

## Chapter 2

# Balancing the Scales: Legislating for Access



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

— Commonwealth Expert Group on the Right to Know, 1999<sup>44</sup>

It is the duty of governments to promote and protect the internationally recognised human right to access information. This is most effectively done by enacting specific legislation. To evolve a law that is truly in tune with the context and the needs of users, the process of making law in partnership with people is as important as what the law contains. Over the years, international organisations and civil society have developed principles and guidelines that encapsulate minimum standards to assist the development of effective laws. While many of the access laws within the Commonwealth leave much to be desired, there are also many examples of good practice to draw on.

## Key International Standards

### **The Commonwealth**

As early as 1980, the Commonwealth Law Ministers' Meeting recognised that official information needs to be accessible to enable public participation in a democracy.<sup>45</sup> Yet little was done to promote the right to information until 1999 when the Commonwealth Secretariat set up the Expert Group on the Right to Know and the Promotion of Democracy and Development. Based on the Expert Group's final report, the Commonwealth Law Ministers adopted the Commonwealth Freedom of Information Principles, recognising the right to access information as a human right whose "benefits include the facilitation of public participation in public affairs, enhancing the accountability of government, providing a powerful aid in the fight against corruption as well as being a key livelihood and development issue."<sup>46</sup>

#### **Commonwealth Freedom of Information Principles (1999)**

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

Unfortunately, the final set of Principles adopted by the Commonwealth Law Ministers is much less comprehensive and liberal than those recommended by the Expert Group. The principle of *maximum* disclosure was watered down, and the exemptions provision does not include the requirement that information be withheld "only when disclosure would harm essential interests [and] provided that withholding the information is not against the public interest". Also, the Guidelines recommended by the Expert Group, which focus on ensuring that appropriate administrative provisions are in place to ensure effective implementation, largely did not find their way into the Law Ministers' final set of Principles.

## Disclosure In The Commonwealth: The Need To Lead By Example

Despite the Commonwealth's stated commitments to openness and transparency, it has failed to lead by example in the area of information-sharing. Its main agency, the Commonwealth Secretariat, does not have a comprehensive disclosure policy in place, and despite some welcome good practice at recent meetings of its officials, the Official Commonwealth continues to hesitate to engage civil society in its working or functions. Information such as communiqués of meetings are released, but records of policy formation and decision-making, and even the internal administration of the Secretariat, are automatically deemed confidential and remain secret for thirty years. Even after that time access can be difficult.

By contrast, the United Nations Development Programme's (UNDP) Public Information Disclosure Policy is extremely wide and inclusive. The Policy's objective is stated clearly to be to "ensure that information concerning UNDP operational activities will be made available to the public in the absence of a compelling reason for confidentiality".<sup>47</sup> There is "a presumption in favour of public disclosure of information and documentation generated or held by UNDP".<sup>48</sup> Anyone can ask for copies of any document in the UNDP's possession, except those expressly exempted on such grounds as commercial confidentiality, confidentiality of internal deliberative processes, legal privilege and privacy of employees.<sup>49</sup> Where a request is refused, an appeal can be made to an Oversight Panel consisting of three UNDP professional staff members and two outsiders.<sup>50</sup> Such policies are an important step forward, facilitating citizens' participation in projects that affect them and working to ensure that economic development reaches its target.

The Commonwealth can also usefully draw on the information disclosure example provided by the European Union (EU), an organisation similar in its composition and mode of operation. The EU gave explicit legal status to the right to access information in 1997 through the Amsterdam Treaty.<sup>51</sup> The 2000 Charter of Fundamental Rights of the European Union explicitly guarantees access to documents of the European Parliament, Council and Commission.<sup>52</sup> In 2001, the EU passed a specific regulation on freedom of information to "ensure the widest access possible to documents".<sup>53</sup> It covers "all documents held by an institution, that is to say, drawn up or received by it and in its possession, in all areas of activity of the European Union".<sup>54</sup> The Regulation obligates both the European Union Commission and the European Parliament to maintain updated public registers of documents on the internet. The European Ombudsman's Code of Good Administrative Behaviour, which applies to all institutions of the EU,<sup>55</sup> also requires officials to "provide members of the public with the information that they request". The Code enjoins officials to deal with requests in a timely fashion,<sup>56</sup> and to take effective steps to inform the public about their rights under it.<sup>57</sup>

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

— Mr Abid Hussain,  
UN Special Rapporteur, 1999<sup>68</sup>

The Commonwealth Law Ministers encouraged the Commonwealth Secretariat to actively promote the Principles which the Commonwealth Heads of Government approved in November 1999.<sup>58</sup> To this end, the Secretariat has designed a Model Law on Freedom of Information<sup>59</sup> to serve as a guide to law-makers. Overall, the Model Law is progressive and contains a good set of provisions. However, it has some limitations and omissions, which do not accord with generally recognised international standards. For example:

- It focuses on access to “documents” rather than “information”.<sup>60</sup> If interpreted narrowly, this could result in a more restrictive application of the law.
- It allows for excessive exemptions. A general ministerial override provision allows for exemption in any category if required by the “national interest”. Ministerial certificates that disclosure would be contrary to the public interest in certain specified areas are conclusive and not open to independent review.<sup>61</sup>
- There is no statement that the law overrides inconsistent legislation, like secrecy laws, or that such laws should be repealed or amended.
- The only avenue for independent appeals is through the courts.<sup>62</sup> There is no provision for independent review by a specialist commissioner, tribunal or ombudsman because the Commonwealth felt that creating separate oversight bodies could prove too difficult for developing countries and small states with limited resources.<sup>63</sup> However, many of these countries already have general independent oversight bodies like an Ombudsman, who could provide citizens with an additional forum to appeal information refusals without the expense of the courts.

