

## Freedom of Information: Access to Information as a Key to Democratic Governance

Padmaja Padman, Co-ordinator, *Inisiatif Wartawan*

### CONTEXT AND CONCEPTS

It took the Russian health authorities four days to reveal the active agent in the gas used to end a hostage crisis, when 50 Chechen separatists held 800 people in a Moscow theatre from Oct 23-26, 2002.

Special forces pumped in the gas to knock out the hostage-takers, 41 of whom died. During the incident and in the following days, 128 of the hostages died. Doctors claimed they did not know the right antidote to administer. Global speculation was that a chemical weapon had been used. Russian officials threatened to act against journalists who criticised their handling of the situation.

Finally on Oct 30, bowing to international pressure, Health Minister Yuri Shevchenko said the gas was derived from *Fentanyl*, an opium-based and highly addictive narcotic. He claimed that hospital authorities had been informed and that an antidote had been readied. Most of the deaths, he said, were due to respiratory problems and heart failure.

Tellingly, US Ambassador to Russia Alexander Vershbow had said a day earlier: "It is clear that with perhaps with a little more information, at least a few more of the hostages may have survived."

The Russian Health Ministry does not stand alone in dithering over what information to release during a crisis. Its Malaysian counterpart has been periodically accused since 1997 of failure to deliver information in timely manner, even as public alarm was being fuelled by fatalities due to the *Nipah* and *Coxsackie* viruses, Japanese encephalitis, meningitis and dengue haemorrhagic fever respectively.

Access to information may not always be linked to matters of death, but it is certainly connected to matters of daily life. Routine choices of citizens are reliant upon the accuracy, timeliness, quality, quantity and relevance of information released by custodians, in particular the government.

As a case in point, more than 100 people were caught by surprise on Oct 21, 2002, when the Malaysian Immigration Department would not process work permit applications for foreign-worker intake unless the prospective employers were present. The directive took effect the same day. Some applicants had been waiting from 2.30am for a place in the queue because the department sets a limit on daily transactions.

Immigration director-general Mohd Jamal Kamdi said the directive was to end allegations that 'middlemen' were bribing officers to expedite services. He conceded the error of implementing it without prior notice, but said it was "also good to shock the market a bit". He later amended the directive to enable employers to name a representative to deal with the department. (*The Star*, Oct 22, 2002)

Except in repressive regimes, it is generally accepted that a free flow of information and dialogue benefits both government and society. The United Nations Development Programme (UNDP) advocates two-way communications in programmes to eradicate poverty, create good governance and deliver human rights. It also says transparency and accountability in administration can reduce opportunities for corruption.

Article 19, the London-based global movement for free expression, describes information as “the oxygen of democracy”. It explains that people cannot take a meaningful part in the affairs of their society if they do not know what is happening and if the actions of those in charge are hidden. Only bad governments need secrecy to survive, it says, but the absence of disclosure also allows inefficiency, wastefulness and corruption to thrive.

The media stands in the middle of this process, as the World Bank notes, to facilitate the dialogue and bring about check and balance. In a report launched in November 2002, it has placed a free press at the core of equitable development.

“The media can expose corruption...keep a check on public policy by throwing a spotlight on government action...let people voice diverse opinions on governance and reform and help build public consensus to bring about change,” says its president, James D. Wolfensohn. “Such media help markets work better...(and) can facilitate trade, (by) transmitting ideas and innovation across boundaries.” (*The World Bank 2002, Foreword*)

For this, there must be on guarantees of the independence, quality and ability of the media to reach a wide audience and to obtain relevant information. A free press acts as a watchdog over the government and corporate sector, in the public interest. (*The World Bank 2002, Chapter 1*)

The Delhi-based Commonwealth Human Rights Initiative takes the view that FOI legislation is necessary:

- To guarantee citizens' right to information and meaningful freedom of expression;
- For accountability of those in power;
- For transparency of decision-making processes of those with political and economic control of national resources; and
- To ensure citizens' fair access to economic and social human rights, since information=knowledge=empowerment=wealth.

### **Concepts of official information**

Discussions on access to information are most often approached from the viewpoint of legal and human rights. As taxpayers and voters, citizens are legally entitled to know how the government makes decisions and what information it holds.

The human right to information is enshrined in Article 19 of the Universal Declaration of Human Rights 1948. It states: Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers. The UN International Civil and Political Rights Covenant expands on this basic right.

Combining both the legal and human right, many countries have enacted 'Freedom of Information' (FOI) legislation that spells out what records are available to the public and the procedures of access. Sometimes, it is called an 'Official Information Act' in reference to the wide variety of public (or official) records that the government holds.

Often, the law operates alongside a Personal Data Protection Act, which allows individuals to obtain records that contain personal information about themselves from public and private bodies. The government holds such data to issue documents like the passport, identity card, driving licence, and birth and death certificates.

## THE SITUATION OF FREEDOM OF INFORMATION

### **Global FOI evolution**

Sweden pioneered FOI legislation in 1766 through its Freedom of the Press Act, with Colombia next in 1888. The 1990s saw an explosion in the number of countries that adopted FOI legislation. Right of access is provided through legislation or codes of practice. In some countries, provision for freedom of information is built into the Constitution, government directives or media laws. (*The World Bank 2001, p189*)

In July 2002, London-based human rights group Privacy International released findings of a study commissioned by virtual network *freedominfo.org*. It found that more than 40 countries – including about 12 in Asia – had enacted laws, with another 30 in the process of doing so. Author David Banisar attributes the increase in interest to the collapse of authoritarian regimes and emergence of democracies with updated constitutions.

On Sept 4, 2002, the Taiwan cabinet stamped approval on the Law on Opening Government Information, to be sent to the legislative assembly for passage. On Sept 21, Pakistan approved its Freedom of Information Ordinance, while India followed on Dec 16 with a federal-level Freedom of Information law.

International bodies like the Commonwealth, Council of Europe and Organisation of American States have drafted guidelines and model legislation to promote FOI. The World Bank, International Monetary Fund and other multilateral institutions or donor agencies are pressing countries to adopt access to information, in order to reduce corruption and increase administrative transparency.

In response to legitimate criticism, international financial institutions are reviewing their own information disclosure policies. A new *freedominfo.org* survey says the Inter-American Development Bank and European Bank for Reconstruction and Development have called for public comments on proposals, while the Asian Development Bank is due to reveal its policy in the first quarter of 2003. In June 2003, the IMF may reconsider making public all Article IV reports, which refer to documents produced from bilateral discussions with member countries and financial and economic data collected from them usually on annual basis. (*available on: <http://www.freedominfo.org/ifti.htm>*)

Civil society groups in various countries are pushing their governments in the direction of disclosure. (*Banisar 2002*) Legislators and the media are weighing in as well. In April 2002, Parliamentarians and journalists from Indian Ocean rim Commonwealth countries

meeting in Cape Town, South Africa, endorsed the need for FOI legislation to facilitate a supportive environment for free flow of information. (*Commonwealth Parliamentary Association 2002*)

In November 2002, Asian NGO and media representatives conducted a preparatory meeting in Bangkok, Thailand, for input into the 'World Summit on the Information Society', to be held in two phases - in December 2003 (Geneva, Switzerland) and November 2005 (Tunis, Tunisia). Delegates committed to achieving social justice, equality and human rights through people-oriented strategies for access to information and communication technologies. They called for the lifting of restrictions on freedom of information, in order to enable public participation in governance.

However, some of the gains have been negated in the post-Sept 11 (2001) period in the United States and Canada. Their governments have passed proposals to limit access to certain records under both national and state FOI laws.

The US Department of Justice has reportedly drafted a Domestic Security Enhancement Act 2003, which had yet to be officially revealed up to mid-February 2003. The secret draft dated Jan 9, 2003, a copy of which was obtained by the public watchdog Centre for Public Integrity, proposes to curtail access to information about accused terrorists being held in custody. It will also limit access to 'worst case scenario' reports that companies producing chemicals must file with the Environmental Protection Agency about the potential impact of disasters, describing such data as a "roadmap for terrorists". Only residents within the immediate area of potential disaster sites will be allowed to read the reports. (*Centre for Public Integrity 2003*)

Britain, meanwhile, has postponed implementation of some of its FOI provisions until 2005. The North Atlantic Treaty Organisation (NATO) and European Union have imposed new restrictions on member-countries, although the latter are being challenged in the European Parliament. (*Banisar 2002*)

Hong Kong is moving to pass legislation to criminalise treason, secession, sedition, subversion, theft of state secrets, and unauthorised disclosure of sensitive or damaging information on China-Hong Kong relations. (*Committee to Protect Journalists, available on: <http://www.cpj.org/news/2002/China19sept02na.html>*) However, following vehement protests by pro-democracy lawmakers, human rights activists, civil society groups, journalists and residents, the government backed down in January 2003 on aspects seen to adversely affect press freedom and freedom of expression. The law may be passed in 2003.

