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FREEDOM OF INFORMATION: OPPORTUNITIES, CHALLENGES AND PRINCIPLES FOR LEGISLATION

Venkat Iyer*

Introduction

The right to freedom of information (FOI) is being increasingly accepted as a necessary adjunct to participatory democracy the world over. Currently, it is estimated that as many as 40 countries provide a right of access to state-held information either through discrete legislation or Codes of Practice on the subject;¹ a few more countries are in the process of enacting such legislation.²

The rationale for this right is rooted simply in the concept of open and transparent government – a concept which has been described variously by such expressions as offentlighetsprincip in Sweden, transparence administrative in France, and glasnost in Russia. Freedom of information has been seen as capable of advancing a number of desirable objectives in any society. In the first place, it helps to make the government more accountable to the people being governed. Secondly, by facilitating the acquisition of knowledge, it encourages self-fulfilment. Thirdly, it acts as a weapon in the fight against corruption and abuse of power by state functionaries. Fourthly, it contributes to improving the quality of official decision-making. Fifthly, it enhances the participatory nature of democracy. Sixthly, it goes some way in redressing the inherent balance in power between the citizen and the state, and strengthens the hand of the individual in his dealings with government.

It needs to be stated, however, that freedom of information is not by any means an unmixed blessing, much less a panacea for all the ills of modern democracy. Indeed, an ill-drafted ‘right to know’ statute, or a maladroit use of that concept, can often result in impairing, rather than improving, the quality of government. As with all such mechanisms, the key to success lies as much in the sagacity with which a FOI regime is worked in practice as in the regime’s theoretical elegance.

In this brief speech, I propose to attempt a fairly simple task: to suggest a set of general principles which, I believe, could usefully underpin any effective legislation on the subject. These principles could also, hopefully, form the basis for some of our discussions in the next couple of days.

Freedom of Information and International Law

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² E.g. the United Kingdom, India, Fiji, Bulgaria, Moldova, and Trinidad & Tobago.
It may be useful, at the outset, to take a quick glance at the position accorded to freedom of information under international law and to clear some of the terminological confusion that often clouds discussions on the subject. Most advocates of the 'right to know' argue that it is a basic human right for an individual to seek and obtain information from his or her state. They usually refer to Article 19 of the Universal Declaration of Human Rights (1948) in support of their claim. This article guarantees everyone the right to freedom of opinion and expression - a right which, as the article explains, includes the "freedom to ... seek, receive, and impart information and ideas through any media regardless of frontiers." A similar formulation is used in the International Covenant on Civil and Political Rights which expands upon the rights contained in the Universal Declaration.

It is clear, therefore, that international law treats the freedom to "seek, receive and impart information" as part of the right to freedom of expression and not as a separate and distinct right. Whether this formulation implies a legally binding right to be able to 'obtain' information in the possession of the state is not so clear; in other words, can it be said that the formulation implies a duty on the part of the state to hand over the information sought by the individual? In this respect, 'freedom of information' is probably different from 'freedom of expression' - there, the duty cast on the state is a largely negative one: the duty not to place any unjustified impediment in the way of an individual who wishes to express himself within the bounds of the law. This has not, of course, prevented campaigners for the 'right to know' from drawing sustenance from Article 19. They have also often relied on a resolution passed by the United Nations General Assembly in 1946, which stated that "Freedom of Information is a fundamental human right and is the touchstone for all freedoms to which the United Nations is consecrated." At the European level, although the European Court of Human Rights has ruled that the right to freedom of information is not a legally-enforceable right under the European Convention on Human Rights, the Parliamentary Assembly and the Committee of Ministers of the Council of Europe have expressed themselves in favour of the need for FOI legislation in the Council's member-states. There is also a Code of Conduct, as well as Decisions, promulgated by the European Community, guaranteeing access to EC Council of Ministers and Commission documents, subject to certain exceptions.