All these shortcomings make the Commonwealth's standards less comprehensive than those endorsed by other international bodies. For example, the African Union recognises the right to access information from private bodies, clearly recognises the need to amend secrecy laws in order to enable access to information and accepts the need for an independent appeals body. The principles endorsed by the UN Commission for Human Rights especially incorporate the government's obligation to protect whistleblowers and make provision for public education. None of these requirements are present in the Commonwealth Model Law.

### **United Nations**

In furtherance of its early recognition of the right to information as a human right, in 1993 the UN Commission on Human Rights appointed a Special Rapporteur on Freedom of Opinion and Expression whose mandate included monitoring and reporting on the implementation of the right. The Special Rapporteur has unequivocally clarified that freedom of information under Article 19 of the International Covenant on Civil and Political Rights imposes “a positive obligation on States to ensure access to information, particularly with regard to information held by Government in all types of storage and retrieval systems.”<sup>64</sup> In 1998, the Commission passed a resolution welcoming this view.<sup>65</sup> In 2000, the Special Rapporteur endorsed a set of principles on freedom of information,<sup>66</sup> which the Commission has noted.<sup>67</sup>

## UN Principles On Freedom Of Information (2000)

- **Maximum disclosure:** Public bodies have an obligation to disclose information and every member of the public has a corresponding right to receive information; “information” includes all records held by a public body, regardless of the form in which they are stored.
- **Obligation to publish:** Public bodies should publish and widely disseminate documents of significant public interest, for example, on how they function and the content of decisions or policies affecting the public.
- **Promotion of open government:** At a minimum, the law should make provision for public education and the dissemination of information regarding the right, and include mechanisms to address the problem of a culture of secrecy within government.
- **Limited scope of exceptions:** A refusal to disclose information may not be based on trying to protect government from embarrassment or the exposure of wrongdoing. The law should include a complete list of the legitimate grounds which may justify non-disclosure and exceptions should be narrowly drawn to avoid including material which does not harm the legitimate interest.
- **Processes to facilitate access:** All public bodies should be required to establish open, accessible internal systems for ensuring the public’s right to receive information; the law should provide strict time limits for processing requests and require that any refusal be accompanied by substantive written reasons.
- **Costs:** Fees for gaining access should not be so high as to deter applicants and negate the intent of the law.
- **Open meetings:** The law should establish a presumption that all meetings of governing bodies are open to the public.
- **Disclosure takes precedence:** The law should require that other legislation be interpreted, as far as possible, in a manner consistent with its provisions. The exemptions included in the law should be comprehensive and other laws should not be permitted to extend them.
- **Protection for whistleblowers:** Individuals should be protected from any legal, administrative or employment-related sanctions for releasing information on wrongdoing.<sup>69</sup>

The value of the right to access information has not only been recognised by the UN’s human rights agencies, but also in a number of the UN’s other areas of activity. In 1992 for example, the Rio Declaration on Environment and Development recognised that: “[E]ach individual shall have appropriate access to information on hazardous materials and activities in their communities...States shall facilitate and encourage public awareness and participation by making information widely available”.<sup>70</sup> In 1997, the UN General Assembly endorsed the Rio Declaration’s provision on access and specifically resolved that: “Access to information and broad public participation in decision-making are fundamental to sustainable development”.<sup>71</sup> The Plan of Implementation adopted at the Rio+10 World Summit on Sustainable Development in Johannesburg in 2002 also called upon governments to “ensure access, at the national level, to environmental information and judicial and administrative proceedings in environmental matters”.<sup>72</sup> Likewise, following the World Summit for Social Development, the Copenhagen Programme of Action affirmed the obligation to “enable and encourage access by all to a wide range of information” and recognised that “an open political and economic system requires access by all to knowledge, education and information”.<sup>73</sup>



## **Regional Organisations**

Outside their UN obligations, many Commonwealth states are also members of regional, security and economic groupings. Every major grouping – including the Organization of American States, the African Union and the European Union – has stressed the importance of freedom of information and either laid down policy guidelines, created codes to open up their own working or legislated to protect the right in their foundational documents.

### **African Union**

Signed over twenty years ago, the African Charter on Human and Peoples' Rights, signed by all nineteen of the Commonwealth's African member states, explicitly recognises the right to receive information.<sup>74</sup> In 2002, the African Union's African Commission on Human and Peoples' Rights adopted the Declaration of Principles on Freedom of Expression in Africa and reiterated that "public bodies hold information not for themselves but as custodians of the public good and everyone has a right to access this information".<sup>75</sup> Part IV deals explicitly with the right to information. Though not binding, it has considerable persuasive force as it represents the will of a sizeable section of the African population.

#### **African Union Declaration Of Principles: Part IV (2002)**

- Everyone has the right to access information held by public bodies.
- Everyone has the right to access information held by private bodies which is necessary for the exercise or protection of any right.
- Any refusal to disclose information shall be subject to appeal to an independent body and/or the courts.
- Public bodies shall be required, even in the absence of a request, to actively publish important information of significant public interest.
- No one shall be subject to any sanction for releasing in good faith information on wrongdoing, or information which would disclose a serious threat to health, safety or the environment.
- Secrecy laws shall be amended as necessary to comply with freedom of information principles.<sup>76</sup>

### **Organization of American States**

The laws and standards of the Organization of American States apply to twelve countries of the Commonwealth, including all the Commonwealth Caribbean states,<sup>77</sup> Belize, Canada and Guyana. The American Convention on Human Rights includes as part of the right to freedom of thought and expression the "freedom to seek, receive and impart information and ideas".<sup>78</sup> The Inter-American Court of Human Rights, which oversees the implementation of the Convention, has made it clear that "a society that is not well informed is not a society that is truly free".<sup>79</sup> The Inter-American Declaration of Principles on Freedom of Expression adopted in 2000 specifically recognises that

## International Financial & Trade Institutions: Not Exempt

International financial and trade institutions such as the World Bank, International Monetary Fund (IMF) and World Trade Organization (WTO) preach openness as a key factor in national government reform and development, but have themselves resisted giving information with any ease. Yet this is vital – as much to ensure the effectiveness of their interventions, as for the maintenance of their institutional image. Many Commonwealth countries are members of these international institutions and are bound by their policies. Conversely, membership and associated voting rights offers them the opportunity to encourage these institutions to implement the principles of good governance that they preach.