### ***Opening up Southeast Asia***

The 10 countries of Southeast Asia (excluding East Timor) offer a varied landscape in their ability to deliver free flow of information. Until 1987, all these countries were under governments that ranged from the dictatorial to the authoritarian. This left little room for demands for democratic discourse or accountability.

When 'people power' in the Philippines swept President Ferdinand Marcos out of power in 1986, the first changes emerged. A new Constitution was framed in 1987, guaranteeing freedom of the press and right to information. While there is no FOI law, there are administrative and judicial remedies in case of non-disclosure by the State.

The government is also increasing use of technology to store and disseminate information.

To deal with remaining resistance and pockets of secrecy, more than a dozen Filipino NGOs have formed the Access to Information Network to lobby for FOI legislation. This seeks to compel the government to put in place a uniform, simple and speedy procedure to enforce the right to information, and to provide clear penalties for the unlawful denial of access and destruction of records. (*Chua 2003*)

In Thailand, the 1992 people's uprising ended long-standing rule by a series of military *juntas*. Five years later, through gradual democratisation, a liberal Constitution was passed – it, too, included features for press freedom and access to information. An Official Information Act was passed in September 1997, taking effect in December that year.

The 1997 East Asian financial crisis that inflicted economic and social chaos across Southeast Asia had political outcomes in some countries. In Indonesia, it forced the end of President Soeharto's 33-year rule of repression. The country is moving robustly, albeit chaotically, towards putting its administration in order. Again, press freedom is guaranteed.

A NGO Coalition for Freedom of Information submitted a draft FOI law that the Indonesian Parliament accepted as a Bill in March 2002. The government recently decided to initiate its own version, but the informal indications are that MPs will consider it a supplementary document. The January-March 2003 Parliament sitting is expected to designate a commission to handle the passage of the draft law – if all goes well, within a year.

Access to information in Southeast Asia is tied to the political and media regimes in place (*Coronel 2001, pp8-9*). The 'democracies' of the Philippines, Thailand and Indonesia have a progressive Constitution and a free media. Except in Indonesia, there are legal guarantees of information disclosure and mechanisms to enforce access.

The 'semi-democracies' of Malaysia, Singapore and Cambodia qualify freedom of expression, do not provide for the right to know and place restrictions on the media and citizens. The 'non-democracies' of Vietnam (socialist rule) and Myanmar (military *junta*) are extremely restrictive and maintain stringent control over information flow.

In 2000/01, journalists assigned to research access to 43 categories of official records in these eight countries found varying responses in relation to macro-economic data, socio-economic indicators, laws and parliamentary proceedings, government budgets and contracts, information on public officials and data on private individuals. (*Coronel 2001, p11-12*)

The results were tallied to indicate the percentage of records to which the public either have or do not have access. Qualified responses ('sometimes') were not included.

**Box 1: Access to Information – the Scoreline**

<i>Rank based on 'Yes' answers</i>		<i>Rank based on 'No' answers</i>	
Philippines	59%	Myanmar	55%

Thailand	56%	Singapore	53%
Cambodia	44%	Vietnam	49%
Singapore	42%	Cambodia	49%
Malaysia	33%	Malaysia	42%
Vietnam	18%	Indonesia	38%
Indonesia	18%	Philippines	23%
Myanmar	5%	Thailand	17%

Source: *Coronel, 2001, p12*

**Note:** Generally, the most open countries have the highest percentage of 'Yes' and lowest percentage of 'No' answers. Malaysia's mid-table 'Yes' ranking was assisted by 'smart access' policies formulated to satisfy foreign investors and multilateral institutions after the East Asian financial crisis of 1997. Business, financial and socio-economic data is easier and simpler to access today, while there is free access to laws and parliamentary proceedings. Near-absent access to government budgets and contracts, information on public officials and data on private individuals contributed to the 'No' responses.

In August 2002, meanwhile, Article 19 initiated a three-year project in six Southeast Asian countries – Cambodia, East Timor, Indonesia, Malaysia, the Philippines and Thailand – to protect and promote freedom of expression and freedom of information. This aims to utilise research and advocacy to link local NGOs, journalists, judges, academicians, government officials, Parliamentarians and inter-governmental organisations on the issues.

By August 2005, Article 19 hopes for civil society input into new legislation or amendments to laws in each country. Such an approach has succeeded in Britain, Japan and Indonesia, where citizens' movements initiated moves towards FOI legislation.

### ***Profile of a citizens' campaign***

People's movements in Southeast Asia that were denied access to information or avenues for free expression have made innovative use of technology to achieve their ends. In May 1992, Thai people used mobile phones to pass on information and organise protests against the military's usurping of power after the general election. In the late 1990s, the Internet and SMS text via mobile phones were the tools of choice of Indonesian and Malaysian political reformers. In 2000, Filipinos were also mobilised by SMS text to take part in demonstrations against President Joseph Estrada for alleged corruption.

Technology helps but it is legwork that counts in the pursuit of change, as the Japanese experience shows. Information Clearinghouse Japan (ICJ) came out of the citizens' movement for an information disclosure law to dismantle excessive government secrecy. The movement lobbied for more than 20 years for national legislation, which was enacted on April 1, 2001. (*Information Clearinghouse Japan 2002*)

Periodic incidents of defects in food and medicine fuelled the FOI movement:

- The *Thalidomide* tragedy of 1961/62 left babies with deformities because the government did not disclose known dangers or withdraw the harmful drug.
- Lack of disclosure over the drug *Chroloquine* led to blindness in many people.
- Haemophiliacs treated with a particular line of unheated blood products from the United States became infected with HIV. The Japanese health authorities had been

alerted to the problem in June 1983 and, indeed, had issued a warning before reversing its position a week later.

The movement therefore linked up with citizens' groups working on consumer protection and human rights to pursue FOI legislation:

- *September 1979*: The Japanese Civil Liberties Union (JCLU) drafted model national legislation containing the key demands of proponents.
- *March 1980*: Leading activists formed a Citizen's Movement for an Information Disclosure Law, an umbrella body for consumers, housewives, civil libertarians, and environmental activists; this broad base of support was important to legislative and public education campaigns.
- *January 1981*: A Mission Statement was publicised through the media, newsletters of member-groups and other means.
- *May 1981*: The JCLU published a model information disclosure ordinance designed for local governments that were already showing interest in this area; the model promoted best practices demanded by citizens.
- The campaign helped block the passage of an Official Secrets Act in the 1980s, a period when the Liberal Democrats controlled both houses of Parliament.
- Throughout the 1980s and 1990s, the movement continued to educate citizens and parliamentarians on the need for information disclosure, finding entry points and case studies in local government ordinances that had come into effect.
- In *1993*, the first breakthrough came when the Liberal Democrats' domination of Parliament ended; a coalition government was formed under Prime Minister Morihiro Hosokawa, a proponent of information disclosure at prefecture level.
- In *1994*, the government set up an administrative reform committee to examine information disclosure systems; NGO specialists were appointed to a sub-committee to propose national legislation.
- *November 1996*: The sub-committee turned in its report, and the reform committee made recommendations to new Prime Minister Ryutaro Hashimoto; several Opposition parties handed up alternative bills, demanding a 'right to know' clause.
- *March 1998*: The government sent its bill to the Diet (Parliament), but this did not stipulate a 'right to know'.
- Deliberations went on for 14 months, during which time pro-disclosure citizens' groups coached Opposition MPs on how to obtain key concessions for a progressive law.
- *May 1999*: An amended version of the bill passed through the Diet. The Citizen's Movement was disbanded and the ICJ was formed.
- *April 2001*: The law came into force – led by the media, 4,000 requests were filed within the first week.

Also in 2001, the ICJ organised a symposium on Asian FOI laws to learn about experiences in South Korea, Thailand, India and the Philippines. Global collaboration has since helped widen the local body of knowledge and expertise.

## TEST OF GOOD GOVERNANCE

### ***Principles of FOI***

Article 19 says governments always find reasons for maintaining secrecy – national security and public order, among these – and “treat official information has their

property, rather than something they hold and maintain on behalf of the people". Based on analysis of international and national laws, standards and evolving practices, the movement has drawn up nine basic principles for FOI legislation. (*Article 19 1999*)

More critical advocates say that the success of any FOI law depends on striking the right balance between the competing interests of the state and of society.

### 1. Maximum disclosure

All information held by public bodies should be subject to disclosure, except in very limited circumstances. Ideally, the Constitution should state that access to information is a basic right, and related legislation should implement maximum disclosure in practice. Every citizen should have the right of access without having to show a specific interest in the information. If a public authority denies access, it should be made to justify its refusal at every step of the proceedings.