Some commentators have questioned the value, in legal terms, of the phrase 'freedom of information' itself. The authors of one recent study, for example, went so far as to characterise it as a "phrase with little inherent meaning". In their opinion,

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3 Some campaigners go further and assert a similar right against non-state entities as well, e.g. private companies, but it is doubtful if such an assertion commands widespread support.
5 A contrary view has been expressed by the United Nations' Special Rapporteur on Freedom of Expression. He has stated that "the right to seek and receive information is not simply a converse of the right to freedom of opinion and expression but a freedom on its own" - see UN Doc. E/CN.4/1998/40 dated 28 Jan 1998.
6 Res. dated 14 Dec 1946 (UNGA, 65th Plenary Meeting).
7 Guerra & Ors. v. Italy (1998). In this case, the court rejected the argument that this right was protected by Art. 10 of the Convention which, like Art. 19 of the ICCPR, guaranteed the right to freedom of expression.
Freedom of information is a very different notion from freedom of speech, freedom of the press or freedom of expression. Freedom of information is a phrase which was invented in the United States and which is misleading. It has to do with the ability of individuals to gain access to information in the possession of the state. Freedom of information legislation in the United States gives people a legal right of access to such information. The federal legislation in Canada is more accurately titled as the Access to Information Act. This title describes what the statute is about.\(^{10}\)

I tend to agree with that view. A more accurate description of the right being claimed by FOI advocates would, therefore, be 'the right of access to (state-held) information'. However, for the sake of convenience, I shall use the phrase 'freedom of information' interchangeably with the more accurate phraseology.

Striking the right balance

Whatever the terminology used, there can be no doubt that any attempt to legislate for freedom of information must take into account the inherent tension between the interest in open government and certain other equally valid, but often conflicting, interests that are considered worthy of protection by most liberal societies. These interests include: the need for free and frank exchanges between civil servants and ministers; the need for a measure of confidentiality in matters involving national security, law enforcement, the maintenance of public order, the investigation and prevention of crime, conduct of international relations, and certain commercial transactions; and, no less important, the need to allow individuals a measure of privacy concerning their own lives. The success of any FOI regime would depend, obviously, on the balance that it is able to achieve between these competing interests.

It is not enough, however, that the legislation strikes the right balance, extremely difficult through even that feat is to achieve. For, there is only so much that a law — any law, however well-crafted — can do. As the British Parliament’s Select Committee on Public Administration explained recently,

This matter of balance is crucial. How it is weighed, and by whom, is central to all Freedom of Information regimes. Even when it is stated in a general way in legislation, it then has to be interpreted in the concrete circumstances of particular cases. This often requires fine judgments to be made.\(^{11}\)

The ability to make fine judgments is vital because the question that may confront a decision-maker may not always involve a stark choice between disclosure and secrecy. It may call for a more creative use of the available legal tools, such as allowing partial disclosure, or disclosure to a limited number of people, or staggered disclosure.\(^{12}\)

Principles for FOI legislation

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\(^{10}\) Ibid.


\(^{12}\) For example, in circumstances where the premature release of the information may prejudice legitimate interests.
Over the years, numerous attempts have been made by campaigners to draw up lists of principles aimed at giving effect to the right to freedom of information.\textsuperscript{13} The process of drawing up FOI legislation clearly presents formidable challenges. In the first place, there are definitional problems to be overcome: what precisely, for example, is meant by ‘information’ for the purposes of the law? How should ‘privacy of the individual’ be defined? Secondly, there are problems as to the extent of the law’s coverage in terms of institutions: should state-owned commercial enterprises, for example, be brought within the scope of an FOI regime? What about private entities that might be discharging a public function? Thirdly, there are questions about the costs of administering a FOI regime: should users be made to bear the entire cost or should the system be subsidised by the tax-payer? Fourthly, there are questions as to the procedure for access: how easy must access be to information covered by the law, without the system being swamped by an avalanche of requests which would have the effect of diverting scarce administrative resources away from more pressing tasks? These are some of the questions for which, alas, there are no ready answers.