The international financial and trade institutions have long maintained that they are not subject to international rights regimes or national laws and that they are accountable only to member states. In recent times though, however reluctantly, in response to the demand for greater accountability the institutions have been putting in place information disclosure policies. The policies implement varied degrees of openness; much continues to be secret and criticism remains that information is more readily given about structure and function than about governance and decision-making. Ironically, the very volume of information released can make relevant information difficult to pinpoint, and lack of familiarity with the complex workings of their systems and the technical jargon used can make documents difficult to interpret.<sup>80</sup> To be valuable for democracy and development, information from influential international institutions must be accessible to the people to whom it matters, meaningful enough to allow input into the decision-making process, and detailed enough to enable citizens to hold these powerful institutions and member governments accountable for their policies.

*World Bank:* Under the new disclosure policy, implemented since 2002, governments are now required to disclose some previously confidential structural adjustment material and have the option to release other documents on a voluntary basis. However, by making the release of most final documents voluntary rather than mandatory, the Bank has side-stepped responsibility for its own transparency, giving governments power over deciding whether or not to disclose World Bank documents.<sup>81</sup> Information on operations and policies is available, such as environmental assessments and resettlement plans, but other useful information remains secret, such as country assistance reviews, board minutes, draft policy papers, supervision reports, project completion reports and performance audit reports.

*International Monetary Fund:* The IMF has been severely criticised for operating in secret. Its 1998 disclosure policy lists documents that can be made available; but disclosure is only possible if concerned governments consent. Agendas and minutes of meetings of the governing board are excluded from what is already a very bare list of documents for disclosure. Successive managing directors have stated that the IMF is only accountable to its member countries, and increased openness will require consensus among governments.<sup>82</sup> On the positive side, the IMF is currently examining the legalities of requiring member states to make mandatory disclosures.

*World Trade Organization:* Information about the governing structure and descriptions of key bodies and functions are available, as are final agreements and summaries of governing body decisions and statements. However, all trade negotiations and dispute settlements are closed to the public. Critics argue that providing access to agreements only after they are signed is unsatisfactory because without knowing what really goes on during negotiations, it is difficult to hold the WTO or country representatives to account. The new 2002 Derestriction Policy<sup>83</sup> though, is very comprehensive, shortening the time frame in which documents can be released from an average of eight to nine months, to six to eight weeks.<sup>84</sup> Some documents can still be withheld (most commonly, documents the member itself has provided to the WTO) if a WTO member-government demands non-disclosure, but the list of undisclosed documents has been cut down.

Although these institutions are now beginning to pay more attention to transparency in their operations, there are still some fundamental flaws in their information disclosure policies. Firstly, all conform to the principle that member states must consent to information disclosure regarding their activities and that a change in policy requires a consensus of member states. Secondly, there is no provision for independent review where requests for information have been refused. Thirdly, the documents released are usually geared towards informing people of decisions after they have been made, rather than providing information throughout the decision-making process; but information supplied after decisions are taken does not help broaden participation. While progress has been made in opening up, clearly there is still work to be done.

“access to information held by the state is a fundamental right of every individual. States have obligations to guarantee the full exercise of this right. This principle allows only exceptional limitations that must be previously established by law in case of a real and imminent danger that threatens national security in democratic societies”.<sup>85</sup>

## Developing National Legislation

The right to information can be protected through a variety of legal mechanisms, from explicit constitutional safeguards to individual departmental orders that allow for access. For example, information can be obtained through the provisions of citizens charters adopted voluntarily by departments or through codes or executive orders. The United Kingdom has been providing access to information since 1997 through the *Open Government Code* which will be in force until the *Freedom of Information Act 2000* comes into effect in 2005. However, enabling access to information through executive orders and administrative directives is not ideal, as they can be easily overturned at any time. Specific access legislation remains the ideal legal mechanism by which to entrench the right to information.

Even where there is no specific access legislation, sector-specific laws sometimes mandate disclosure. For example, environmental laws may require publication of impact assessments, or corporate laws may require the dissemination of annual reports and financial statements. Constitutional protection is also often provided. The constitutions of Ghana, Malawi, Mozambique, Papua New Guinea, South Africa, Tanzania and

### Not Just Any Old Law

Some access laws in the Commonwealth have been hailed as extremely comprehensive, as in South Africa, but others are mere window dressing. For example, when taken cumulatively, the weaknesses of both the Pakistan Freedom of Information Ordinance 2002 and the Indian Freedom of Information Act 2002 cast serious doubt on the capacity of the Acts to effectively secure the right to know. They both grant excessively broad exemptions and refusals to give requested information are not subject to the test that the public good would be significantly harmed by releasing the information. In addition, the provision for appeals are unsatisfactory; in the case of Pakistan, neither the procedure for hearing before the appellate authority nor the authority's investigative powers have been specified; and under the Indian Act, all recourse to the courts is barred.

The Zimbabwe Access to Information and Protection of Privacy Act 2000 is also deficient. The Act deals not only with access to information, but also use of personal information by public bodies and control of the media. The Act has been criticised as having been crafted to prevent, rather than promote, accountability and disclosure and its media registration provisions have, for instance, been used against Zimbabwe's privately-owned newspaper, the *Daily News*. The law makes no statement in favour of openness and there are so many and such wide exemptions that disclosure is unjustifiably constrained in practice.<sup>86</sup>



Uganda<sup>87</sup> all give the right to information explicit protection. Elsewhere, a number of Commonwealth constitutions recognise the right to receive and communicate information as a part of the fundamental right to freedom of speech and expression.<sup>88</sup> In other countries, such as India and Sri Lanka, although the constitution does not specifically mention the right to information, courts have read this right into the constitutionally recognised right to freedom of speech and expression or freedom of thought.