'Information' should be defined to cover all records held by a public body, regardless of the form in which it is stored (document, tape, electronic recording, etc), who originated it and the date of production. 'Public body' should include all service providers at all levels of government that operate under a statutory mandate, as well as private bodies that carry out public functions (like running the railway, providing utility or waste-disposal services, or operating public universities). Private bodies, which hold information that related to key public interests like health and the environment, should be covered by the scope of legislation.

The law should make it a criminal offence to obstruct access and wilfully destroy records. It should stipulate minimum standards on the maintenance and preservation of records. Public bodies should be made to allocate sufficient resources to keeping official records. The obligation to disclose should apply to what records are available, and not just the information they contain.

### 2. Obligation to publish

Public bodies should be made to publish information of significant public interest, subject to reasonable limits of resources and capacity. The law should state a general obligation to publish key categories of information:

- Operational data about how it functions – costs, objectives audited accounts, standards, achievements – especially if it provides direct services to the public;
- Information on any public requests, complaints or other direct actions taken against the body;
- Guidance on processes through which the public can provide input into major policy or legislative proposals;
- The types of information which the body holds and the form in which these are held; and
- The content of any decision or policy affecting the public, together with reasons for the decision and important background material used in framing the decision.

### 3. Promotion of open government

Since a stubborn civil service can undermine even the most progressive legislation, public bodies should be legally obliged to promote the goals of the law through public education, among other activities. Citizens should know that they have a right to access information, what information is available, and how they can exercise their right. Public bodies and the supervisory authority for FOI education could utilise the media or mobile film units, or hold town meetings to achieve this objective.

Within government, the culture of secrecy should be addressed through FOI training for employees. This should cover the importance and scope of information, procedures for access, how to maintain and retrieve records efficiently, information that the public body is required to



publish, and the level of protection available for whistleblowers. Each body should be encouraged to adopt an internal code on access and openness.

The supervisory authority should promote openness within government through performance-based incentives, communications campaigns, and programmes to address secrecy problems. It could produce an annual report to Parliament, with recommendations for improved access and constraints that need to be resolved.

#### 4. Limited scope of exceptions

Exceptions to accessing official records should be clearly and narrowly drawn, and subject to strict 'harm' and 'public interest' tests. Any refusal to disclose information is not justified unless the public body can prove that:

- the information relates to a legitimate aim (of non-disclosure) listed in the law;
- disclosure would threaten to cause substantial harm to that aim; and
- such harm would be greater than the public interest in having the information.

Non-disclosure must be justified on a case-by-case basis. All three branches of government should be bound by this principle, including agencies with functions of security and defence. Restrictions are not acceptable if these are only meant to protect the government from embarrassment or exposure of wrongdoing.

Where non-disclosure is required, the law should stipulate a complete list of legitimate aims to justify this. It should be limited to matters of law enforcement, privacy, national security, commercial and other confidentiality, public or individual safety, and the effectiveness and integrity of government decision-making processes. If the benefits of disclosure outweigh the harm, then information should still be disclosed.

#### 5. Processes to facilitate access

Requests for information should be processed rapidly and fairly. An independent review of refusals should be available. Procedures should be drawn up at three levels to decide on requests – within the public body; appeals to an independent administrative body; and appeals to the courts. All public bodies should be required to establish open, accessible internal systems that facilitate access. Staff should be designated to accept and process requests. The law should stipulate strict time limits for processing requests and for refusals to be explained in writing.

The public body may reject frivolous or vexatious requests – if such information is available in a publication, then it should refer the applicant to that source instead. However, it should be made to assist applicants to get the information required, including those who are illiterate, disabled or who do not understand the language in which the record is produced.

There should be provisions for appeal against refusals, within the body itself. In addition, the applicant should have a right to appeal to an independent administrative body such as an Ombudsman or Human Rights Commission, or a new appellate body like a tribunal or Information Commission. The process of appointing its members should be open and representative, with room for public input. Appointees should be required to meet strict standards of professionalism, independence and competence, and must comply with rules on conflict of interest.

The appellate body's independence must be guaranteed, and it must meet certain standards. The appeals procedure should respond rapidly and keep costs low for applicants. Excessive delays and exorbitant fees would deter the public from making use of the system. The appellate body should have full power to investigate any appeal, including compelling witnesses to attend or requiring the public body to provide it with any information or record, *in camera* where necessary and justified.

It should have the power to dismiss the appeal or require information disclosure; adjust any charges levied by the public body; and to fine the authority for obstructive behaviour and/or impose costs on it in relation to the case. It should be able to refer cases to the court for criminal obstruction of access, or wilful destruction of records. Both the applicant and public body should be able to appeal against the decision of the appellate body by turning to the courts, which should then have the power to review the entire case on its merits.

#### 6. Low access costs

Individuals should not be deterred from submitting requests for information, due to imposition of excessive costs aimed at recouping investment in the system. Some countries use a two-tier system, starting with a flat fee for a request and then adding a graduated fee based on the cost of retrieval and provision of the information required. In some places, higher fees are charged for commercial requests to subsidise the cost of public-interest requests.

#### 7. Open meetings

The public has a right to know what the government is doing on its behalf and to participate in decision-making processes. FOI legislation should establish a presumption through a 'sunshine' clause that all formal meetings of government bodies are open to the public. This would include meetings of elected bodies and their committees, planning and zoning boards, education authorities and industrial development agencies. Adequate notice should be extended to the public, who should also be allowed to debate any need for closed meetings. Acceptable circumstances for closing a meeting would relate to public health and safety, law enforcement or investigation, personnel matters, privacy, commercial matters and national security.

#### 8. Disclosure takes precedence

FOI legislation should state that other laws should be interpreted, as far as possible, in a manner consistent with its provisions. For instance, secrecy laws should not make it illegal for officials to reveal information that they are required to disclose under FOI law. Over the long term, all laws relating to information should be brought in line with FOI principles.

Officials should have protection where they have, reasonably and in good faith, disclosed information in relation to a request under the FOI – even when it is later determined that the information should not have been released. This is to overcome the culture of secrecy and cautious attitudes of officials who want to avoid personal risk.

#### 9. Protection for whistleblowers

Individuals who divulge information on wrongdoing must be protected from legal, administrative or contractual sanctions. 'Wrongdoing' is defined to include a criminal offence, failure to comply with a legal obligation, miscarriage of justice, corruption or dishonesty, or abuse of power. It should cover serious threats to health, safety or the environment, or where there is a risk that evidence of wrongdoing will otherwise be concealed or destroyed.

Some countries make protection for whistleblowers conditional upon their releasing the information to certain individuals or supervisory bodies. Where the public interest demands it, protection should also be available in the context of disclosure to other individuals or even the media.

### ***Exemptions and variations in clauses***

Exemptions exist in almost every FOI law for certain records that relate to protection of administrative, commercial and private interests. These generally cover defence, national security, public or individual safety, conduct of international relations, law enforcement and crime investigation, commercial confidentiality (trade secrets), legal privilege, personal privacy, and government correspondence. (*Iyer 2001, p10*) In many cases, records of Cabinet meetings are also deemed secret.

Variations appear in different FOI laws, which either further restrict or expand access to information. Examples are:

➤ Additional grounds for protection of information

New Zealand's Official Information Act 1982 covers public health. Sweden withholds information on the preservation of plant and animal species. South Africa's Promotion of Access to Information Act 2002 protects the security of buildings, and communications and transport systems.

Australia's Freedom of Information Act 1982 bars access to information on the national economy, research in progress (also in Denmark and Britain) and information in electoral rolls (except if the information directly concerns the requester). The Australian government may also refuse to confirm or deny if records exist, if these affect national security or Commonwealth-State relations.

➤ Additional safeguards against abuse

Sweden's FOI legislation includes checks and balances against abuse of its provisions. For instance, documents necessary to preserve national security are stipulated to prevent sweeping interpretations in favour of official secrecy. The Secrecy Act 1980 contains an extensive and comprehensive list of exemptions to access. (*Banisar 2002, 'Sweden'*).

➤ Limit on duration of secrecy for current and historical records

The period varies – 30 days (Colombia), 10 years (Trinidad and Tobago), 20 years (Canada), 25 years (US) – usually from the date the record was created. Britain offers a range of time limits, starting with 30 years from the year following the creation of historical records. In Finland, personal information is kept secret for 50 years after the individual's death.

➤ Clauses to extend the culture of openness

South Africa allows government bodies and individuals to gain access to 'information held by another person' if this can prevent harm to the public. It means that community organisations and private individuals can also be subjected to requests for access to certain information, for instance, on environmental matters.

