Joint Declaration that included the following statement:

Implicit in freedom of expression is the public's right to open access to information and to know what governments are doing on their behalf, without which truth would languish and people's participation in government would remain fragmented.

The right to access public information has also explicitly been recognized in all three regional systems for the protection of human rights.

In 2002 the African Commission on Human and Peoples' Rights adopted a Declaration of Principles on Freedom of Expression in Africa, Principle IV of which states, in part:

1. Public bodies hold information not for themselves but as custodians of the public good and everyone has a right to access this information, subject only to clearly defined rules established by law.
2. The right to information shall be guaranteed by law in accordance with the following principles:
 - everyone has the right to access information held by public bodies;
 - everyone has the right to access information held by private bodies which is necessary for the exercise or protection of any right;
 - any refusal to disclose information shall be subject to appeal to an independent body and/or the courts;

- public bodies shall be required, even in the absence of a request, actively to publish important information of significant public interest;
- no one shall be subject to any sanction for releasing in good faith information on wrongdoing, or that which would disclose a serious threat to health, safety or the environment save where the imposition of sanctions serves a legitimate interest and is necessary in a democratic society; and
- secrecy laws shall be amended as necessary to comply with freedom of information principles.

The Inter-American Commission on Human Rights approved the Inter-American Declaration of Principles on Freedom of Expression in 2000. The Principles unequivocally recognize freedom of information, including the right to access information held by the state, as both an aspect of freedom of expression and as a fundamental right on its own:

3. Every person has the right to access information about himself or herself or his/her assets expeditiously and not onerously, whether it be contained in databases or public or private registries, and if necessary to update it, correct it and/or amend it.
4. Access to information held by the state is a fundamental right of every individual. States have obligations to guarantee the full exercise of this right. This principle allows only exceptional limitations that must be previously established by law in case of a real and imminent danger that threatens national security in democratic societies.

Within Europe, the Committee of Ministers of the Council of Europe adopted a Recommendation on Access to Official Documents in 2002. Principle III provides generally:

Member states should guarantee the right of everyone to have access, on request, to official documents held by public authorities. This principle should apply without discrimination on any ground, including that of national origin.

The rest of the Recommendation goes on to elaborate in some detail the principles which govern this right.

Some Commonwealth countries, mainly those which have adopted or substantially revised their constitutions recently, have specific constitutional protection for the right to access information. These include Malawi and South Africa. The South African guarantee is perhaps unique inasmuch as it requires legislation giving effect to the right to be adopted within three years of its coming into force:

1. Everyone has the right of access to – ...
 - b. any information held by the state; and
 - c. any information that is held by another person and is required for the exercise or protection of any rights.
2. National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.

In other countries, the highest courts have held that the right to access information is included in the general constitutional guarantee of freedom of expression. For example, in 1982, the Supreme

Court of India ruled that access to government information was an essential part of the fundamental right to freedom of speech and expression, guaranteed in Article 19 of the constitution:

The concept of an open Government is the direct emanation from the right to know which seems implicit in the right of free speech and expression guaranteed under Article 19(1)(a). Therefore, disclosures of information in regard to the functioning of Government must be the rule, and secrecy an exception justified only where the strictest requirement of public interest so demands. The approach of the Court must be to attenuate the area of secrecy as much as possible consistently with the requirement of public interest, bearing in mind all the time that disclosure also serves an important aspect of public interest.

A number of Commonwealth countries have passed access to information laws, starting with Australia, Canada and New Zealand, all in 1982. At present, in addition to these three, Belize, India, Jamaica, Pakistan, South Africa, Trinidad and Tobago, and the United Kingdom have adopted access to information laws, while such laws are under consideration in a number of other Commonwealth countries, including Fiji Islands, Ghana, Nigeria, Sri Lanka, Uganda and Zambia.

Progress towards adoption of a law is very advanced in Nigeria, where a campaign on freedom of information has been active since early 1999, dating from the beginning of the post-Abacha era. Legislation has been put forward on various occasions since that time, with strong support from civil society groups. On 25 August 2004, the House of Representatives, the lower House of Parliament, passed the third reading of the Freedom of Access to Information Bill. The Bill will now go to the upper House for consideration.

A Bill on access to information is also being considered in Ghana. The cabinet approved a Right to Information Bill 2003 for consideration by Parliament in September 2003 and, subsequently, the Ministry of Information invited NGOs to submit comments on the draft before it went to Parliament. A roundtable later that year brought together a range of NGOs and others to comment on the Bill. Despite these positive developments, the Bill has yet to be adopted.

In Fiji, the right to access information held by public authorities is guaranteed in section 174 of the 1997 constitution, which also calls on the government to pass implementing legislation "as soon as practicable". A Freedom of Information Bill was published in 1998, but was never adopted. This year, in renewed enthusiasm for seeing such legislation passed, a coalition of NGOs produced an unofficial Freedom of Information Bill as a means of promoting further debate. At a workshop on freedom of information in September 2004, the Fijian Information Minister insisted that the government was serious about adopting legislation to give effect to this key right and confirmed that the Bill was the responsibility of the Prime Minister's Office, which had accorded it high priority status.

Right of Access

Historically, perhaps particularly in Commonwealth countries, public bodies have often treated the information they hold as though it were for the exclusive use of their officials. Systems of classification and security vetting, along with comprehensive and often draconian secrecy laws, have backed this up. In practice, officials in many government departments have in the past placed some level of classification on practically every document. Even the lowest level of classification effectively acts as an almost absolute barrier to public access to the document so labelled.

As noted above, however, this sort of attitude and approach is no longer acceptable. It has been recognized that public bodies hold information not for themselves, but as custodians of the public good. This new understanding, described in South Africa as the principle of maximum disclosure, establishes a presumption that publicly-held information shall be open to disclosure, subject only to a carefully crafted regime of exceptions. As such, requests from the public must be satisfied absent an overriding reason to refuse to disclose the information.

The right of access, even if constitutionally guaranteed, must be implemented by specific legislation setting out in detail not only the manner in which the right is to be exercised, but also the regime of exceptions and the right to appeal any refusal to provide access. The access to information legislation should be co-ordinated closely with any privacy or data protection legislation. For countries that do not have either of these laws, consideration should be given to preparing them together, given the close relationship between their subject matters.

The experience of countries around the world shows that the importance of openness and the need for access to information legislation is in no way restricted to the more developed countries. Indeed, in some ways, access to information guarantees are more important in less developed countries. Such laws can, in particular, be seen as empowering the disempowered majority. Furthermore, access to publicly-held information is a fundamental human right, not simply an administrative privilege, and so all countries are bound to provide effective guarantees for this right.

The process by which the freedom of information or access to information law is adopted should itself be open and provide for public input to ensure that the law respects the very standards it seeks to impose. In Scotland, for example, an extensive process of consultation was conducted prior to the adoption of the Freedom of Information Bill. Extensive evidence was provided to the parliamentary committee examining the proposed legislation; indeed, that committee actively sought out public input. In total, some 61 submissions were received and five public sittings held as part of the process of developing the access law.

There is likely to be some opposition to access to information legislation, notwithstanding the global trends, noted above, in favour of recognition of this right. Governments are often nervous about the idea of being forced to be open, something they have not had to deal with previously. There is an important role for Parliament here, both in ensuring passage of a good law and in making it clear to the bureaucracy that they actually have nothing to fear from openness.

In some cases, this opposition has led to a situation where the government, or specifically the head of state or government, may try to block legislation. In most countries, any presidential veto is subject to parliamentary override. It has been noted that it may be easier to get commitment to an access to information law in the context of significant political change (regime change). This was

certainly the case in South Africa and in Scotland prior to the adoption of laws there, and arguably the case in the United Kingdom in 1997 when the Labour Party took power after 17 years of Conservative Party rule. In Nigeria, a similar situation pertained after the fall of the Abacha regime, after which the new government made a strong commitment to access to information.

Parliamentarians can be expected to be significant users of an access to information law, something that may bolster support for passage of a law. In British Columbia, for example, a major user group is the opposition party, paralleling trends in other jurisdictions. But majority party Parliamentarians have also become a significant user group in many jurisdictions. As noted above, given balance of power changes in recent years and, in particular a decline in the importance of Parliament, this trend is likely to increase.

The principle of maximum disclosure dictates that both information and public bodies should be defined broadly subject, as always, to the regime of exceptions. Best practice jurisdictions define information as including all recorded information, regardless of its form, source, date of creation, or official status, whether or not it was created by the body that holds it and whether or not it is classified. It may be noted, in this regard, that classification is simply an administrative label, which should not be allowed to override the principle of openness (unlike exceptions specifically set out in the access to information law).

Public bodies should be defined to include all statutory, departmental, constitutional or government funded or controlled bodies. The definition should also comprise private bodies undertaking public functions. In this era of outsourcing, this is of particular importance. It would clearly be inappropriate to allow public bodies to avoid their disclosure obligations simply by privatizing their work. All levels of government – national, state or provincial, and local – should be included. In some countries, constitutional separation of powers dictates that the national government cannot legislate openness for provincial or state institutions. Where this is the case, laws should be adopted in each sub-national jurisdiction as necessary to give full effect to the right of access. In Canada, for example, there is a national access law, as well as separate laws in each province.

The definition of public bodies should also include the legislative branch of government, or Parliament. Specifically, the authority that runs Parliament should be covered by the access to information law. The judicial branch of government should similarly be subject to the obligations set out in the access to information law. The difference between the administrative and judicial functions of the courts is recognized in some access laws, with only the former being subject to disclosure obligations. At the same time, the courts are public bodies like all others and they should be subject to public review of their performance and be accountable to the public. Ideally, therefore, they should be covered by an access to information law in the same way as any other public body, subject to the regime of exceptions.

In principle, no bodies should be completely excluded from the ambit of the access to information law. Even if a large part of their functions is covered by the regime of exceptions, there will still be areas where openness should prevail. Even the most secret intelligence service buys pens and paper, and the public has a right to know how much they pay for them. At the same time, some laws do entirely absolve certain bodies from the obligation of openness. In Trinidad and Tobago, for example, the Central Bank is excluded, while in India, some 19 bodies are excluded.

Some access to information laws go even further, including private bodies within their ambit. This is the case, for example, in South Africa, where the law covers private bodies to the extent that the

information is required for the exercise or protection of any right. The precise scope of this aspect of the right is still being established, including through litigation. It may, however, be noted that today there is increasingly a continuum between public and private bodies, with NGOs, government NGOs, privatized industries and the like forming a sort of interface between these historically separate sectors. As a result, the once sharp distinction between public and private is increasingly being questioned.

Routine Publication

The right to access information is most commonly associated with a right to request and to receive documents. While the request-driven aspect of this right is certainly very important, equally important, particularly given recent technological advances, is the obligation on public bodies actively to publish information of key importance. This is in form a positive right, placing an obligation on public bodies to take specific measures to ensure a free flow of information to the public.

One of the reasons routine publication is so important is that individuals are often unaware of basic information relating to government; what services are available, which departments do what, what opportunities there may be for them to participate in decision- or policy-making, and even how to make an information request. Put another way, people do not know what it is that they do not know. Routine publication is one means of addressing a lack of civic awareness. As a result, this aspect of transparent governance is of particular importance in less developed countries.

Ideally, and by using new technologies, the scope of information subject to routine publication should be increased over time. Publication over the Internet, for example, is not subject to similar resource constraints as traditional publication. As a result, it is perfectly feasible for public bodies to publish massive amounts of information, indeed, any information which is clearly not subject to any exception. In this way, over time, routine publication should lead to a situation where only a narrow band of (contentious) information is not automatically available and for which one might need to make a request.

Linked to this is the idea that once information has been disclosed pursuant to a request, it should, if there is any likelihood that anyone else might be interested in that information, be subject to routine publication. This saves time and money for both requesters and public bodies, which will not have to process further requests relating to this same information.

Different laws generally deal with this aspect of the right to information in one of two ways. Some provide a list of the categories of documents that must be published, such as information about their general operations, about services provided and about how to request information. This has the virtue of being clear and consistent across all public bodies. At the same time, it is not easy to amend over time to ratchet up the amount of information subject to routine publication. This is important since public bodies cannot immediately be expected to achieve the levels of routine disclosure that are necessary to deliver the goals noted above. Instead, systems are needed to gradually increase routine publication over time.

In Trinidad and Tobago, public bodies are required to publish information about their activities and functions, as well as a list of key documents that they hold. To facilitate the continuous improvement of routine publication, the government has made a public commitment to put in place an information backbone connecting all ministries to the Internet and to each other. The idea is that eventually this will significantly reduce the number of information requests, due to the fact that people will rarely have to ask for information as most of it will already be available.

Other laws require public bodies to come up with publication schemes or proposals on what information will be subject to routine publication. In some cases, these schemes need to be approved by an independent oversight body. This approach is more flexible, allowing for the scheme to gradually increase the amount of material subject to routine publication over time as the capacity of pub-

lic bodies grows. At the same time, publication schemes may lead to differences in the scope of information published by different public bodies.

The U.K. Freedom of Information Act employs a system of routine publication. Each public body must either come up with its own publication scheme or adopt a model scheme developed by the Information Commissioner. In the former case, the scheme must be approved by the Information Commissioner. Such approval may be time limited or the Commissioner may withdraw his or her approval by giving six months notice. In this way, the schemes can be kept up-to-date and the amount of information subject to routine publication increased over time.

As noted, routine publication systems should be designed so that the amount of information being published increases over time. At the same time, minimum standards apply to the type of information that should be subject to routine publication. The ARTICLE 19 Principles, for example, provide:

Public bodies should, as a minimum, be under an obligation to publish the following categories of information:

- operational information about how the public body functions, including costs, objectives, audited accounts, standards, achievements and so on, particularly where the body provides direct services to the public;
- information on any requests, complaints or other direct actions which members of the public may take in relation to the public body;
- guidance on processes by which members of the public may provide input into major policy or legislative proposals;
- the types of information which the body holds and the form in which this information is held; and
- the content of any decision or policy affecting the public, along with reasons for the decision and background material of importance in framing the decision.

Obviously, this encompasses clear instructions about how to make a request for information. Indeed, making this information available is crucial to the success of any access to information system and it should be published in a means that render it widely accessible.

Closely linked to this is the need to ensure prior and informed consultations with affected parties before implementation of a project. This is important in all parts of the world, but takes on a particular shade in developing countries, where such projects may be undertaken or financed by donors or other international actors, such as the multilateral development banks. Some donors, and most of the multilateral development banks, have recently developed their own openness policies to address this need. While these policies leave much to be desired in some cases, they at least signal a recognition of the need to ensure the participation of, and consultation with, project affected individuals.

For routine publication to be effective, the information needs to be disseminated not only in print form, or over the Internet, but also in ways that are specifically designed to ensure that it is accessible to all citizens. Where possible, information should be specially targeted at those individuals for whom it is most important. In South Africa, for example, there are 11 official languages and a commitment has been made to try to provide information in the official language requested whenever possible.