Even where there is a constitutional guarantee, there is still a need for legislation to detail the specific content and extent of the right. The constitutions of Fiji, South Africa and Uganda<sup>89</sup> specifically require that governments draft legislation to protect the right. Legislation sets a clear framework for putting in place systems and creating cultures of openness that are uniform across public bodies.

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## **Objectives**

*The law must begin with a clear statement that establishes the rule of maximum disclosure and a strong presumption in favour of access. Well-worded objectives clauses serve to unequivocally commit the government to certain key principles, and assist administrative and judicial interpretation.*

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Preambles and objectives clauses detail the reasons for passing the law and broadly indicate its scope. Strong statements supporting the principles of maximum disclosure, transparency, and accountability and explicitly recognising the peoples' right to information send the right message to citizens and public officials about government commitment to open governance. Conversely, failure to explicitly recognise the citizen's right to information or an emphasis on the limits of the right tempt restrictive interpretations.

South Africa's *Promotion of Access to Information Act 2000* states that one of its objectives is to "foster a culture of transparency and accountability."<sup>90</sup> Australia's *Freedom of Information Act 1982* expressly states that its object is to "extend as far as possible the right of the Australian community to access to information in the possession of the Government".<sup>91</sup> However, at the other end of the spectrum, the Pakistan Ordinance fails to explicitly declare that individuals have the right to information at all.

Objectives clauses also provide guidance on striking the balance between disclosure and non-disclosure. The Trinidad and Tobago *Freedom of Information Act 1999* clarifies that where discretions are to be exercised about providing information they "shall be exercised as far as possible so as to facilitate and promote, promptly and at the lowest reasonable cost, the disclosure of information".<sup>92</sup> The Canadian *Access to Information*

Act 1983 makes it clear that “government information should be available to the public, that necessary exceptions to the right of access should be limited and specific, and that decisions on the disclosure of government information should be reviewed independently of government”.<sup>93</sup>

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### **Extent of Coverage**

*The principle of maximum disclosure must underpin the law, and the extent of coverage should be defined as widely and inclusively as possible.*

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#### **Who is covered?**

*The law should cover all public bodies, as well as private bodies and non-government organisations that carry out public functions or where their activities affect people’s rights.*

Traditionally, access laws have concentrated on getting information from the executive branch of government, rather than the legislature and the judiciary, although even within the executive, exemptions have been granted for heads of state.<sup>94</sup> The need for these blanket exemptions in a modern electoral democracy is questionable.

In setting out the coverage of access to information legislation, a general definition of “public authorities” or “prescribed authorities” is usually provided. Most Commonwealth access laws cover ministries, government departments, public bodies, local authorities, state-owned corporations, commissions of inquiry and public service commissions. The Indian Act extends to any authority or body established under the Constitution or by Government law, or any body “owned, controlled or substantially financed by Government funding”.<sup>95</sup> The South African Act includes all three branches of government, provincial and local bodies, and any public functionary or institution performing a public function under law, but excludes the Cabinet and its committees, courts and tribunals insofar as their judicial functions are concerned, and Members of Parliament in that capacity.<sup>96</sup>

**In a world where non-state actors influence the destinies of millions, access laws are increasingly being extended to cover private bodies. The provisions of the South African Act are indicative of this trend.**

Increasingly, access laws are being extended to cover private bodies. The provisions of the South African Act are indicative of this trend, granting access to information held by private bodies if that information is required “for the exercise or protection of any rights”.<sup>97</sup> The Act also specifically covers records “in the possession or under the control of...an independent contractor engaged by a public body or private body” which is subject to the Act.<sup>98</sup> The United Kingdom *Freedom of Information Act 2000* extends its basic definition of “public authority” to cover information held by other persons “on behalf of [an] authority”,<sup>99</sup> thus including government contractors

in the duty to give information. The Jamaican *Access to Information Act 2002* gives the responsible minister the discretion to make the law applicable to any other body or organisation that provides services of a public nature, which are essential to the welfare of Jamaican society.<sup>100</sup> Of course, under these provisions not all information concerning private bodies will be released. Traditionally accepted limits such as privilege, personal privacy, and commercial confidentiality may still weigh in to balance the need for disclosure against the need to protect business and personal interests.

### **Who can access?**

*Any person at all should be able to access information under the legislation, whether a citizen or not. People should not be required to provide a reason for requesting information.*

Some laws permit any person at all to ask for information,<sup>101</sup> while others require the requester to be a citizen,<sup>102</sup> a lawful permanent resident<sup>103</sup> or to furnish an address in the country for correspondence.<sup>104</sup> The New Zealand *Official Information Act 1982* specifically includes corporate bodies or those having a place of business in that country in the list of potential requesters.<sup>105</sup> Where the laws permit access to personal information, such as medical records, tax files or social security documents, stricter conditions apply; the need to protect individual privacy usually permits only the person whose records are at issue to have access.

In no Commonwealth country is the requester required to state the reasons for their request, although in some jurisdictions reasons are sought if the requester is making a case for an urgent response.<sup>106</sup> In some jurisdictions, however, application forms sneak in provisions that require people asking for information to state the purpose for which it is sought.<sup>107</sup> Bureaucrats resisting disclosure argue that they need to know requesters' reasons because there may be mischievous motives behind information applications. But the motive for requesting information is irrelevant; access to information is not a needs-based concept, but a right premised on the fact that information is a public resource for the free use of individuals and groups.

### **What is covered?**

*The definition of "information" should be wide and inclusive.*

In law, every word counts. Hence, in determining what can be made available, access to 'information' rather than access to 'documents' or 'records' is preferred because, if pedantically interpreted, these latter two terms are more limiting. 'Information' on any given subject may not always be in one 'document/record'. For example, the number of times a particular contractor has been awarded government contracts (which gives a more complete picture about their relationship with government) may be scattered in various documents through various departments.