➤ Periodic review of the law to effectively meet needs of the day

In the US, the Electronic Freedom of Information Act Amendments of 1996 makes it a duty for all federal agencies to create FOI web sites. Then President Bill Clinton said this was to bring legislation into the information and electronic age by clarifying that it also applies to records maintained in CD-ROM, computer tapes and diskettes. Following the amendments, an enormous amount of financial and declassified defence-related data were posted on web sites. Much of the effort was undone when President George W

Bush ordered the removal of many records from – or closure of many – web sites of federal agencies after the Sept 11, 2001 attacks.

➤ Protection for custodians of public information

In Britain, there is protection against defamation should the requesters publish any defamatory matter contained in material that the authority obtained from a third person – unless there was malice in communicating the information to the requester. New Zealand and US authorities ask that requests be narrowed down to specifics to prevent waste of time in identifying the exact records required.

➤ Sanctions against obstruction or delay

Officials who do not provide unclassified materials on request are subjected to criminal and civil penalties, as a disincentive to obstruction, or falsification or destruction of records. In South Africa, fines and jail terms are imposed. Penalties elsewhere include dismissal from the job.

### **Credibility check**

A government's transparency is gauged by the effort it puts into making information available, within recognised and reasonable limits. The credibility of FOI legislation can be tested through the following questions, which also assist in identifying best practice. (Iyer 2001)

- Does it stipulate a comprehensive mechanism of access to information including clauses for an appeals procedure and periodic review of legislation?
- Does the mode of access enable applicants to inspect, view, read or listen to official records, and to obtain photocopies, transcripts, summaries or computer printouts? (*New Zealand also provides oral information; US federal agencies have FOI web sites; in Estonia, government departments and other holders of public information maintain web sites*)
- Are the grounds that limit access clearly stated? (*as in Australia, New Zealand*)
- Is provision made for translation of records where there is more than one official language? (*Canada*)
- Can applicants submit requests in most instances without having to show why they have a specific interest in the information? (*Sweden*)
- Are government officials required to assist requesters as far as possible? (*Australia*)
- Is the cost of access too high for the majority of the population? Can payments be waived or reduced on a case-by-case basis? (*Canada, Australia*)
- Is a deadline specified to deliver the information requested? (*Immediately or within three days in Norway; 10 days in Colombia, Romania. Slovakia; 14-30 days in most countries*)

- Are sanctions also imposed on the public body itself for not complying within the time limit?
- Are government officials required to give reasons for administrative decisions not to disclose information? (*Ireland, Britain*)
- Are government departments obliged to provide contact details of officers designated to deal with requests (*Canada*) or of information officers in all public bodies (*South Africa*)?

### ***Systematic implementation***

It is one thing to succeed in getting FOI legislation into the law books, and quite another to ensure its successful implementation. In every country from Albania to Uzbekistan where the law has been enforced, the transition years have been filled with common complaints:

- Key documents or data have been blacked out or removed from the files.
- Complex procedures and poor infrastructure complicate information retrieval.
- Custodians are ignorant of the law or refuse to comply with requests within set time limits.
- Access fees and/or the cost of making copies are too high.
- Appeals against bureaucratic decisions take too long to be decided.
- Public bodies and their officials are not punished for failing to disclose information on request.

On Oct 11, 2002, South African pro-disclosure advocacy group Open Democracy Advice Centre (ODAC) of Cape Town, released findings of a study on implementation of the information law. Although legislation was enforced from March 2001, the study found that 54% of the public bodies contacted were still unaware of its existence, while 16% were aware, but were not implementing it. The rest were implementing the law, with the Defence Department being cited for excellence. Dismal results were recorded in a check of private-sector bodies. (*ODAC 2002*)

ODAC executive chairperson Richard Calland remarked in a media release: "The right to access information...unlocks the door to so many other rights. A strong sense of determination unites the access to information community. We will not let this crucial law gather dust. We will use...and enforce it."

The short answer – but undoubtedly long process – to overcoming problems in all countries with an information regime lies in citizens learning to stress-test the system to expose its shortcomings and demand improvements.

In Japan, citizens routinely file appeals against non-disclosure and take cases up to the Supreme Court for resolution. The Information Clearinghouse Japan (ICJ) files requests and monitors implementation in additional ways:

- It conducts an annual survey that also examines the decisions of information disclosure review boards.
- It compiles case studies for a databank.
- It advocates change in related areas.

Currently, the ICJ is working on a number of issues – legal protection for personal data held by the government; formal mechanisms to enable citizens' groups to take part in policy-making processes; timely disclosure for participation in governance; and an enabling environment for growth of a vibrant civil society.

The civil service everywhere moves ponderously, but it can be persuaded to adapt best practice from other countries to strengthen the law and its implementation. Access to information provisions in Sweden's press law, for example, obliges every civil servant to give out official documents free of charge to any citizen upon request, except where restricted by law (*Banisar 2002, 'Sweden'*). Civil servants may also reveal information to the media in order to prevent abuse of power and corruption. Whistleblowers have legal protection, and their supervisors are barred from finding out their identity under the Freedom of the Press Act 1949 (amended 1976).

### ***Limitations of FOI regimes***

Drawing from country experiences, the World Bank points out factors to take into account when a FOI regime is implemented. On the legal front, limitations to access may arise when the law is balanced with legitimate privacy and national security interests. However, this should not become an excuse to create loopholes that constrain FOI objectives.

The cost of implementation can be substantial. If infrastructure capacity is weak, the cost, time and complexity of retrieving information will also increase. The government will therefore have to invest in infrastructure and training to gather, process, store and manage information, and to generate timely and reliable statistics. The US government spends about \$286 million each year to maintain information systems. (*The World Bank 2001, p190*)

Another limitation could result from low user demand. The ICJ cautions that – despite advancements over the past decade – only a small proportion of the Japanese population understands and uses the information system. Citizens' activism is still at low levels and funding is insufficient for pro-disclosure activities. The ICJ sees a challenge for itself in teaching citizens to access records and training government officials to improve implementation.

Similar bureaucratic obstacles exist in the Philippines and Thailand, where the media and citizens are acting to overcome difficulties. Thailand recorded 500,000 requests between December 1997 and 2000. The government proclaimed 2002 the 'Year of Access to Official Information', to give this a higher profile. (*Banisar 2002, 'Thailand'*)

In Japan, the media has been the most enthusiastic user-group – its first requests were submitted with minutes of the law taking effect, for documents relating to the banking sector. However, not all journalists have the skills to research, analyse and communicate information that the domestic market requires. The World Bank Institute provides training in investigative and business journalism to build media capacity in such areas as privatisation, economic reforms and environmental issues. To date, it has conducted training in some 50 countries.

It may take years before the desired levels of public awareness and administrative transparency are established in countries that are coming out of secrecy. Fortunately, the general experience suggests that there is no turning back once the journey starts.

### **Box 2: Activating Access – Landmark Cases in Asia**

**The Philippines:** A paper/people/electronic trail into allegations that President Joseph Estrada was living it up led to proof that his expenditure far exceeded his declared income. The Philippines Centre for Investigative Journalism painstakingly unearthed official records over the span of 2000 that linked his lavish acquisitions to immediate family and close friends. Based on some of these findings, an official inquiry was held. Accompanying public protests, including mass demonstrations, exerted pressure that forced Estrada to step down in January 2001. (*Philippines Centre for Investigative Journalism, Manila*)

**Thailand:** A mother took on the authorities of an elite government primary school in 1998 after her daughter failed an entrance examination. When they rejected her request to see the test sheets and marks, she complained to the Office of Information Commission. It ruled that she could only view her daughter's test sheet and marks. She appealed to the Information Disclosure Tribunal. It decided that all the test sheets and marks were official records, a decision later upheld by judicial decisions up to the Supreme Court. In March 1999, after viewing the records and spotting discrepancies, she found out that candidates with lower marks had been admitted because of family connections. She took the case to the Constitutional Court on grounds of discrimination and favouritism. It ruled that the school's special admission criteria were unconstitutional and ordered these to be abolished, adding that all schools should admit students on merit. (*Kavi Chongkittavorn 2001, The Right to Know: Access to Information in Southeast Asia*)

**Japan:** In 1996, a request was filed for disclosure of Tokyo legislators' expenses while on a European trip. The head of accounting refused to show the documents, claiming this would adversely affect relations between the governor of the Tokyo prefecture and legislature. The refusal was disputed right up to the Supreme Court, which ordered full disclosure. Many falsified receipts were discovered, after which the same applicant demanded a full audit. It revealed about ¥800,000 (about US\$6,800) in losses, which the legislators were made to reimburse. (*Information Clearinghouse Japan*)

### ***Awais! The Zimbabwe model***

Zimbabwe has bucked the global trend with its version of FOI legislation. The controversial Access to Information and Protection of Privacy Act, which took effect in February 2002, pays more attention to controlling the media and preventing 'abuse of free expression' than to its stated intentions.