An over-ambitious FOI regime, however well-intentioned, runs the risk of either being paralysed by its own success or sapping the morale of the administration to such an extent that good governance is put at serious risk. At the other end, a minimalist system runs the equally unacceptable risk of proving so ineffective as to lose all credibility with the public. The key to success, therefore, lies in treading a middle path which ensures that pragmatism, and not attachment to any dogma, whether in favour of secrecy or of disclosure, informs the process of constructing a FOI regime.

With this caveat in mind, I venture to suggest the following basic principles as worthy of consideration.

1. The objectives of the legislation must be stated as clearly as possible.

Though not crucially important, it would be highly desirable that the legislation set forth the objectives that are being sought to be achieved by its framers. Interestingly, there is a wide range of objectives to be found in the various statutes that have either been passed or proposed so far. Most of these laws refer to the need to extend, as far as possible, the right of access to information held by the government to the wider community, though not all of them use phrases such as ‘openness in government’ or ‘transparency in administration’ – phrases which one would normally be hard put to escape in any public discussion of the subject.\textsuperscript{14} The New Zealand Act attempts to dampen any excessive expectations of its scope by making it clear at the outset that any extension of the right of access would be no more than “progressive”.\textsuperscript{15}

Some of the laws also attempt to combine the right to freedom of information functions with the functions of ‘whistle-blower’ legislation or ‘sunshine’ legislation,\textsuperscript{16} on the


\textsuperscript{14} An explicit reference of that kind is to be found in the South African Promotion of Access to Information Act 2000, which states as one of its objectives the need to “foster a culture of transparency and accountability in public, and private bodies” (Preamble). This law also sets out a number of other specific objectives (s. 9).

\textsuperscript{15} S. 4(a), Official Information Act 1982.

\textsuperscript{16} Typically, a ‘whistle-blower’ Act would seek to protect persons who disclose confidential information in contravention of the law, arguing that they are doing so to expose maladministration or corruption in government, while a ‘sunshine’ law would seek to ensure
grounds that these two concepts are also closely linked to open government. More frequently, FOI legislation covers aspects of activity covered by data protection laws, e.g. the right of individuals to access information about themselves in the possession or control of the state. Where there are such overlaps, it would be helpful if the law defined its mandate fairly precisely.

The advantages of having clearly stated 'objectives' causes are obvious. Not only do such clauses unequivocally commit the government to certain basic principles, but they also help in administrative and judicial interpretation.

2. The extent of coverage must be defined as widely and as precisely as possible

There are two aspects to be considered here: (i) subject-matter; and (ii) institutions. In terms of subject-matter, the law should encompass the widest possible range of materials held by the government. There is considerable variation in the terminology used in existing legislation. Some of the laws refer only to official 'documents' or 'records', while others use the term 'information'. It is important how these terms are defined, if only because not all kinds of information being sought from a government agency may be contained in an existing document; very often, a request may need the agency to obtain facts and figures from diverse sources and collate them before passing them on to the requester. Nor may all the information be reduced to writing. To exclude such information from the purview of FOI legislation would be unfair. The legislation should make it clear that the widest possible meaning would be given to the phrase 'record' or 'document' and would include information contained in correspondence, memoranda, books, plans, maps, drawings, photographs, films and microfiches, sound recordings, video-tapes, and other media.

The law should also recognise the principle of severability, so that, where the information sought is contained in a document which is otherwise exempt from disclosure, it may still be made available to the requester after being severed from the rest of the document, provided of course that the information itself is not covered by any of the recognised exemptions.

As for the institutions covered, here again, there is need for a wide latitude to be given if the legislation is to be meaningful. The law should, ideally, cover all public bodies, including quasi non-governmental organisations (quangos), state-run commercial enterprises, hospital trusts, local authorities and the like, at least in so far as their public the widest possible public access to meetings of government bodies. Both these features were present, for example, in the South African Open Democracy Bill, which preceded that country's Promotion of Access to Information Act.

