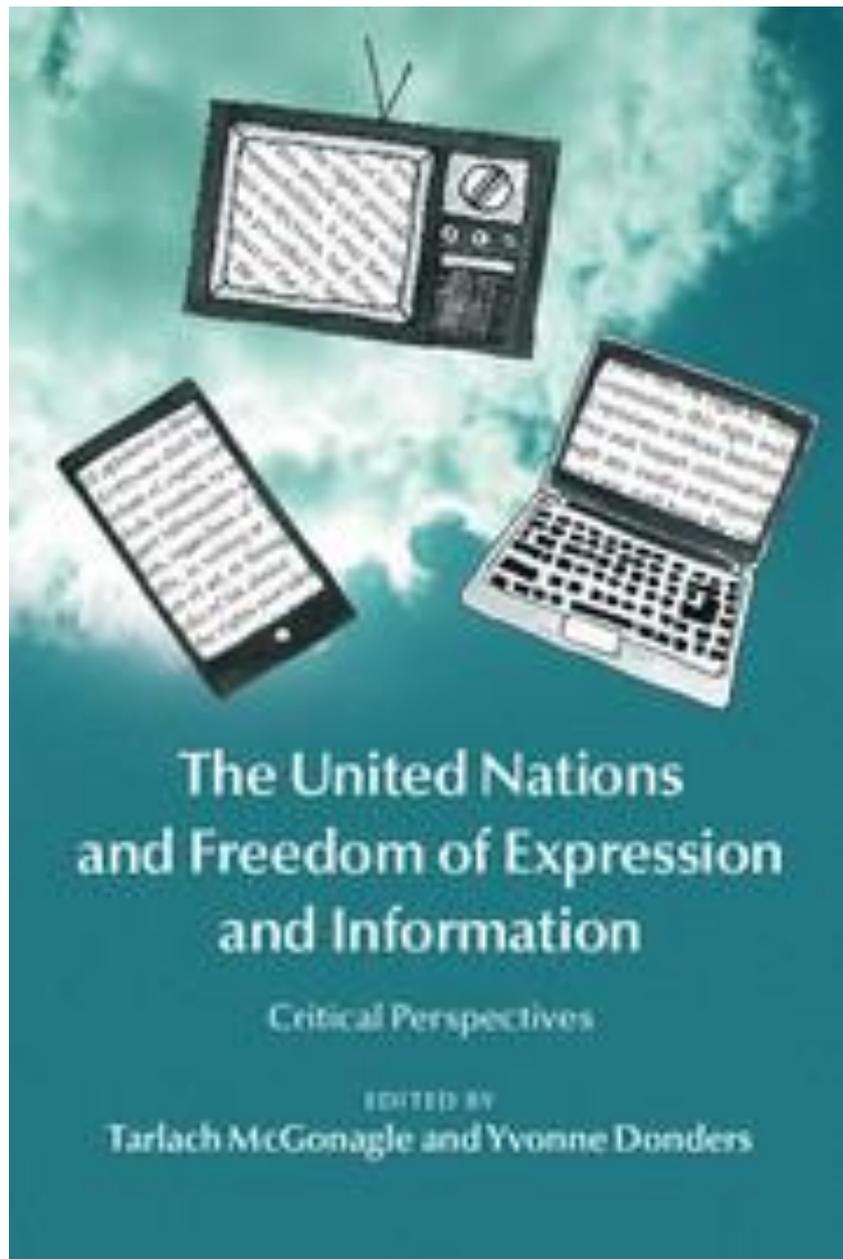


## Ten Challenges for the Right to Information in the Era of Mega-Leaks

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# Critical perspectives on freedom of expression:

## Ten Challenges for the Right to Information in the Era of Mega-Leaks

By Helen Darbshire\*

### 1. Is Transparency Working?

Government transparency is on the march, with 98 countries now having laws which give a right of access to information, and of these over 50 having constitutional provisions confirming this right as a fundamental right.<sup>1</sup> International human rights bodies, including the Inter-American Court of Human Rights (2006) and the European Court of Human Rights (2009) have ruled that access to information from public bodies is a human right, something confirmed in July 2011 by the United Nations Human Rights Committee.

Governments around the world are taking up the challenge of opening up to the public, out the recognition that enlightenment ideas of a public right to scrutinise how power is being exercised is a *sine qua non* of a 21<sup>st</sup> Century democracy. In 2011 a new global alliance of democratic countries was formed, the Open Government Partnership, which is predicated on the principles of promoting transparency, accountability and participation, and to date has 63 participating states as well as active involvement of civil society.<sup>2</sup>

There is a vibrant global civil society movement promoting transparency, with activists, journalists and members of the public reporting daily on successes in obtaining information, as well as denouncing obstacles and frustrations in the implementation of this right.

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<sup>1</sup> For the full list of laws, including analysis of Constitutional Provisions, please see [www.RTI-Rating.org](http://www.RTI-Rating.org).

<sup>2</sup> Open Government Partnership, [www.opengovpartnership.org](http://www.opengovpartnership.org), 63 participating member states as of January 2014.

Yet, in spite of all this progress, in recent years some of the most significant disclosures of information about government behaviour – certainly those which made the biggest headlines – have come through massive leaks rather than in responses to access to information requests. The mega-leaks era started in 2010 with bulk disclosures of sensitive information about the war on terror by WikiLeaks,<sup>3</sup> followed in 2013 by the Snowden disclosures which ripped the lid off massive surveillance operations invading the privacy of private individuals and public figures the world over.<sup>4</sup> Also in 2013, the Offshore leaks finally gave us a true picture of tax avoidance and hidden dealings of the mega-rich, politicians, and criminals, through a leaked cache of over 2.5 million files on over 120,000 offshore companies and trusts.<sup>5</sup>

These highly controversial leaks have led to greater accountability for the war on terror, reforms of law and practice on protection of privacy, public pressure for changes in the behaviour of intelligence agencies, and revision of legislation about the information companies should disclose to regulators. At the national level, investigative journalists, civil society researchers, academics and others continue to rely on leaked information to find out what is really going on inside government, how public money is being spent and how power is being exercised. The media seem to report leaks as often as about documents obtained through legal channels in response to access to information requests or through proactive disclosure of information by public bodies.

Some sceptics have suggested that as access to information laws get stronger, public officials simply get more creative at avoiding scrutiny. Government in the age of transparency has

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<sup>3</sup> In April 2010, WikiLeaks published the “Collateral Murder” video footage from the 12 July 2007 Baghdad airstrike in which Iraqi journalists were among those killed. In July 2010, WikiLeaks released Afghan War Diary, a compilation of more than 76,900 documents about the War in Afghanistan not previously available to the public. In October 2010, the group released a set of almost 400,000 documents called the “Iraq War Logs” in coordination with major commercial media organisations. In November 2010, WikiLeaks collaborated with major global media organisations to release U.S. State department diplomatic “cables” in redacted format. Source:

<http://en.wikipedia.org/wiki/WikiLeaks>.

<sup>4</sup> The full story on the Snowden Disclosures can be found on the Guardian newspaper website:

<http://www.theguardian.com/world/the-nsa-files>

<sup>5</sup> The International Consortium for Investigative Journalists’ Offshore Leaks page has the details <http://www.icij.org/offshore>. Before these leaks, no journalist had been able to crack the secret offshore money system on a global scale. The *Columbia Journalism Review* called the revelations “a landmark series on offshore tax havens that has law enforcement scrambling and scofflaws sweating from Mongolia to Germany, Greece to the US.”

[http://www.cjr.org/darts\\_and\\_laurels/darts\\_laurels\\_mj2013.php](http://www.cjr.org/darts_and_laurels/darts_laurels_mj2013.php). An example of the legislative reforms are the revisions to the EU’s Anti Money Laundering Directive, currently being debated by the European Parliament which would require companies to reveal who are their beneficial owners.

been described as akin to “how gangsters in crime movies talk when they know that the police are listening. They speak clearly and offer banalities while exchanging notes under the table.”<sup>6</sup> This cynicism does reflect real challenges: In 2013 Canada’s Information Commissioner expressed concern that the use of around 98,000 Blackberry telephones by Canadian public officials was putting information out of the reach of the Freedom of Information Act.<sup>7</sup>

There is still far too little empirical data available to be able to measure and track levels of transparency over time and to reach compelling conclusions about how access to information is working in different countries. There are, however, multiple anecdotal examples of how access to information is having a positive impact on the relationship between civil society and government.