**The notion of a right to information holds within it the duty on public bodies to actively disclose, publish and disseminate, as widely as possible, information of general public interest even when not asked for.**



People asking for information may not know which specific document they are looking for or may want information that will be useful only if compiled from many sources. For example, statistical information such as the annual incidence of a disease, may not be available in one or several documents, but may become intelligible ‘information’ if collated from several records held by different agencies. ‘Information’ includes the notion of more than just written documents and covers things like samples of materials used in construction or scale models of buildings, which may be of importance to someone seeking knowledge of government sponsored projects or on the quality of materials used for construction.

Many Commonwealth laws refer only to official ‘documents’ or ‘records’.<sup>108</sup> The Indian Act however, permits access to “information in any form relating to the administration, operations or decisions of a public authority”.<sup>109</sup> Likewise, the United Kingdom Act refers to a broad right to information and does not specifically limit access to documents or records.<sup>110</sup> Most access laws cover information contained in a variety of media and are drafted broadly to cover newer technological innovations for creating and storing information.

### **Proactive disclosure**

*The law should impose an obligation on government to routinely and proactively disseminate information of general relevance to citizens, including updates about structure, norms and functioning of public bodies, the documents they hold, their finances, activities and any opportunities for consultation.*

The notion of a right to information holds within it the duty on public bodies to actively disclose, publish and disseminate, as widely as possible, information of general public interest even when not asked for. This is a particularly important aspect of access laws because often the public has little knowledge of what information is in the possession of government and little capacity to seek it. A larger supply of routinely published information also reduces the number of requests made under access to information laws. Particularly valuable are laws that make it compulsory for government agencies and departments to regularly publish: the structure and activities of every department; information about all classes of records under each department’s control; a description of all manuals used by employees for administrative purposes; and names and addresses of officers who deal with information requests.

A number of Commonwealth laws require departments to publish a statement setting out: the particulars of the organisation; its functions, including its decision-making powers; arrangements that exist for consultation with the public on policy formulation; and categories of documents held by the organisation.<sup>111</sup> In South Africa, contact details of departmental Information Officers must be published in every telephone directory – an effective and low-cost option for dissemination.<sup>112</sup> The Belize *Freedom of*

Information Act 1994 even requires that if a document containing basic departmental procedures is *not* made available, any person can be excused for any shortfall in conduct arising from the non-availability of that document.<sup>113</sup> The Indian Act has taken a positive step forward and requires public authorities to publish all relevant facts concerning important decisions and policies that affect the public when announcing such decisions, and likewise, before initiating any project to communicate all facts available to people likely to be affected and the public in general.<sup>114</sup>

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### **Limits on Disclosure**

*The limits on disclosure need to be tightly and narrowly defined. Any denial of information must be based on proving that disclosure would cause serious harm and that denial is in the overall public interest.*

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The acid test of any access law lies in the limits that it imposes on disclosure. That not all information held by governments and private bodies can be released is generally accepted, but disagreements arise about where the boundaries of ‘protected’ information lie. The issue of exemptions from disclosure involves a complex balancing act between different legitimate interests. But too often, the leeway to keep information away from the public in certain circumstances is used to retain more than is justifiable. The overriding principle needs to be that all information should be disclosed, unless the harm caused by disclosure is greater than the public interest in disclosure. The burden and the cost of proving that disclosure is not in the public interest should lie with government.

The recent Hutton Inquiry in the United Kingdom has provided ample evidence of the subjectivity that is applied when determining what is exempt and what will be disclosed. As a prominent civil society advocate has pointed out: “The level of disclosure at the Hutton Inquiry has gone far beyond that which a British law would normally provide. [Freedom of Information] laws balance the right of access against exemptions, one of which invariably gives government some privacy for its internal thinking. But the material we are now seeing is not filtered in this way”.<sup>115</sup> The reams of documents released during the Inquiry – many of which were originally classified as ‘confidential’, ‘secret’ or ‘private’ – has demonstrated in a compelling fashion that many disclosures that governments argue should be exempt because they would harm the public interest are actually protected only because of the harm they might cause to the ruling government.

### **Keeping Things Under Wraps**

Too many access laws allow government to keep secret information relating to investigations and proceedings conducted by public authorities. Such provisions usually cover commissions of inquiry, which are set up to examine matters of urgent public concern such as riots, financial scams and political scandals. Long drawn out inquiries can become an expedient means of overcoming periods of public outrage, while ensuring that damaging facts are still kept secret. In Pakistan, this was evidenced in the handling of the Commission of Inquiry set up to examine the 1971 War. The Commission was set up in December 1971, but its report, produced in July 1972, was not made public. Only a few copies were prepared and the distribution list was kept secret. In August 2000, an Indian newspaper disclosed a lengthy excerpt from the report – which was then widely reproduced by newspapers inside Pakistan. Eventually, in 2001, almost thirty years after the Commission was held, a major part of the report was declassified and released. However, at that late stage, accountability issues were almost impossible to pursue, frustrating the very objectives of the Commission.<sup>116</sup>



## Openness Is Its Own Reward

Politicians and bureaucrats closely guard the 'deliberative process' and the formulation or development of government policy on the basis that disclosure would affect the frankness and candour of discussions. While it may sometimes be necessary to protect official information from disclosure at certain stages of policy-making, the same degree of confidentiality is hardly necessary once the policy has actually been agreed. Recognising this, in 1994 the United Kingdom Government decided to release the minutes of the monthly meetings between the Chancellor of the Exchequer and the Governor of the Bank of England – information that had previously been kept a closely guarded secret – six weeks after each meeting. Initial fears that the policy would create self-censored and bland discussions proved ill-founded. The *London Times* has commented: "Instead of papering over disagreements with platitudes, the minutes are impressively clear and sharp."<sup>121</sup>

## Specific exemptions by person/organisation or class/category

*Legislation should avoid broad, blanket exemptions. In most cases, each document and the context of its release is unique and should be judged on its merits.*

Access laws often explicitly provide a blanket exemption for a particular government position or agency of state, such as national security and intelligence organisations.<sup>117</sup> But excluding whole organisations from any duty to give information at all gives them unjustified protection from accountability. It is only a very narrow band of information held by military, security, and scientific agencies that is 'sensitive' in nature; for the rest it is pretty routine fare. For example, recruitment criteria of a national security organisation or travel allowances paid to members of parliament hardly merit secrecy. There is also a risk that the protection of such blanket provisions will be extended too far. In Australia, for example, even the Sydney Organising Committee for the Olympic Games<sup>118</sup> and the Australian Grand Prix Corporation<sup>119</sup> have been exempted from the coverage of certain state access regimes.

