<table>
<thead>
<tr>
<th><strong>Title</strong></th>
<th>The right to freedom of information</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Author(s)</strong></td>
<td>Cushrow Irani</td>
</tr>
<tr>
<td><strong>Citation</strong></td>
<td></td>
</tr>
<tr>
<td><strong>Date</strong></td>
<td>2000</td>
</tr>
<tr>
<td><strong>URL</strong></td>
<td><a href="http://hdl.handle.net/10220/3214">http://hdl.handle.net/10220/3214</a></td>
</tr>
<tr>
<td><strong>Rights</strong></td>
<td></td>
</tr>
</tbody>
</table>
SPEECH BY MR.CUSHROW IRANI,
EDITOR-IN-CHIEF, THE STATESMAN, CALCUTTA (INDIA),
AT THE SEMINAR ON “ASIAN MEDIA AND FREEDOM OF
INFORMATION” AT BANGKOK ON MAY 8, 2000.

It seems to me best to present some real life experiences as an introduction to the subject we are discussing this afternoon.

When Indira Gandhi was Prime Minister of India, her Minister for Information and Broadcasting publicly claimed that the entire Government of India and all actions taken by the Government were protected by the law of privacy – an unacceptable dimension to what was otherwise a reasonable and necessary right.

I am reminded of a particular case some years ago when Narasimha Rao was Prime Minister, a huge scandal erupted over a severe shortage of sugar within the country. Repeated meetings were held within the Government where the Secretary in the Ministry of Food, an honest and upright bureaucrat, kept warning that there would be a major shortage of sugar and asked for massive imports before the world caught on that India was in the market for huge quantities of sugar in which case prices would skyrocket.
This strategy, eminently in the country's interest, did not suit the Minister-in-Charge, Kalpanath Rai, and his crooked friends. On the contrary, they were interested in preventing imports so that prices could rise within the country and they would get a cut from sugar mill owners who would make a fortune. We are in the business of finding out what the Government does not wish us to know. We managed to get hold of copies of a series of decisions taken by the Cabinet Committee concerned where the decision to import was recorded but no action was taken. Finally, a meeting was taken by the Prime Minister himself and categorical instructions were given to arrange import of sugar at once. Even these instructions were ignored. It transpired that the Commerce Minister who was to implement the decision was part of the conspiracy and preferred to sit on his hands. Later, when the scandal blew up and he had to answer for his conduct, he explained it away by saying that nobody had told him who would be responsible for the widening difference in costs between the official price in India and the world price at which imports were to be arranged. It was part of the conspiracy to let the international market know that India was about to buy over a half-million tonnes of sugar. The world market price went through the roof and there was an uproar in the Indian Parliament. Bowing to pressure from all sides of the House, the Prime Minister appointed the former Comptroller and Auditor-
General of India, Mr. Gyan Prakash, to head a Commission of Inquiry. He hoped that the gentleman concerned would be understanding of the Government’s commitment, but he proved to be an honest man and a professional of high calibre. His report was damning. He held the Minister for Food directly responsible for the shortage and commended the bureaucrats in the Food Ministry for their timely warnings. He asked for investigations into the reasons why the Cabinet Committee’s decisions were not implemented and to fix responsibility. The problem, however, was that this Report was not published for at least seven months even when a demand for its publication was raised in Parliament. There is a law in India called the Commissions of Inquiry Act under which it is provided that reports of Inquiry Commissions must be placed before Parliament and thus published, but the bureaucrats had found a loophole. The provision was that the Report would be tabled in Parliament together with the Action Taken Report, that is to say, with the action taken by the Government on the Report. By the simple expedient delaying the Action Taken Report, the main Report of the Commission of Inquiry was routinely withheld from publication.

Armed with a copy of the Report which I had obtained through my own sources, I sought an appointment with Prime Minister Narasimha Rao who
was, to say the least, very uncomfortable. I told him frankly that I was disappointed to hear him say in Parliament the day before that the Report would not be published. I said I was struck by two points. One was the Prime Minister's statement that he had not had the time to read the Report although it was now more than seven months old. The other was the attitude of the Food Minister, Kalpanath Rai, who died recently. He was so irritated by the concerted attack on him that while replying to the debate in Parliament, he said quite plainly, "Do not ask me any questions; whatever I have done, it is at the behest of this man", and he pointed his finger at the Prime Minister of India, who sat with his head bent. I told the Prime Minister that I would urge him to reconsider his decision not to publish the Report because I had a copy. When he suggested that I was threatening him, I denied the allegation saying that I was only trying to respect the office of the Prime Minister of India.