In Trinidad and Tobago, information must be published in newspapers, and public bodies need to gazette a list of documents that are subject to routine publication. Ideally, routine publication also should make use of other forms of media. The importance of broadcasting, particularly in societies with high levels of illiteracy, or where newspapers are prohibitively expensive or simply do not reach some parts of the country, should not be overlooked.

Innovative approaches to routine publication should be explored. Mobile film units, for example, can be an effective way to ensure information penetration in some countries. NGOs can play a role in disseminating information widely. Collectively, NGOs often reach the poorest and most alienated citizens and, as a result, can serve as an important means of communication for them. The idea of direct mailouts or other direct approaches can be effective, for example to reach project affected populations. Local governments can also play a role; this can either be informal or be pursuant to protocols or other formal agreements.

There are a number of ways in which Parliamentarians can help ensure that active publication, and in ways that ensure that relevant information reaches those that need it, takes place. In South Africa, for example, constituency offices effectively serve as information relay points, with a store of information available to locals including all adopted legislation, departmental information and so on. Furthermore, departments that have offices throughout the country also serve as information relay points, making available a wealth of information to citizens. At the heart of these systems is technology, without which this would not be possible.

Exceptions

The regime of exceptions is at the heart of any access to information law. On the one hand, the exceptions must be comprehensive in the sense that they cover every legitimate secrecy interest. This is to ensure that legitimate interests, both public and private, are protected against harmful disclosures. It is also necessary if the access to information law is to override secrecy laws, in line with best practice in this area (see below). On the other hand, if the exceptions are too broad, they will undermine the very goal of openness that the legislation seeks to promote, limiting its effectiveness, as well as its ability to deliver the objectives noted above (accountability, greater participation, control of corruption and so on). In other words, the regime of exceptions has to be carefully crafted to be just right.

It is of the greatest importance that the access to information law should, to the extent of any inconsistency, override existing secrecy laws. In most countries, secrecy laws, and particularly the official secrets act or a local version thereof, are seriously at odds with the principles underpinning the access to information law and, indeed, with broader modern notions of democracy and openness. If effectively left in place by the access law, secrecy laws can seriously undermine moves towards greater openness. Many access to information laws do in fact override inconsistent legislation, although some do not. The Indian Freedom of Information Act 2002 specifically mentions the Official Secrets Act, stating:

14. The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in the Official Secrets Act 1923 and any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act.

As has already been noted, no public bodies should be completely excluded from the ambit of the access to information law. Again, a comprehensive set of exceptions underpins this since, if the exceptions protect all legitimate secrecy interests, there is no need to exclude bodies from the general obligation of openness.

The ARTICLE 19 Principles set out a clear three-part test for exceptions to the right of access:

All individual requests for information from public bodies should be met unless the public body can show that the information falls within the scope of the limited regime of exceptions. A refusal to disclose information is not justified unless the public authority can show that the information meets a strict three-part test.

The three-part test

- the information must relate to a legitimate aim listed in the law;
- disclosure must threaten to cause substantial harm to that aim; and
- the harm to the aim must be greater than the public interest in having the information.

The first part of the test simply means that all of the specific interests being protected should be listed in the law. A range of interests are protected in different countries but there is a high degree of overlap in the various access to information laws. Some commonly protected interests include

law enforcement, privacy, national security, commercial, legal and other confidentiality, public or individual safety, and the effectiveness and integrity of government decision-making processes.

It is of the greatest importance that the interests to be protected be carefully, clearly and narrowly defined. The language in which exceptions are cast should be as free of ambiguity as possible. Subjective or flexible terms should be avoided. Otherwise, there is a very real risk that the public officials applying the law, at least in the first instance, will, based on historic practices of secrecy, interpret the exceptions too broadly. For example, while it is recognized that some secrecy is necessary to ensure the effective operation of government, an exception relating to this could, if not defined clearly, cover practically all internal documents. Rather precisely, the South African Promotion of Access to Information Act 2000 defines this interest as follows:

44. (1) Subject to subsections (3) and (4), the information officer of a public body may refuse a request for access to a record of the body—
- (a) if the record contains—
 - (i) an opinion, advice, report or recommendation obtained or prepared; or
 - (ii) an account of a consultation, discussion or deliberation that has occurred, including, but not limited to, minutes of a meeting, for the purpose of assisting to formulate a policy or take a decision in the exercise of a power or performance of a duty conferred or imposed by law; or
 - (b) if—
 - (i) the disclosure of the record could reasonably be expected to frustrate the deliberative process in a public body or between public bodies by inhibiting the candid—
 - (aa) communication of an opinion, advice, report or recommendation; or
 - (bb) conduct of a consultation, discussion or deliberation; or
 - (ii) the disclosure of the record could, by premature disclosure of a policy or contemplated policy, reasonably be expected to frustrate the success of that policy.
- (2) Subject to subsection (4), the information officer of a public body may refuse a request for access to a record of the body if—
- (a) the disclosure of the record could reasonably be expected to jeopardize the effectiveness of a testing, examining or auditing procedure or method used by a public body;
 - (b) the record contains evaluative material, whether or not the person who supplied it is identified in the record, and the disclosure of the material would breach an express or implied promise which was—
 - (i) made to the person who supplied the material; and
 - (ii) to the effect that the material or the identity of the person who supplied it, or both, would be held in confidence; or
 - (c) the record contains a preliminary, working or other draft of an official of a public body.
- (3) A record may not be refused in terms of subsection (1) if the record came into existence more than 20 years before the request concerned.
- (4) A record may not be refused in terms of subsection (1) or (2) insofar as it consists of an account of, or a statement of reasons required to be given in accordance with section 5 of the Promotion of Administrative Justice Act 2000.

While this may seem lengthy, it has the very distinct virtue of being both clear and narrow. It also provides for exceptions to exceptions, namely where the record is more than 20 years old or is required to be disclosed under another law. Such exceptions to exceptions can be very useful in further narrowing the scope of exceptions. For example, the South African law does not protect private information where the public body to which it was given has informed the individual that it belongs to a class of information that might be disclosed.

It is not enough for the information simply to fall within the scope of a legitimate interest listed in the law. The disclosure of the information must pose a real risk of substantial harm to the protected interest. In Scotland, the phrase used is “real, actual and substantial harm”. In the absence of a risk of harm, there is no justification for refusing to disclose information. For example, a great deal of information relating to the armed forces, or even to national security per se, would not, if disclosed, pose the slightest risk to security. The example given above about security services buying pens and paper is one example. It is clear that embarrassment on its own does not qualify as substantial harm, although public officials sometimes demonstrate a tendency to withhold information on this basis alone.

The question of whether or not disclosure poses a risk of substantial harm to a legitimate interest must be assessed at the time of the request. What might pose such a risk to national security in time of war may be very different from the same consideration in time of peace. Indeed, it is implicit in the three-part test for exceptions that it be assessed on a case-by-case basis, at the time a request is made.

Finally, the three-part test provides for the disclosure of information even if this would pose a real of substantial harm to a protected interest where this is in the overall public interest. In other words, the harm must be balanced against the public benefit in disclosing the information, with the greater interest prevailing. To continue with the national security example, sensitive information which revealed large-scale corruption should still be disclosed. The reasons for this are obvious; indeed, in the example given, addressing the problem of corruption is likely to enhance security in the longer term.

Closely related to this is the idea that information about gross human rights abuse should never be subject to an exception, regardless of the harm to a protected interest that may ensue. The idea here is that the public interest will always be served by such disclosure.

It may be noted that large bureaucracies are, in information terms, almost always ‘leaky ships’. In a healthy democracy, information of significant public interest is very likely to be leaked, often to the media. To the extent that this is true, the public interest override simply provides statutory protection to those who do leak information.

The regime of exceptions must also comply with constitutional standards. Where these circumscribe exceptions even more closely than the three-part test described above, the national law must respect that.

Certain exceptions, such as the privacy exception, are of particular interest to Parliamentarians. Some laws do not extend privacy protection to information relating to the public activities of officials. The privacy exception in the South Africa law, for example, does not apply to information,

“about an individual who is or was an official of a public body and which relates to the position or functions of the individual”.

A number of laws include an exception in favour of cabinet documents. This is perhaps unfortunate and it should be clear from the three-part test, noted above, that exceptions should protect only specific privacy interests, not classes of information. A key issue here is how long these documents remain confidential. In British Columbia, it is 15 years, while in Trinidad and Tobago, it is 10. There are obvious political implications to opening up cabinet documents but even the shorter timeframe of 10 years would ensure that the cabinet in question, and probably even that government, no longer existed.

Secrecy

Passage of an access to information law is only one small step in promoting open governance. Equally, or perhaps even more, important is the question of addressing the culture of secrecy that exists in most governments and public bodies, at least in the period immediately after an access to information law has been adopted. Simply passing a law without addressing larger questions of secrecy can be counterproductive; in some countries, civil servants have been known to move to oral forms of communication, specifically to avoid the strictures of an access to information law.

In practice, true openness depends on daily decisions by thousands of individual civil servants. While a good access to information law will include mechanisms to ‘force’ openness, including administrative and judicial appeals, truly open governance is possible only where officials have some belief in and commitment to openness. As a result, addressing the culture of secrecy is fundamental to proper implementation of an access to information law, as well as the broader project of open governance.

A number of measures can be taken to address the culture of secrecy. These range from the obvious to some quite innovative approaches. It has even been suggested that, instead of taking an oath of secrecy, civil servants should be required to make a commitment to openness.

At the legislative level, those who release information pursuant to the access to information law should be protected against sanction, as long as they acted reasonably and in good faith. This should be the case even if they in fact made a mistake and released information that should have been kept confidential. Such protection will ensure that officials have the confidence to apply the law in the manner intended, rather than being fearful of sanction every time they release information.

This is particularly important where the previous practice has been to treat all or most official information as secret. Such practices lead to a situation where many officials are likely to have an unduly restrictive understanding of what should properly be disclosed. In this environment, change of the old understandings is possible only if civil servants feel free to disclose information without risk of sanction.

Closely related to this is legal protection for whistleblowers, individuals who release information about wrongdoing or serious mismanagement. Whistleblowers act as an important safety value, ensuring that the public are informed about matters of importance. Legal protection helps to nurture a culture of whistle blowing. Often, whistle blowing is protected in a separate law, specifically on this topic. This is the case, for example, in the United Kingdom and South Africa. The idea of providing rewards to whistleblowers has also been suggested, although there are potential problems with this as well.

Training is also an important means of addressing the culture of secrecy, as well as ensuring proper implementation of the access to information law. Such training should address not only formal questions of implementation, but also the rationale behind the legislation and the benefits it will bring to society. It should also deconstruct any lingering views that openness, or the right to information, is a Western notion by highlighting the use and importance of these laws in developing countries.

Particular emphasis should be placed in training on the benefits openness brings to officials themselves. At its root, access to information legislation is about changing relations between officials and the public, about transforming the civil service from a top-down institution to a public-private partnership. Openness should result not only in a flow of information from officials to the broader public, but also in a similar flow of information from the public to officials, including in the form of greater and more informed, effective participation in policy- and other decision-making. Both flows will benefit officials. On the one hand, the public will understand their role, and the particular challenges they face, better, reducing friction, misunderstanding and unwarranted criticism. On the other hand, public participation is likely to improve decision-making and to ensure that officials have better and more comprehensive information to base their work upon.

Routine disclosure can also play an important role in addressing the culture of secrecy. As more and more information is routinely disclosed, officials will become accommodated to the idea of openness, develop a better sense of the impact it has on their lives and gain a better sense of the appropriate limits of secrecy. This should, at the very least, serve to show that openness will not result in serious problems or difficulties for them.

In tandem with these ‘carrot’ approaches, there should be a ‘stick’ in the form of criminal punishment for obstruction of access, for example by wilfully refusing requests or by destroying records. In Trinidad and Tobago, for example, civil servants can be imprisoned for wilful obstruction of access. In some countries, the panoply of rules protecting civil servants against sanction for work-related failures may need to be reviewed.

Parliamentarians can play a key role here, playing a leadership role both by setting their own example (see below under Parliamentary Openness) and by making it clear to officials that they are expected to be open. The latter can be very important in the context of a new access to information law. If officials feel that senior officials and Parliamentarians are not really committed to the new law, perhaps having passed it under international or civil society pressure, they are unlikely to open up in practice. If, on the other hand, Parliamentarians and senior civil servants make it clear that they see fulsome implementation of the access to information law as a priority, officials are likely to respond to that.

A range of specific measures should be considered, which will need to be adapted to the particular circumstances of each country. In Trinidad and Tobago, for example, Parliamentarians are trying to involve senior bureaucrats in their meetings with the public, to promote greater links, to demonstrate the importance of openness directly and to provide the public with a chance to interact directly with these officials. Town meetings, for example, should involve officials as well as Parliamentarians. The training processes for permanent secretaries is also being made more participatory, and includes training on access to information.

Processes

A number of process rules are necessary to ensure effective access to information. This report will touch on some of the more important of these.

It is essential that access to information laws establish clear timelines for responding to requests and for appeals. In Trinidad and Tobago, for example, the time limit for responding to requests is 30 days while in the United Kingdom it is 20 working days. It should be noted that time limits are maximum periods, not minimum ones, and that information should be disclosed as soon as reasonably possible. In some countries, concern has been expressed, in particular by journalists, that an access to information law will actually be used as an excuse by officials to delay provision of information; clearly this should not be the case.

Most systems provide for some system for extending the time limit; ideally this should be restricted to exceptional cases, for example where the request is for a large number of records, would require searching through a large number of records or involves a third party. Requesters should be notified of any extension of this sort. Other controls on the extension of time limits should also be contemplated. In British Columbia, any extension to the original time limit requires permission from the Information Commissioner.

In many countries, public bodies are required to appoint information officers to serve as central points of contact for dealing with information requests and to provide assistance as required to requesters in formulating their requests. These officers should also provide assistance to individuals who are unable, for example because of illiteracy or disability, to make a request. Finally, they should provide any necessary assistance to other officials they work with to ensure appropriate implementation of the law.

Requesters should not have to provide reasons for their requests. It is not for officials to assess whether or not requesters have sufficient reasons to want a specific piece of information; it is the latter's right to access that information. On the other hand, the law should require public bodies to provide full reasons for any refusal to provide information, including the specific exception that is being relied upon. These reasons will be necessary in case of an appeal and the notice of refusal should also include information about any right of appeal. In some countries, a failure to respond to a request within the stipulated time period is a deemed refusal. This is important to facilitate appeals but should not be seen as authorization for public bodies to fail to respond to requests.

Requesters should be able to specify the form in which they want information to be communicated, for example to inspect the document, to be provided with an electronic copy if available or to be given a photocopy. This allows requesters to obtain the information the form that is most convenient and least costly for them.