Normally, there are significant differences between FOI and Data Protection regimes: whereas the former allows access to information maintained by the public sector only, the latter extends to information in the possession of private bodies as well. Also, in some countries (e.g. the UK, prior to the enactment of recent legislation), Data Protection laws only apply to computerised information, while FOI laws cover manually-generated records as well.

E.g. Australia's Freedom of Information Act 1982, s. 4(1).
E.g. South Africa's Promotion of Access to Information Act 2000, s. 1.
E.g. India's Freedom of Information Bill 1998, s. 2(d).

The Information Commissioner in Canada has ruled that his country's Access to Information Act 1982 applied to e-mail as well as paper communications, and has directed that all government agencies preserve e-mail communications for at least two years – see Information Commissioner, Annual Report 1994-95.

Such a provision exists, for example, in the Australian Act, s. 17. The New Zealand Act, on the other hand, makes decisions on severability a matter of discretion for the authorities.
functions are concerned. Campaigners have often demanded that private entities should also be brought within the remit of FOI legislation, but that is a more debatable proposition. Certainly, where a private body exercises a monopoly power, such as the General Medical Council, there may be a case for bringing it within the purview of the FOI regime, but I would urge some caution in taking a maximalist line here, on grounds both of principle and practicality.

Traditionally, FOI laws have only covered the executive branch of government, given that, under most legal systems, the other two branches – the legislature and the judiciary – enjoy a higher degree of privilege and immunity from public scrutiny. FOI legislation should, obviously, recognise this reality, but that cannot justify a blanket ban on access to information concerning the legislature or the judiciary.

3. No unreasonable conditions should be imposed on access to information

The legislation should make access as nearly universal as possible. Access should, in particular, not be made subject to citizenship requirements, as this might often have the effect of denying information to large sections of the legally-resident population in a given country.

Access should also not unreasonably be denied to certain categories of persons such as criminals serving jail sentences, although a case can be made for denying this privilege to fugitives from justice.

4. Disclosure should be made the rule and non-disclosure the exception

If the aim of FOI legislation is to promote openness and transparency in government, as it self-evidently is, then few would deny the need for disclosure of information to be made the rule rather than the exception. In practical terms, this means that, where a request has been denied, the onus should be on the authority concerned to show that the information being withheld falls within one or more of the exempted categories, rather than for the requester to prove that it does not.

5. Exemptions and exclusions should be clearly and narrowly defined

By far the most important test of a FOI regime's credibility in most people's eyes would lie in the extent to which it succeeds in minimising the areas of secrecy permitted to the state. In practice, this means that the limits of non-disclosure need to be tightly and

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23 Most common law countries, for example, have laws on parliamentary privilege and contempt of court which shield the legislature and the judiciary, respectively, from undue criticism. Such laws are premised on the principle that these institutions need a higher degree of autonomy to discharge their functions without fear or favour.

24 Most existing FOI laws permit citizens as well as lawful alien residents to use the system, although there are some exceptions. The Indian Freedom of Information Bill, for example, restricts the right of access to Indian citizens only (s. 3). The Australian Act requires requesters to furnish an address in the country for correspondence (s. 15(1)(c)).


26 There have been a few cases under the U.S. Freedom of Information Act of such persons seeking access to documents (either on their own or through others). Case law suggests that the courts may deny such requests – see, e.g. Doyle v. United States Dept. of Justice 494 F. Supp. 842 at 843 D.D.C., 1980).
narrowly drawn, and refusal of access to official information confined to situations where some overriding need of the most pressing kind is clearly demonstrable.

Among the most frequently used grounds for exempting disclosure are: defence of the realm; national security; public safety; safety of individuals; conduct of international relations; law enforcement and the prevention and investigation of crime; conduct of federal-provincial relations; commercial confidentiality; legal privilege; personal privacy; confidentiality of inter- and intra-departmental dealings; confidentiality of information received from international organisations; and effective management of the economy. Some of the additional grounds advanced include: public health; material loss to members of the public; sanctity of constitutional conventions; security of buildings and communication or transport systems; confidentiality of ongoing research; and confidentiality of information contained in electoral rolls.