Now comes the interesting part. A major newspaper published from New Delhi printed a story spread over four columns to the effect that the Gyan Prakash Report had exonerated the Food Minister and had squarely blamed the bureaucrats, the exact opposite of what I knew to be the truth. The Food Minister had ensured this publication by issuing licences for six new sugar
mills to the son-in-law of the proprietor of the newspaper. The significance of issuing licences for new sugar mills is a peculiar phenomenon in India. New mills are exempt for a period of six years from being obliged to part with a significant portion of the total sugar production to the Government at a subsidized price for distribution through the public distribution system for people below the poverty line. This led to endless corruption, but that is another matter. I have to say that this newspaper with a large circulation acted in gross breach of the elementary principles of journalism. I am not saying this from the safety of a foreign land. I have said this publicly in India and said this in the presence of representatives of the newspaper in question. I am the strongest critic of the Press from within the Press and the most zealous upholder of the standards that my paper, The Statesman, seeks to set before itself. I strongly believe that the Press has no business criticizing men and affairs everyday unless its own conduct, like Caesar’s wife, is above suspicion.

The story has an epilogue. Instead of standing by the honest Secretary in the Ministry of Food, and penalizing the Food Minister, Prime Minister Rao connived at transferring out the honest bureaucrat to a less significant job and giving the Minister more powers to meddle in the Food Ministry. This
could only happen if the Prime Minister himself were involved in the conspiracy to cheat the nation.

If you want to gauge the extent of corruption involved in this scandal, some further details are necessary. The Minister was not content to issue six new licences for sugar mills to the newspaper proprietor's son-in-law. He issued hosts of new licences. We presented his actions in three columns. In column 1, we presented details of new licences for sugar mills given in areas where there was no surplus sugarcane available. In column 2 we presented details of new licences given in areas where sugarcane did not grow at all. In the third column we presented details of licences for new sugar mills given in barren areas where nothing grew. I have to admit that when an Indian bureaucrat and an unscrupulous politician enter into an unholy alliance, they can cause immense damage to the public interest. There was a footnote to say that licences were being given in areas where nothing grew at present because it had come to the knowledge of the Minister that there were plans for irrigation facilities to be provided in these areas in course of time and when the facilities became available sugarcane would be grown and sugar mills would become necessary! Faced with this shocking abuse of power,
we published the Report and the newspaper concerned and the Government both had egg on their faces.

I am constantly told that it is all very well for me to take such bold positions. I run a newspaper and wield enormous influence. I have two answers to this approach. One, ownership or editorship of a newspaper does not automatically bring with it a certain reputation. As in other fields of human conduct, reputations have to be earned and respect has to be commanded; it cannot be ordered off the shelf. The second answer is that there is almost always an excuse for inaction on the part of those who ought to stand up and be counted in the face of evil. A situation which is all too common is that it is always the other man who should be standing up and doing his duty. Let me quote to you what the Prophet Mohammed had to say on the subject because I think he put it very well. He said, “If you come face to face with an evil, you must fight it with your hands. If you are unable to fight, you must speak against it. If you cannot use your tongue, you must condemn it in your heart. That is the lowest level of faith”. These are profound words. Everybody can demonstrate the lowest level of faith. Nothing justifies joining the bandwagon of opportunity for unlawful enrichment, for abuse of power. I can go on like this till breakfast time tomorrow giving you case
after case, details upon details of a wide variety of corruption and abuse of power as examples on the subject, but I do not have the time.

Let me now go on to refer to Dr. Venkat Iyer’s presentation on the subject of Freedom of Information Act. There is indeed a Bill pending in the Indian Parliament called the Freedom of Information Bill 2000 introduced earlier this year. It is not a Bill that I can support. To summarize, it is drawn up by bureaucrats for the benefit of bureaucrats and for the protection of bureaucrats. It is wholly against public interest. According to Dr. Iyer, and I agree with him, the principle must be disclosure and the exception secrecy and the exceptions must be clearly and narrowly defined. Also there cannot be too many exceptions. This particular Bill does not pass this test. First, the question of the absence of the necessary climate. I speak with some experience having been the Chairman of the International Press Institute for four years, longer than anybody else and on its Board for close to 20 years. In most countries in Asia and certainly in several countries elsewhere as well, governments *ex hypothesi* proceed on the basis that secrecy is the principle and disclosure the exception. Only those governments are not prone to secrecy which have a very vigilant public opinion and a vibrant and
free press. Let me briefly enumerate the flaws in the Indian Freedom of Information Bill:

First, all requests for information have to be sent to an officer designated as the Public Information Officer. He will be a bureaucrat appointed by the Government. An appeal from his decision lies to a tribunal consisting of more bureaucrats, also appointed by the Government. There is scope for a third and final appeal and the final appeal brings us full circle – the appeal is to the Government itself which is almost always the offender in the first place!