There is also a growing body of evidence that access to information laws do make a difference in practice. In addition to monitoring by civil society at the national level, comparative studies such as the 14-country “Transparency and Silence” monitoring (2006)<sup>8</sup> and the 80-country “Ask Your Government! 6 Question Campaign” (2011)<sup>9</sup> have found that countries with access to information laws consistently performed better in responding to the same or comparable information requests than those without.

This chapter summarises the current status of the right of access to information from a human rights perspective and then sets out ten unresolved challenges facing this still-emerging right.

## **2. The Right of Access to Information as We Know It**

To understand the nature and contours of the right of access to information as currently reflected in national and international law, it is essential also to understand the history of the right as it developed over the past two centuries and, in particular, during the second half of the 20<sup>th</sup> Century.

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<sup>6</sup> Ivan Krastev, The Transparency Conspiracy, <http://www.project-syndicate.org/commentary/the-false-promise-of-transparent-government-by-ivan-krastev#pFVbiTFO4bj1KoRb.99>

<sup>7</sup> Info Czar Suzanne Legault: Ban Instant Messaging On Government BlackBerrys, Huffington Post, 28 November 2013, [http://www.huffingtonpost.ca/2013/11/28/suzanne-legault-instant-messaging\\_n\\_4356163.html](http://www.huffingtonpost.ca/2013/11/28/suzanne-legault-instant-messaging_n_4356163.html)

<sup>8</sup> Transparency and Silence: A survey of access to information laws in 14 countries, Open Society Justice Initiative, 2006, <http://www.opensocietyfoundations.org/publications/transparency-and-silence-survey-access-information-laws-and-practices-14-countries>

<sup>9</sup> Ask Your Government! 6 Question Campaign, Access Info Europe and Centre for Law and Democracy, October 2011, <http://www.access-info.org/en/anti-corruption/200-6-question-campaign>

The world's first access to information law was the Swedish Freedom of the Printing Press Act in 1766. This law was a product of enlightenment thinking. The benefits of openness had been posited during the 18th century when the word "transparency" was used in the works of political philosophers such as Jean-Jacques Rousseau (1712–1778), who promoted openness in his plans for the government of Poland in 1772, proposing that all public officeholders should operate "in the eyes of the public" and even wear a uniform so that they could never be anonymous.<sup>10</sup>

France's Declaration of the Rights of Man and of the Citizen of 1789 provides that citizens have the right to determine and follow the spending of taxes (Article 14) and that society has the right to demand accountability from all public bodies (Article 15).<sup>11</sup>

Yet, while limited versions of these principles were enshrined in administrative codes and good government practice, only Sweden had a specific act until 1951 when Finland, an independent country since 1917, caught up with its own history: the drafter of the Swedish Act of 1766, Anders Chydenius, had in fact come from Finland.

With such limited development of access to information laws, the right was not included in the catalogue of rights in the Universal Declaration of Human Rights (1948). The focus at the time was on "the advent of a world in which human beings shall enjoy freedom of speech and belief" and hence Article 19 of the Declaration established that "*everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.*"<sup>12</sup>

The post–World War II years saw a strengthening in a handful of countries of the mechanisms for accessing government information. The United States with the first iteration of the Freedom of Information Act in 1966 (it was upgraded after the Watergate scandal in 1974) was followed by France and the Netherlands in 1978.

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<sup>10</sup> Christopher Hood, "What Happens When Transparency Meets Blame-Avoidance?," *Public Management Review* 9.2 (2007): 193–94. Hood cites Rousseau and states that philosophers Jeremy Bentham, Immanuel Kant, and, earlier, Baruch de Spinoza put forward similar ideas. It should be noted that these pre-20th-century concepts of transparency also include the notion of government according to stable and known rules, and the notion of maximum social openness (everyone under scrutiny by everyone else), as well as the notion of open government in the sense of public access to government documents.

<sup>11</sup> Déclaration des droits de l'homme et du citoyen (1789), <http://www.assemblee-nationale.fr/histoire/dudh/1789.asp>.

<sup>12</sup> Universal Declaration of Human Rights, <http://www.un.org/en/documents/udhr/index.shtml#a19>

These laws continued to reflect a paradigm of administrative responsiveness to the “administered” or “citizens” of a particular country.<sup>13</sup> An example of this is France’s 1978 law, which was adopted with the title of the law on “improving relations between the administration and the public”<sup>14</sup> and which only applies to the administrative activities of government. This law also typifies the earlier laws in the sense that it was a top-down instrument, part of a package of laws necessary for the functioning of a modern democracy and a service-oriented bureaucracy, but not a response to popular demand for a broad fundamental right to be enshrined in law.

In line with this approach, the Council of Europe in 1981 adopted a Recommendation to member states on “Access to Information Held by Public Bodies” which limits the scope of the right: “Everyone within the jurisdiction of a member state shall have the right to obtain, on request, information held by the public authorities *other than* legislative bodies and judicial authorities.”<sup>15</sup>

The Canadian Freedom of Information Law, adopted in 1983, also reflects this more restricted view of an administrative right: it can be exercised only by Canadian citizens and residents and only upon payment of an up-front C\$5 fee for each request. The Canadian law does not apply to the legislative or administrative branches, nor to private bodies performing public functions or operating substantially with public funds.

By the end of the 1980s, just a handful of countries had access to information or freedom of information law, and these were the Nordic countries (Denmark, Finland, Norway, and Sweden), some Anglo-Saxon countries (the United States, Canada, Australia and New Zealand), as well as the Netherlands, France, and Italy.

This initial batch of laws, while in many respects powerful tools for citizens to hold government accountable, were designed primarily to regulate communications between citizens and an increasingly large public administration. By 1990, only Finland and Sweden recognised access to information as a right in their constitutions, Norway subsequently did so

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<sup>13</sup> For example, Australia’s 1982 law establishes “the right of the Australian community to access to information in the possession of the Government,”  
[http://www.austlii.edu.au/au/legis/cth/consol\\_act/foia1982222/s3.html](http://www.austlii.edu.au/au/legis/cth/consol_act/foia1982222/s3.html).

<sup>14</sup> Loi n° 78-753 du 17 juillet 1978 portant diverses mesures d'amélioration des relations entre l'administration et le public et diverses dispositions d'ordre administratif, social et fiscal  
Version consolidée au 20 décembre 2013,  
<http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000339241>.

<sup>15</sup> Recommendation No. R (81) 19 of the Committee of Ministers to Member States on the Access to Information Held by Public Authorities,  
[http://www.coe.int/t/dghl/standardsetting/media/doc/cm/rec%281981%29019\\_EN.asp](http://www.coe.int/t/dghl/standardsetting/media/doc/cm/rec%281981%29019_EN.asp). Emphasis added.

(2004), whereas in none of the others was access to information a full-fledged constitutional right.<sup>16</sup>

The big push forward for access to information, which led to defining and broadening the scope of the right of access to information came after the fall of the Berlin wall, with a strong and coordinated civic reaction to counter the information control exercised by the authoritarian regimes behind the Iron Curtain. Just as the Swedish Freedom of the Press Act was adopted in reaction to the suppression of free thought and pamphleteering in an earlier time, it was a response to the information inequalities of Soviet bloc which led to the demand for a right to information in Central and Eastern Europe.

It was this movement which led to the development of access to information as a right in the sense of a fundamental human right. As early as 1992 Hungary's Constitutional Court ruled in 1992 that access to information is a right essential for citizen oversight, stating that "*the publicity and accessibility of data of public interest is a fundamental right guaranteed by the Constitution ... Free access to information of public interest promotes democratic values in elected bodies, the executive power, and public administration by enabling people to check the lawfulness and efficiency of their operations.*"<sup>17</sup>

All of the eight former communist countries which joined the European Union on 1 May 2004 had an access to information law, as did Romania and Bulgaria, which joined on 1 January 2007, and Croatia, which by the time it joined the EU on 1 July 2013 had already had an access to information law in force for ten years. All eleven of these countries also have constitutional provisions establishing the right.