A very important issue is that of costs. If the costs are too high, they will deter requests and undermine the whole system. A number of potential costs are involved in a request, including the time spent searching for the information, time spent assessing whether the information is covered by an exception and the actual costs of duplicating and sending the information to the requester. In some countries, such as South Africa, the Minister is given the power to make central rules relating to costs. This helps ensure that costs are consistent across all public bodies and also promotes transparency in relation to costs.

Most countries limit costs in one way or another. In Scotland, for example, no charges are applied for searching for documents or for obtaining advice on exceptions. This is only fair, given that these costs are closely related to the manner in which records are maintained, hardly something requesters should be responsible for, and the question of exceptions, again something that is quintessentially government business. Furthermore, the first £100 is free and requesters are only charged 10 per cent after that.

In British Columbia, the first three hours are free. Furthermore, the Information Commissioner has the power to waive costs for requesters who do not have the ability to pay and access to personal information is free. Public bodies are required to provide requesters with a breakdown of the costs in advance, so that they can decide whether or not they wish to proceed with the request.

In Trinidad and Tobago the system is even more progressive. Requesters only pay for the cost of duplication. Furthermore, requesters may have their money refunded if the information is not provided within seven days of the payment being made. In addition, the Ombudsman can review any charges to see if they are reasonable and appropriate.

Independent Administrative Body

It is of the greatest importance to the success of an access to information law that an independent administrative body been given various roles and powers in relation to implementation. As detailed below, this body should have the power to hear appeals from any refusal to provide access to information. It should also have various roles in relation to promotional measures, including the training noted above under Secrecy.

This administrative body could either be an existing body or a body specially designated for this purpose. Obviously the cost of establishing a new body will be a consideration, particularly for smaller countries. At the same time, there are a number of good reasons for establishing a new body. First, a new body will be able to develop the specialized expertise in this area that will be necessary for it to discharge its responsibilities well. Second, the volume of work that can be expected to be associated with the new freedom of information system, outside of the smallest countries, warrants the establishment of a dedicated body. Third, and perhaps most importantly, the body will need to have binding decision-making powers in relation to appeals (see below); existing bodies, like ombudsmen or human rights commissions, often lack these powers.

Regardless of whether it is a new body or an existing one, it is essential that the administrative body be independent, in the sense of being protected against political or other interference. It may be noted that, in some regions of the world, the track record with supposedly independent bodies has not been very impressive, and stringent efforts must be made to address this in the context of access to information. Ideally, the body should have constitutional status, with its independence constitutionally protected.

The appointment of the leading individual, or group of members, of the administrative body is one of the most important ways to ensure independence. Indeed, selection of an appropriate individual, who will stand up to instances of unwarranted secrecy and take effective measures to promote openness, is probably the single most important step in promoting open governance.

The appointments process should be overseen by Parliament. In Scotland, for example, an ad hoc parliamentary committee is responsible for the appointments process. In British Columbia, the whole Parliament votes on the shortlisted candidate and the current Commissioner was unanimously approved. Consideration should be given to requiring a super-majority vote for appointments, to help prevent majority parties from voting in someone sympathetic to their party or to the government. Furthermore, the law should set out clear criteria for appointees, which should prohibit those with strong political connections from being appointed and also ensure that only individuals with the required expertise will be given the position.

It is also of the greatest importance that the appointments process be open and participatory, with an opportunity for civil society input. This can help further ensure against patronage appointments. It can also help lay down a marker for future reference. In the recent appointments process in Scotland, for example, certain parties expressed concern about the proposed appointee. As a result, that individual now has to prove his worth and, in particular, avoid validating the concerns that were raised during the appointments process.

The question of how the administrative body is funded is also of some importance. In Scotland and British Columbia, for example, as in other countries, funds for the Information Commissioner's

office are voted directly by Parliament. Funding should not, in any case, be set by a particular Minister. The budget should be charged to the consolidated fund, not a fund controlled by a Minister. It is very important that adequate funds be allocated to the administrative body, to ensure that it can properly discharge its obligations under the access to information law.

Another important issue is how staffing levels are set and where staff come from. In Scotland, staff are agreed with the Attorney General's office. It is essential that staff have the required expertise for this particular position. As a result, they should not be restricted to those who have qualified to enter the civil service or, even more importantly, those already in civil service employment. On the other hand, to attract good staff, consideration should be given to making this position a potential entry-level point for the civil service. Salary levels for both staff and the lead individual or group of members should be linked to pre-existing salary structures, for example for judges or civil servants.

As noted above, one of the key roles of the independent administrative body is to hear appeals from any refusals to provide access to information. In some countries, the law provides first for an internal appeal to a higher authority in the same body which originally refused the request. This can be an effective way to deal with unwarranted refusals to grant access but, at the same time, it is important that the process is not unduly lengthy.

Many access to information laws provide for an appeal to an independent administrative body. In Scotland, British Columbia and the United Kingdom, this is to an Information Commissioner specifically appointed for that purpose. In Trinidad and Tobago, appeals go to the Ombudsman.

In some jurisdictions, the administrative body can play both a mediation role, to see if the matter can be sorted about satisfactorily between the parties, and an adjudication role, to decide any issues which cannot be resolved through mediation. The body should have the power to make binding decisions in relation to a number of matters. At the very least, it should be able to order public bodies to disclose the requested information. Such orders should be binding, for example through being registered with courts so that failure to implement becomes a contempt of court. They should also have similar powers in relation to fees, failure to respond to requests and failures to provide the information in the form requested. Ideally, administrative bodies should also have the power to impose penalties on public bodies that are seriously failing to discharge their obligations under the access to information law.

As part of its power, the administrative body should be able to review the information in question; this is essential to its ability to determine whether or not a claim of secrecy is justified. At the same time, staff should be under an obligation not to disclose any information that is found to be within the scope of an exception to the right of access. The body should also, as part of its adjudicative role, have the power to compel evidence.

In practically every country, there is also an appeal to the courts. In some cases this will be a form of judicial review (which is limited to considering whether or not the original decision was made properly) while in other cases it will be a full decision on the merits (which will consider whether the original decision was correct). Over time, the courts can be expected to clarify the scope of the law and, in particular, of the exceptions, but this is a slow process. In the meantime, the decisions of the administrative body can serve to elaborate on the meaning of the law.

The administrative body should also have a role in relation to general promotion of openness and to proper implementation of all aspects of the access to information law. As noted above, it should

have some role to play in relation to training of officials, perhaps helping to develop and deliver training courses. It should also have some general public educational role to promote awareness about the new law and how it works.

A number of other roles are possible for the administrative body. In the United Kingdom, for example, the Information Commissioner is tasked with approving the publication schemes that every public body must develop for purposes of routine publication. The Commissioner is also required to draw up a model publication scheme for those public bodies that do not wish to or are unable to develop one themselves. A similar role might be envisaged for the administrative body in relation to the development of record management standards. In both cases, there is need for monitoring to ensure that public bodies do actually publish in accordance with the publication scheme or requirements of the law and maintain their records in an appropriate state.

As noted above, the access to information law should prevail in case of conflict with an existing secrecy law. However, it is obviously important, over time, to review secrecy laws and to bring them into line with the access to information law so that such conflicts become increasingly rare. Furthermore, it is important to review proposed legislation that may impact on openness, to ensure that it is consistent with the approach taken in the access to information law. In British Columbia, the Information Commissioner is given responsibility for both of these tasks.

The administrative body could also be given a more pro-active role to ensure that public bodies are complying generally with their obligations under the law. This could include the power to conduct an investigation into allegations or suspicions of non-compliance with the access to information law, as well as the power to fine public bodies for serious non-compliance.

Parliamentary Oversight

Parliament has a very important role to play in overseeing the proper implementation of the access to information law, as well as generally promoting open governance. One important role for Parliament is in relation to reviewing the law and ensuring that it remains up-to-date and in line with best international and comparative practice, as well as the particular needs of the society to which it applies. In British Columbia, for example, the law provides for its own review by Parliament every six years. In practice, these reviews are ahead of schedule, the second one having been completed in 2004 regarding a law passed in 1993.

Parliament can also play a role in reviewing implementation of the law by ministries and other public bodies. Ideally, such reviews should not simply be ad hoc in nature, but they should be conducted regularly, say every two years. Such reviews should look at the way the law is being implemented, including in particular ministries or other public bodies, as well as generally, and make recommendations for reform or improved implementation. Parliamentary committees may be particularly important in this regard and it may be noted that individual ministers are responsible to Parliament for any failures by their ministries to implement the access to information law. Indeed, Parliament can summon anyone to account in this regard.

To facilitate such reviews, and to ensure that openness remains on the agenda, all public bodies should be legally required to provide annual reports on their performance under the law and the steps they have taken to improve implementation. In particular, these reports should provide details of all information requests and how they were resolved (requests satisfied, internal appeals and their outcome, administrative appeals and their outcome and so on), as well as other matters (routine publication, training, record management, public awareness raising and so on). Such reports may be provided either to a responsible ministry or to the administrative body responsible for the access to information law, but they should be tabled before Parliament and the body to which they are reported should in turn provide an integrated report to Parliament summarizing implementation across the whole system. In Trinidad and Tobago, for example, all public bodies are required to report to one ministry, which then reports to Parliament.

Parliament should also play an oversight role in relation to the independent administrative body that is responsible for appeals and promotion of implementation of the access to information law. As noted above, Parliament should oversee the appointments process and play a role in relation to funding. The body should also be required to report annually to Parliament on its own activities, providing a regular opportunity for parliamentary review.

Parliament could exercise a number of other oversight roles. It could review secrecy laws to assess whether or not they are consistent with the access to information law and, where they are not, take steps to bring them into line. In some countries, all regulations passed under the access to information law must be laid before Parliament and, where these are not accepted, they may be returned to the drafter for review.

Parliamentary Openness

Parliament can play an important leading role in promoting openness by starting with making its own operations as transparent as possible. This should involve a number of institutional measures, such as question period, getting material online as soon as possible and opening up committees. But it should also involve innovative approaches to promoting openness.

It is essential to build awareness among Parliamentarians both of the importance generally of access to information and of the need to be open themselves. This will not only directly promote openness, but also enhance the ability of Parliamentarians to play an active and effective oversight role.

The Internet is hugely important in ensuring openness within Parliament. It is not only important that a wide range of parliamentary materials goes online, but also that they do so as quickly as possible. In Scotland, for example, material is usually available within three to four days at the latest. Material to be placed online should include virtually all documents that are not confidential and, specifically, full records of parliamentary and committee discussions (subject to the closure of these meetings in exceptional circumstances, see below), a record of question period, voting records, reports, ownership declarations by Parliamentarians, workplans, working committees, timetables and so on.

Media access to Parliament is also of the greatest importance. Parliamentary sessions and committee meetings should be open to the media, including the broadcast media. In addition, active efforts should be made to promote greater and smoother interaction between the media and Parliament. Facilities should be provided in or near Parliament for the media, so that they have the support they need to report effectively. Many Parliaments have special committees, such as Nigeria's Media and Public Affairs Committee, to promote good relations with the media. In India, Parliament conducts a 10-day special media interaction each year, where special efforts are made to promote two-way flows of information and better understanding between Parliament and the media. These allow for more profound interaction than one might expect during a press conference. Media efforts should not be restricted to outlets based in the capital; efforts should be made to promote access for the local media as well.

A number of institutional mechanisms exist in most Parliaments to promote openness. These include things such as parliamentary immunities, although it may be noted that these are normally restricted to statements made in Parliament, so that Parliamentarians may be somewhat more careful outside of that context. Parliamentarians are normally subject to certain reporting requirements, for example of their assets and, in general, these documents are public, although parts of them may not be. In some jurisdictions, these disclosure obligations extend to parliamentary assistants. Codes of conduct are in place in many countries, along with Ethics Committees to police them. These codes may themselves include reference to openness obligations.

Parliamentary question periods are a very important means of promoting open governance. These periods should be televised, and reports should be provided on the Internet as soon as possible. Responses to written questions should be complete, relevant and accurate. Parliamentarians should work with the media in formulating their questions, so that often, these questions will be prompted by the media. It may be noted that in many jurisdictions, whereas questions formerly came largely from the opposition, majority party Parliamentarians are now increasingly asking questions. This is

certainly a trend that should be encouraged. The practice of asking live questions in Parliament is also an important openness mechanism.

National Parliamentarians should make an effort to ensure a flow of information to their constituents in various ways. In India, for example, national Parliamentarians may be Members of provincial or state-level committees, proving an institutional link which may also be used for informational purposes. In South Africa, an innovative approach has been put in place whereby the upper House of Parliament, the National Council of Provinces, spends two weeks a year holding sessions in different parts of the country. There is a media component to these travels, as well as open question periods where anyone can ask any question they like.

It is now widely recognized that committees should, like Parliament itself, be open to the public and to the media. Although concern has sometimes been voiced that this will undermine frank and open debate in committees, the imperative for openness is simply too important to allow these meetings to be closed. Furthermore, the experience of the increasingly large number of countries that do have open committee meetings suggests that this concern is overrated and that business proceeds largely as normal, even where meetings are open to the public. Furthermore, committee Chairs can play a role in ensuring that media access does not undermine proceedings and, in particular, that committee Members do not play up to the media.

Committee openness should extend to the evidence presented to committees. Oral evidence should be recorded and be reflected in committee reports. Any votes should also be recorded and made public. Committees should take proactive measures to promote public awareness of their work. This should include cultivating good media relations, as well as making an effort to present their work in forms that are accessible to the public at large.

At the same time, there may sometimes be legitimate reasons for closing committees; for example to protect privacy or to avoid premature disclosure of financial plans. In these cases, there should be a specific procedure for closing meetings, which should itself be open. The meeting should then be closed, but only for as long as is necessary to deal with the particular business that forms the basis for the closure. In most countries, cabinet meetings remain closed. However, press briefings should be held after these meetings to ensure that the public are informed about any important developments.

Record Management

It is clear that an effective access to information system depends on good record management; if public bodies cannot find the information being sought, or have to spend excessive amounts of time locating it, the system will fail to deliver the desired results. Record management also has implications for costs, whether they are borne by the requester or the public body in question, as time spent searching has to be paid for.

However, the importance of effective record management goes well beyond the issue of access to information. It is no exaggeration to say that effective management of information is at the heart of good governance and the ability of the government to do its business efficiently.

Many countries include record management systems as part of their access to information laws. These systems normally provide for the development of central minimum record management standards. In Scotland, for example, the access to information law provides for the development of such standards, and the resulting code of practice is an extremely detailed document. It was developed in close consultation with public authorities both to ensure that it is well adapted to their operational circumstances and to promote buy-in from officials, essential if the system is to work in practice. It was laid before Parliament before being put into operation.