Some of the laws contain 'override' provisions for exempt information. These allow the authorities to grant access to such information on grounds of the larger public interest in certain circumstances, such as: where the record concerned would reveal evidence of a substantial contravention of, or failure to comply with, the law, or an imminent and serious public safety or environmental risk; or where the public interest in the disclosure of the record clearly outweighs the harm contemplated in the exemption clause.

Another safeguard that has been included in some of the laws to lessen the rigours of exemption provisions is a time-limit on the secrecy permitted. The Freedom of Information Bill published by the Government of Trinidad and Tobago states, for instance, that although Cabinet documents are generally exempt from disclosure, this ban shall cease to apply after a period of 10 years from the date of creation of the document. The exact nature and scope of the exemption clauses will, to some extent, be determined by local conditions. However, as a rule, any FOI regime should avoid sweeping 'class exemptions' whereby information relating to a whole category or area of state activity is placed beyond public scrutiny.

Another contentious provision which is sometimes found in FOI legislation relates to the power of the Government to refuse to confirm or deny the existence of certain types of information. While such a power may be justified in certain sensitive areas, care should be taken to ensure that it is not made more widely available to administrators than is strictly necessary to protect legitimate interests of state.

27 Official Information Act 1982 (New Zealand), s. 9(2)(c).
28 Ibid., s. 9(2)(e).
29 Ibid., s. 9(2)(f).
30 Promotion of Access to Information Act 2000 (South Africa), s. 38(b).
31 Freedom of Information Act 1982 (Australia), s. 43A.
32 Ibid., s. 47A. Under this section, access may be denied to electoral rolls, except where the requester seeks information concerning himself.
33 E.g. Promotion of Access to Information Act 2000 (South Africa), s. 46(a)(i).
34 Ibid., s. 46(a)(ii).
35 Ibid., s. 46(b).
36 s. 24(2). This function is usually performed by legislation such as Public Records Acts in countries like the United Kingdom.
37 The Australian Act, for instance, permits the Government to withhold information about the existence or non-existence of documents affecting national security or Commonwealth-State relations, s. 25.
6. Even where the requested information belongs to an exempted category, access should only be denied if disclosure would cause 'substantial harm' to any of the specified interests.

Most FOI laws recognise this principle, although there is a wide variation in the terminology used to give effect to it. Some of the laws use the test of 'prejudice', while others require the likelihood of 'damage' or 'injury' for an application to be refused. Often, the same law provides different thresholds of harm to be met for different interests, thus recognising the principle that not all interests deserve the same level of protection - a principle which accords with common sense.

Some campaigners have, controversially, argued that this is not enough, and that the 'substantial harm' test should be qualified by an 'override' provision, to be triggered in certain circumstances. One of the exponents of this view, the London-based NGO, Article XIX, explains it thus:

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

7. The government should be under an obligation to promote a culture of openness

The government has a number of tangible obligations to perform in addition to legislating for freedom of information. These include, first and foremost, a duty to publish and disseminate, as widely as possible - subject only to constraints of resources and capacity - documents of significant public interest. Most FOI legislation do impose such an obligation, and require governments to maintain and publish, usually on a department-wise or agency-wise basis, at least the following information: a description of the department or agency and its key functions; a description of all classes of records kept under its control; a description of all manuals used by its employees for administrative purposes; and names and contact details of officers designated to deal with FOI requests.

The South African Act requires the Director-General of the department responsible for government communications and information services to include the address and other contact details of the information officer for every public body in the telephone directories.