As with post-communist Eastern Europe, the democratic transitions in Latin America played a significant role in advancing the right to information. In Mexico, the Grupo Oaxaca, a gathering of intellectuals, academics, journalists and activists, promoted and helped to draft

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<sup>16</sup> In New Zealand, Section 14 of the Bill of Rights Act 1990 reads: "Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form." Prior to passage of this Act, the New Zealand Court of Appeal had already described New Zealand's freedom of information legislation as "an Act of constitutional significance." See case of Commissioner of Police v Ombudsman [1988] 1 NZLR 385. The Bill of Rights affirms and extends that position, for example, influencing public access to court records. See *Mafart v. Television New Zealand Ltd.*, Sup. Ct. No. SC70/2006, [2006] NZSC 78, (2006) 18 PRNZ 394, [www.Right2INFO.org](http://www.Right2INFO.org).

<sup>17</sup> Decision 32/1992 (V.29) AB, 183–84 (as translated by the Office of the Hungarian Parliamentary Commissioner for Data Protection and Freedom of Information). In 1994, the Hungarian Court struck down a state secrets law, ruling that it imposed impermissible restrictions on the right to information. In so doing, the Court found that free access to data of public interest, including those held by the state, is one of the preconditions for the exercise of the right to free expression (Decision 34/1994 (VI.24) AB).

Mexico's Federal Law on Transparency and Access to Public Information.<sup>18</sup> The Mexican law was adopted in 2002 by the government of President Vicente Fox who in 2000 had become the first president of Mexico to be elected from an opposition party, ending the 71 years of one-party rule by Mexico's Institutional Revolutionary Party, the PRI.

Mexico's constitution at Article 6 establishes the right of free access to information and details its scope as well as oversight mechanisms. Since 2002, 13 countries in Latin America have adopted access to information laws. Africa followed with 10 laws, and the global total is now 98.

These developments not only expanded the number of countries recognising a public right to obtain information from public bodies, but they also expanded the scope of the right itself, applying it to all information held by administrative, legislative and judicial bodies as well as often private bodies performing public functions. Indeed, the South African constitution and law went even further to apply the right to private bodies who hold information necessary for the defence of other rights.<sup>19</sup>

In this way, as often happens in the development of human rights, progress on the national level impacted on international standard setting, which in turn fuelled the advance of national standards, setting up a virtuous circle which accelerated the speed of acceptance of access to information laws as an essential underpinning of a democratic state.

A strong and well-organised international civil society movement pushed forward the standard setting, through national, regional, and international declarations on the main elements of access to information laws, starting with the 1998 Principles on Freedom of Information Legislation from the human rights organisation ARTICLE 19.<sup>20</sup> These standard-setting exercises were complemented by conferences and debates and multiple other advocacy initiatives to promote this emerging right. Civil society worked closely with government officials, with key staff in inter-governmental organisations (IGOs), and with the Special Rapporteurs on Freedom of Expression to further define the standards.

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<sup>18</sup> See Issa Luna Pla, "Movimiento social del derecho de acceso a la información en México published by the Universidad Nacional Autónoma de México" (2009), <http://biblio.juridicas.unam.mx/libros/libro.htm?l=2629>.

<sup>19</sup> Constitution of the Republic of South Africa, 1996, Article 32 "1)Everyone has the right of access to : a)any information held by the state; and b)any information that is held by another person and that is required for the exercise or protection of any rights. 2)National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state." <http://www.gov.za/documents/constitution/1996/a108-96.pdf>

<sup>20</sup> A list of some of the key texts, principles, and declarations can be found on the Access Info Europe website here: <http://www.access-info.org/en/principles>

In the context of these developments, Europe's human rights body, the Council of Europe embarked in 2006 on the exercise of converting a political recommendation of 2002<sup>21</sup> into the world's first binding treaty on access to information held by public bodies, what would become the Council of Europe Convention on Access to Official Documents, which was formally adopted in June 2009, although it has yet to enter into force.<sup>22</sup>

The process of drafting the Convention laid bare the disagreements over nature of the right, as many of the government representatives who drafted Convention between January 2006 and February 2008, roundly rejected the idea that access to information is a fundamental right. There was a tension in the drafting group between countries with constitutional provisions on the right of access to information (Nordic countries and new democracies such as Slovenia) and those without such clarity or with national laws which had a more limited scope (notably France).<sup>23</sup> One of the main consequences of this is that the Convention applies only to administrative information and it is left up to ratifying states to extend it on an optional basis to the legislative and judicial powers.

A major change in the human rights standards on the right came in September 2006 when the Inter-American Court of Human Rights ruled in the case of *Claude Reyes et al. v. Chile* that the protection of freedom of expression and information under Article 13 of the American Convention on Human Rights:

*“protects the right of all individuals to request access to State-held information, with the exceptions permitted by the restrictions established in the Convention. Consequently, this article protects the right of the individual to receive such information and the positive obligation of the State to provide it, so that the individual may have access to such information or receive an answer that includes a justification when, for any reason permitted*

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<sup>21</sup> Recommendation Rec(2002)2 of the Committee of Ministers on Access to Information, [http://www.coe.int/t/dghl/standardsetting/media/doc/H-Inf%282003%29003\\_en.pdf](http://www.coe.int/t/dghl/standardsetting/media/doc/H-Inf%282003%29003_en.pdf)

<sup>22</sup> Council of Europe Convention on Access to Official Documents CETS No. 205, <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=205&CM=1&CL=ENG> Signed as of 21 April 2014 by 14 countries and ratified by 6 countries; the treaty will enter into force when it has 10 ratifications.

<sup>23</sup> This author was present at the drafting sessions as a civil society observer and the French representative clearly stated that his mandate was to negotiate a Convention which did not set a higher standard for the right than that set by French law. The law is limited to access to administrative information. Germany did not participate actively in the drafting, having sent an official communication at the outset of the process doubting the necessity of such an instrument.

*by the Convention, the State is allowed to restrict access to the information in a specific case.”*<sup>24</sup>

It is interesting to note that the linking by the Inter-American Court of the right of access to information to freedom of expression is consistent with the approach taken by the world’s first access to information law, the Swedish Freedom of the Printing Press Act of 1766.

The European Court of Human Rights adopted similar reasoning in 2009 in the case of *Társaság a Szabadságjogokért*, (Hungarian Civil Liberties Union, TASZ) v. Hungary when it argued that when a public body holds information which is essential either for the media to play their role as “public watchdogs” or for civil society to play a “social watchdog” function, then to withhold that information is an interference with freedom of expression, and hence is protected by Article 10 of the European Convention on Human Rights which protects freedom of expression.<sup>25</sup> The judges arrived at this conclusion using the logic that when a public body holds information and refuses to release it, it is exercising the “censorial power of an information monopoly” and hence the interference with freedom of expression.<sup>26</sup>

In parallel with these developments, political declarations expanding on the nature of this right were also adopted. These include Model Laws from the Organisation of American States (OAS)<sup>27</sup> and the African Union<sup>28</sup> which further define in detail what an access to information law should look like. These soft law instruments go further than the Council of Europe Convention on Access to Official Documents, for example the OAS Model Law has a section dedicated to promoting openness which includes an extensive list of information which should be made available proactively, as well as other features such as information officers and the establishment of an Information Commissioner.

These progressive and significant changes in the global hard and soft law framework for the right of access to information were picked up by the UN Human Rights Committee which on 29 July 2011 in its General Comment 34 confirmed that there exists a fundamental human right to access information held by public bodies and private bodies performing public

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<sup>24</sup> Case of *Claude Reyes and others v. Chile*, Paragraph 77, see [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_151\\_esp.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_151_esp.pdf) (Spanish original) and [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_151\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_151_ing.pdf) (English). Last accessed 6 January 2014.

<sup>25</sup> Case of *Társaság a Szabadságjogokért v. Hungary* (App. No. 37374/05), ECHR, 14 April 2009, para. 36, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-92171>. Paragraphs 36 and 38.

<sup>26</sup> *Ibid*, Paragraph 36.

<sup>27</sup> Organisation of American States, AG/RES. 2607 (XL-O/10), Model Inter-American Law on Access to Public Information [http://www.oas.org/dil/AG-RES\\_2607-2010\\_eng.pdf](http://www.oas.org/dil/AG-RES_2607-2010_eng.pdf)

<sup>28</sup> African Union, Draft Model Law for AU Member States on Access to Information, [http://www.achpr.org/files/instruments/access-information/achpr\\_instr\\_draft\\_model\\_law\\_access\\_to\\_information\\_2011\\_eng.pdf](http://www.achpr.org/files/instruments/access-information/achpr_instr_draft_model_law_access_to_information_2011_eng.pdf)

functions, and that it is linked to the well-established right to freedom of expression set out in Article 19 of the International Covenant on Civil and Political Rights.<sup>29</sup> In other words, our right to free expression is contingent on information and when this information is held by public bodies, we have a right to access it, with only limited exceptions.