Codes of practice for record management address a number of different issues. These include the keeping and management, as well as the destruction, of records. They should also address questions relating to the transfer of records to a central archive, once they are no longer needed by the public body in question. Generally, these codes do not prescribe precise rules for the management of specific records; rather, they set out the goals and standards to which the particular record management strategy of each public body should conform. This normally also includes a section on training, dealing with the characteristics that training strategies should contain. Parliament, like all public bodies, is responsible for its own particular record management strategy.

In many countries, a central agency is responsible for dealing with this issue. For example, in South Africa there is a State Information Technology Agency with a mandate to provide guidance and assistance in this sphere. There is also, as in many countries, a central office for parliamentary records.

Ideally, any system for record management should provide for the ratcheting up of standards over time. In many countries, records are maintained in varying states and it is not realistic to expect public bodies to completely transform record management in a short period of time. Instead, the system should be designed to introduce reforms gradually, but at the most rapid realistic pace, so that, over time, record management can be brought up to modern standards.

Codes of practice can achieve this by being continually revised to introduce ever more stringent record management standards. In British Columbia, for example, the three-year rolling Service Plans that have to be developed by all government departments include a record management component. Individual ministries are required to outline their goals for the next three-year period in these Plans, including in the area of record management. This also allows for standards to be continuously improved.

Many public bodies will require assistance in putting in place effective record management strategies. The independent administrative body can play a role here, providing advice and capacity building assistance. In Scotland, for example, this is one of the functions of the Information Commissioner. International assistance within the Commonwealth can also help in this area. The idea of a Commonwealth model code of practice for record management has been mooted and could provide valuable guidance to many countries.

Technology is clearly very relevant to effective record management. Indeed, it has been suggested that technology is breaking down the differences between the developed and developing countries as the latter countries can use technology to leapfrog up to the best existing standards. Electronic systems for storing and managing information present enormous opportunities, not only in terms of storage capacity but also in terms of moving information around, including filing it. It takes literally seconds to transfer hundreds of files to a new electronic location, compared to potentially hours to do this physically. At the same time, care needs to be taken to ensure appropriate reliance on electronic storage systems. For example, over time, storage devices can deteriorate and there are issues relating to duplication and identification of final documents.

Promotional Measures

An access to information law does not implement itself. In addition to measures to address the culture of secrecy, detailed above, a wide range of promotional measures are needed to ensure that the public are aware of their rights, that the system is being used and implemented properly, and that the standards being applied promote the goal of maximum disclosure.

It is of the greatest importance to the success of a freedom of information system that the public are broadly aware of their rights under the legislation, as well as how to exercise them. If not, the system will not be used and the whole exercise will fail to deliver openness. In some countries, the public are actually hostile to openness for various reasons. In Fiji, for example, it has been argued the public may be concerned that excessive openness could revive ethnic tensions. Public awareness campaigns need to address any such concerns.

A number of mechanisms can be used to ensure that this goal is achieved. From a legislative perspective, the process for making requests needs to be practical and accessible. Forms for making information requests should not be unduly complicated or time consuming to complete. Requesters should be able to make requests both via electronic systems and orally. A request for information, even if not formally presented as a request under the access law, should automatically be accorded the benefits of such a request.

The specific means used for informing the public about their right to access information will vary from country to country. However, a number of systems should be in place to achieve this. The law should give the administrative body responsible for implementation a role here, including in relation to public education campaigns and providing individual advice and assistance to members of the public. In South Africa, for example, the Human Rights Commission has a broad mandate in this area, including an obligation to compile a guide on how to use the access law, to develop and conduct public education campaigns and to provide advice to individuals.

Special information officers appointed by public bodies can also play a promotional role, ensuring that their departments are putting in place effective practices for routine disclosure, processing requests, record management and so on. They can also help ensure that their departments undertake effective public campaigns directed at the specific audiences they may serve. For example, a Ministry of Health may want to target people living with HIV/AIDs while a Ministry of Natural Resources should ensure that any people that are affected by resource extraction projects are aware of their information rights.

Efforts should be made to ensure that awareness efforts are not restricted to the capital or the cities, but reach the whole population. In South Africa, each department with offices in the provinces is required to have an information desk at these offices. These offices could also play a role in publicizing the right locally. Parliamentarians should play an active role in awareness-raising among their constituents, ensuring that they reach a wide audience. These efforts should also target different groups in society, ensuring that traditionally marginalized groups are not excluded. Special efforts should be made to ensure that children and minorities are targeted, along with women, who have been shown to play a particularly significant role in the family and in developmental generally.

Freedom of information issues should be built into the service plans of public bodies so that it is integrated into their regular policy and implementation approaches. This should include public education, as well as the range of issues discussed above.

The roles noted above – for the administrative body, for information officers and for public bodies themselves – can be built directly into the access to information law, making it a legal obligation rather than simply a policy goal. The administrative body could be given a role in ensuring that public bodies take their responsibilities in this area, as in other areas, seriously, for example by monitoring and reporting on their efforts.

In addition to these official players, a range of other actors can and should play a role here. The media is obviously in a key position to publicize the right and also to monitor and report on implementation. Community broadcasters, as well as mainstream broadcasters, can play a particularly important role here. The media is also one of the significant user groups of access to information legislation in many countries, and they can play a role in targeting requests to promote progressive interpretation of the law.

NGOs and civil society generally can also play a key role, not just in public education, but also in other ways. NGOs can play various roles, including monitoring, using the legislation, appealing refusals of access before the administrative body and the courts, providing advice to individuals wishing to use the law, advocacy for the legislation in the first place and for ongoing reform over time, and so on.

Other means of promoting awareness of the right of access should also be considered. Street theatre and mobile film units have proved effective in some countries. Mainstreaming access to information into civic education classes at schools and universities should also be looked at.

Programmatic Ideas

The Study Group discussed a number of concrete areas for future co-operation and assistance involving Parliaments and their Members, as well as other actors from the international community, including the Commonwealth Parliamentary Association, the World Bank Institute and NGOs.

Technical assistance on a range of issues – including training public officials, addressing the issue of laws that are inconsistent with the right to access information and improving record management systems – could all contribute to better implementation of access to information laws. The development of public educational materials and strategies for public awareness-raising would also be very useful. It was recognized that small states, as well as states in transition, would particularly benefit from this assistance.

One specific idea, which would have a number of objectives, would be regional seminars on access to information. Such seminars could be held, for example, in the Caribbean and/or the Pacific regions. Bringing together decision-makers and NGOs from these regions, as well as international experts, the seminars would highlight the need to adopt access to information laws, promote better understanding of best practices in this regard and allow for sharing of regional experiences with openness.

Another suggestion was the idea of publishing comparative studies on Commonwealth practices and experiences regarding key thematic access to information issues. These might include exceptions, addressing the culture of secrecy, record management systems, training approaches, processing of requests, appeals systems and so on.

The Study Group also supported the idea of the development of a Commonwealth model code of practice for record management to assist countries wishing to reform their current information systems. Members of the Study Group made a personal commitment to disseminate the report widely among their fellow Parliamentarians and other interested stakeholders in their respective countries.

Appendix One

Commonwealth Freedom of Information Principles

Adopted by the Commonwealth Law Ministers Meeting, Trinidad and Tobago, 1999

Commonwealth Law Ministers recalled that at their Meeting in Barbados in 1980 they emphasised that “public participation in the democratic and governmental process was at its most meaningful when citizens had adequate access to official information”.

Ministers noted that since that time a number of Commonwealth countries have enacted freedom of information legislation establishing a public right of access to government information. Their experience has demonstrated that these laws enhance the effectiveness of government. Other Commonwealth countries are preparing legislation drawing on this rich practical experience.

During the 1990s the Commonwealth, guided by its fundamental political values enshrined in the 1991 Harare Commonwealth Declaration, has sought to promote democracy, the rule of law, just and honest government and fundamental human rights. In consolidating the achievements of the past decade the Commonwealth seeks to focus its efforts on strengthening the processes of open and accountable government together with the promotion of sustainable development.

The 1990s has been a decade of democratisation with a number of countries, many within the Commonwealth, making the transition from one party and authoritarian regimes to elected representative governments.

The new millennium promises to be an era for transparency and accountability on the part of government and all sectors of society concerned with public life. These trends will be further stimulated by the growth of information technology and increased globalisation and interdependency of national economies.

Benefits of Freedom of Information

Freedom of information has many benefits. It facilitates public participation in public affairs by providing access to relevant information to the people who are then empowered to make informed choices and better exercise their democratic rights. It enhances the accountability of government, improves decision-making, provides better information to elected representatives, enhances government credibility with its citizens, and provides a powerful aid in the fight against corruption. It is also a key livelihood and development issue, especially in situations of poverty and powerlessness.

Commonwealth Freedom of Information Principles

Ministers formulated and adopted the following Principles

1. Member countries should be encouraged to regard freedom of information as a legal and enforceable right.
2. There should be a presumption in favour of disclosure and Governments should promote a culture of openness.

3. The right of access to information may be subject to limited exemptions but these should be narrowly drawn.
4. Governments should maintain and preserve records.
5. In principle, decisions to refuse access to records and information should be subject to independent review.

The Role of the Commonwealth

Ministers recommend that the Commonwealth Secretariat takes steps to promote these principles and to report to Law Ministers about the progress achieved at their next Meeting. They also asked that the Secretariat, subject to the availability of resources, facilitate and assist governments in promoting these principles through technical and other assistance including measures to promote the sharing of experience between member countries and the involvement of civil society in this process.

Ministers encouraged Commonwealth associations and organisations to consider ways in which they can contribute to the process of promoting the right to know.

Appendix Two

Declaration of Principles on Freedom of Expression in Africa

Adopted by the African Commission on Human and Peoples' Rights, 2002

Preamble

Reaffirming the fundamental importance of freedom of expression as an individual human right, as a cornerstone of democracy and as a means of ensuring respect for all human rights and freedoms;

Reaffirming Article 9 of the African Charter on Human and Peoples' Rights;

Desiring to promote the free flow of information and ideas and greater respect for freedom of expression;

Convinced that respect for freedom of expression, as well as the right of access to information held by public bodies and companies, will lead to greater public transparency and accountability, as well as to good governance and the strengthening of democracy;

Convinced that laws and customs that repress freedom of expression are a disservice to society;

Recalling that freedom of expression is a fundamental human right guaranteed by the African Charter on Human and Peoples' Rights, the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, as well as other international documents and national constitutions;

Considering the key role of the media and other means of communication in ensuring full respect for freedom of expression, in promoting the free flow of information and ideas, in assisting people to make informed decisions and in facilitating and strengthening democracy;

Aware of the particular importance of the broadcast media in Africa, given its capacity to reach a wide audience due to the comparatively low cost of receiving transmissions and its ability to overcome barriers of illiteracy;

Noting that oral traditions, which are rooted in African cultures, lend themselves particularly well to radio broadcasting;

Noting the important contribution that can be made to the realisation of the right to freedom of expression by new information and communication technologies;

Mindful of the evolving human rights and human development environment in Africa, especially in light of the adoption of the Protocol to the African Charter on Human and Peoples' Rights on the establishment of an African Court on Human and Peoples' Rights, the principles of the Constitutive Act of the African Union, 2000, as well as the significance of the human rights and good governance provisions in the New Partnership for Africa's Development (NEPAD); and

Recognising the need to ensure the right to freedom of expression in Africa, the African Commission on Human and Peoples' Rights declares that:

I

The Guarantee of Freedom of Expression

1. Freedom of expression and information, including the right to seek, receive and impart information and ideas, either orally, in writing or in print, in the form of art, or through any other form of communication, including across frontiers, is a fundamental and inalienable human right and an indispensable component of democracy.
2. Everyone shall have an equal opportunity to exercise the right to freedom of expression and to access information without discrimination.

II

Interference with Freedom of Expression

1. No one shall be subject to arbitrary interference with his or her freedom of expression.
2. Any restrictions on freedom of expression shall be provided by law, serve a legitimate interest and be necessary in a democratic society.

III

Diversity

Freedom of expression imposes an obligation on the authorities to take positive measures to promote diversity, which include among other things:

- availability and promotion of a range of information and ideas to the public;
- pluralistic access to the media and other means of communication, including by vulnerable or marginalised groups, such as women, children and refugees, as well as linguistic and cultural groups;
- the promotion and protection of African voices, including through media in local languages; and
- the promotion of the use of local languages in public affairs, including in the courts.

IV

Freedom of Information

1. Public bodies hold information not for themselves but as custodians of the public good and everyone has a right to access this information, subject only to clearly defined rules established by law.
2. The right to information shall be guaranteed by law in accordance with the following principles:
 - everyone has the right to access information held by public bodies;
 - everyone has the right to access information held by private bodies which is necessary for the exercise or protection of any right;
 - any refusal to disclose information shall be subject to appeal to an independent body and/or the courts;
 - public bodies shall be required, even in the absence of a request, actively to publish important information of significant public interest;
 - no one shall be subject to any sanction for releasing in good faith information on wrongdoing, or that which would disclose a serious threat to health, safety or the

environment save where the imposition of sanctions serves a legitimate interest and is necessary in a democratic society; and

- secrecy laws shall be amended as necessary to comply with freedom of information principles.
- 3. Everyone has the right to access and update or otherwise correct their personal information, whether it is held by public or by private bodies.

V

Private Broadcasting

1. States shall encourage a diverse, independent private broadcasting sector. A State monopoly over broadcasting is not compatible with the right to freedom of expression.
2. The broadcast regulatory system shall encourage private and community broadcasting in accordance with the following principles:
 - there shall be equitable allocation of frequencies between private broadcasting uses, both commercial and community;
 - an independent regulatory body shall be responsible for issuing broadcasting licences and for ensuring observance of licence conditions;
 - licensing processes shall be fair and transparent, and shall seek to promote diversity in broadcasting; and
 - community broadcasting shall be promoted given its potential to broaden access by poor and rural communities to the airwaves.

VI

Public Broadcasting

State and government controlled broadcasters should be transformed into public service broadcasters, accountable to the public through the legislature rather than the government, in accordance with the following principles:

- public broadcasters should be governed by a board which is protected against interference, particularly of a political or economic nature;
- the editorial independence of public service broadcasters should be guaranteed;
- public broadcasters should be adequately funded in a manner that protects them from arbitrary interference with their budgets;
- public broadcasters should strive to ensure that their transmission system covers the whole territory of the country; and
- the public service ambit of public broadcasters should be clearly defined and include an obligation to ensure that the public receive adequate, politically balanced information, particularly during election periods.

VII

Regulatory Bodies for Broadcast and Telecommunications

1. Any public authority that exercises powers in the areas of broadcast or telecommunications regulation should be independent and adequately protected against interference, particularly of a political or economic nature.
2. The appointments process for members of a regulatory body should be open and transparent, involve the participation of civil society, and shall not be controlled by any particular political party.