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38 E.g. the South African Act, s. 36(1)(c).
39 E.g. the Australian and Canadian legislation.
40 The New Zealand Act, for example, adopts a multi-tiered approach under which the withholding of some types of information is justified if disclosure would 'prejudice' certain interests (e.g. the security of the state), whilst in the case of certain other interests, a higher threshold of 'serious damage' would need to be met before information can be withheld (e.g. in relation to the national economy).
41 *The Public's Right to Know...*, supra, note 13.
42 E.g. Access to Information Act (Canada), s. 5. Some of the laws require the government to publish a guide for potential users of FOI legislation, e.g. *Promotion of Access to Information Act* (South Africa), s. 10.
that the department publishes from time to time.\textsuperscript{43} Under the Australian Act, if the relevant document containing basic information about government agencies is not made available to an applicant, he would, in effect, be excused for any shortfall in his conduct arising from the non-availability of that document.\textsuperscript{44}

Another obligation which is also sometimes imposed by FOI legislation on governments is to give reasons for administrative decisions.\textsuperscript{45} The benefits of such a requirement, from the point of view of the affected individual, are obvious; less obvious is the fact that, in the long term, such a practice would foster a culture of openness which will profit society as a whole. It is therefore a practice which needs to be encouraged.

FOI legislation should also make it an offence for any document to be doctored or destroyed with a view to preventing access to it.

Some campaigners have demanded that the government should be under a legal obligation to devote adequate resources towards promoting the goals of FOI legislation,\textsuperscript{46} but it would not be practicable to make this a basic requirement of universal applicability.

8. The procedural arrangements for access to information should not be unduly burdensome.

Another key test of the credibility of a FOI legislation would be the ease, inexpensiveness and promptness with which those seeking information are able to obtain it. It is vital, therefore, that the procedures prescribed for access are not unduly burdensome on applicants. To some extent, the procedural arrangements will be determined by factors such as the availability of resources and, in particular, the extent to which there is consensus in society over what is an acceptable level of costs for running the system and who should bear those costs. That said, this principle can be examined under several heads.

First, mode of access. It would be desirable that the law permits applicants to inspect, read, view or listen to official records as well as ask for photocopies, transcripts, summaries, or computer print-outs of them. There may even be some merit in allowing applicants to obtain oral information about the contents of documents.\textsuperscript{47} A further innovation would be to emulate the American practice of using electronic information technology to enhance the availability of government records.\textsuperscript{48}

Secondly, limits on access. Access should be limited only on rational and clearly defined grounds such as: where it would involve substantial and unreasonable interference with the work of government,\textsuperscript{49} disproportionately divert the resources of a public authority,\textsuperscript{50} be contrary to any legal duty of the government in respect of the information

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\textsuperscript{43} s. 16.
\textsuperscript{44} s. 10.
\textsuperscript{45} E.g. Freedom of Information Act (Ireland).
\textsuperscript{46} See, e.g. The Public’s Right to Know..., supra note 13 (Principle 3).
\textsuperscript{47} Such a right is recognised by the New Zealand Act (s. 16(1)(f)).
\textsuperscript{48} Under recent U.S. legislation (The Electronic Freedom of Information Act Amendments 1996), all federal agencies are obliged to have FOIA websites to serve an ‘electronic reading room’ function for records created on or after 1 Nov 1996, as this is seen to be a highly cost-effective method of expanding public access to information.
\textsuperscript{49} E.g. Freedom of Information Act (Australia), s. 29(3)(a).
\textsuperscript{50} E.g. Freedom of Information Bill (India), c. 7(4).
sought, is frivolous or vexatious or the information sought is trivial, or where the document concerned is available for purchase by the public. Access may also be postponed in certain circumstances, for example, where the government is under a duty to present the information or document sought to the national parliament before it releases it to the general public.

Thirdly, language of access. Where a country has more than one official language, the law should require the authorities to comply with requests for translations in any of the recognised languages, if necessary at a reasonable charge to be borne by the applicant.

Fourthly, the standing of the applicant. Generally speaking, the law should not make access conditional upon the applicant showing a specific interest in the information being sought, although reasonable restrictions may be imposed in respect of certain types of information. A case also can be made for requiring the applicant to furnish reasons where he or she asks for urgent or expedited access.