The Act has created a Media and Information Commission to register journalists and regulate the media. Critics contend that the provisions have been mainly used to harass independent local journalists and their foreign counterparts, who are regularly hauled up by the police for questioning. By June 2002, 12 journalists had faced charges or were jailed under the Act (*Banisar 2002, 'Zimbabwe'*).

In November 2002, amendments were being considered to give the Information Ministry full control over the commission by nominating all its members. Free-expression groups

and independent journalists' organisations were (at the time) organising resistance to the move, which may also restrict the duration of stay of foreign journalists to 30 days.

[Malaysian journalists would have reason to be wary of the Zimbabwe model. Since May 2002, then Information Ministry parliamentary secretary (now Deputy Minister) Zainuddin Maidin has proposed several times that a body be set up to vet the entry of journalists into the media industry and to license them. He says the body should have powers to 'expel' journalists who do not toe the line.]

Under other provisions in Zimbabwe, citizens or residents may request access to records held by a public body, which must respond within 30 days. Access is restricted where documents relate to administrative decisions, client-attorney privilege, law-enforcement proceedings, national security, foreign relations, public safety, commercial information and privacy. The commission has powers to conduct inquiries and order the release of official records. The law allows the government to issue disclosures on threats to public order, crime prevention and national security, even if there is no request for such information.

Elsewhere on the continent, the African Commission on Human and People's Rights signed a declaration in November 2002 to promote free-expression principles including media pluralism, access to information laws and a diverse broadcasting sector. These will be implemented under strategies to realise the New Partnership for Africa's Development (NEPAD), aimed at eradicating poverty, under-development in member-countries and marginalisation of the continent. (*Article 19 2002*)

## [COMMENT, ANALYSIS, ISSUES AND CHALLENGES FOR MALAYSIA](#)

### ***Malaysia's legal regime***

Within a Constitution that only provides for qualified freedom of expression, Malaysia has held on to laws enacted during British colonial rule and further tightened some of these after independence in 1957. Laws today that impinge upon freedom of information and expression include the Sedition Act 1948, Control of Imported Publications Act 1958 (amended 1972), Internal Security Act (ISA) 1960, Universities and University Colleges Act 1971, Official Secrets Act 1972 (amended 1986), Printing Presses and Publications Act 1984 and Broadcasting Act 1988.

Four parallel proclamations of emergency in 1964, 1966, 1967 and 1977 are technically still in force, although the respective periods of internal crisis have ended. Until Parliament annuls the proclamations, special regulations are retained – including a ban on assembly of more than five persons in a public place.

Section 27 of the Police Act 1967 allows the police to stop meetings from being held even in a private venue, if they feel the gathering could be prejudicial to national security. In October 2002, police stopped the 'Ban ISA Movement' from launching a campaign at the Selangor Chinese Assembly Hall in Kuala Lumpur. Police said they were acting on information from Internet postings that called on "all Malaysians" to attend the gathering. They would not identify the web site concerned, but claimed the meeting had to be prevented because of concerns over crowd control.



The civil service, meanwhile, is bound by the General Orders and Administrative Guidelines, of which Clause 17(1) prevents officers from revealing information to the public or media without written approval. Since March 2002, all civil servants as well as academicians in public universities are required to sign a loyalty pledge (*Akujanji*), which curbs actions purportedly detrimental to government interests.

Under section 123 of the Evidence Act 1950, witnesses testifying in court may not adduce unpublished official records or information relating to state affairs without the permission of the head of department. However, the judge has the power to decide the admissibility of such documents. (*Zalina 2001, pp106-115*)

Both the Constitution and the Commissions of Inquiry Act 1950 allow commissions to hold official hearings behind closed doors. Generally, their final reports are classified secret and must be submitted to the King or government for action, including any decision to make the findings public. On occasion, open hearings have been held, as with the 1999 Royal Commission of Inquiry into the assault on sacked Deputy Prime Minister Anwar Ibrahim while he was in police custody in September 1998.

The Defamation Act 1957 has potential to curb access to information involving public personalities. Between July 2000 and March 2001, almost every newspaper and television station in Malaysia was sued for millions of ringgit filed mainly by businessmen and companies. In March 2001, Chief Justice Mohamed Dzaiddin Abdullah reminded plaintiffs not to stipulate the quantum of damages, but to leave the decision to the court. He also said the law against defamation was not a “licence to destroy” press freedom. These incidents, however, should serve as a wake-up call for the media to upgrade professional standards and ethics, to avoid being sued on grounds that are journalistically indefensible.

### ***Official Secrets Act***

The Official Secrets Act (OSA) is considered the evil twin of FOI law, for its opposite effect on access to information. Secrecy laws are a common legacy of Britain’s rule over former colonies. Most replicated provisions of the British OSA of 1911, originally enacted to contain Germany’s growing power and threat of infiltration of foreign agents into Britain at the time.

Britain itself updated the law in 1989, limiting secrecy to certain categories of information – national security, international relations, defence and criminal investigations. The government, however, retains discretionary power to decide on what disclosures are damaging to national interests.

Critics in Britain say the OSA does not have measures to protect whistleblowers in civil service or allow alleged offenders to cite public interest as a defence. If journalists receive secret information, the prosecution has to prove that damage was done by disclosure. To date, Britain’s intelligence and security services have tried without success to pin legal charges on three journalists.

Former MI5 officer David Shayler was, however, jailed in November 2002 on three counts of breaching the OSA, for leaking “sensitive” information to a newspaper and making public allegations of incompetence and malpractice in the intelligence service.

The law bans former and serving employees of intelligence and security services from speaking about their work without prior approval.

Britain's OSA exists alongside the Freedom of Information Act, enacted in November 2000. Although citizens had campaigned for FOI legislation for 20 years, their reaction has reportedly been lukewarm because the law does not meet their demands. Implementation has been slow and provisions to allow the public to access information will not take effect until 2005. (*Banisar 2002, 'United Kingdom'*)

In Malaysia, the OSA was passed in 1972 to restrict the potential for political instability as the country recovered from the May 1969 racial riots. (*Zaharom 2002, p126*) The law covers more than the wrongful possession, recording and communication of an official secret. Provisions prohibit spying, harbouring offenders, impersonating authorised personnel to gain entry to restricted places, impeding police or army personnel from carrying out their duties, forgery, and making false declarations to obtain a permit.

A Federal Minister, Chief Minister of a state, or principal administrative officer may classify official documents, information or materials as top secret, secret, confidential or restricted. The range of 'documents' includes maps, plans, illustrations, photographs and audio-visual devices. Materials may be declassified any time.

This is in addition to the schedule of specified official secrets – Cabinet and state executive council documents; records of decisions and deliberations including those of the Cabinet and state executive council meetings; and documents concerning national security, defence and international relations.

The Act applies to citizens, permanent residents and to persons (citizens or otherwise) who hold or have held public service in Malaysia. The law has effect outside Malaysia as well. It provides for search and seizure; special powers of investigation that compel information disclosure from anyone questioned; admission of oral or written statements by the accused, as evidence; and protection of informers.

The court may order alleged offenders to testify as witnesses for the prosecution. The certificate of official secrecy is deemed to be conclusive evidence and cannot be questioned in any court on any ground. The public may be excluded from a trial upon the prosecutor's application, if the testimony to be given is deemed prejudicial to national security. However, the passing of the sentence must be done in open court.

In 1986, an amendment was proposed to remove judicial discretion in sentencing. The penalty then provided for a maximum RM10,000 fine or up to seven years' imprisonment, or both. In its place, the government proposed a mandatory jail sentence for those convicted.

Journalists, civil society groups and the Bar Council mounted an intense lobby that collected 36,000 signatures and organised public protests, but the amendment was nevertheless passed on Dec 5, 1986 by a vote of 131 to 21 (*Far Eastern Economic Review, Jan 8, 1987*). Those convicted must now serve between one and seven years in jail. The penalty for spying remains as imprisonment for life.

### ***Implications for information flow***

In real terms, any document can technically be stamped 'secret' under such a law. In Britain, for instance, even the type of biscuits served to the Prime Minister for tea was a classified secret up to 1989. (*The World Bank 2001, p189*) Malaysian civil servants similarly err on the side of caution because of the wide interpretation attached to 'secret'. The public has no way of knowing when a document has been classified, and when it is declassified. Checks and balances cannot be exerted against abuse of executive power.