3. Any public authority that exercises powers in the areas of broadcast or telecommunications should be formally accountable to the public through a multi-party body.

VIII

Print Media

1. Any registration system for the print media shall not impose substantive restrictions on the right to freedom of expression.
2. Any print media published by a public authority should be protected adequately against undue political interference.
3. Efforts should be made to increase the scope of circulation of the print media, particularly to rural communities.
4. Media owners and media professionals shall be encouraged to reach agreements to guarantee editorial independence and to prevent commercial considerations from unduly influencing media content.

IX

Complaints

1. A public complaints system for print or broadcasting should be available in accordance with the following principles:
 - complaints shall be determined in accordance with established rules and codes of conduct agreed between all stakeholders; and
 - the complaints system shall be widely accessible.
2. Any regulatory body established to hear complaints about media content, including media councils, shall be protected against political, economic or any other undue interference. Its powers shall be administrative in nature and it shall not seek to usurp the role of the courts.
3. Effective self-regulation is the best system for promoting high standards in the media.

X

Promoting Professionalism

1. Media practitioners shall be free to organise themselves into unions and associations.
2. The right to express oneself through the media by practising journalism shall not be subject to undue legal restrictions.

XI

Attacks on Media Practitioners

1. Attacks such as the murder, kidnapping, intimidation of and threats to media practitioners and others exercising their right to freedom of expression, as well as the material destruction of communications facilities, undermines independent journalism, freedom of expression and the free flow of information to the public.
2. States are under an obligation to take effective measures to prevent such attacks and, when they do occur, to investigate them, to punish perpetrators and to ensure that victims have access to effective remedies.
3. In times of conflict, States shall respect the status of media practitioners as non-combatants.

XII

Protecting Reputations

1. States should ensure that their laws relating to defamation conform to the following standards:
 - no one shall be found liable for true statements, opinions or statements regarding public figures which it was reasonable to make in the circumstances;
 - public figures shall be required to tolerate a greater degree of criticism; and
 - sanctions shall never be so severe as to inhibit the right to freedom of expression, including by others.
2. Privacy laws shall not inhibit the dissemination of information of public interest.

XIII

Criminal Measures

1. States shall review all criminal restrictions on content to ensure that they serve a legitimate interest in a democratic society.
2. Freedom of expression should not be restricted on public order or national security grounds unless there is a real risk of harm to a legitimate interest and there is a close causal link between the risk of harm and the expression.

XIV

Economic Measures

1. States shall promote a general economic environment in which the media can flourish.
2. States shall not use their power over the placement of public advertising as a means to interfere with media content.
3. States should adopt effective measures to avoid undue concentration of media ownership, although such measures shall not be so stringent that they inhibit the development of the media sector as a whole.

XV

Protection of Sources and other journalistic material

Media practitioners shall not be required to reveal confidential sources of information or to disclose other material held for journalistic purposes except in accordance with the following principles:

- the identity of the source is necessary for the investigation or prosecution of a serious crime, or the defence of a person accused of a criminal offence;
- the information or similar information leading to the same result cannot be obtained elsewhere;
- the public interest in disclosure outweighs the harm to freedom of expression; and
- disclosure has been ordered by a court, after a full hearing.

XVI

Implementation

States Parties to the African Charter on Human and Peoples' Rights should make every effort to give practical effect to these principles.

Appendix Three

Inter-American Declaration of Principles on Freedom of Expression

Adopted by the Inter-American Commission on Human Rights, Office of the Special Rapporteur for Freedom of Expression, 2000

PREAMBLE

REAFFIRMING the need to ensure respect for and full enjoyment of individual freedoms and fundamental rights of human beings under the rule of law;

AWARE that consolidation and development of democracy depends upon the existence of freedom of expression;

PERSUADED that the right to freedom of expression is essential for the development of knowledge and understanding among peoples, that will lead to a true tolerance and cooperation among the nations of the hemisphere;

CONVINCED that any obstacle to the free discussion of ideas and opinions limits freedom of expression and the effective development of a democratic process;

CONVINCED that guaranteeing the right to access to information held by the State will ensure greater transparency and accountability of governmental activities and the strengthening of democratic institutions;

RECALLING that freedom of expression is a fundamental right recognized in the American Declaration on the Rights and Duties of Man and the American Convention on Human Rights, the Universal Declaration of Human Rights, Resolution 59 (1) of the United Nations General Assembly, Resolution 104 adopted by the General Conference of the United Nations Educational, Scientific and Cultural Organization (UNESCO), the International Covenant on Civil and Political Rights, as well as in other international documents and national constitutions;

RECOGNIZING that the member states of the Organization of American States are subject to the legal framework established by the principles of Article 13 of the American Convention on Human Rights;

REAFFIRMING Article 13 of the American Convention on Human Rights, which establishes that the right to freedom of expression comprises the freedom to seek, receive and impart information and ideas, regardless of borders and by any means of communication;

CONSIDERING the importance of freedom of expression for the development and protection of human rights, the important role assigned to it by the Inter-American Commission on Human Rights and the full support given to the establishment of the Office of the Special Rapporteur for Freedom of Expression as a fundamental instrument for the protection of this right in the hemisphere at the Summit of the Americas in Santiago, Chile;

RECOGNIZING that freedom of the press is essential for the full and effective exercise of freedom of expression and an indispensable instrument for the functioning of representative democracy, through which individuals exercise their right to receive, impart and seek information;

REAFFIRMING that the principles of the Declaration of Chapultepec constitute a basic document that contemplates the protection and defence of freedom of expression, freedom and independence of the press and the right to information;

CONSIDERING that the right to freedom of expression is not a concession by the States but a fundamental right;

RECOGNIZING the need to protect freedom of expression effectively in the Americas, the Inter-American Commission on Human Rights, in support of the Special Rapporteur for Freedom of Expression, adopts the following Declaration of Principles:

PRINCIPLES

1. Freedom of expression in all its forms and manifestations is a fundamental and inalienable right of all individuals. Additionally, it is an indispensable requirement for the very existence of a democratic society.
2. Every person has the right to seek, receive and impart information and opinions freely under terms set forth in Article 13 of the American Convention on Human Rights. All people should be afforded equal opportunities to receive, seek and impart information by any means of communication without any discrimination for reasons of race, color, sex, language, religion, political or other opinions, national or social origin, economic status, birth or any other social condition.
3. Every person has the right to access to information about himself or herself or his/her assets expeditiously and not onerously, whether it be contained in databases or public or private registries, and if necessary to update it, correct it and/or amend it.
4. Access to information held by the state is a fundamental right of every individual. States have the obligation to guarantee the full exercise of this right. This principle allows only exceptional limitations that must be previously established by law in case of a real and imminent danger that threatens national security in democratic societies.
5. Prior censorship, direct or indirect interference in or pressure exerted upon any expression, opinion or information transmitted through any means of oral, written, artistic, visual or electronic communication must be prohibited by law. Restrictions to the free circulation of ideas and opinions, as well as the arbitrary imposition of information and the imposition of obstacles to the free flow of information violate the right to freedom of expression.
6. Every person has the right to communicate his/her views by any means and in any form. Compulsory membership or the requirements of a university degree for the practice of journalism constitute unlawful restrictions of freedom of expression. Journalistic activities must be guided by ethical conduct, which should in no case be imposed by the State.
7. Prior conditioning of expressions, such as truthfulness, timeliness or impartiality is incompatible with the right to freedom of expression recognized in international instruments.

8. Every social communicator has the right to keep his/her source of information, notes, personal and professional archives confidential.
9. The murder, kidnapping, intimidation of and/or threats to social communicators, as well as the material destruction of communications media violate the fundamental rights of individuals and strongly restrict freedom of expression. It is the duty of the state to prevent and investigate such occurrences, to punish their perpetrators and to ensure that victims receive due compensation.
10. Privacy laws should not inhibit or restrict investigation and dissemination of information of public interest. The protection of a person's reputation should only be guaranteed through civil sanctions in those cases in which the person offended is a public official, a public person or a private person who has voluntarily become involved in matters of public interest. In addition, in these cases, it must be proven that in disseminating the news, the social communicator had the specific intent to inflict harm, was fully aware that false news was disseminated, or acted with gross negligence in efforts to determine the truth or falsity of such news.
11. Public officials are subject to greater scrutiny by society. Laws that penalize offensive expressions directed at public officials, generally known as "desacato laws," restrict freedom of expression and the right to information.
12. Monopolies or oligopolies in the ownership and control of the communication media must be subject to anti-trust laws, as they conspire against democracy by limiting the plurality and diversity which ensure the full exercise of people's right to information. In no case should such laws apply exclusively to the media. The concession of radio and television broadcast frequencies should take into account democratic criteria that provide equal opportunity of access for all individuals.
13. The exercise of power and the use of public funds by the state, the granting of customs duty privileges, the arbitrary and discriminatory placement of official advertising and government loans; the concession of radio and television broadcast frequencies, among others, with the intent to put pressure on and punish or reward and provide privileges to social communicators and communications media because of the opinions they express threaten freedom of expression, and must be explicitly prohibited by law. The means of communication have the right to carry out their role in an independent manner. Direct or indirect pressures exerted upon journalists or other social communicators to stifle the dissemination of information are incompatible with freedom of expression.

Appendix Four

International Mechanisms for Promoting Freedom of Expression

Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media and the Organization of American States (OAS) Special Rapporteur on Freedom of Expression, 2004

Having discussed these issues in London and virtually with the assistance of ARTICLE 19, Global Campaign for Free Expression;

Recalling and reaffirming their Joint Declarations of 26 November 1999, 30 November 2000, 20 November 2001, 10 December 2002 and 18 December 2003;

Noting the growing recognition of the key right to access information held by public authorities (sometimes referred to as freedom of information), including in authoritative international statements and declarations;

Applauding the fact that a large number of countries, in all regions of the world, have adopted laws recognising a right to access information and that the number of such countries is growing steadily;

Recognising the fundamental importance of access to information to democratic participation, to holding governments accountable and to controlling corruption, as well as to personal dignity and business efficiency;

Condemning attempts by some governments to limit access to information either by refusing to adopt access to information laws or by adopting laws which fail to conform to international standards in this area;

Stressing the need for informational ‘safety valves’ such as protection of whistleblowers and protection for the media and other actors who disclose information in the public interest;

Welcoming the commitment of the African Commission on Human and Peoples’ Rights to adopt a regional mechanism to promote the right to freedom of expression and noting the need for specialised mechanisms to promote freedom of expression in every region of the world;

Adopt, on 6 December 2004, the following Declaration:

On Access to Information

- The right to access information held by public authorities is a fundamental human right which should be given effect at the national level through comprehensive legislation (for example Freedom of Information Acts) based on the principle of maximum disclosure, establishing a presumption that all information is accessible subject only to a narrow system of exceptions.

- Public authorities should be required to publish pro-actively, even in the absence of a request, a range of information of public interest. Systems should be put in place to increase, over time, the amount of information subject to such routine disclosure.
- Access to information is a citizens' right. As a result, the procedures for accessing information should be simple, rapid and free or low-cost.
- The right of access should be subject to a narrow, carefully tailored system of exceptions to protect overriding public and private interests, including privacy. Exceptions should apply only where there is a risk of substantial harm to the protected interest and where that harm is greater than the overall public interest in having access to the information. The burden should be on the public authority seeking to deny access to show that the information falls within the scope of the system of exceptions.
- Public authorities should be required to meet minimum record management standards. Systems should be put in place to promote higher standards over time.
- The access to information law should, to the extent of any inconsistency, prevail over other legislation.
- Those requesting information should have the possibility to appeal any refusals to disclose to an independent body with full powers to investigate and resolve such complaints.
- National authorities should take active steps to address the culture of secrecy that still prevails in many countries within the public sector. This should include provision for sanctions for those who wilfully obstruct access to information. Steps should also be taken to promote broad public awareness of the access to information law.
- Steps should be taken, including through the allocation of necessary resources and attention, to ensure effective implementation of access to information legislation.

On Secrecy Legislation

- Urgent steps should be taken to review and, as necessary, repeal or amend, legislation restricting access to information to bring it into line with international standards in this area, including as reflected in this Joint Declaration.
- Public authorities and their staff bear sole responsibility for protecting the confidentiality of legitimately secret information under their control. Other individuals, including journalists and civil society representatives, should never be subject to liability for publishing or further disseminating this information, regardless of whether or not it has been leaked to them, unless they committed fraud or another crime to obtain the information. Criminal law provisions that don't restrict liability for the dissemination of State secrets to those who are officially entitled to handle those secrets should be repealed or amended.
- Certain information may legitimately be secret on grounds of national security or protection of other overriding interests. However, secrecy laws should define national security precisely and indicate clearly the criteria which should be used in determining whether or not information can be declared secret, so as to prevent abuse of the label "secret" for purposes of preventing disclosure of information which is in the public interest. Secrecy laws should set out clearly

which officials are entitled to classify documents as secret and should also set overall limits on the length of time documents may remain secret. Such laws should be subject to public debate.

- “Whistleblowers” are individuals releasing confidential or secret information although they are under an official or other obligation to maintain confidentiality or secrecy. “Whistleblowers” releasing information on violations of the law, on wrongdoing by public bodies, on a serious threat to health, safety or the environment, or on a breach of human rights or humanitarian law should be protected against legal, administrative or employment-related sanctions if they act in “good faith”.

Ambeyi Ligabo

UN Special Rapporteur on Freedom of Opinion and Expression

Miklos Haraszti

OSCE Representative on Freedom of the Media

Eduardo Berton

OAS Special Rapporteur on Freedom of Expression

Appendix Five

Recommendation Rec(2002)2 of the Council of Europe Committee of Ministers to member states on access to official documents

Adopted by the Committee of Ministers, 2002

The Committee of Ministers, under the terms of Article 15.b of the Statute of the Council of Europe,

Considering that the aim of the Council of Europe is to achieve greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage;

Bearing in mind, in particular, Article 19 of the Universal Declaration of Human Rights, Articles 6, 8 and 10 of the European Convention on Human Rights and Fundamental Freedoms, the United Nations Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (adopted in Aarhus, Denmark, on 25 June 1998) and the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data of 28 January 1981 (ETS No. 108); the Declaration on the freedom of expression and information adopted on 29 April 1982; as well as Recommendation No. R (81) 19 on the access to information held by public authorities, Recommendation No. R (91) 10 on the communication to third parties of personal data held by public bodies; Recommendation No. R (97) 18 concerning the protection of personal data collected and processed for statistical purposes and Recommendation No. R (2000) 13 on a European policy on access to archives;

Considering the importance in a pluralistic, democratic society of transparency of public administration and of the ready availability of information on issues of public interest;

Considering that wide access to official documents, on a basis of equality and in accordance with clear rules:

- allows the public to have an adequate view of, and to form a critical opinion on, the state of the society in which they live and on the authorities that govern them, whilst encouraging informed participation by the public in matters of common interest;
- fosters the efficiency and effectiveness of administrations and helps maintain their integrity by avoiding the risk of corruption;
- contributes to affirming the legitimacy of administrations as public services and to strengthening the public's confidence in public authorities;

Considering therefore that the utmost endeavour should be made by member states to ensure availability to the public of information contained in official documents, subject to the protection of other rights and legitimate interests;

Stressing that the principles set out hereafter constitute a minimum standard, and that they should be understood without prejudice to those domestic laws and regulations which already recognise a wider right of access to official documents;

Considering that, whereas this instrument concentrates on requests by individuals for access to official documents, public authorities should commit themselves to conducting an active communication policy, with the aim of making available to the public any information which is deemed useful in a transparent democratic society,

Recommends the governments of member states to be guided in their law and practice by the principles set out in this recommendation.