The importance of General Comment 34 on the right of access to information should not be underestimated. It is a milestone in the development of human rights because, rather than being a mere interpretation of established rights, it confirms the existence of an emerging human right. It is more generic than the finding in a particular case before a human rights tribunal and goes further than the jurisprudence, in particular with respect to the obligation to publish information proactively. Hence it contributes to a redefinition of a modern democratic society, and the relationship between the people and the governments they elect.

At the same time, the very belated recognition of access to information as a fundamental right by international human rights bodies also highlights how not all are convinced that it is or should be seen as such. Indeed, one UN member and party to the ICCPR, Germany, urged the Human Rights Committee not to conclude that access to information is a right, as there is nothing in the German legal or constitutional framework which sees access to information from public bodies as a fundamental right.<sup>30</sup> The German position is at odds with many other European countries which do have constitutional provisions recognising the right (28 in the Council of Europe region),<sup>31</sup> and even the European Union, which recognises a fundamental right of access to its documents,<sup>32</sup> but nevertheless illustrates how this is not yet universally taken as a given, and even in countries where there is a constitutional provision on the right to information, what this means in practice is not always clear.

It was therefore particularly important at this juncture to have a further confirmation of the right of access to information from the European Court of Human Rights. This came in June 2013 in the case of the *Youth Initiative for Human Rights v. Serbia*. The case concerned the refusal of the Serbian intelligence agency to provide the appellant civil society organisation

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<sup>29</sup> UN Human Rights Committee General Comment No. 34 – Article 19: Freedoms of Opinion and Expression CCPR/C/CG/34, Paragraphs 18 and 19.

<sup>30</sup> According to civil society reports, Germany tried to remove the human right of access to public documents – as well as other human rights -- from the Draft General Comment No. 34 on Article 19 ICCPR. Germany argued that access to public documents is not considered a fundamental right according to the German Basic Law. The ICCPR has only the rank of a law. Therefore it is suggested to remove access to public documents from the ICCPR. More information here:

[http://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/DEU/INT\\_CCPR\\_NGO\\_DEU\\_14663\\_E.pdf](http://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/DEU/INT_CCPR_NGO_DEU_14663_E.pdf)

<sup>31</sup> See country details on the RTI Rating, [www.rti-rating.org](http://www.rti-rating.org)

<sup>32</sup> Consolidated version of the Treaty on the Functioning of the European Union, Article 15 <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0047:0200:en:PDF>.

with information about electronic surveillance, even after it had been ordered to do so by the Serbian Information Commissioner.<sup>33</sup> In finding a violation of Article 10, the Court underscored the existence of a right of access to information and cited the Human Rights Committee General Comment 34, as well as declarations by the United Nations Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression, and the ACHPR (African Commission on Human and Peoples' Rights) Special Rapporteur on Freedom of Expression, which also confirm the existence and scope of the right of access to information.<sup>34</sup>

A further European Court of Human Rights decision of 28 November 2013 in a case against Austria again confirmed the right of access to information. In this case a civil society organisation (hereafter, CSO) was seeking information about land records from a regional land register, the Tyrolean Real Property Transactions Commission ("the Commission"). Not only did the court rule that the refusal to provide this information was a violation of freedom of expression, but stated that given the "considerable public interest" in the land records, it "finds it striking that none of the Commission's decisions was published, whether in an electronic database or in any other form."<sup>35</sup> In this way, the Court for the first time hinted, if only in the most subtle way, at the possibility of obligations to proactively publication information.

An important feature of the international jurisprudence linking the right of access to information to freedom of expression is not simply that a convenient "hook" was needed, but that the tribunals have made the connection between information, expression, and active engagement in public affairs as an essential aspect of democratic societies.

Such a linkage also been made in the jurisprudence of the Court of Justice of the European Union, for example, in the case of *Council of the European Union v. Access Info Europe*, where the Court underscored the relationship between accessing documents and participation in EU decision making, stating that "*If citizens are to be able to exercise their democratic*

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<sup>33</sup> Case of the Youth Initiative for Human Rights v. Serbia <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-120955>. Last accessed 10 January 2014.

<sup>34</sup> Ibid, paragraphs 13, 14 and 15.

<sup>35</sup> Case of Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung eines wirtschaftlich gesunden land- und forstwirtschaftlichen Grundbesitzes v. Austria, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-139084>. Last accessed 10 January 2014. Paragraph 46 cited.

*rights, they must be in a position to follow in detail the decision-making process” and that they should “have access to all relevant information.”*<sup>36</sup>

From the collected body of national laws and international standards, it is possible to identify some core elements of the right of access to information, namely that it is a right of all persons, that it should apply to all information held by all public bodies, that the right may be exercised free of charge and without having to give reasons, that requests should be answered as rapidly as possible and in no more than a maximum of 20 working days, that exceptions should be limited and should be subject to both harm and public interest tests, and that there should be oversight by some independent body, often an ombudsman or information commissioner, in addition to there being recourse to the judicial authorities.

In spite of these tremendous advances, there remain various areas in which there is still too little clarity about the precise nature and normative content of the right of access to information and the consequences of its inclusion in the pantheon of fundamental rights have not as yet been fully explored. The remainder of this chapter maps out ten key challenges facing the right of access to information which are likely to be at the heart of debates about this right during in coming years.

### **3. Ten Unresolved Challenges for the Right to Know**

#### **3.1 A Right of All Persons**

A fundamental right is one which should apply to all persons, irrespective of their nationality, place of residence, or other criteria. This would be consistent with the “without frontiers” nature of the right to freedom of expression.

In total 89 of the world’s 98 access to information laws recognise that the right may be exercised by “all persons” or “everyone”. Indeed, 64 of these laws extend the right to legal persons such as businesses, civil society organisations, or political parties.

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<sup>36</sup> Council of the EU v. Access Info Europe, Final Judgment in Case 280/11 P, available at <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-280/11>. Last accessed 10 January 2014.

Yet, as noted above, some countries limit exercise of the right to the population directly served by the administration. These countries include Canada where only citizens and residents may make freedom of information requests,<sup>37</sup> Malta,<sup>38</sup> and Turkey<sup>39</sup>.

The European Union similarly limits the right to citizens and residents, doing so in the treaties which establish that “*Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to documents of the Union institutions ...*”.<sup>40</sup>

It will be interesting to see whether a legal challenge taken in one of these countries resting upon the UN Human Rights Committee standard or the jurisprudence of one of the regional courts could result in changes to national law.

There are some practical implications to the universal nature of access to information, not least the barrier posed by language. Even in countries with a broad definition of the right, there is usually a requirement that it be exercised in one of the official languages of the administration. The degree of flexibility which public administrations show on the language issue varies between countries and often depends on national culture rather than law.<sup>41</sup> There is a reasonableness test to be applied here and it is clearly unreasonable to expect national administrations around the world to provide translations into any of the world’s 7,105 living languages, or even the 80 languages spoken by more than 10 million people.<sup>42</sup> This is

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<sup>37</sup> Canada, Access to Information Act, last modified 2010, Article 4.1, available at: <http://www.rti-rating.org/files/pdf/Canada.pdf> “Subject to this Act, but notwithstanding any other Act of Parliament, every person who is (a) a Canadian citizen, or (b) a permanent resident within the meaning of subsection 2(1) of the Immigration and Refugee Protection Act, has a right to and shall, on request, be given access to any record under the control of a government institution.”

<sup>38</sup> Malta’s 2008 Freedom of Information Act at Article 2 defines a person eligible to submit a request as a resident, citizens from Malta, EU citizens or citizens from other countries with which there is a treaty that includes the right of access to information. See [http://www.rti-rating.org/view\\_country.php?country\\_name=Malta](http://www.rti-rating.org/view_country.php?country_name=Malta)

<sup>39</sup> Turkish law on the Right to Information, Law 4982 of 2003, States at Article 4 that “*Foreigners domiciled in Turkey and the foreign legal entities operating in Turkey can exercise the right in this law, on the condition that the information that they require is related to them or the field of their activities*”. See [http://www.rti-rating.org/view\\_country.php?country\\_name=Turkey](http://www.rti-rating.org/view_country.php?country_name=Turkey)

<sup>40</sup> Consolidated version of the Treaty on the Functioning of the European Union, Article 15 <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0047:0200:en:PDF>. Last accessed on 10 January 2014.