Fifthly, formality of requests. The formal requirements for access requests should be kept at the barest minimum, consistently with the requirements of administrative efficiency. Most of the existing laws require applications to be made in writing, often in a prescribed form. There is usually also a stipulation that applicants provide sufficient information about the document being sought to enable the authorities to identify it. This is to discourage 'fishing expeditions' on the part of applicants and to prevent government employees being reduced, in the words of one American court, "to full-time investigators on behalf of requesters." The law should also require government departments to render reasonable assistance to applicants in making their requests, including guiding them to another department where that becomes necessary.

Sixthly, cost of access. The cost of access should be kept as low as possible. Ideally, no fee should be charged for making an application, although this is not always reflected in existing legislation. Some of the laws make no charge for searches, others stipulate fees proportionate to the time spent on a search. Almost all the laws require applicants to pay for photocopies or copies made available on tape, disc, film or other media. Some of the laws provide for the fees to be waived or reduced, either entirely at the discretion of the

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51 E.g. Official Information Act (New Zealand), s. 16(2)(b).
52 Ibid., s. 18(h).
53 e.g. Freedom of Information Act (Australia), s. 12(1)(c).
54 Ibid., s. 21. Adequate safeguards should, however, be provided to ensure that such a provision is not allowed to be used as a pretext to indefinitely delay the publication of the information or document.
55 The Canadian Act allows the head of the government department concerned to consider whether translating any requested document would be 'in the public interest' (s. 12(2)).
56 The most obvious example would be where the information being sought is personal information.
57 E.g. Official Information Act (New Zealand), s. 12(3).
58 There are a few exceptions: the South African Act, for example, allows oral requests where the requester is either illiterate or disabled (s. 18(3)).
59 E.g. Official Information Act (New Zealand), which requires the applicant to specify the information sought "with due particularity" (s. 12(2)).
61 E.g. Freedom of Information Act (Australia), s. 15(4).
62 The Canadian Act, for example, prescribes an application fee of C$25 (s. 11(1)(a)).
63 Ibid., s. 11(2).
authorities, or on specified grounds, such as where insistence on payment would cause financial hardship to the applicant, or where the grant of access to a document is in the interest of a substantial section of the public.

Seventhly, time-limits. The law should provide a strict and tight time-frame within which requests for information must be processed. Practice under existing legislation varies markedly from "as soon as practicable" to 30 days from the date of application. This time-limit is often extendable in circumstances, for example, where the request is for a large number of documents or the document needs to be edited before being allowed to be seen by the applicant. The law should provide adequate sanctions for non-compliance with the prescribed time-limits.

9. There should be an independent and impartial arbiter to decide any disputes that may arise in the interpretation of the law

The effectiveness of any FOI regime is only as good as the mechanisms provided for its enforcement. The presence of an independent and impartial arbiter to resolve disputes is, in particular, one of the most valuable safeguards against administrative lethargy, indifference or intransigence. The existing or proposed laws provide for a wide range of enforcement mechanisms, including: Information Commissioners, Ombudsmen, Information Tribunals and the Courts. Some of the laws also provide for internal appeals or reviews, i.e. appeals or reviews by the government department concerned, as a quicker method of grievance redressal.

Whatever the mechanism chosen, the law should ensure not only that the authority concerned is independent of the government, but also that it is adequately resourced, so that disputes are resolved fairly quickly and at a reasonable cost. It would be helpful as well if the law imposes a duty on every government minister and civil servant to comply with any recommendation or decision of the appellate authority within a strict time-limit, failing which he or she could be hauled up for contempt or made to pay damages to the affected party.