I. Definitions

For the purposes of this recommendation:

"public authorities" shall mean:

- i. government and administration at national, regional or local level;
- ii. natural or legal persons insofar as they perform public functions or exercise administrative authority and as provided for by national law.

"official documents" shall mean all information recorded in any form, drawn up or received and held by public authorities and linked to any public or administrative function, with the exception of documents under preparation.

II. Scope

1. This recommendation concerns only official documents held by public authorities. However, member states should examine, in the light of their domestic law and practice, to what extent the principles of this recommendation could be applied to information held by legislative bodies and judicial authorities.

2. This recommendation does not affect the right of access or the limitations to access provided for in the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data.

III. General principle on access to official documents

Member states should guarantee the right of everyone to have access, on request, to official documents held by public authorities. This principle should apply without discrimination on any ground, including that of national origin.

IV. Possible limitations to access to official documents

1. Member states may limit the right of access to official documents. Limitations should be set down precisely in law, be necessary in a democratic society and be proportionate to the aim of protecting:

- i. national security, defence and international relations;
- ii. public safety;
- iii. the prevention, investigation and prosecution of criminal activities;

- iv. privacy and other legitimate private interests;
- v. commercial and other economic interests, be they private or public;
- vi. the equality of parties concerning court proceedings;
- vii. nature;
- viii. inspection, control and supervision by public authorities;
- ix. the economic, monetary and exchange rate policies of the state;
- x. the confidentiality of deliberations within or between public authorities during the internal preparation of a matter.

2. Access to a document may be refused if the disclosure of the information contained in the official document would or would be likely to harm any of the interests mentioned in paragraph 1, unless there is an overriding public interest in disclosure.

3. Member states should consider setting time limits beyond which the limitations mentioned in paragraph 1 would no longer apply.

V. Requests for access to official documents

1. An applicant for an official document should not be obliged to give reasons for having access to the official document.

2. Formalities for requests should be kept to a minimum.

VI. Processing of requests for access to official documents

1. A request for access to an official document should be dealt with by any public authority holding the document.

2. Requests for access to official documents should be dealt with on an equal basis.

3. A request for access to an official document should be dealt with promptly. The decision should be reached, communicated and executed within any time limit which may have been specified beforehand.

4. If the public authority does not hold the requested official document it should, wherever possible, refer the applicant to the competent public authority.

5. The public authority should help the applicant, as far as possible, to identify the requested official document, but the public authority is not under a duty to comply with the request if it is a document which cannot be identified.

6. A request for access to an official document may be refused if the request is manifestly unreasonable.

7. A public authority refusing access to an official document wholly or in part should give the reasons for the refusal.

VII. Forms of access to official documents

1. When access to an official document is granted, the public authority should allow inspection of the original or provide a copy of it, taking into account, as far as possible, the preference expressed by the applicant.
2. If a limitation applies to some of the information in an official document, the public authority should nevertheless grant access to the remainder of the information it contains. Any omissions should be clearly indicated. However, if the partial version of the document is misleading or meaningless, such access may be refused.
3. The public authority may give access to an official document by referring the applicant to easily accessible alternative sources.

VIII. Charges for access to official documents

1. Consultation of original official documents on the premises should, in principle, be free of charge.
2. A fee may be charged to the applicant for a copy of the official document, which should be reasonable and not exceed the actual costs incurred by the public authority.

IX. Review procedure

1. An applicant whose request for an official document has been refused, whether in part or in full, or dismissed, or has not been dealt with within the time limit mentioned in Principle VI.3 should have access to a review procedure before a court of law or another independent and impartial body established by law.
2. An applicant should always have access to an expeditious and inexpensive review procedure, involving either reconsideration by a public authority or review in accordance with paragraph 1 above.

X. Complementary measures

1. Member states should take the necessary measures to:
 - i. inform the public about its rights of access to official documents and how that right may be exercised;
 - ii. ensure that public officials are trained in their duties and obligations with respect to the implementation of this right;
 - iii. ensure that applicants can exercise their right.
2. To this end, public authorities should in particular:
 - i. manage their documents efficiently so that they are easily accessible;
 - ii. apply clear and established rules for the preservation and destruction of their documents;
 - iii. as far as possible, make available information on the matters or activities for which they are responsible, for example by drawing up lists or registers of the documents they hold.

XI. Information made public at the initiative of the public authorities

A public authority should, at its own initiative and where appropriate, take the necessary measures to make public information which it holds when the provision of such information is in the interest of promoting the transparency of public administration and efficiency within administrations or will encourage informed participation by the public in matters of public interest.

Appendix Six

Principles on Freedom of Information Legislation

Produced by ARTICLE 19, Global Campaign for Free Expression, 1999

PRINCIPLE 1. MAXIMUM DISCLOSURE

Freedom of information legislation should be guided by the principle of maximum disclosure

The principle of maximum disclosure establishes a presumption that all information held by public bodies should be subject to disclosure and that this presumption may be overcome only in very limited circumstances (see Principle 4). This principle encapsulates the basic rationale underlying the very concept of freedom of information and ideally it should be provided for in the Constitution to make it clear that access to official information is a basic right. The overriding goal of legislation should be to implement maximum disclosure in practice.

Public bodies have an obligation to disclose information and every member of the public has a corresponding right to receive information. Everyone present in the territory of the country should benefit from this right. The exercise of this right should not require individuals to demonstrate a specific interest in the information. Where a public authority seeks to deny access to information, it should bear the onus of justifying the refusal at each stage of the proceedings. In other words, the public authority must show that the information which it wishes to withhold comes within the scope of the limited regime of exceptions, as detailed below.

Definitions

Both ‘information’ and ‘public bodies’ should be defined broadly.

‘Information’ includes all records held by a public body, regardless of the form in which the information is stored (document, tape, electronic recording and so on), its source (whether it was produced by the public body or some other body) and the date of production. The legislation should also apply to records which have been classified, subjecting them to the same test as all other records.

For purposes of disclosure of information, the definition of ‘public body’ should focus on the type of service provided rather than on formal designations. To this end, it should include all branches and levels of government including local government, elected bodies, bodies which operate under a statutory mandate, nationalised industries and public corporations, non-departmental bodies or quangos (quasi non-governmental organisations), judicial bodies, and private bodies which carry out public functions (such as maintaining roads or operating rail lines). Private bodies themselves should also be included if they hold information whose disclosure is likely to diminish the risk of harm to key public interests, such as the environment and health. Inter-governmental organisations should also be subject to freedom of information regimes based on the principles set down in this document.

Destruction of records

To protect the integrity and availability of records, the law should provide that obstruction of access to, or the wilful destruction of records is a criminal offence. The law should also establish minimum standards regarding the maintenance and preservation of records by public bodies. Such bodies should be required to allocate sufficient resources and attention to ensuring that public record-keeping is adequate. In addition, to prevent any attempt to doctor or otherwise alter records, the obligation to disclose should apply to records themselves and not just the information they contain.

PRINCIPLE 2. OBLIGATION TO PUBLISH

Public bodies should be under an obligation to publish key information

Freedom of information implies not only that public bodies accede to requests for information but also that they publish and disseminate widely documents of significant public interest, subject only to reasonable limits based on resources and capacity. Which information should be published will depend on the public body concerned. The law should establish both a general obligation to publish and key categories of information that must be published.

Public bodies should, as a minimum, be under an obligation to publish the following categories of information:

- operational information about how the public body functions, including costs, objectives, audited accounts, standards, achievements and so on, particularly where the body provides direct services to the public;
- information on any requests, complaints or other direct actions which members of the public may take in relation to the public body;
- guidance on processes by which members of the public may provide input into major policy or legislative proposals;
- the types of information which the body holds and the form in which this information is held; and
- the content of any decision or policy affecting the public, along with reasons for the decision and background material of importance in framing the decision.

PRINCIPLE 3. PROMOTION OF OPEN GOVERNMENT

Public bodies must actively promote open government

Informing the public of their rights and promoting a culture of openness within government are essential if the goals of freedom of information legislation are to be realised. Indeed, experience in various countries shows that a recalcitrant civil service can undermine even the most progressive legislation. Promotional activities are, therefore, an essential component of a freedom of information regime. This is an area where the particular activities will vary from country to country, depending on factors such as the way the civil service is organised, key constraints to the free disclosure of information, literacy levels and the degree of awareness of the general public. The law should require that adequate resources and attention are devoted to the question of promoting the goals of the legislation.

Public Education

As a minimum, the law should make provision for public education and the dissemination of information regarding the right to access information, the scope of information which is available and the manner in which such rights may be exercised. In countries where newspaper distribution or literacy levels are low, the broadcast media are a particularly important vehicle for such dissemination and education. Creative alternatives, such as town meetings or mobile film units, should be explored. Ideally, such activities should be undertaken both by individual public bodies and a specially designated and adequately funded official body – either the one which reviews requests for information, or another body established specifically for this purpose.

Tackling the culture of official secrecy

The law should provide for a number of mechanisms to address the problem of a culture of secrecy within government. These should include a requirement that public bodies provide freedom of information training for their employees. Such training should address the importance and scope of freedom of information, procedural mechanisms for accessing information, how to maintain and access records efficiently, the scope of whistleblower protection, and what sort of information a body is required to publish.

The official body responsible for public education should also play a role in promoting openness within government. Initiatives might include incentives for public bodies that perform well, campaigns to address secrecy problems and communications campaigns encouraging bodies that are improving and criticising those which remain excessively secret. Another possibility is the production of an annual report to Parliament and/or Parliamentary bodies on remaining problems and achievements, which might also include measures taken to improve public access to information, any remaining constraints to the free flow of information which have been identified and measures to be taken in the year ahead.

Public bodies should be encouraged to adopt internal codes on access and openness.

PRINCIPLE 4. LIMITED SCOPE OF EXCEPTIONS

Exceptions should be clearly and narrowly drawn and subject to strict “harm” and “public interest” tests

All individual requests for information from public bodies should be met unless the public body can show that the information falls within the scope of the limited regime of exceptions. A refusal to disclose information is not justified unless the public authority can show that the information meets a strict three-part test.

The three-part test

- the information must relate to a legitimate aim listed in the law;
- disclosure must threaten to cause substantial harm to that aim; and
- the harm to the aim must be greater than the public interest in having the information.

No public bodies should be completely excluded from the ambit of the law, even if the majority of their functions fall within the zone of exceptions. This applies to all branches of government (that is, the executive, legislative and judicial branches) as well as to all functions of government (in-

cluding, for example, functions of security and defence bodies). Non-disclosure of information must be justified on a case-by-case basis.

Restrictions whose aim is to protect governments from embarrassment or the exposure of wrongdoing can never be justified.

Legitimate aims justifying exceptions

A complete list of the legitimate aims which may justify non-disclosure should be provided in the law. This list should include only interests which constitute legitimate grounds for refusing to disclose documents and should be limited to matters such as law enforcement, privacy, national security, commercial and other confidentiality, public or individual safety, and the effectiveness and integrity of government decision-making processes.

Exceptions should be narrowly drawn so as to avoid including material which does not harm the legitimate interest. They should be based on the content, rather than the type, of the document. To meet this standard exceptions should, where relevant, be time-limited. For example, the justification for classifying information on the basis of national security may well disappear after a specific national security threat subsides.

Refusals must meet a substantial harm test

It is not sufficient that information simply fall within the scope of a legitimate aim listed in the law. The public body must also show that the disclosure of the information would cause substantial harm to that legitimate aim. In some cases, disclosure may benefit as well as harm the aim. For example, the exposure of corruption in the military may at first sight appear to weaken national defence but actually, over time, help to eliminate the corruption and strengthen the armed forces. For non-disclosure to be legitimate in such cases, the net effect of disclosure must be to cause substantial harm to the aim.

Overriding public interest

Even if it can be shown that disclosure of the information would cause substantial harm to a legitimate aim, the information should still be disclosed if the benefits of disclosure outweigh the harm. For example, certain information may be private in nature but at the same time expose high-level corruption within government. The harm to the legitimate aim must be weighed against the public interest in having the information made public. Where the latter is greater, the law should provide for disclosure of the information.

PRINCIPLE 5. PROCESSES TO FACILITATE ACCESS

Requests for information should be processed rapidly and fairly and an independent review of any refusals should be available

A process for deciding upon requests for information should be specified at three different levels: within the public body; appeals to an independent administrative body; and appeals to the courts. Where necessary, provision should be made to ensure full access to information for certain groups,

for example those who cannot read or write, those who do not speak the language of the record, or those who suffer from disabilities such as blindness.

All public bodies should be required to establish open, accessible internal systems for ensuring the public's right to receive information. Generally, bodies should designate an individual who is responsible for processing such requests and for ensuring compliance with the law.

Public bodies should also be required to assist applicants whose requests relate to published information, or are unclear, excessively broad or otherwise in need of reformulation. On the other hand, public bodies should be able to refuse frivolous or vexatious requests. Public bodies should not have to provide individuals with information that is contained in a publication, but in such cases the body should direct the applicant to the published source.

The law should provide for strict time limits for the processing of requests and require that any refusals be accompanied by substantive written reasons.

Appeals

Wherever practical, provision should be made for an internal appeal to a designated higher authority within the public authority who can review the original decision.

In all cases, the law should provide for an individual right of appeal to an independent administrative body from a refusal by a public body to disclose information. This may be either an existing body, such as an Ombudsman or Human Rights Commission, or one specially established for this purpose. In either case, the body must meet certain standards and have certain powers. Its independence should be guaranteed, both formally and through the process by which the head and/or board is/are appointed.

Appointments should be made by representative bodies, such as an all-party parliamentary committee, and the process should be open and allow for public input, for example regarding nominations. Individuals appointed to such a body should be required to meet strict standards of professionalism, independence and competence, and be subject to strict conflict of interest rules.

The procedure by which the administrative body processes appeals over requests for information which have been refused should be designed to operate rapidly and cost as little as is reasonably possible. This ensures that all members of the public can access this procedure and that excessive delays do not undermine the whole purpose of requesting information in the first place.