<sup>41</sup> This author has experience of submitting requests in English to and receiving information from northern European countries such as Denmark, Finland, the Netherlands, Norway and Sweden, whereas in other countries the response to an English-language request has come variously in French, German, Greek, or Polish, for example.

<sup>42</sup> Ethnologue reports that there 7,105 living languages, see here: <https://www.ethnologue.com/>. Wikipedia reports that there are 1,300 languages with 100,000 speakers or more, 750 with 300,000 or more, some 400 with a million or more, 200 with at least 3 million, 80 with 10 million, and 40 with 30 million, see here:

particularly the case as in most countries a response to an access to information request is itself an official document and hence needs to be in the working languages of the administration. A pragmatic solution might be to make it acceptable to submit requests and obtain information in one of the UN languages, namely Arabic, Chinese, English, French, Russian and Spanish.<sup>43</sup>

Such practical challenges still lie ahead of this new right and in the future it is likely that more consideration will have to be given about how it can be exercised in an increasingly globalised but still multi-cultural and multi-lingual world.

### **3.2 Definition of Information**

What the public can ask for when exercising the right is also an issue where greater clarity is needed. What is information precisely?

The UN Human Rights Committee stated that the information to which the right applies “includes records held by a public body, regardless of the form in which the information is stored, its source and the date of production.”<sup>44</sup>

Such a broad definition is essential in the modern era in which information is stored in a wide variety of formats. As both the right to information and technology have advanced, there has been a gradual expansion of the definition of information and a combination of law, jurisprudence, and practice is giving access to a greater variety of types of information. It is now generally agreed that “information” recorded in formats such as photographs, and audio-visual recordings is included in the scope of the right. Hence use of the right can be made by, for example, documentary film makers.<sup>45</sup>

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[http://en.wikipedia.org/wiki/List\\_of\\_languages\\_by\\_number\\_of\\_native\\_speakers](http://en.wikipedia.org/wiki/List_of_languages_by_number_of_native_speakers). Both last accessed on 21 February 2014.

<sup>43</sup> In addition to this, a good practice would be to supply information in electronic, machine-readable, format wherever possible, thus permitting the use of on-line translators which – although not always reliable and no substitute for official translations – often provide a good indication of the content of documents received. When information is provided in a foreign language in a locked, scanned, PDF, this seriously impedes obtaining even a gist of what it contains.

<sup>44</sup> UN Human Rights Committee General Comment 34 Paragraph 18.

<sup>45</sup> A nice example of this is the Spanish Documentary “Flecha Rota” (“Broken Arrow”) about the 1966 crash of a B52 plane carrying nuclear warheads onto the coast of Almería in southern Spain. The documentary makers made FOI request in the US to get original footage shot by Marines involved in the clean up of the spilled plutonium. See the documentary here:

[http://www.documentalesonline.com/operacion-flecha-rota-el-accidente-nuclear-de-palomares-video\\_688839aa5.html](http://www.documentalesonline.com/operacion-flecha-rota-el-accidente-nuclear-de-palomares-video_688839aa5.html) and read more here: [http://en.wikipedia.org/wiki/1966\\_Palomares\\_B-52\\_crash](http://en.wikipedia.org/wiki/1966_Palomares_B-52_crash)

In an increasing number of countries email communications also come under the scope of the right of access to information. It is increasingly common to receive copies of emails as part of answers to requests for information. In some jurisdictions the use of private email accounts will not always take messages out of the scope of the right to information, with a high profile example of this being the 13,000 emails from former US presidential candidate and Alaskan Governor Sarah Palin.<sup>46</sup>

At the other end of the spectrum, hand written documents also fall within the definition of information. This is particularly important where the only notes of a meeting are those taken by a public official, jotted on his or her notepad. An example of such a document which contains the notes of a UK public official from a meeting held in the Council of the EU can be found on the Access Info Europe website.<sup>47</sup>

Some jurisdictions, however, cling to their historical roots, still referring to a right of access to “documents” rather than to “information”. Indeed the very name of the Council of Europe Convention on Access to Official Documents reflects this, although the Convention found a solution by defining “official documents” as “all information recorded in any form, drawn up or received and held by public authorities.”<sup>48</sup>

Defendants of a documents-based approach argue that it is essential to protect public bodies from an obligation to make any additional effort to compile information in response to an information request. One of the starkest examples of this is at the European Union level where the right of access to its documents was first recognised in 1997 by Treaty of Amsterdam, just on the cusp of the modern information age. The EU’s 2001 access to documents rules, contain a broad definition of “document” as “*any content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audiovisual recording)*”.<sup>49</sup> Current EU policy, however, is to draw a line between requests for documents and requests for information, which will be answered under the non-binding code of good administrative practice.<sup>50</sup>

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<sup>46</sup> The emails were released as over 24,000 printed pages, which were then scanned and put on line by the Guardian newspaper and analysis of them was crowdsourced, permitting some new information to emerge about the relationship with BP in negotiations over an oil pipeline. See the page from which the scan documents are accessible <http://www.theguardian.com/world/sarah-palin-emails>.

<sup>47</sup> The document, which consists of handwritten notes taken during a meeting of the Council of the European Union’s Working Party on Information, is available here <http://www.access-info.org/decision-making-transparency>.

<sup>48</sup> Council of Europe Convention on Access to Official Documents Article 1.2.b

<sup>49</sup> Regulation 1049/2001 regarding access to European Parliament, Council and Commission documents, Article 3.a. [http://www.europarl.europa.eu/register/pdf/r1049\\_en.pdf](http://www.europarl.europa.eu/register/pdf/r1049_en.pdf).

<sup>50</sup> The EU’s rules concerning access to documents and to general information can be found here: [http://ec.europa.eu/transparency/access\\_documents/index\\_en.htm](http://ec.europa.eu/transparency/access_documents/index_en.htm)

Hence EU officials will apply a distinct legal basis for responding to a request asking “please provide documents which detail spending on official travel in 2013” and asking “how much was spent on official travel in 2013?” Whilst a well-prepared requester can easily find a way around this in the way the question is framed, it remains a formal obstacle placed in the way of a fundamental right and it places an undue burden on the requester to know how to formulate their request.

The conceptual divide between “documents” and “information” in some jurisdictions has led open data activists to call for a complementary “right to data”.<sup>51</sup> This author strongly believes that such a new right is not necessary, and could even be unhelpful, muddying the waters just as clarity about the right of access to information is being established. Such proposals do, however, highlight the need to upgrade both legislation and bureaucratic attitudes to the digital era if full access is going to be provided to all information held by public bodies.

### **3.3 Scope: The Legislative and Judicial Branches**

The extension of the right of access to information from core administrative bodies to all branches of power, including the legislative and judicial branches, has been tracked above as part of the evolution of the right of access to information (Section 2 above).

The UN Human Rights Committee in its General Comment No. 34 specifically confirmed that right of access to information is part of an obligation which falls upon:

*All branches of the State (executive, legislative and judicial) and other public or governmental authorities, at whatever level – national, regional or local – are in a position to engage the responsibility of the State party.*<sup>52</sup>

Three years earlier, in 2008, the Council of Europe member states had been unable to reach agreement on this and hence the Convention on Access to Official Documents establishes a right of access only to the administrative information held by the legislative and judicial branches but not to all other information they hold. The Convention makes it optional for states to grant a wider right of access.<sup>53</sup>

For those countries with older laws, the right remains limited. In France, for example, the distinction between administrative and non-administrative information means in practice is that whilst it may be possible to find out about the budgets and organisation of the parliament

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<sup>51</sup> The “Right to Data” agenda was taken up by the UK Government and set out in a White Paper on Open Data published in June 2012

[http://data.gov.uk/sites/default/files/Open\\_data\\_White\\_Paper.pdf](http://data.gov.uk/sites/default/files/Open_data_White_Paper.pdf)

<sup>52</sup> UN Human Rights Committee General Comment 34, para. 7.