In the Southeast Asian study of 2000, information was found to be off-limits in 20 of the 43 categories of public records surveyed in Malaysia, largely due to official secrecy. Classified documents include national and local government budgets; military expenditures, loans and contracts; military and police intelligence reports; police investigation reports; information on public officials; certain government directives and circulars; and records of gun licences and permits. (*Padman 2001, p115*)

Draft laws are not available for public scrutiny before these are tabled in the Dewan Rakyat. In most cases, Ministers or senior officials only release the content in trickles at official functions or when ambushed by the media. An exception was recorded when the Energy, Communications and Multimedia Ministry posted the Personal Data Protection Bill on its web site in late 2000, for public feedback before finalising the draft. It first requested the Cabinet to declassify the document. (*The Sun, Nov 18, 2000, available on: <http://www.mycert.mimos.my/newscutting/news0117.html>*) This raises interesting issues of precedence and public interest, which the civic lobby has not effectively exploited.

### Box 3: Convictions under the OSA, Malaysia

- **1978:** Former Opposition leader Lim Kit Siang became the first person to be convicted on five charges of wrongful receipt and communication of secrets relating to the tender and purchase of four navy vessels. He was fined a total of RM15,000 or 41 months' jail in default. The fine was reduced to RM6,500 on appeal in 1979.
- **1978:** Datuk Haji Dzulkifli Datuk Abdul Hamid was convicted on four counts of unlawful possession of a letter written by a Sabah state official and communicating it to the *Kinabalu Sabah Times*, which published it. The Federal Court upheld the conviction on appeal in 1980 (penalty not cited in source).
- **1985:** In October, *Far Eastern Economic Review* correspondent and former diplomat James Clad pleaded guilty to two charges of receiving, possessing and divulging an "official document" and knowing that this contravened the Act. He had based a report on Malaysia's relations with China on the document, which police found in his house. He was fined a total of RM10,000, and was the first foreign journalist to be tried under the Act.
- **1986:** In January, *New Straits Times* defence correspondent Sabry Sharif pleaded guilty on advice to possession of a secret Air Force document on the proposed purchase of four planes. He had based a news report on this. He was fined RM7,000 or one year's jail – the company paid the fine. A second charge was dropped.
- **1987:** In October, lawyer and former Deputy Public Prosecutor Phang Ah Hee was sentenced to six months jail and fined RM1,000, or two weeks' jail in default, on three charges of contravening the Act. On March 2, he had pleaded guilty (but sentencing was deferred) to possessing "secret official documents" – comprising police investigation papers – at his office on Oct 25, 1986.
- **2002:** In August, Parti Keadilan Youth Chief Mohd Ezam Mohd Nor was jailed for two years, for revealing to the media the contents of two classified Anti-Corruption Agency inquiry reports on International Trade and Industry Minister Rafidah Aziz and former Malacca Menteri Besar Abdul Rahim Thamby Chik in November 1999.

Sources: *Zalina, 2001, pp97-106; Press reports*

While relatively few charges have been brought under the OSA, real hindrances to the right to information and free expression lie in frequent threats to apply a variety of laws – of which the Internal Security Act, Sedition Act and OSA rank highest – against perceived troublemakers.

Due to this, custodians of information become even more cautious than they are required to be. Alternative sources of information are occasionally silenced as well. During episodes of haze in 1997 and 1998, the government gagged environmental scientists and university-based researchers and declared the numerical Air Quality Pollutant Index out-of-bounds in media coverage. The clampdown was to stem “adverse publicity” said to be affecting the country’s “image” abroad and affecting tourist arrivals.

The media is increasingly being deterred from investigating and reporting news deemed detrimental to the “national interest” (as opposed to “national security”). Social activists are warned that the government’s reserves of patience are not infinite. The public takes the cue to be discreetly silent in public, although little stops them from being vocal in private.

#### **Box 4: OSA – Warning Shots**

- ❖ A *Bernama* report in September 2002 quoted *de facto* Law Minister Dr Rais Yatim as saying Opposition Leader Abdul Hadi Awang should disclose his sources of information for the shadow budget presented two days before the government tabled the Budget 2003 speech in the Dewan Rakyat on Sept 20. The financial data in the ‘alternative budget’ corresponded uncannily with the official version. Dr Rais said the government officials who may have provided the data could be charged under Section 8 of the Official Secrets Act. While “copying facts” was not an offence, he said, “retrieving information from documents classified a secret is an offence”. Hadi himself was liable to be penalised under the OSA, and the Criminal Procedure Code or the Penal Code for “obstructing government administration”, Rais added. (*Bernama, Sept 22, 2002*)
- ❖ Johor Baru police fired a warning shot across the bows of the media in March 1995, when they arrested *Harian Metro* reporters Yusaini Ali and Saniboey Mohamed Ismail. They were alleged to have released classified information in a news report dated Dec 10, 1994 on the kidnapping and murder of a Malaysian industrialist’s 14-year-old son. They were released on bail on April 3, but police dropped the charges on June 3. Upon release, Saniboey advised journalists to be “more cautious” in reporting the news. Ahmad Tarmizi, a former Special Branch officer at the Johor police headquarters and a stringer for the paper was arrested on April 11, 1995, for supplying the information. He was released on bail five days later and the charges against him were dropped on June 16. (*Committee to Protect Journalists 1995*)

Aspirations have long been heard in Malaysia for repeal of the OSA and introduction of FOI legislation. Veteran Opposition leader Lim Kit Siang moved a private member’s FOI Bill in 1976, but it was rejected. Opposition parties, the Bar Council, Transparency International Malaysia, the NGO coalition People’s Manifesto Campaign, human rights groups Suaram and Hakam, social reform group Aliran and the Women’s Development Collective have each initiated calls or memoranda to the Home Ministry since then. There has been no response.

Since April 2000, coalitions of political and civil rights groups and journalists' organisations have separately submitted memoranda to the Human Rights Commission of Malaysia (Suhakam), which has professed empathy. Its clearest response was to organise a workshop on press freedom issues for government officials, the media and civil society groups on Aug 1, 2002. Participants endorsed the following recommendations among others:

- Ensure equal access to information to all. The media has a right and corresponding duty to report on matters of public interest and human rights.
- Review the use of national security legislation – Sedition Act, ISA and OSA – in relation to media operations. Threats to national security should not be seen as an excuse to restrict freedom of the media, particularly in relation to issues of editorial independence and protection of confidential sources.
- Enact FOI legislation and repeal all laws and administrative procedures that hinder the work of the media and journalists.

As its own statutory powers are limited, Suhakam can do little more than hear out concerned parties and make recommendations on reform to the government. Legislators, however, have proved to be hard of hearing, given their undivided loyalty to the ruling National Front (BN) coalition that controls Parliament.

This is not just a domestic phenomenon. In Indonesia, the much-awaited passage of the FOI Bill has been stalled. A senior Indonesian journalist says this is due to two reasons. It is caught in a backlog of Bills that has built up from July 2001, when President Megawati Sukarnoputri took office. Its priority is also uncertain, if compared to the speed with which two anti-terrorism bills were passed after the Bali bomb blasts of Oct 12, 2002. Any unfinished parliamentary business will have to be carried over, given that a general election is due in 2004.

More to the point, says the journalist, is that Indonesian MPs are “not terribly keen” on enacting FOI law, which may be used to track public scandals, official misconduct, state-sponsored junkets, collusion with government and Big Business. It is simply a matter of preserving self-interest instead of promoting the public interest.

### ***Custodians, gatekeepers and stakeholders***

In Malaysia's 'Yes-Minister' form of government, civil servants may be the custodians of information, but must bow to the decisions of leaders and appointees of BN political parties. The Prime Minister and his deputy over-arch this structure and, by virtue of their influence, tend to set the parameters of debate on matters of public interest.

It is particularly difficult for citizens' groups and the media to separate the aims of the state from those of the political and corporate elite. The interests of the latter two have spilled over into most areas of administration since the mid-1980s. That was when privatisation, corporatisation and Malaysia Inc policies were adopted, to outsource traditional state-operated services to the private sector. This transferred responsibility for key public goods and services to the private sector, but created a political-economic power nexus that is tough to penetrate.

Secrecy has been transferred as well, shielding the activities of the companies involved from public scrutiny. The public tender system does not apply to these projects, while feasibility and technical studies are usually stamped 'secret'. Since the public-sector employees are absorbed by newly formed companies, they transplant and replicate the bureaucratic culture that impedes information flow to consumers and delays responses.

Calls to enhance corporate transparency have increased over the past two decades, in tandem with the private sector's growing influence on economic, social and human development. Any FOI legislation must therefore facilitate access to corporate records where these relate to the public interest. Other solutions lie in establishing transparency laws, ethics committees and additional mandatory disclosure requirements to business and financial authorities. There must first be independence, credibility and integrity at all levels of supervision – in terms of the agency created and those appointed to it.