The administrative body should be granted full powers to investigate any appeal, including the ability to compel witnesses and, importantly, to require the public body to provide it with any information or record for its consideration, in camera where necessary and justified.

Upon the conclusion of an investigation, the administrative body should have the power to dismiss the appeal, to require the public body to disclose the information, to adjust any charges levied by the public body, to fine public bodies for obstructive behaviour where warranted and/or to impose costs on public bodies in relation to the appeal.

The administrative body should also have the power to refer to the courts cases which disclose evidence of criminal obstruction of access to or wilful destruction of records.

Both the applicant and the public body should be able to appeal to the courts against decisions of the administrative body. Such appeals should include full power to review the case on its merits and not be limited to the question of whether the administrative body has acted reasonably. This will ensure that due attention is given to resolving difficult questions and that a consistent approach to freedom of expression issues is promoted.

PRINCIPLE 6. COSTS

Individuals should not be deterred from making requests for information by excessive costs

The cost of gaining access to information held by public bodies should not be so high as to deter potential applicants, given that the whole rationale behind freedom of information laws is to promote open access to information. It is well established that the long-term benefits of openness far exceed the costs. In any case, experience in a number of countries suggests that access costs are not an effective means of offsetting the costs of a freedom of information regime.

Differing systems have been employed around the world to ensure that costs do not act as a deterrent to requests for information. In some jurisdictions, a two-tier system has been used, involving flat fees for each request, along with graduated fees depending on the actual cost of retrieving and providing the information. The latter should be waived or significantly reduced for requests for personal information or for requests in the public interest (which should be presumed where the purpose of the request is connected with publication). In some jurisdictions, higher fees are levied on commercial requests as a means of subsidising public interest requests.

PRINCIPLE 7. OPEN MEETINGS

Meetings of public bodies should be open to the public

Freedom of information includes the public's right to know what the government is doing on its behalf and to participate in decision-making processes. Freedom of information legislation should therefore establish a presumption that all meetings of governing bodies are open to the public.

“Governing” in this context refers primarily to the exercise of decision-making powers, so bodies which merely proffer advice would not be covered. Political committees – meetings of members of the same political party – are not considered to be governing bodies.

On the other hand, meetings of elected bodies and their committees, planning and zoning boards, boards of public and educational authorities and public industrial development agencies would be included.

A “meeting” in this context refers primarily to a formal meeting, namely the official convening of a public body for the purpose of conducting public business. Factors that indicate that a meeting is formal are the requirement for a quorum and the applicability of formal procedural rules.

Notice of meetings is necessary if the public is to have a real opportunity to participate and the law should require that adequate notice of meetings is given sufficiently in advance to allow for attendance.

Meetings may be closed, but only in accordance with established procedures and where adequate reasons for closure exist. Any decision to close a meeting should itself be open to the public. The grounds for closure are broader than the list of exceptions to the rule of disclosure but are not unlimited. Reasons for closure might, in appropriate circumstances, include public health and safety, law enforcement or investigation, employee or personnel matters, privacy, commercial matters and national security.

PRINCIPLE 8. DISCLOSURE TAKES PRECEDENCE

Laws which are inconsistent with the principle of maximum disclosure should be amended or repealed

The law on freedom of information should require that other legislation be interpreted, as far as possible, in a manner consistent with its provisions. Where this is not possible, other legislation dealing with publicly-held information should be subject to the principles underlying the freedom of information legislation.

The regime of exceptions provided for in the freedom of information law should be comprehensive and other laws should not be permitted to extend it. In particular, secrecy laws should not make it illegal for officials to divulge information which they are required to disclose under the freedom of information law.

Over the longer term, a commitment should be made to bring all laws relating to information into line with the principles underpinning the freedom of information law.

In addition, officials should be protected from sanctions where they have, reasonably and in good faith, disclosed information pursuant to a freedom of information request, even if it subsequently transpires that the information is not subject to disclosure. Otherwise, the culture of secrecy which envelopes many governing bodies will be maintained as officials may be excessively cautious about requests for information, to avoid any personal risk.

PRINCIPLE 9. PROTECTION FOR WHISTLEBLOWERS

Individuals who release information on wrongdoing – whistleblowers – must be protected

Individuals should be protected from any legal, administrative or employment-related sanctions for releasing information on wrongdoing.

“Wrongdoing” in this context includes the commission of a criminal offence, failure to comply with a legal obligation, a miscarriage of justice, corruption or dishonesty, or serious maladministration regarding a public body. It also includes a serious threat to health, safety or the environment, whether linked to individual wrongdoing or not. Whistleblowers should benefit from protection as long as they acted in good faith and in the reasonable belief that the information was substantially true and disclosed evidence of wrongdoing. Such protection should apply even where disclosure would otherwise be in breach of a legal or employment requirement.

In some countries, protection for whistleblowers is conditional upon a requirement to release the information to certain individuals or oversight bodies. While this is generally appropriate, protection should also be available, where the public interest demands, in the context of disclosure to other individuals or even to the media.

The “public interest” in this context would include situations where the benefits of disclosure outweigh the harm, or where an alternative means of releasing the information is necessary to protect a key interest. This would apply, for example, in situations where whistleblowers need protection from retaliation, where the problem is unlikely to be resolved through formal mechanisms, where there is an exceptionally serious reason for releasing the information, such as an imminent threat to public health or safety, or where there is a risk that evidence of wrongdoing will otherwise be concealed or destroyed.

Appendix Seven

Recommendations for an Informed Democracy

Conclusions of a CPA Study Group on Parliament and the Media, held in partnership with the World Bank Institute and the Parliament of Western Australia, Perth, Western Australia, 2003

Freedom of the press should not be regarded simply as the freedom of journalists, editors or proprietors alone to report and comment. Rather, it should be regarded as the embodiment of the public's right to know and to participate in the free flow of information.

Recognizing this, the Commonwealth Parliamentary Association (CPA) Study Group on Parliament and the Media urges Commonwealth Parliaments to be exponents of the protection of the media as a necessary adjunct to democracy and good governance. An avowed goal of all Parliaments should be the establishment of a culture and practices, if necessary through legislation, that protect and facilitate the operation of the media based on the fundamental rights of freedom of speech, freedom of expression and the freedom of the press. Parliaments should seek to ensure the dissemination of information and a plurality of opinions without any intervention from the state and without censorship.

The Group, which has met in partnership with the World Bank Institute and the Parliament of Western Australia, acknowledges that the media are at the cutting edge of civic engagement. It therefore recommends the following reforms to remove legal and institutional obstacles and other measures to develop a fully informed society through an open and accountable Parliament and a free and responsible media.

The role of Parliament and the media in communicating parliamentary activities to citizens is essential in enfranchising the public, and the media provides a conduit through which public opinion is communicated to Members of Parliament.

(1) The Right to Know

(1.1) The public's right to know must be balanced against the individual's right to privacy, which must sometimes be sacrificed by public figures to the extent that their private lives impinge on their public roles. The responsible determination of the balance between the public's legitimate right to know and public curiosity is a matter for the media initially but for the public itself, and if necessary, ultimately for the independent judiciary.

(1.2) While it is clear that "the government's interest" and "the majority interest" are not synonymous with "the public interest", neither a more precise nor a justiciable definition of "the public interest" can or should be made as this must always be an evolving definition determined on the merits of each situation and contemporary standards. In the first instance, this determination must remain the duty of a responsible media which should use stringent tests to establish that a private matter does in fact impact upon a person's public position.

(1.3) When “the public interest” is claimed by government to be in conflict with the demand for secrecy in “the national interest”, the determination of what constitutes “the national interest” and when it should take precedence over “the public interest” should be assigned by law to the courts.

(2) Freedom of Expression

(2.1) Any restrictions on free expression should be justified only in the context of international obligations such as those contained in Article 19 of the United Nations’ Declaration on Human Rights, the African Charter on Human and Peoples’ Rights and Article 10 of the European Convention on Human Rights, and interpretations thereof by such institutions as, for example, the United Nations Human Rights Commission and the Inter-American Court of Human Rights.

(2.2) Accordingly, the media’s right to criticize and express opinion, as well as to report, must be guaranteed and no legislation should be passed which impinges on that right.

(2.3) Excessive or disproportionate levels of damages in legal actions have a chilling effect on free speech and should be discouraged.

(3) Regulation

(3.1) The Group notes the Council of Europe recommendation on broadcasting which says the rules and procedures of regulatory authorities should clearly affirm their independence and stipulate their need to be protected from political and economic interference, including by public authorities.

(3.2) The regulation of the media therefore should be left to independent bodies which are:

(3.2.i) Possibly government funded but which operate totally independently from the funder in the same way as the courts or electoral commissions are independent from government,

(3.2.ii) Composed of strong and independently minded people of integrity and sensitivity who are committed to the concept of the duty of the media to inform the public accurately and responsibly, and

(3.2.iii) Appointed through an independent and transparent process which ensures those selected are free of associations with any interest which might interfere with their ability to adjudicate fairly and impartially.

(3.3) Governments are free to make commercial decisions but should not misuse their financial power to seek to influence or intimidate the media.

(3.4) It is the responsibility of the media, not Parliament, to set and supervise their highest professional and ethical standards.

(3.5) Governments and Parliaments should not use examples of inaccurate reporting to legislate controls on the media. The media are held to account for their inaccuracies by the court of public opinion through loss of reputation and loss of market share or by courts of law.

(3.6) Infrastructure Regulation

Regulations on electronic networks and infrastructures based on technical capacity should not be used as a tool for any form of censorship. Regulations put in place at time when such capacity was

limited should be reviewed in light of recent technological advances which have greatly increased communications capacity.

(3.7) Broadcast Content Regulation

The regulation of broadcasting should be completely independent of commercial or politically partisan influences. Indicators of independence can be found in the standards agreed by this Group for the appointment of regulators, their funding and their operations.

(3.8) Internet Regulation

The Group called for greater international clarity and harmony in the regulation of and policies toward the Internet.

(4) Licensing

(4.1) Government should not use licensing of media organizations as a tool by government to influence or censor the media.

(4.2) Licensing authorities should not demand excessive financial guarantees or conditionalities from existing or prospective media owners.

(4.3) Governments should not licence individual journalists since licensing can be misused to impede the free flow of information.

(5) Ownership

(5.1) Owners of media outlets must recognize that ownership entails a commitment to inform which is at least equal to its need to earn a profit.

(5.2) Foreign investment in the media can be beneficial but should not jeopardize plurality of content, particularly local content.

(5.3) Local regulators should set appropriate levels of local content for both news and entertainment to balance the benefits of foreign investment with the need to preserve and develop the local community and culture.

(5.4) Cross-media ownership can have an adverse effect on the dissemination of a plurality of views, so local regulators should consider whether safeguards are appropriate.

(6) Contempt of Parliament

(6.1) As the democratic embodiment of the public's political views, each Parliament must respect the right of individuals and particularly the media to criticize its role, integrity and performance. It must properly react to such criticism with argument and through its own conduct rather than with punishment.

(6.2) Parliaments should repeal legislation, rescind Standing Orders and/or publicly abandon their traditional authority to punish the media and others for offending the dignity of Parliament simply by criticism of the institution or its Members.

(6.3) Inaccurate reporting by the media should not be considered as a contempt of Parliament. Contempt should be reserved for serious cases of interference with Parliament's ability to perform its functions.

(6.4) Where confidential parliamentary documents are leaked in breach of Standing Orders, the Group believes it is a matter for Parliament to deal with Members who commit the breach but not journalists who are recipients of the information. However, it noted that leaks would become less relevant if parliamentary procedures, especially committee proceedings, were more open to the media.

(7) Privilege and the Right of Reply

(7.1) Privilege belongs to Parliament, not to Members as individuals but as trustees of the people. This ancient parliamentary privilege, especially where there is no easy way to seek redress, places Members in a uniquely powerful position in society which they must use responsibly and with the utmost care to ensure the truth of any allegations made under the protection of privilege. The protection of privilege should be continued to enable Members to represent their constituents fully and openly without fear of being silenced or punished by legal action against the expression of that representation.

(7.2) The fair and accurate reporting by the media of parliamentary proceedings should be protected by law.

(7.3) If a Member, or a witness appearing in a parliamentary proceeding, under the protection of privilege, defames or makes allegedly false statements, either intentionally or unintentionally, about a person who is outside Parliament, that person should have the right to apply to the Parliament to have a reply placed on the public parliamentary record. The Study Group commended to other the Commonwealth of Australia's Senate Privilege Resolutions of 1988 (Resolution 5) for right of reply.

(7.4) In order to ensure that a reply is published in the parliamentary record as close as possible to the initial allegation, a request from a member of the public to rebut a statement made in Parliament about them should be referred to the relevant House's Privileges Committee which must rule on the matter fairly and expeditiously.

(7.5) The media should report the rebuttal if they have reported the original allegation.

(8) Parliamentary Access

(8.1) Parliaments should provide as a matter of administrative routine all necessary access and services to the media to facilitate their coverage of proceedings. Parliament should not use lack of resources as an excuse to limit media access and should use its best endeavours to provide the best facilities possible.

(8.2) Questions of eligibility for media access should be determined by the media itself. Parliaments should retain the right to suspend access for media representatives who violate Standing Orders or otherwise disrupt parliamentary proceedings.

(8.3) Parliaments should employ public relations officers to publicize their activities, especially to the media which do not cover Parliament, and education staff to run outreach programmes to stimulate interest in parliamentary democracy. Both services should operate in an apolitical way under guidelines set by the House.

(8.4) Parliaments should provide the media with as much information as possible. Attendance and voting records, registers of Members' interests and other similar documents should be made readily available. Members have an obligation to update their entries in the register of interests and registers should be kept in such a way as to give a clear and current picture of both a Member's full interests and changes to those interests.

(8.5) Parliaments should consider the extent to which disclosure of Members' interests should be applied to their families and, if so, how this should be done while protecting their families' individual rights to privacy.

(8.6) The development of professional and ethical standards for journalists is a matter for the media. Integral to this is the media's responsibility to ensure that a journalist's private interests do not influence reporting.

(8.7) To assist in the information flow, Parliaments should publish as much of their material as possible on online.

(8.8) Electronic media in Parliament

(8.8.i) Given the importance of broadcast and other electronic access to the proceedings of Parliament both in Chambers and committees, Parliament should either provide an uninterrupted feed or access for broadcasters to originate their own feed, if appropriate on a pool basis. Guidelines for electronic coverage should be as flexible as possible.

(8.8.ii) Guidelines for electronic coverage should ordinarily be put in place in consultation with broadcasters. Terms of availability should not be discriminatory between different media outlets and access to such feeds should not be used for censorship or sanctioning.

(8.8.iii) Parliaments should be encouraged to provide live coverage of their proceedings on a dedicated channel and/or online.