Frequently, documents are automatically exempted because they relate to specific topics or belong to a certain class of information. Among the most common categories are documents related to: defence; national security; foreign policy and international relations; deliberative processes of government and cabinet; investigations and proceedings conducted by public authorities such as commissions and inquiries; law enforcement and the prevention or detection of crime; federal-provincial relations; legal privilege; personal privacy; public safety; the safety of individuals; confidential inter- and intra-departmental dealings; and sensitive economic and commercial information.

Additional grounds include documents whose release would: endanger public health; cause material loss to members of the public; affect the sanctity of constitutional conventions; or impair the confidentiality of ongoing research or information contained in the electoral rolls. In a narrow category of cases, such as those affecting national security or when information is supplied by an intelligence agency, governments can even refuse to confirm or deny that information exists.<sup>120</sup>

## **Bureaucratic discretion and ministerial veto**

Disclosure is often made subject to discretionary exemptions or veto. But internal government discretion being exercised subjectively really amounts to being judge in one's own cause and is a major defect in any effective access to information regime. The most pernicious of these types of discretionary provisions give ministers the power to unilaterally issue certificates that prevent disclosure of information, usually in specified areas such as national security or foreign affairs. The Australian and Jamaican provisions are much wider and include cabinet proceedings, law enforcement, public safety and the economy. Ministerial certificates are usually conclusive and cannot even be revoked by the appeals tribunals overseeing the legislation.<sup>122</sup> Under the United Kingdom Act, the Information Commissioner cannot revoke ministerial certificates, but the Information Tribunal can.<sup>123</sup>

When discretionary powers are granted to officials without being subject to any supervision or scrutiny, their use can be arbitrary and contrary to the fundamental purpose of access legislation. That such unfettered discretionary powers are not always used sensibly is witnessed by vetoes exercised in Australia, where the costs of a proposed national identity card and a review of the effectiveness of certain health programmes was vetoed, and in New Zealand, where the successful tender price for wall plugs, unemployment estimates and an evaluation of computer use in schools were vetoed.<sup>124</sup> In the United Kingdom, the veto power was recently invoked when the Prime Minister's Office refused to comply with an Ombudsman recommendation that it release a list of gifts received by ministers. The Ombudsman revealed that the Lord Chancellor, who favoured disclosure, was overruled when the Prime Minister's Chief of Staff decided that press coverage of a "huge list of gifts" would be embarrassing.<sup>125</sup>

## **Public interest override and harm tests**

*Exemptions should be subject to content-specific case-by-case review and non-disclosure only permitted where it is in the public interest and release would cause serious harm.*

While an absolute bar against disclosure sometimes applies to certain categories of information, such as cabinet papers or deliberative documents and advice, in other cases 'override' provisions allow access to be granted even to exempted information where it is shown that the public interest in disclosure outweighs any harm that is likely to occur upon release. Examples include cases where the information would reveal evidence of: substantial contravention of the law; injustice to an individual; unauthorised use of public funds; an imminent and serious safety or environmental risk; or abuse of authority or neglect in the performance of official duty by a public servant.<sup>126</sup>

The Australian, Trinidad and Tobago and South African Acts are quite liberal in their use of public interest overrides. They adopt an open-ended approach, allowing the interest in release to be balanced against non-disclosure. The New Zealand Act adopts

## Balancing The Public Interest

A case from New Zealand illustrates the practical value of a public interest override. Following a boating accident in which two men were killed, the Maritime Safety Authority, a government body, conducted an investigation. When a copy of the investigation report was sought, the Authority declined after consulting the widows of the victims who asked that the information be kept out of the public domain. On appeal, the Ombudsman agreed that the information in question was indeed protected by a privacy interest, but he noted that there was also a public interest in the release of the information, as it would help in preventing similar accidents in future. He therefore ruled that the public interest in disclosure was stronger than the privacy interest in withholding.<sup>127</sup>

a multi-tiered approach under which withholding of some types of information is justified if disclosure would 'prejudice' certain interests,<sup>128</sup> whilst in other cases a higher threshold of 'serious damage' is required before information can be withheld.<sup>129</sup> The Canadian override is narrower, coming into play exclusively in relation to third party commercial information; but even then, the only public interest issues that can be taken into account are those of public health, public safety or protection of the environment.<sup>130</sup>

The United Kingdom Act, in particular, has come in for heavy criticism because it allows whole classes of information to be withheld without subjecting them to any 'harm test'. These include information relating to the formulation and development of government policy, investigations by law enforcement and regulatory agencies, advice received from law officers and information concerning the security services. Whether or not it is in the public interest to release information, the Minister responsible for the department has an ultimate veto, even where the Information Commissioner orders the concerned department to produce a certain document, and can overrule the decision and stop its release.<sup>131</sup>

### Partial disclosure

Sometimes documents contain some information that falls within an exempt category, but the remainder of the document is not exempt. Most laws recognise the principle of 'severability', so that where requested information is in a document which is otherwise exempt from disclosure, it may still be provided after being severed from the rest of the document.<sup>132</sup> Openness can be supported by a creative use of available legal tools, such as partial disclosure, disclosure to a limited number of people or staggered disclosure over a period of time.