<sup>53</sup> Council of Europe Convention on Access to Official Documents Article 1.2.a.ii.

or the court system, it is not possible to obtain using the right of access to information other documents such as documents used by Parliamentary Committees when discussing draft laws (the laws themselves are normally public by democratic tradition) or records of voting (in France the voting records of the National Assembly are not published).<sup>54</sup>

One problem here is that there is no clear international definition of what administrative functions are. The Council of Europe Convention on Access to Official Documents ducked this issue saying that administrative functions are “as defined by national law.”<sup>55</sup> At the EU level a number of bodies – including the European Court of Justice, European Central Bank and European Investment Bank – only have an obligation to provide administrative information but without a definition of what this means.

One of the arguments invoked in favour of sustaining a distinction between administrative and other functions is that it is necessary to preserve the impartiality and independent functioning of certain bodies, such as the court system.

The problem with this approach is that accountability and citizen oversight is blocked in the name of impartiality and due process. In fact, there are well established exceptions which can be invoked when information should be withheld. For example, the Convention on Access to Official Documents, establishes an exception to protect “the equality of parties in court proceedings and the effective administration of justice.”<sup>56</sup>

With an appropriate regime of exceptions in place, there should be no need for blanket exclusions of certain bodies from the reach of the right of access to information. This is something which still has to be worked through in a number of jurisdictions and clarified further by international human rights bodies.

### **3.4 Scope: Private Bodies**

The fourth major and, as yet, still barely explored, consequence of the right of access to information being recognised as a fundamental human right is that this could mean that it applies, at least to some extent, to private bodies.

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<sup>54</sup> It is very rare that the votes of deputies in the French Assemblée Nationale are published, and according to the CSO Regards Citoyens, for 93% of votes it is impossible to know how each deputy voted. See <http://www.regardscitoyens.org/la-transparence-des-votes-de-lassemblee-nationale-cest-possible/>

<sup>55</sup> Explanatory Report to the Convention, Paragraph 8, <http://conventions.coe.int/Treaty/EN/Reports/Html/205.htm>

<sup>56</sup> Convention on Access to Official Documents, Article 3.1.i.

After all, other rights should be upheld by private bodies as well: the right to privacy as articulated in data protection laws applies to information held by all legal entities that hold personal data.

There was more agreement on this point during drafting of the Council of Europe Convention on Access to Official Documents than over the legislative and judicial branches, and as a result the Convention requires that the right extend to “natural or legal persons insofar as they exercise administrative authority” whilst making it optional to also extend it to “natural or legal persons insofar as they perform public functions or operate with public funds, according to national law.”<sup>57</sup> For the UN Human Rights Committee “such bodies may also include other entities when such entities are carrying out public functions.”<sup>58</sup>

The full consequences of the right applying to private bodies have not yet been addressed, in part because the right to information community still has so many challenges securing information from public bodies.

The only legal regime which extends this right more broadly to public bodies is the South African law which applies to all private bodies if the information relates to or can be used for protection of other human rights.<sup>59</sup>

The European Court of Human Rights concept of “information monopolies” which hold information necessary for freedom of expression could also serve here as the basis for exploring when the public has a right to obtain information from private information holders.

### **3.5 Scope: Inter-Governmental Organisations**

A universal right is clearly one which should also be upheld by inter-governmental and supranational bodies.

At present, however, only the European Union has recognised a fundamental right of access to the documents it holds (and, as noted above, this right is limited to citizens and residents of the EU area). First established in the 1997 Treaty of Maastricht, in 2009 this right was moved by the Lisbon Treaty to the fundamental rights section of the Treaty on the Functioning of the European Union. This right is reinforced by also being included in Article 42 of the Charter of Fundamental Rights of the EU.

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<sup>57</sup> Convention on Access to Official Documents, Articles 2.a.i.3, and 2.a.ii.3 respectively.

<sup>58</sup> General Comment No. 34, Paragraph 18.

<sup>59</sup> South Africa’s Promotion of Access to Information Act (2000), Section 50, states there is a right to ask for a record [that] is required for the exercise or protection of any rights.” Available at [http://www.acts.co.za/prom\\_of\\_access\\_to\\_info/index.htm](http://www.acts.co.za/prom_of_access_to_info/index.htm).

Apart from this, not one of the other of the world's major inter-governmental organisations has formally recognised the right of access to information as binding upon them. It is a particular irony that not one of the intergovernmental bodies that have lead the way in promoting an recognising the right of access to information has explicitly applied the right to itself: Not the United Nations,<sup>60</sup> nor UNESCO, nor the Council of Europe, nor the Organization of American States, nor the African Commission for Human and Peoples' Rights, nor the Organization for Security and Co-operation in Europe.

In addition, there have been limited efforts to introduce rules which would resolve this anomalous situation. At issue here is not merely the failure to establish that the right to ask for information applies to these organisations, but also the simple failure to establish formal mechanisms by which the public can request and receive information as well as the failure to establish a comprehensive proactive publication policy.

The consequences of this lack of access to information held by inter-governmental organisation are of particular concern given that many decision-making processes are now taken forward in inter-governmental negotiations carried out in forums about which even representatives of national parliaments do not always have information.

An example of the consequences of such bodies not providing information to the public is that of Eurocontrol, a stand-alone inter-governmental body which regulates European airspace. Eurocontrol has refused to provide human rights researchers with the information it holds about CIA extraordinary rendition flights, even when the information was need for ongoing human rights litigation.<sup>61</sup>

There a pressing need to resolve the issue of the right of access to information applying to IGOs. The UN would in theory be best placed to take the lead given the unequivocal interpretation of international law by the Human Rights Committee, but agreeing to adopt such a norm would not be easy. Much more probable is having the Council of Europe apply its Convention on Access to Official Documents to itself, thereby taking the lead and establishing a model for IGOs. It would also be appropriate for the OSCE to adopt the Convention on Access to Official Documents. If the OAS could apply its model law to itself, that would also be a significant step forward in reinforcing a right to ask at the inter-

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<sup>60</sup> The UN Development Programme on the other hand does have a Information Disclosure Policy, first adopted in 1997 and last updated in 2013, available here: [http://www.undp.org/content/undp/en/home/operations/transparency/information\\_disclosurepolicy.html](http://www.undp.org/content/undp/en/home/operations/transparency/information_disclosurepolicy.html). UNICEF also has a disclosure policy, available here: [http://www.unicef.org/about/legal\\_disclosure.html](http://www.unicef.org/about/legal_disclosure.html)

<sup>61</sup> More information on this research conducted by Reprieve, the Global Rendition Project and Access Info Europe can be found at <http://www.access-info.org/en/human-rights/397-global-rendition-system-mapping>

governmental organisation level, and all such moves would help encourage other bodies to adopt similar standards.

### **3.6 An Obligation to Publish Information Proactively**

The next challenge for the right of access to information is to move beyond a right to ask and receive information to an obligation on public bodies to make such information available proactively.

If the only channel for access to information were via requests filed by individuals, huge information inequalities would rapidly arise with different people knowing different things about the functioning of government, with large sections of the population remaining ill informed, to the detriment of society as a whole.

Such a system would also place an intolerable burden on public officials who would have to strive to answer huge volumes of requests from information-hungry citizens. Proactive disclosure therefore levels the playing field for access to government-held information.

The Human Rights Committee General Comment 34 takes this into account, stressing that proactive publication is essential to achieve full enjoyment of the right to information. It states:

“To give effect to the right of access to information, States parties should proactively put in the public domain Government information of public interest. States parties should make every effort to ensure easy, prompt, effective and practical access to such information”<sup>62</sup>.

In spite of the importance of proactive publication, this dimension of the right to information was not the focus of campaigners’ attention, at least not until the last five years when “open data” – the proactive release of entire government datasets – came into vogue.

Democratic governments have always made some information available proactively. For example, the principle of the rule of law requires that laws be known and hence be published.<sup>63</sup> Yet this pre-existing tradition of proactive publication was not sufficient to do

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<sup>62</sup> UN Human Rights Committee General Comment No. 34, Paragraph 19.