(8.9) Access to Committees

Committee meetings should be open to the public except in cases where it is determined in public that it is necessary to hold parts of a committee's proceedings in private. The Group notes that this is the practice, for example, in South Africa and commends this to other Parliaments.

(9) Archaic Legislation and Standing Orders Affecting Free Speech

(9.1) The Study Group recognizes that the role of Parliament is to facilitate the free flow of information and it looks to international standards applied in conventions, treaties, charters and covenants on human, civil and political rights.

(9.2) In light of the above international agreements, criminal laws inhibiting free speech, such as incitement to disaffection, treason felony, criminal libel (including defamatory, seditious, blasphemous and obscene libel), scandalizing the courts, "insult" laws and laws against injuring the economic interests of the state should be revoked.

(9.3) Legislation or Standing Orders which deal with insulting or offending the dignity of Parliament or Parliamentarians should be repealed.

(9.4) Prohibitions against note-taking in parliamentary galleries should be lifted except when it can be shown that it genuinely disrupts the proceedings of the House.

(10) Conclusion

The Group acknowledges that its recommendations constitute a significant body of work that no Parliament or Legislature will be able to undertake all at once and that some recommendations may not be immediately appropriate for all jurisdictions due to constitutional, legal, procedural and cultural differences. But the Group believes its recommendations offer Parliaments and Legislatures a range of ideas to stimulate consideration of ways to improve their relations with their media and the flow of information to their societies, other Parliaments and the world at large.

Appendix Eight

Recommendations for the Right to Information

Concluding recommendations of Open Sesame: Looking for the Right to Information in the Commonwealth, published by the Commonwealth Human Rights Initiative, 2003

Four common problems impede development and democracy in the Commonwealth: the inequality of power between government and citizen; the consequent lack of accountability and near impunity of politicians and public officials; corruption; and exclusion of the public from participating in decisions that affect their lives. Open governance and assured access to information offers the key to address these complex issues.

In this interconnected, speeding information age, the combination of technology and easy availability of know-how, coupled with guaranteed access to information, offers unprecedented opportunities for the radical overhaul of governance. Information must be harnessed to create short cuts to development and democracy. It must be shared equitably and managed to the best advantage of all members of society. The means are available, but sadly the will is often not. It is an indictment on the performance of the Commonwealth that so many member states continue to fail to live up to the democratic ideals that are reflected in the commitment to the right to information.

Good governance and democracy are the cornerstones of national and international politics. Autocrats that operate government like a closed shop will not long remain unchallenged. Zimbabwe and Pakistan are examples of the international community's unwillingness to tolerate governments that are not open to their people. Commitments to open government must be taken seriously by members of the Commonwealth if they want to be taken seriously themselves. Putting in place people-friendly access regimes is a way of sending a strong message of commitment to democracy and development to the global community. It is long overdue for all Commonwealth countries to dispense with secrecy and information-hoarding and reap the benefits of openness. Doing so might dismay autocrats, but it will be welcomed by democrats committed to building a more dynamic and prosperous society.

CHRI recommends -

The Commonwealth must:

- Call on member countries to introduce liberal access to information legislation. CHOGM 2003 should declare that the right to access information is central to democracy and development and should obligate themselves to adopting laws that are in conformity with international best practice by the next CHOGM at the latest.
- Assist member countries to put in place effective access to information regimes. Containing vibrant civil society organisations and some states with exemplary laws, the Commonwealth is well placed to assist members to design and implement effective regimes. For example, the Commonwealth Secretariat can facilitate cooperation with other member states and provide financial and intellectual resources to support the development of access regimes; its Human Rights Unit can provide training to government officials; and the Commonwealth Foundation can encourage public participation in the law-making process and build civil society capacity.

- Be a role model of open governance. Each of the agencies of the Official Commonwealth must put in place a clear policy on disclosure, have mechanisms that facilitate openness and must proactively disseminate information about their governance structure, norms and functioning. To implement previous commitments to partnerships between the official and unofficial Commonwealth, the Commonwealth must open up its ministerial meetings and CHOGMs, which currently remain so stubbornly inaccessible.
- Introduce a reporting mechanism to monitor Commonwealth commitments. Declarations of support and intent are not enough and a clear procedure for systematically monitoring the implementation of pledges is essential for accountability. The Commonwealth should require its member countries to report to each CHOGM on their implementation of Commonwealth commitments, including those on access to information regimes.

Member countries must:

- Introduce liberal access to information laws by no later than CHOGM 2005. These must include the minimum requirements listed below. As with all legislation, the law-making process must be open and individuals and civil society groups must be encouraged to participate to the fullest.
- Ensure that access to information is effectively implemented. This requires recognition of the fact that structural and attitudinal obstacles exist, and the will to overcome them.
- Report to each CHOGM on implementation of past Commonwealth commitments. This includes reporting on progress towards realising the right to access information, as well as other key commitments.
- Cooperate with the Commonwealth's efforts to assist members to operationalise open governance.
- Demonstrate their commitment to open governance by disseminating information about the structure, norms and functioning of public bodies. This requires proactive publication of information about, for example, the basic activities of government departments, their rules of operation and procedure, their decision-making criteria, performance indicators, points of public access and financial information including expenditure.

Civil Society must:

- Create public awareness of the value of a guaranteed right to information; act as a bridge between marginalised people and governments to ensure people's information needs are known; and engage with government towards creating the legal regime that best serves the people's interests.
- Monitor the use and implementation of access to information laws. This includes testing and extending the limits of accessibility; reporting upon the extent of secrecy, the availability of information and the need for further reform; and reminding governments of their obligation to ensure access to information.

Minimum standard for maximum disclosure

Access to information legislation must:

- Begin with a clear statement that establishes the rule of maximum disclosure and a strong presumption in favour of access;
- Contain definitions of information and bodies covered that are wide and inclusive, and include private corporations and non-government organisations where their activities affect people's rights;
- Strictly limit and narrowly define any restrictions on access to information. Any body denying access must provide reasons and prove that disclosure would cause serious harm and that denial is in the overall public interest;
- Override inconsistent and restrictive provisions in existing laws;
- Require governments to create and maintain records management systems that meet public needs;
- Include clear and uncomplicated procedures that ensure quick responses at affordable fees;
- Create powerful independent bodies that are mandated to review any refusal to disclose information, compel release, and monitor and promote implementation;
- Impose penalties and sanctions on those who wilfully obstruct access to information;
- Provide protection for individuals who, in good faith, provide information that reveals wrongdoing or mismanagement;
- Contain an obligation to routinely and proactively disseminate updates about structure, norms and functioning of public bodies including the documents they hold, their finances, activities and any opportunities for consultation;
- Contain provisions obligating the government to actively undertake training for government officials and public education about the right to access information.

Appendix Nine

Commonwealth Human Rights Initiative

Country Chart: Legal Protection of Right to Information

Reproduced from Open Sesame: Looking for the Right to Information in the Commonwealth, published by the Commonwealth Human Rights Initiative, 2003

Country	Constitution: Fundamental Rights	RTI Laws
Antigua and Barbuda	Article 12 includes the freedom to receive information and disseminate the information within the ambit of freedom of expression.	
Australia	There is no constitutional provision guaranteeing the right to information.	Australia has a federal Freedom of Information Act 1983, as well as separate freedom of informational legislation in most of its states and territories.
Bahamas	Article 23(1) includes the right to receive and impart ideas and information without interference within the right to freedom of expression.	
Bangladesh	Article 39 guarantees freedom of thought, conscience and speech, but there is no reference in the Constitution to the right to information.	
Barbados	Section 20(1) includes the freedom to receive and communicate ideas and information without interference as part of the right to freedom of expression.	
Belize	Section 12(1) includes the freedom to receive and communicate ideas and information without interference as part of the right to freedom of expression.	The Freedom of Information Act 1994 implements the constitutional right to information.
Botswana	Section 12 includes the freedom to receive and communicate ideas and information without interference as part of the right to freedom of expression.	
Brunei Darussalam	Brunei Darussalam is a monarchical state with no Constitution. There is therefore no constitutional guarantee of the right to information.	
Cameroon	The Constitution endorses the provisions of the Universal Declaration of Human Rights, the UN Charter and the African Charter on Human and People's Rights. As such, Article 19 of the	

	UDHR which recognises the right to receive and impart information as part of the right to freedom of expression applies.	
Canada	The constitution recognises the right to freedom of speech and expression, but there is no reference in it to the right to information.	Canada has a federal Access to Information Act 1983, as well as separate freedom of information legislation in all provinces and territories.
Cyprus	Article 19(2) includes the freedom to hold opinions and receive and impart information and ideas without interference by any public authority and regardless of frontiers, as part of the right to freedom of speech and expression.	
Dominica	Section 10 includes the freedom to receive and communicate ideas and information without interference as part of the right to freedom of expression.	
Fiji Islands	Article 30(1) includes the freedom to seek, receive and impart information and ideas as part of the right to freedom of expression. Article 174 explicitly requires that Parliament should enact a law to give members of the public access to official documents of the Government and its agencies, as soon as practicable after commencement of the Constitution.	
The Gambia	Article 25 guarantees a list of rights and freedoms, but there is no reference to the right to information.	
Ghana	Article 21(1)(f) explicitly recognises that all persons shall have the right to information, subject to such qualifications and laws as are necessary in a democratic society.	
Grenada	Article 10 includes the freedom to receive and communicate ideas and information without interference as part of the right to freedom of expression.	
Guyana	Article 146 includes the freedom to receive and communicate ideas and information without interference as part of the right to freedom of expression.	

India	Article 19 which upholds the right to freedom of speech and expression, has been interpreted by the Supreme Court of India to implicitly include the right to receive and impart information.	India's Freedom of Information Act was passed in December 2002 but has yet to come into force. To date, nine states also have separate legislation.
Jamaica	Article 22 includes the freedom to receive and impart ideas and information without interference as part of the freedom of expression.	Jamaica has an Access to Information Act which implements the constitutionally guaranteed right to information. It was passed in June 2002 and implementation has begun.
Kenya	Article 79 includes the freedom to receive and communicate ideas and information as part of the right to freedom of expression.	
Kiribati	Article 12 includes the freedom to receive and communicate ideas and information without interference as part of the right to freedom of expression.	
Lesotho	Article 14 includes the right to receive and communicate information and ideas without interference as part of the right to freedom of expression.	
Malawi	Article 37 explicitly guarantees the right to access all information held by the state or any of its organs at any level of government in so far as it is required for the exercise of a person's rights.	
Malaysia	Article 10 recognises the right to freedom of speech and expression, but there is no reference in the Constitution to the right to information.	
Maldives	Article 25 recognises the right to freedom of expression, conscience and thought, but there is no reference in the Constitution to the right to information.	
Malta	Section 41 includes the right to receive and communicate ideas and information without interference as part of the right to freedom of expression.	
Mauritius	Article 12 includes the right to receive and impart ideas and information without interference as part of the right to freedom of expression.	
Mozambique	Article 74(1) explicitly recognises the right to information. Every citizen has the right to in-	

	form him/herself and be informed about relevant facts and opinions, as well as to disseminate information, opinions and ideas through the press.	
Namibia	Article 21 recognises the right to freedom of expression, but there is no reference in the Constitution to the right to information.	
Nauru	Article 12 recognises the right to freedom of expression, but there is no reference in the Constitution to the right to information.	
New Zealand	New Zealand's Constitution does not guarantee the right to information.	The Official Information Act 1982 legislates for the right to access information.
Nigeria	Article 39(1) includes the right to receive and impart ideas and information without interference as part of the right to freedom of expression.	
Pakistan	Article 19 recognises the right to freedom of speech and expression and freedom of the press, but there is no constitutional guarantee of the right to information.	The Freedom of Information Ordinance was promulgated in October 2002 and is protected under the Provisional Constitutional Order.
Papua New Guinea	Article 51 explicitly recognises the right of reasonable access to official documents, subject only to the need for such secrecy as is reasonably justifiable in a democratic society.	
Samoa	Article 13(1) recognises the right to freedom of speech and expression, but there is no reference in the Constitution to the right to information.	
Seychelles	Article 22(1) includes freedom to seek, receive and impart ideas and information without interference as part of the right to freedom of speech and expression.	
Sierra Leone	Article 25 includes the freedom to receive and impart ideas and information without interference as part of the right to freedom of speech and expression.	
Singapore	Article 14(1) recognises the right to freedom of speech and expression, but there is no reference in the Constitution to the right to information.	
Solomon Islands	Article 12 includes the freedom to receive and communicate ideas and information without interference as part of the right to freedom of expression.	
South Africa	Section 32 explicitly guarantees the right of access to information held by the state or held by another person if it is required for the exercise or protection of any rights. The section	The Promotion of Access to Information Act 2000 operationalises the consti-

	requires the National Legislature to enact legislation to make the right effective. Section 16 also includes the freedom to receive and impart information as part of the right to freedom of expression.	tutional right to access information.
Sri Lanka	Article 14(1) recognises the right to freedom of speech and expression, but there is no reference in the Constitution to the right to information.	
St Kitts and Nevis	Article 12 includes the freedom to receive and communicate ideas and information without interference as part of the right to freedom of expression.	
St Lucia	Article 10 includes the freedom to receive and communicate ideas and information without interference as part of the right to freedom of expression.	
St Vincent and the Grenadines	Article 10 includes the freedom to receive and communicate ideas and information without interference as part of the right to freedom of expression.	
Swaziland	Swaziland has no Constitution, although a draft constitution was presented to King Mswati in May 2003. Article 25 of the Draft Constitution includes the freedom to receive and communicate ideas and information without interference as part of the right to freedom of expression and opinion.	
Tonga	Article 7 guarantees the right to freedom of speech, expression and of the press, but there is no reference in the Constitution to the right to information.	
Trinidad and Tobago	Section 4 guarantees a list of rights and freedoms, but there is no reference to the right to information.	The Freedom of Information Act 1999 legislates for the right to access information. The Act came into effect on 20 February 2001.
Tuvalu	Article 24 includes the freedom to receive and communicate ideas and information without interference as part of the right to freedom of expression.	
Uganda	Article 41 explicitly guarantees the right to access information in possession of state or any other agency of the state. Article 41 expressly requires parliament to make a law to prescribe the procedure for providing access to information.	

United Kingdom	The United Kingdom has no Constitution.	The Freedom of Information Act 2000 legislates for the right to access information, but will only be fully operational in January 2005.
United Republic of Tanzania	Article 18(1) includes the right to seek, receive and impart information as part of the right to freedom of opinion and expression. Article 18(2) guarantees every citizen the right to be informed at all times.	
Vanuatu	Article 5 guarantees a list of rights and freedoms, but there is no reference to the right to information.	
Zambia	Article 20 includes the freedom to receive, impart and communicate ideas and information without interference as part of the right to freedom of expression.	