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## Procedural Requirements

*A key test of an access law's effectiveness is the ease, inexpensiveness and promptness with which people seeking information are able to obtain it. The law should include clear and uncomplicated procedures that ensure quick responses at affordable fees.*

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### How to make a request

Most laws require requests in writing, although the Jamaican Act permits requests to be made by telephone.<sup>133</sup> The Indian and South African Acts are well-crafted to facilitate access by the poor and unlettered; they specifically provide that where a request cannot be made in writing, the officials shall render all reasonable assistance to the person to reduce their oral request to writing.<sup>134</sup> Nearly all the laws oblige government departments to render reasonable assistance to applicants so as to minimise refusal, including assisting applicants to formalise their request, referring them to another department or transferring their request to the right department(s).<sup>135</sup>

In order to discourage 'fishing expeditions' and to reduce the time taken to process requests, there are usually stipulations which require that requesters provide sufficient information about the document or record being sought to allow authorities to identify it.<sup>136</sup> Providing people with the right to inspect documents and requiring departments to maintain lists of available documents moderates the strictness of such provisions by making it easier for applicants to identify the information they are looking for and formulate a specific request.

### Forms of access

User-friendly laws make accommodations for the diverse capacities of information-seekers. Most laws allow applicants to inspect, read, view or listen to official records or ask for photocopies, transcripts or computer print-outs.<sup>137</sup> The New Zealand Act expressly permits the government to furnish applicants with oral information about the contents of any document.<sup>138</sup> This affords the opportunity to get information without waiting for a written copy. The South African Act confers a right on disabled requesters to get information in a form that they can read, view or hear, albeit on payment of an additional fee.<sup>139</sup> The Indian and United Kingdom Acts leave open the form of access, allowing the authorities room to comply with any *reasonable* request.<sup>140</sup>

In places where there is more than one official language, many access laws provide for information to be kept in several languages and provided in the language of choice. Without such provisions, whole groups could otherwise be excluded from accessing information. In Canada for example,



information is often kept in French and English. There is also a provision allowing a head of department to provide a translation if it is “in the public interest”.<sup>141</sup> The South African law requires that information be provided in the language of choice if the records are maintained in that language.<sup>142</sup> Surprisingly, the new Indian Act is silent on this matter, despite India having sixteen officially recognised languages.<sup>143</sup>

### **Fees**

All Commonwealth access laws allow for fees to be charged, although in Australia at least, the federal freedom of information regime did not impose fees in the first four years of its operation.<sup>144</sup> Fees are now said to be an important element in deterring frivolous requests. Governments also sometimes contend that it costs money and takes time to develop and maintain records or information systems and that the public must bear some of this cost when seeking information. These arguments are of questionable

merit. Record-keeping and information dissemination are basic and essential functions of effective government and are anyway already funded by public money. In countries where most people are poor, fees are a serious obstacle.

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Nevertheless, most access laws charge a fee at the time of application, as well as an additional charge based on the time taken by officials for a search<sup>145</sup> and/or for replication of the document.<sup>146</sup> But if imposed at all, fees should only cover the actual cost of reproducing the information requested; they should not be charged on application, nor for the time taken to process a request. Some

laws provide for fees to be waived or reduced, either at the discretion of the authorities<sup>147</sup> or on specified grounds, such as where insistence on payment would cause financial hardship to the requester or where the grant of access is in the interest of a substantial section of the public.<sup>148</sup>

### **Time limits**

Bureaucratic delay is a prime device for defeating requests for information. All laws set down time frames within which information must be given, usually between 14 and 30 days from the date of filing of the request. In order to avoid the habit of giving information at the very last minute, some laws usefully direct public officials to give information “as soon as practicable” or “as expeditiously as possible”.<sup>149</sup> Certain types of information can be requested within shorter timeframes. For example, the Indian Act makes a distinction between information concerning the life and liberty of a person, which is required to be provided within 48 hours, and other information, which is to be provided within 30 days.<sup>150</sup> The Canadian and South African Acts try to force timely compliance by providing that if a decision on a request is not communicated to the requester within the stipulated time limits, it will be construed as a deemed refusal, thereby allowing appeals mechanisms to come into play.<sup>151</sup>



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## Appeals and Enforcement

*Effective enforcement provisions ensure the success of access legislation. Any body denying access must provide reasons. Powerful independent and impartial bodies must be given the mandate to review refusals to disclose information and compel release. The law should impose penalties and sanctions on those who wilfully obstruct access to information.*

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### Appeals

It is not sufficient for administrators simply to refuse applications from citizens; they must state why an application has been denied, so that the disappointed applicant can meaningfully appeal. In fact, the duty to give reasons for refusing information is increasingly a general requirement under administrative law in many Commonwealth countries, with the courts coming down heavily upon public authorities who fail to comply with this basic requirement of fair play. Most Commonwealth access laws require public authorities to give reasons for their decisions to refuse access, to furnish the grounds in support of those reasons and to inform the requester about remedies available to them by way of internal review, appeal, complaint or judicial review.<sup>152</sup>

The natural tendency of governments to confuse their own interests with the public interest requires that appeals go beyond departmental reviews, which make the government judge and jury in its own cause. All laws provide for some form of appeal from a decision to reject a request for information. Most use a tiered method that first allows for an internal review, and then goes on to adjudication by an independent specialist tribunal and/or court. While internal appeals provide an inexpensive first opportunity for review of its decision, oversight by an umpire independent of government pressure is a major safeguard against administrative lethargy, indifference or intransigence and particularly welcome where court-based remedies are slow, costly and uncertain. The fear of independent scrutiny ensures that exemption clauses are interpreted responsibly and citizens' requests are not unnecessarily obstructed. Special independent oversight bodies that review or decide complaints of non-disclosure are a cheaper, more efficient alternative to courts and enjoy public confidence when they are robustly independent, well-funded and procedurally simple.