<sup>63</sup> In Europe this principle was affirmed in 2009 by the European Court of Justice which struck down a secret regulation adopted by the European Union about what passengers may and may not carry onto aircraft. The Court stated that “the principle of legal certainty requires that ... rules enable those concerned to know precisely the extent of the obligations which are imposed on them. Individuals must be able to ascertain unequivocally what their rights and obligations are and take steps accordingly.” Case C-345/06 Gottfried Heinrich, Reference for a preliminary ruling from the Unabhängiger Verwaltungssenat im Land Niederösterreich, 10 March 2009. Available at <http://eur->

away with the demand for specific mechanisms by which members of the public could request specific documents, particularly in the transitional democracies of Central and Eastern Europe and of Latin America which shaped the right to information movement over the past two decades.

In this context the emphasis was on the right to ask rather than on securing proactive obligations. Very few constitutional references exist and they tend to be vague. For example, Estonia's 1992 Constitution states at Article 44 that "*Everyone has the right to freely obtain information disseminated for public use.*" The Estonian Constitution thus creates equality of access to proactive published materials, without explicitly requiring or defining the scope of such publication.<sup>64</sup>

Similarly, the Constitution of Chile, amended in 2008 following the Claude Reyes case, is rather ambiguous, stating that: "*The acts and decisions of the state authorities, as well as their reasoning and the procedures they use, shall be public,*" without prescribing how this publicity is to come about.<sup>65</sup>

An undoubted obstacle to securing constitutional provisions or laws which clearly set out proactive publication obligations is the complexity of legislating in this area: to define and secure political consensus around the precise nature and scope of the proactive disclosure is not an easy task.

As a result, even the newer and more comprehensive access to information laws such as those of Mexico (2002)<sup>66</sup> and India (2005)<sup>67</sup> have relatively limited provisions, requiring that core or basic information be published by government bodies, but deferring to sector-specific, laws and to good bureaucratic practice to determine which other information should be disclosed without the need for a member of the public to submit a request.

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[lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62006J0345:EN:HTML](http://lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62006J0345:EN:HTML), last accessed on 27 March 2010.

<sup>64</sup> Constitution of the Republic of Estonia 1992 obtained from the Office of the President of Estonia, <http://www.president.ee/en/republic-of-estonia/the-constitution/>, Article 44. Last accessed on 21 June 2013. Article 44 also established in its second paragraph the right to request information: "*All state agencies, local governments, and their officials have a duty to provide information about their activities, pursuant to procedure provided by law, to an Estonian citizen at his or her request, except information the disclosure of which is prohibited by law, and information intended exclusively for internal use.*"

<sup>65</sup> Constitution of the Republic of Chile 1980 as amended, Article 8, <http://www.leychile.cl/Navegar?idNorma=242302>

<sup>66</sup> Mexico's Federal Transparency and Access to Public Information Act, adopted 11 June 2002, Article at Article 7.XVII, in Spanish, <http://www.ifai.org.mx/transparencia/LFTAIPG.pdf>,

<sup>67</sup> India's Right to Information Act, 21 June 2005, No. 22 of 2005, Section 4, <http://righttoinformation.gov.in/rti-act.pdf>

In a typical reflection of developments at the national level, the drafters of international standards on the right of access to information have also been hesitant to define the scope of proactive publication. So while sector-specific standards such as the Aarhus Convention on access to environmental information<sup>68</sup> or the UN Convention against Corruption<sup>69</sup> do identify classes of information that should be made public, the drafters of the Council of Europe Convention on Access to Official Documents rejected proposals by civil society to require parties to the future convention to have minimum proactive publication obligations in place, and instead opted for rather general language in its Article 10 which has the tone more of a recommendation than of a binding treaty as it suggests that:

*At its own initiative and where appropriate, a public authority shall take the necessary measures to make public official documents which it holds in the interest of promoting the transparency and efficiency of public administration and to encourage informed participation by the public in matters of general interest.*<sup>70</sup>

The Explanatory Memorandum to the Convention elaborates on the rationale for this, stating that citizens need information “to form an opinion on the authorities that govern them and to become involved in the decision-making process. National rules on proactive publication are thus encouraged.”<sup>71</sup>

The Explanatory Memorandum includes a short list of examples of the classes of information which should be published proactively:

*[I]nformation about their structures, staff, budget, activities, rules, policies, decisions, delegation of authority, information about the right of access and how to request official documents, as well as any other information of public interest.*<sup>72</sup>

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<sup>68</sup> Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, Adopted at Aarhus, Denmark, 25 June 1998, <http://www.unece.org/env/pp/documents/cep43e.pdf>

<sup>69</sup> United National Convention against Corruption, adopted by UN General Assembly Resolution, 58/4 of 31 October 2003,

[http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026\\_E.pdf](http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf)

<sup>70</sup> Council of Europe, Convention on Access to Official Documents, 18 June 2009, <http://conventions.coe.int/Treaty/EN/Treaties/Html/205.htm>, last accessed 28 March 2010. Opened for signature on 18 June 2009, to date the Convention has been signed by 12 states out of the 47 members of the Council of Europe, of which two—Norway and Hungary—had ratified by 31 January 2010.

<sup>71</sup> Explanatory Report to the draft Council of Europe Convention on Access to Official Documents, paragraph 71, <http://conventions.coe.int/Treaty/EN/Reports/Html/205.htm>, last accessed 28 March 2010. It will be noted that the recommendation from the OSCE Representative on Freedom of the Media which was submitted to the drafters of the Convention has been taken into consideration in defining the classes of information.

<sup>72</sup> *Ibid.*, Paragraph 72

The OAS Model Law, adopted in 2010 contains much more elaborate proactive disclosure provisions. Although not a binding treaty, it does set a soft standard which is a valuable reference for the scope of the proactive obligation.<sup>73</sup>

A useful forum for further defining the nature and reach of proactive publication obligations is the Open Government Partnership, where debates are taking place over the standards for open data and which data sets governments should prioritise. Civil society is responding to this challenge by measuring the availability of such data sets, with initiatives such as the Open Data Index<sup>74</sup> and through the Open Government Standards, a civil society initiative to define what is meant by open government.<sup>75</sup>

### **3.7 A Duty to Collect Information**

For information to be made public, it must first be collected. Where national legal frameworks contain proactive publication provisions, this places an obligation on public bodies to collect the relevant information.

Sometimes this obligation is implicit in the requirement to publish, at other times it is explicitly set out. For example, under the Aarhus Convention, there is an obligation to produce and publish Environment Impact Assessments.<sup>76</sup>

There is, however, no obligation to collect specific information in response to requests for information. The Explanatory Report to the Council of Europe Convention explains that the right to information “*does not oblige Parties to create new documents upon requests for information, although some Parties recognise this wider duty to some extent.*”<sup>77</sup>

Indeed, it is often argued and even stated in some laws that the right of access is limited to existing information and that there is no obligation to collect or compile information. The European Court of Human Rights has stated that “*the right to receive information cannot be*

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<sup>73</sup> Organisation of American States Model Inter-American Law on Access to Information, available here: [http://www.oas.org/dil/access\\_to\\_information\\_model\\_law.htm](http://www.oas.org/dil/access_to_information_model_law.htm) (last accessed 22 June 2013).

<sup>74</sup> The Open Knowledge Foundation’s Open Data Index here <https://index.okfn.org/> and Access Info Europe’s Open Government Standards here: <http://www.opengovstandards.org/>

<sup>75</sup> Open Government Standards, <http://www.opengovstandards.org/>

<sup>76</sup> Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, Adopted at Aarhus, Denmark, 25 June 1998, <http://www.unece.org/env/pp/documents/cep43e.pdf>. Last accessed 6 January 2014.

<sup>77</sup> Ibid para 14.

*construed as imposing on a State positive obligations to collect and disseminate information of its own motion”.*<sup>78</sup>

The mechanism by which the right of access to information currently leads to the collection or creation of information when critical voices from media or civil society question why certain information does not exist.

There is much work to be done in defining which information should be collected by public bodies in the course of their duties. Current multi-lateral and multi-stakeholder initiatives, including the Open Government Partnership and sector-specific processes such as the International Aid Transparency Initiative Standard are now resulting in a focus on which information should be generated. In the field of anti-corruption, there is a focus on how much detail should be included in specific types of information such as assets declarations or public procurement contracts. The same is true in other areas ranging from budget data to crime statistics to epidemiological data.<sup>79</sup>

This is one of the most interesting challenges for the right of access to information in the coming period, as it also relates to the efficiency and effectiveness of public bodies and what information is at their disposal when decisions are taken and hence the quality of those decisions.