An active media could play a watchdog role to probe irregularities and bring about open debate on issues of public interest. However, the Malaysian media is hobbled by both external and internal factors. Apart from laws, policies and practices that hamper free and independent media operations, the industry is beholden to the corporate sector for advertising revenue. Allies of the government hold licences for newspapers, and there is even less criticism of policies and practices today than in the period up to the mid-1990s. News coverage and analysis tends to be superficial, subjecting official statements to little comment or query.

Foreign newspapers and magazines, satellite television news channels and the Internet may occasionally supplement local sources of information. But these have limited reach due to lower circulation, higher cost, absence of electricity supply or telephone connection, or lack of fluency in the English language. Those in power consistently deride foreign editorial content and discredit those disseminating it, suggesting that hidden agendas or ignorance are strong influences – this may not be entirely inaccurate, but it unfairly tars all foreign coverage of issues with the same brush.

Generally, there is an absence of unified and concerted public demand for information because of fragmented political, business, social and cultural interests in a society that is still divided along ethnic and class lines. Significantly, too, there is absence of widespread deprivation of basic needs that might have otherwise brought the masses together over a common purpose – as has happened in the Philippines, Thailand and Indonesia.

Educated Malaysians have abrogated their civic duties by leaving policy- and decision-making to legislators and administrators. The well connected have access to all the information they need – or can tap someone in authority – to enhance decisions or expedite response. Income-poor, marginalised or vulnerable groups must rely on the vagaries of politicians and administrators, as well as on a controlled media for what they need to know or wish to communicate.

The middle class is still bent on acquiring material wealth rather than asserting basic rights. Most people declare they or have "no time" to attend local government meetings, NGO events or neighbourhood campaigns aimed at gathering public input or support. Many are also wary of possible repercussions. They wait for NGOs, residents' associations, Opposition parties, the media or social reform movements to articulate

representative 'public views' over unpopular policies and practices. Well-marshalled citizens' lobbies are the exception rather than the norm.

#### **Box 5: Puchong Incinerator Project**

When residents around Kampung Bohol in Puchong, Selangor, got wind in July 2002 that the government proposed to build RM1.5 billion thermal incinerator plant in their locality, they became alarmed about potential toxic emissions and the impact on health and the environment. About 260,000 people live within a five-kilometre radius of the site.

Mobilising expert resources within their community, they set up an action committee to research the subject and examine available official documents like the Environmental Impact Assessment (EIA) report. Several technical discrepancies and inconsistencies were detected in the report. They launched an education and advocacy campaign to link residents through a web site and public talks. A signature campaign yielded 135,000 names up to November 2002. The committee met Housing and Local Government Minister Ong Ka Ting and ministry officials periodically over several months, but alleged their questions and concerns were not adequately addressed.

Their concerns received no coverage in the major newspapers. This led to suspicion of political pressure for a news blackout – the minister is a member of political party Malaysian Chinese Association (MCA), the investment arm of which controls *The Star*, *Nanyang Siang Pau* and *China Press*. A *Star* editor denied this, claiming that the newspaper was only taking a "cautious" stand on the issue in the interests of balanced reporting.

Opposition MP Teresa Kok raised the issue in the Dewan Rakyat, but Deputy Housing and Local Government Minister Peter Chin Fah Kui said the Science, Technology and Environment Ministry had already dealt with it. Chin said residents had developed a "not in my backyard" mentality, and that they would feel better once the plant becomes operational, scheduled in 2007.

Puchong residents planned to show their disapproval in the forthcoming general election, due by November 2004, if the plant was not relocated. The BN controls five of the six parliamentary constituencies in the area.

On Nov 21, 2002, government sources told *Malaysiakini* that the project would be relocated to Broga, Selangor. Residents there have since mounted their own campaign against the project.

Source: *Malaysiakini* reports available on: <http://www.malaysiakini.com>

#### **State of access to information**

As and when Malaysians need to access information, they are quickly put off by poor infrastructure and attitudinal barriers. However, rather than initiate reform, they have been content to grumble in private and adjust to privations. Individuals are persuaded to act only when personal interests are affected and, even then, are quickly reassured or intimidated by means of co-option or coercion. (*Padman 2001*)

Official information is held at federal and state levels because the Federal Constitution provides for separation of powers in land administration, religious affairs and development of natural resources. Problems arise in compiling or updating data when state agencies do not comply with federal requests for information in timely manner. Federal orders for improved practices are ignored if these affect state economic interests, especially in the tussle between environmental preservation and land development or resource exploitation.

At both levels, too, information is distributed between the head office and branches of various agencies. Citizens and often journalists must usually submit a written request for data. They are not allowed to view actual records unless they have obtained special permission as researchers. Even then, they have no access to 'secret' documents, while a moratorium may be placed on publication of findings considered 'sensitive'.

The quantity and quality of information varies. Researchers say social and demographic data are incomplete in both geographical and emerging areas of coverage. Shortcomings exist in some sampling and data-collection methods, leading to doubts if the information is comprehensive, current and credible. Physical retrieval of data through registry 'searches' of business and land records, while affordable, is a slow process that may yield information of little real value. The financial and economic fields have shown the greatest improvement. Technological upgrading has helped end the siege mentality of key agencies like the Economic Planning Unit, Central Bank and Statistics Department, which routinely post current data on web sites. (*Padman 2001*)

The Malaysian civil service still has some way to go before it meets public expectations. It has been upgrading counter services to transit from paper-based files to computer-based records, but progress is uneven. A move to electronic government is among the seven flagship applications that will give practical effect to the Multimedia Super Corridor project. This is expected to remove some of the human obstacles in accessing information.

Until then, the information chase will be a tiresome one due to:

- Tedious procedures and unexplained delays in response that exceed a month.
- Fragmented information that is distributed throughout the bureaucracy.
- Politics of disclosure (in that information is withheld or revealed only as half-truths).
- Limited recourse to official or judicial appeal.
- Arrogance, ignorance and lack of courtesy among custodians of information.
- Location of, and poor transportation facilities to, sources of information.
- Inefficient or insufficient use of electronic means to disseminate information.
- Ignorance, uncertainty and personal difficulty (not knowing how or where to source information, being given the runaround, no guarantee of information, having to take time off from work). (*Padman, 2001*)

### ***Knowledge intensification strategies***

The Internet was initially hailed as the solution to Malaysian information woes, especially in delivering independent news and views not found in the print and electronic media. To some extent, new technology has widened plurality of views and free expression, with the emergence of web sites that highlight the views of Opposition political parties and NGOs. Most newspapers also have web sites that mirror print content. However, these have not explored the freedom of cyber-space as independent operations because of possible revocation of the annual licence for their profitable print versions.

Internet penetration is still low in Malaysia. In 2000, it only covered 7.5 percent of the population of 23 million, but this is expected to increase to 25 percent by 2005. Rural and remote areas lag behind urban areas due to lack of telephone lines or electricity; the high cost of installing and maintaining hardware and software; computer illiteracy; and language problems. Internet media operations, meanwhile, face serious financial difficulties in sustaining operations.



Some categories of Internet content providers are required to obtain licences under the Communications and Act 1998, but this does not apply to news sites like *Malaysiakini*, *Perspektif Pedas* and *thefreemedia.com*. Internet content remains free of government control and censorship, unlike in China. Those who have access to the Internet are able to express themselves freely enough, but not all have the courage to do so under their own identity.

Those who spread 'public alarm' via e-mail face criminal action, although the sole court case to date failed the test of evidence. Defamation and sedition laws may be applied to Internet content in Malaysia. On Jan 20, 2003, police raided the *malaysiakini* office to investigate a complaint about an allegedly seditious letter posted on Jan 9. They seized computer equipment and questioned editorial staff. (*Reports available on: [www.malaysiakini.com](http://www.malaysiakini.com)*)

Still the preserve of the young, the Internet is popularly used in Malaysia to access information on education, job opportunities or skills, health, consumer products and services, sport and entertainment. Ideas of using information to widen democratic discourse or participation in governance have yet to catch on, as relatively few Malaysians have an appreciation of what the Internet can do in the realm of civil and political liberties. Those who do, use the medium to provide information on their causes or political ideology through web sites and electronic groups.

Coalitions of NGOs like the Citizens' Health Initiative and Citizens' Media Initiative (or Charter 2000), as well as the political reform movement, use the Internet to co-ordinate public lobbies and disseminate information that does not get into the mass media. Print and Internet journalists have also formed online communities to promote professional causes. Advocacy efforts are pooled through *Inisiatif Wartawan* (Journalists' Initiative), which responds to wider media issues including those of press freedom, and the right to information and free expression.

The government, meanwhile, is moving to expand the use of computers and access to the Internet; to provide infrastructure and utility supply; and to resuscitate fluency in the English language to arrive at "100 percent basic Information Technology literacy" among citizens. This is to prepare Malaysians to benefit from the Information Age through opportunities to be found in a new knowledge-intensive economy and society (k-economy, k-society).