A particularly despicable feature of the Bill is the exclusion of judicial review. Clause 15 of the Bill says explicitly and I quote, “No court shall entertain any suit, application or other proceedings in respect of any order made under this Act and no order shall be called in question otherwise than by way of appeal under this Act”. Look at the too-clever-by-half approach. “The appeal under this Act” is the appeal from one bureaucrat to a committee of bureaucrats and then to the Government. It is not a Bill that anyone familiar with jurisprudence will accept.
Now let me come to the conclusion that I have reached. I am quite clear in
my mind that unless there is a pre-existing climate of openness, a Freedom
of Information Act can be a veritable disaster. Today I am able to publish
and in fact have published as I have explained earlier, the Report of a
Commission of Inquiry under the Commissions of Inquiry Act which the
Government refused to publish. It is entirely reasonable to expect that a
Freedom of Information Act will provide that such reports of Inquiry
Commissions can only be published once they are tabled in Parliament.
Today I am free to do what I have done with the Gyan Prakash Committee
Report on the sugar scandal and, believe me, we do this all the time and the
only way the Government can take effective action is to go to ordinary
courts of law and seek to prove that what has been published is an official
secret disclosure of which is against the national interest, against the
interests of relations with foreign countries or against the public interest. No
government in India will undertake this burden of proof because the courts
are independent and court proceedings can be published under privilege.
Only a handful of newspapers in India out of the 60000-odd publications
have been able to push back the frontiers of liberty and make the Official
Secrets Act, drawn up in the year 1926, almost a dead letter.
I have nothing against the Freedom of Information Act in principle; on the contrary I am all for it. I helped draft a Bill to that effect sought to be passed by one of the states of the Indian Union. The Bill was introduced in 1988 and remains a Bill in the year 2000. It includes a provision for protection of journalistic sources of information. The Statement of Objects and Reasons of this Bill states quite plainly that an open government is necessary to ensure a proper functioning of a democratically elected government; hence the provisions relating to immunity to journalists from disclosure of sources of information, right of access to public documents and penalties for causing hurt with the intention of preventing journalists from performing their duties. I am not saying that this Bill is the last word on the subject. But it is more germane to the issue that we are discussing than any other Bill including the Central Bill which is pending in the Indian Parliament.

A reference has been made to the position taken by Article XIX. As a member of the Executive Board of this international organization, I endorse their stand. It is necessary to retain a balance. Governments are certainly entitled, and ought to be entitled, to keep some secrets. You cannot run a government on the streets. There is no difficulty with this proposition. The difficulty arises in its implementation. It is extremely difficult to draw up a
model Freedom of Information Act. Having stressed the difficulties involved, I would still say that the way to progress is to proceed in the direction of a Freedom of Information Act. But we must proceed with caution. In more parts of the world than I care to mention and certainly in our part of the world in Asia, caution must the watchword; otherwise we shall end up with a reassuring statement of the need for a free and open society and therefore a Freedom of Information Act, but coupled with it there will be a mile-long list of exceptions and if you come within the exceptions legal penalties will be provided. I do not see why the practice of journalism should proceed under such avoidable perils.

I have come to the conclusion that a free press may be possible without a Freedom of Information Act. India's press, for instance, today is as free as it chooses to be, but it does not always demonstrate its desire to be free. Freedom is a very nebulous and delicate plant; it needs constant nurturing and it needs to be exercised to the fullest. We do not want a situation which puts you in the kind of situation of the erstwhile Soviet Union which had a very reassuring Bill of Rights, but which said in small print at the end that in every situation the supremacy of the Communist Party of the Soviet Union could not be questioned! I would like to suggest that there are no freedoms
so dangerous as those which are not exercised. Therefore, while a free press may be possible without a Freedom of Information Act, it seems to me to follow that a Freedom of Information Act without a free press is an impossibility. The reason is very simple. A model Freedom of Information Act gives the right to every citizen to seek information. But what does he do with that information? If it concerns his own personal records, then no public interest is involved. But this does not happen very often. In the campaign to eradicate the appalling levels of corruption that apply in most of our societies and the need to expose and eliminate gross abuses of power which have impoverished so many nations that we know about, it is axiomatic that the information that the Government is obliged to furnish under an effective Freedom of Information Act should be capable of being published; otherwise the public will not know. In this sense, a Freedom of Information Act is an extension of the public's right to know. The press merely exercises this right on a professional and continuous basis on behalf of citizens. Hence the link between the Freedom of Information Act and the need for a strong and independent and pluralistic press.