**The natural tendency of governments to confuse their own interests with the public interest requires that appeals go beyond departmental reviews, which make the government judge and jury in its own cause.**

Commonwealth laws variously provide for: quick, time-bound internal reviews; specialist external review mechanisms like Information Commissioners, Ombudsmen and Information Tribunals, which may have a mix of powers and duties to both promote the law, review its working and deal with individual complaints of non-disclosure; or court-based appeals. In South Africa, for example, after an internal review requesters can approach the High Court.<sup>153</sup> The Australian Act has an option to approach the Ombudsman for mediation, and if the Ombudsman fails to resolve the issue, appeals can then be made to the Administrative Appeals Tribunal.<sup>154</sup> The Belize, New Zealand and Trinidad and Tobago Acts similarly allow first recourse to their Ombudsman, but then permit appeal to the courts.<sup>155</sup> The Canadian Act allows the Information Commissioner to mediate disputes between requesters and agencies and make recommendations, but provides no power to order agencies to release information. Requesters can also take their complaint to the courts.<sup>156</sup> The United Kingdom Act provides for initial appeals to the Information Commissioner, a second appeal to the Information Tribunal, and appeals on points of law to the courts.<sup>157</sup> The Canadian and United Kingdom Acts also confer powers of entry, search and inspection on enforcement authorities.<sup>158</sup> The Indian Act has been heavily criticised because it bars approach to any court whatsoever,<sup>159</sup> relying instead exclusively on administrative remedies.

### **Enforcement & penalties**

Rights must have remedies. Penalties for unreasonably delaying or withholding information are crucial if an access law is to have any real meaning. Lack of penalties weakens the whole foundation of an access regime. Sanctions are particularly important incentives to timely disclosure in jurisdictions where the bureaucracy is unused to hurrying at the request of public. Without penalties, it is easy for bureaucrats and their political masters, especially in countries with lax or corrupt administrative systems, to subvert the purpose of the law.

Unfortunately, only some laws provide tough sanctions for non-compliance. The Indian Act, for example, is severely weakened by the lack of any penalty provisions. Ideally, heads of departments should be made personally responsible for compliance with access laws by their departments. In certain circumstances, there is every justification for insisting that responsible officers be fined and made to pay out of their own pockets for non-compliance, with further sanctions under the criminal law in more extreme cases where there has been wilful obstruction or serious harm resulting from their actions. Many Commonwealth access laws make it an offence to destroy, conceal, erase, alter or falsify records and contain penalty provisions for these actions.<sup>160</sup>

New Zealand's Privacy Commissioner has pointed out though, that "[i]f an Official Information Act request is not delivered in a timely fashion, the most that will happen on review is that the documents ultimately are required to be handed over",<sup>161</sup> and has suggested that consideration be given to whether victims of delay might also be entitled

to damages.<sup>162</sup> The Trinidad & Tobago Act usefully provides that where requests are not responded to within time, the fees usually payable upon disclosure may not be imposed.<sup>163</sup> Under the United Kingdom Act, if an enforcement notice issued by the Information Commissioner is ignored or a public authority knowingly or recklessly makes a false statement in purported compliance with the notice, the matter can be dealt with by the High Court as a contempt of court.<sup>164</sup> However, on public policy grounds, the Act expressly bars any civil suits for non-compliance, such that disappointed requesters cannot launch civil actions for damages.<sup>165</sup>

Most laws protect government officials and agencies from legal action regarding acts carried out in good faith in exercise of their functions.<sup>166</sup> These measures make it difficult for political pressure to obstruct requests.

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### **Facilitating Implementation**

*A body should be given specific responsibility for monitoring and promoting the Act. The law should obligate government to actively undertake training for government officials and public education about the right to access information. Records management systems should be created and maintained which facilitate the objectives of the Act.*

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### **Monitoring**

Independent monitoring of implementation ensures that the purposes of the law are met and the law is not subverted or watered down in course of time. Most Commonwealth laws require some form of monitoring and periodic reporting. For example, under the Belize Act the responsible minister must annually table a report to the National Assembly.<sup>167</sup> Under the Canadian Act, the Information Commissioner is required to present an annual report to the national legislature and heads of government departments must also present Parliament with annual reports.<sup>168</sup> The South African Human Rights Commission monitors the implementation of the South African Act.<sup>169</sup>

### **Education & training**

Raising awareness is vital to effectuating legislation and creating a demand for information. Recognising this imperative, the South African Act specifically obligates the Human Rights Commission to conduct public education programmes, in particular in disadvantaged communities, and to encourage the participation of private and public bodies.<sup>170</sup> Resources permitting, the Commission is also encouraged to train government information officers. Under the United Kingdom Act, the Information Commissioner is under a duty to promote good practice by public authorities, as well as to disseminate information to the public about the operation of the Act.<sup>171</sup> These provisions are useful in directing specific attention – as well as tangible resources – to implementation.

## **Records management**

The huge volume of information in governments' hands requires that information be carefully managed so that authorities can locate and provide requested information in a timely and efficient way. The key is to ensure a comprehensive framework is in place which is capable of supporting the objectives of the access legislation. The United Kingdom Act specifically requires the development of a code of practice to provide guidance to authorities on appropriate practices for "the keeping, management and destruction of their records".<sup>172</sup> Under the Canadian Act, the responsible minister is required to keep under review the manner in which records are maintained and managed to ensure compliance with the Act.<sup>173</sup> In Australia, a separate National Standard On Records Management provides guidance to all public bodies.<sup>174</sup>

## **Legislation is a Start**

Developing the content of access laws presents formidable challenges. Design matters as do details. Much depends on the balance that the system is able to achieve between ensuring the right of every citizen to be adequately informed of public affairs, and safeguarding those other interests, such as national security and public safety, which are no less prized. While a law alone cannot *always* ensure an open regime, a well-crafted law, which strengthens citizens' democratic participation, is half the battle won.