The underlying philosophy of the k-economy initiative is one of applying maximum knowledge to every sphere of economic activity to sustain global competitiveness and propel the country towards fully developed status by 2020. In the process, an information-rich society will be built. Implementation of the k-economy began in 2001, with Phase 2 scheduled between 2004 and 2006. The final phase will span 2007-2010.

Official pledges of reform made on Sept 9, 2002 at the launch of the K-Economy Master Plan indicate that there may be entry-points for free flow of information and expression. "Critical thinking" is to be introduced in the education curriculum, while the civil service is in line for "radical changes" (*The Star Online, Sept 10, 2002*). Prime Minister Dr Mahathir Mohamad had himself had hinted at new rules of transparency for the public and private sector through new disclosure requirements, when he addressed the Second Global Knowledge Conference held in Kuala Lumpur on March 8, 2000. (*Mahathir 2000*)

“There will, of course, be need for reform in the private and public sector. The ancient and hallowed *sulit* (secrecy) syndrome must be done away with. The traditional ‘Great Information Hoard’ ...must be killed,” he said. “The private and public sector will need to operate according to new rules of transparency, new regulations for disclosure, new processes of corporate and public sector governance.”

However, close reading of the Master Plan does not articulate any such measures. It outlines seven strategic thrusts and 136 recommendations for action – of these, 64 are aimed at developing human resources. The remainder are to establish institutions to drive the k-based economy, provide info-structure and infrastructure, expand science and technology capacity, create a leading role for the private sector, develop a k-based civil service, and bridge the digital divide.

### ***A new information infrastructure***

Pending the delivery of the oral pledges, citizens’ groups and journalists interviewed during the Southeast Asian study in 2000 spelt out several needs for a new culture and infrastructure of information. All agreed that the highest priority should go towards repeal of all laws and discretionary powers that restrict civil and political liberties. Legislation should be subjected to periodic review to ensure these remain meaningful to evolving democratic aspirations. New watchdog bodies would be needed to audit information disclosure and content, and to set benchmarks for acceptable standards of disclosure based on ease of public access to official records. (*Padman 2001, p119-120*)

The researchers’ wish list focused on an efficient, systematic and transparent process of compiling and retrieving information from government agencies. Reform should cover:

- better networking within and across public bodies;
- professional management of information; and
- easy and universal access to data on web sites.

They also wanted research and information officers to be trained to improve the quality, analysis and generation of data. Speedy response was another demand, to enable citizens to provide timely and accurate input into decision-making processes.

Journalists suggested that the government be pro-active in releasing information. They also raised the need for an independent and impartial self-regulatory body to enforce media accountability, sound news values and ethics, so that truthful and balanced information is disseminated.

## [TOWARDS AN ENABLING ENVIRONMENT FOR FOI](#)

### ***Needs in Malaysia***

There is a quick way and a slow way of creating a climate for enactment of FOI legislation. Countries moving out of authoritarian regimes have chosen to bite the bullet and bring in freedoms previously denied to citizens. Through a combination of capacity-building by global institutions and sweeteners dangled by bilateral trade partners, their governments have created a FOI regime, even if these are currently experiencing teething problems.

Where governments are not as easily persuaded, citizens require tenacity and perseverance to elicit change. Malaysians have to aim at comprehensive law reform as the starting point. The OSA and other laws inimical to press freedom and free flow of information have to be repealed or amended to remove existing shackles. As has been shown, FOI legislation can sufficiently meet justified secrecy needs without indulging in paranoia.

On its part, the state should initiate a participatory process for national consultation, as Thailand did when it drafted its 1997 Constitution and FOI legislation. The process reached into the grassroots in remote provinces, deriving input and feedback before the legal instruments were finalised. As a result, Thai people were educated on the intent of law and were motivated to claim ownership of laws when these were enforced.

In Malaysia, such a process could be fed into local administration procedures. The UNDP-sponsored *Local Agenda 21* and township structure plans already incorporate components for disclosure of development-linked information and consultation with ratepayers. The process is still confined to large urban centres – and results are by no means guaranteed for citizens, who may see their input ignored in the final outcome. Still, it has jump-started a process that could be used to expand the information lobby.

As and when FOI provisions come into force in Malaysia, the government will have to invest in upgrading the information infrastructure, to enable routine disclosure on request. Apart from providing comprehensive, accurate and relevant data, civil servants will have to develop an appreciation for the political, social, economic and cultural value of information – they have to be aware that non-disclosure could unleash a backlash, and must find ways to improve communication of information.

Enforced disclosure through transparency laws and ‘best practice’ mechanisms like audit committees would make private bodies holding public records disseminate or deliver information that is in the public interest. The Bank of Thailand, for example, set up an office in October 2001 with the function of providing requesters access to financial and economic information. (*The World Bank 2001, p190*)

Independent bodies have to be set up to track implementation and to mediate in disputes between custodians and citizens. Such bodies should have powers to insist on government compliance. In this respect, the judiciary’s role cannot be under-estimated in setting high disclosure standards when cases are referred to the court, as is done in other countries.

On Nov 22, 2002, for instance, a senior Ugandan judge ordered the release of the Power Purchasing Agreement, a business document in relation to the controversial River Nile (‘Bujagali’) dam project. The Ugandan government and project-funder The World Bank had withheld it, leading a local group to file a legal suit. The court upheld the plaintiff’s case based on Article 14 (on open government) of the Constitution. (available on: <http://www.freedominfo.org/ifti.htm>)

Courageous and creative interpretation of existing legal provisions in Malaysia could review the need for secrecy, set limits and uphold fundamental human rights. To encourage citizens to test the parameters of law, civil court procedures – currently being upgraded – should reduce response time and keep legal costs affordable.

NGOs will have to be diligent and vigilant in carrying the initial burden of educating citizens, and training civil servants to use and improve the information regime. This process will have to use simple and plain language, calling on practical and realistic examples to explain why access to information is important for public knowledge. Citizens, too, will have to find the time to participate in governance and handle official consultations with competence.

As done elsewhere, NGO information-based strategies could further:

- Make active use of the information system to identify real-time responses;
- Teach citizens to access records and critically analyse their content;
- Develop and monitor indicators for practical access to information;
- Mount legal challenges whenever access to information is delayed or denied; and
- Engage the executive, legislature, judiciary and media on delivery of human rights.

At least during the transition years, academicians and researchers would have to help interpret official data for the layperson. Analytical reports and informed comment could build public awareness of political, social and economic developments that have an impact on issues of democratic governance.

The media has a responsibility to disseminate information widely and to obtain input from all sectors of society, especially those most disadvantaged. This requires a media that is free, independent, resourceful and interested in information gathering. Journalists have to actively use the information system – as matters stand, they do not make sufficient use of search facilities even when public records are available.

Still, it would be unrealistic to expect journalists, sub-editors and editors to develop specialised skills overnight to deal with changes to the information regime. Training for journalists must focus, even now, on how to communicate increasingly complex topics to widen public debate. The Malaysian media must revive high ethical and professional standards to regain credibility. There must be an end to censorship and self-censorship, which cripple investigative functions and skills.

### ***Value of information-rich discourse***

The free flow and use of information creates challenges for the shaping of relations among citizens and for co-existence in a pluralistic society. In multi-ethnic, multi-religious Malaysia, information is frequently withheld on the grounds that it could cause social tensions. Official thinking has not evolved, mainly due to political resistance to change. A compliant and complacent citizenry is easier to manage than one that is active and vocal in matters of governance.

However, truth and trust are instant casualties of information blockages. Any shortfall could fuel suspicion, dissent or alarm; breed rumours and conspiracy theories; or escalate civil strife or conflicts. Uncertainty and smear tactics could cause a breakdown in public order that may be manifested in political and economic instability. When the damage is done, even the truth will be received with cynicism, for it will come as too little, too late.

Those campaigning to eliminate official secrecy should anticipate the need to ease citizens into healthy habits of debate. Learning the etiquette of discourse would prevent dominance of some views over others, personal attacks, or the playing of racial and

religious cards. Citizens should learn to make responsible use of information, and high ethical standards must be applied to those providing and disseminating data.

With the right information at the right time, citizens would have access to relevant knowledge. They would feel empowered to contribute to debate on issues that affect their well being. If their views are translated into policies, citizens are likely to trust the government's decisions. When the needs of all sectors of society are met, they would be confident that resources are being fairly shared. All this starts with access to information.

### **Issue for Discussion**

- Identify ways in which the government, civil society and media can better involve citizens in the governance process.

### **Questions for Participants**

- What practical pro-disclosure strategies should the government implement pending the drafting of FOI legislation? How can civil society and the media play a watchdog role?

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