Dr. Iyer's ten points are a brilliant summary of the areas that we should identify and work upon. He has mentioned the need for good governance. It
is beyond doubt the need of the hour. Even in the Indian Constitution the expression *good governance* occurs only once.

It used to be said when I was in college that good government is no substitute for self-government. The world was then divided between colonial powers and subjugated nations and it was tempting to say that we should be left to make our own mistakes and to learn from them. This is true. But I tend to question this proposition today and let me tell you why. It is based on direct experience. A few years ago, a three-member Committee comprising Katherine Graham of the Washington Post, Lord McGregor, Chairman of the Royal Press Commission in the U.K. and myself undertook a visit to Hongkong and Singapore. We went to Hongkong to assist in the effort to clean up the legal system before the colony was handed over to China. We found that in their hurry, in the law relating to sedition, *mens rea* or intent was removed from the connotation of the offence. This meant that anybody who uttered words, wrote something or behaved in a certain way which may cause a disruption of the public peace would be held guilty. Earlier it was necessary to show that the person intended to cause the disruption. The Chinese Head of the Department of the Hongkong Government was not very impressed by our argument. The British Attorney General was away on
holiday. So our next step was to see the Governor of Hongkong who was only two weeks into his job. I argued the point on behalf of our Committee. Governor Wilson listened patiently and at the end of it said that we had made our case but he would need time to look into it as he had only just taken charge. Journalists tend to be cynical. Cynicism is perhaps our most formidable weapon. We must question, dispute endlessly to get the facts before we publish. We had all assumed that this was a polite brush-off and did not take seriously the Governor’s statement to me that he would get back to me in a month. To some surprise on our part, within two weeks I received a letter from Governor Wilson saying that we were right and mens rea or intent had been put back into the definition of the offence.

From Hongkong we went to Singapore, a wonderful country for shopping, holidays and gastronomical delights. We were seen by a very clever and very young Minister. He was very polite and charming, but the Minister was clear – This is our country, we know what we want, thank you for your visit, but you are wasting your time. Remember Hongkong was a colony at that time under colonial rule from London, and Singapore was a self-governing country.
I have had other experiences which point to the same conclusion. It is no longer sufficient to say that good government is no substitute for self-government. We have been overtaken by events. It is necessary now to say that self-government is not a substitute for a responsive government. If good governance rests on the willing consent of the governed, then the governed must be treated with dignity, respect and fairness. This adds up to an open society with a free press and an independent judiciary.

One last word, Ladies and Gentlemen, and I have done. We have been talking about human rights. I would like to urge the European Union to reconsider their attitude to Section 10 of the European Convention on Human Rights. My difficulty is not in the abstract. I have come across it on several occasions in practice. The European Convention is limited to Europe but it has a persuasive influence elsewhere and that is where difficulties arise. Section 10 of the European Convention seems to suggest that such restrictions as are imposed on free speech and free expression must be imposed by law. This is alright in the European context. It is a danger and a menace elsewhere. Let me give you a concrete example. In Sri Lanka which is not far from India, a newspaper editor found himself charged with criminal defamation for something which was published in a signed gossip
column about the President of the Republic. Sri Lanka also has a Press Council Act which, in my view, should be scrapped. A section of this Act provides explicitly that the duty of the Press Council is to carry out the Government’s policy towards the press! It also creates two independent offences, one of which is to defame high authorities of the government. My friend, the editor, was therefore in double jeopardy – one, a charge under the general laws of defamation and a separate charge under the appropriate section of the Press Council Act. I went to attend the trial and I was informed that my presence has had some beneficial effect on the outcome. The case is still pending in appeal before the Supreme Court of the country. During arguments, Counsel for the Prosecution repeatedly stressed the fact that the restrictions had been imposed by law and the European Convention on Human Rights allowed restrictions to be imposed by law. No one familiar with the decisions of the European courts would accept this argument, but it was advanced in this case in Sri Lanka and it may have had some effect.

There is also another aspect that I would like you to consider. If the Universal Declaration of Human Rights is indeed universal, why is there the need for a separate Convention on Human Rights? I have not so far had a satisfactory answer. We must also remember that in jurisprudence as
evolved in the Anglo-Saxon world as elsewhere, there have been good laws and there have been bad laws. Everywhere human progress has been advanced by defiance of bad laws. If this were not so, slavery would still be the law in America. I would therefore plead with my colleagues to clarify if this reliance on laws is an excuse for denial of human rights.

At the end of the day, we are discussing how to advance freedom and access to information throughout the world. Both activities are closely related and in this effort more, not less, information must flow out to citizens. Only despots and tyrants thrive on an ill-informed population. Let us therefore proceed - carefully - to do what we can to take the first step towards a simple, clear and enforceable Freedom of Information Act.

Thank you.