10. The FOI regime should be subjected to periodic supervision by parliament or other body which is representative of electors

At the very least, there should be a reporting requirement on the part of the enforcement agency, under which the elected representatives of the people are kept informed of the functioning of the system. Most of the existing or proposed laws provide for annual reports to be made to the legislature, some even require the head of each

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64 Ibid., s. 11(6).
65 Freedom of Information Act (Australia), s. 29(5).
66 Official Information Act (New Zealand), s. 15(1). This Act prescribes a maximum permissible period of 20 days for the provision of the information requested.
67 Freedom of Information Bill (India).
68 Access to Information Act (Canada), s. 9(1).
69 Freedom of Information Act (Australia), s. 15(6).
70 E.g. the Canadian Act.
71 E.g. the Australian and New Zealand Acts.
72 E.g. the U.K. Bill.
73 E.g. the South African Act.
74 Ibid.
75 Ibid., s. 84.
government department or agency to prepare periodic reports concerning the administration of the law within his own institution and have it presented to the legislature.\footnote{E.g. the Access to Information Act (Canada), s. 72.}

Conclusions

Freedom of information laws have clearly played an important role in enhancing public accountability and transparency in government. Despite the limited experience of their use worldwide, there can be little doubt that they have, over the years, proved their worth as a valuable aid to integrity in public life. This is evidenced, among other things, by their increasing popularity throughout the world, including in the British Commonwealth.

While FOI regimes can be enormously helpful in creating an open and stable societies, they are by no means a "magical cure for all social ills."\footnote{Martin & Feldman, Access to Information in Developing Countries, supra note 9, at 5.} It is important to remember this, as this concept often engenders exaggerated expectations about its capacity to transform societies.

The experience of the operation of FOI regimes in the countries where they have existed for any considerable length of time is, on the whole, quite encouraging. But it also reveals certain shortcomings. Some of these shortcomings are institutional in nature, while others can be attributed to human failures. While cross-country comparisons are generally helpful, it would be foolhardy to imagine that the experience of one country can be replicated \textit{in toto} in another. The success or failure of a FOI regime depends on a number of factors, which may vary from culture to culture. There is therefore a need to exercise some caution in applying in one jurisdiction the lessons learnt from another.
Freedom of Information: Opportunities, Challenges and Principles for Legislation

by

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“You can have good government or you have have open government. But Prime Minister, you can’t have both.”

- Sir Humphrey Appleby in *Yes, Prime Minister*
Objectives of FOI legislation

• Helps make government more accountable to the people;
• Encourages individual self-fulfilment;
• Acts as a weapon in the fight against corruption;
• Contributes to improving the quality of official decision-making;
• Enhances the participatory nature of democracy;
• Helps in redressing the inherent balance of power between the citizen and the state
Article 19
Universal Declaration of Human Rights:

“Everyone has the 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.”
U.N. General Assembly Resolution (1946):

“Freedom of Information is a fundamental human right and is the touchstone for all freedoms to which the United Nations is consecrated.”
European Court of Human Rights:

Right to freedom of information is *not* a legally-enforceable right under the European Convention on Human Rights

*(Guerra & Ors. v. Italy, 1998)*
The delicate balancing act:

Interest in open government

versus

Other interests, e.g.

• need for free and frank exchanges between ministers and civil servants;

• need for confidentiality in matters involving national security, law enforcement, maintenance of public order, investigation and prevention of crime, conduct of international relations and commercial transactions;

• need for individual privacy.
Principles for FOI legislation:

1. The objectives of the legislation must be stated as clearly as possible
2. The extent of coverage must be defined as widely and as precisely as possible.
3. No unreasonable conditions should be imposed on access to information
4. Disclosure should be the rule and non-disclosure the exception
5. Exemptions and exclusions should be clearly and narrowly defined.
6. Even where the requested information belongs to an exempted category, access should only be denied if disclosure would cause ‘substantial harm’ to any of the specified interests.
7. The government should be under an obligation to promote a culture of openness
8. The procedural arrangements for access to information should not be unduly burdensome.
9. There should be an independent and impartial arbiter to decide any disputes that may arise in the interpretation of the law.
10. The FOI regime should be subjected to periodic supervision by parliament or other body which is representative of electors.