### **3.8 Limited Exceptions**

All national laws place some exceptions on the right of access to information in order to protect other rights – such as privacy – and a series of societal interests – such as national security and public order. Such limitations are consistent with the right to information being linked to freedom of expression, which is a fundamental but not an absolute right, and which may be limited provided that the limitations are defined by law, and necessary for the protection of legitimate aims.

The question then arises whether the right of access to information should be subject to exactly the same limitations as freedom of expression and also – importantly – whether these are the only permissible exceptions.

During the drafting of the Council of Europe Convention on Access to Official Documents – between 2006-2008 and hence before European Court recognition of access to information as a right – the member states had little difficulty in agreeing on a list of eleven exceptions to

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<sup>78</sup> Case of *Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung eines wirtschaftlich gesunden land- und forstwirtschaftlichen Grundbesitzes v. Austria*, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-139084>, Paragraph 41.

<sup>79</sup> For more details see the Open Government Standards, [www.opengovstandards.org](http://www.opengovstandards.org).

the right. These exceptions are commonly found in national access to information laws and are broad enough to encompass some national nuances, whilst remaining within what civil society activists engaged in the drafting found to be an acceptable set of limitations on the right of access. Indeed, the list of exceptions was one of the least controversial aspects of defining the Convention language.<sup>80</sup>

Some of the exceptions to the right of access to information fit with the main international human rights treaties agree. For example, the “protection of the rights and reputations of others” is a legitimate grounds for limiting freedom of expression and it is clear in the context of access to information that privacy should be protected by government bodies, which hold huge volumes of personal data about private individuals.

The Convention reflects this by permitting an exception where harm would be caused to “privacy and other legitimate private interests” (Article 3.1.f), provided that the public interest in knowing the information is duly considered before refusing to release it. Hence, for example, information on the detailed health of private individuals would not be released, even if these were public officials, with possible exceptions for very senior politicians such as ministers or the head of state.

In spite of the broad agreement, however, a problem arises when trying to derive the full list of exceptions to access to information from the treaty provisions on freedom of expression. Indeed, only about half of the exceptions set out in the Council of Europe Convention and found in a majority of national access to information laws, can be found in the international human rights instruments.

Of the exceptions which do not form part of the standard list for freedom of expression, a number only have a bearing on access to information. For example, the inspection functions of a public authority, which refers to activities ranging from inspecting restaurants to university exams, all of which requires withholding information from the public during a limited period of time, particularly before the activity has taken place. Such a limitation is

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<sup>80</sup> There was also a basis in the Council of Europe Recommendation (2002)2 of the Committee of Ministers to member states on access to official documents (see here: <https://wcd.coe.int/ViewDoc.jsp?id=262135>) and hence there had already been thorough negotiations on the exceptions. The one controversial exception was the additional, optional, exception, added during the development of the Convention which permits states to declare upon ratification that “communication with the reigning Family and its Household or the Head of State shall also be included among the possible limitations.” This exception was proposed for royal families by various monarchies (Norway and the UK, but not Sweden) and then at the instigation of Ireland extended to heads of state. Source authors own notes from participation in the drafting meetings.

reasonable from a transparency perspective but would be meaningless if applied to freedom of expression more widely.

The difficulty in fitting the access to information exceptions with those developed for freedom of expression begs the question as to whether access to information would not be better served by being a stand-alone right with its own set exceptions. If access to information were separated, then the very specific exceptions could be catered for without blurring the boundaries of the significant body of law and jurisprudence relating to the rights to opinion and expression, and media freedom.

### **3.9 Charges for Obtaining and Using Public Information**

In spite of the basic principle that fundamental rights can normally be exercised free of charge, in particular the right to opinion and expression, a handful of countries still charge requesters to make information requests. More seriously, most others charge for reusing at least some public information.

Those few countries which do charge for making information requests tend to be those with older laws, such as Canada (5 Canadian dollars) and Ireland (15 Euros). Such charges are a vestige of the concept that a requests for information is not exercise of a right but rather that the requester is requiring a service of the administration. This thinking is out of line with a rights-based approach and has been rejected in most countries and in international standards such as the Council of Europe Convention on Access to Official Documents which stipulates that filing requests should be free of charge.<sup>81</sup> Here the Human Rights Committee General Comment 34 lacks clarity when it states “Fees for requests for information should not be such as to constitute an unreasonable impediment to access to information” because it does not specify if these are fees for filing requests or for receiving information pursuant to requests.<sup>82</sup>

Charging for copying or delivery costs actually incurred is widely regarded as acceptable. All access to information laws without exception make a provision for this and it is supported by the Council of Europe Convention which states that a fee may only be charged to the

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<sup>81</sup> Council of Europe Convention on Access to Official Documents Article 7 which establishes that “(1) Inspection of official documents on the premises of a public authority shall be free of charge ... (2) A fee may be charged to the applicant for a copy of the official document, which should be reasonable and not exceed the actual costs of reproduction and delivery of the document. Tariffs of charges shall be published.”

<http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=205&CM=1&CL=ENG> This provision was adopted in spite of lobbying from the Irish Government to permit fees; Ireland is the only country in the wider European region to have mandatory fees for making a request for information. For more information on the current situation in Ireland see: <http://www.access-info.org/en/national-campaigns/516-irish-minister-letter>

<sup>82</sup> UN Human Rights Committee General Comment 34 Paragraph 19

applicant "for a copy of the official document, which should be reasonable and not exceed the actual costs of reproduction and delivery of the document" in other words, only photocopying and postage charges are permitted.<sup>83</sup>

In practice, at least in established access to information regimes, requesters often receive even paper copies of documents free of charge and information delivered electronically (including scanned copies of hard copy documents) is in most countries and in most circumstances free of charge. There are of course reports of abuses and sometimes requesters need to turn to information commissioners or the courts to challenge charges. An example of such a case comes from Peru where a requester was charged above the market rate by the Ministry of Justice for hard copies of court decisions. The case was taken to Peru's Constitutional Court which ordered the Ministry of Justice to adjust its fees to conform with Article 20 of Peru's 2002 the Law on Transparency and Access to Public Information which requires copy rates to be no more than the market rate.<sup>84</sup>

A more significant issue is that of charging for access to large government data sets which have traditionally been sold to commercial re-users for often significant fees. Examples of such data sets include statistical, geospatial, and meteorological data, and databases such as company and land registers. The charges for such data can be significant. Access Info Europe in 2013 carried out a survey<sup>85</sup> which found that company registers are sold for prices ranging from €10,000 in Macedonia, to €75,000 in the Netherlands, to €250,000 in Estonia.<sup>86</sup> An Austrian commercial data user reported paying around €800,000 for the company register. Whilst for some businesses based on the reuse of government data it is worth paying the fees, such charges put the data out of the reach of the average civil society organisation and journalist, let alone the individual citizen.

Such an approach drives a wedge between accessing ("knowing") information and making use of it, and is out of synch with the idea that access to government-generated information, including large datasets, is part of freedom of expression and hence is a violation of the right of access to information. There is as yet no international court jurisprudence on this. There

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<sup>83</sup> Ibid.

<sup>84</sup> The case of Jenny Cabrera v. Ministry of Justice, Decision of 9 January 2007, available at [http://www.right2info.org/cases/plomino\\_documents/r2i-jenny-cabrera-v.-ministry-of-justice](http://www.right2info.org/cases/plomino_documents/r2i-jenny-cabrera-v.-ministry-of-justice)

<sup>85</sup> Survey as yet unpublished, but on file with the author.

<sup>86</sup> In Europe selling of government data is permitted by the EU Directive on Re-use of Public Sector Information, first adopted in 2003 and revised in 2013. Designed to break monopolistic sales arrangements, the impact of the Directive as transposed into national law has been to encourage public officials to ask why requesters want information and what they plan to do with it, even when requests are for smaller chunks of data. Directive 2013/37/EU of the European Parliament and of the Council of 26 June 2013 amending Directive 2003/98/EC on the re-use of public sector information, here: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:175:0001:0008:EN:PDF>

need for greater clarity on the standards and for reform of any laws which permit charging in line with an interpretation of access to information as a fundamental right.<sup>87</sup>

### 3.10 The Right to Reuse Information Obtained

The last but perhaps the most important unresolved challenge which currently faces the right of access to information is whether requesters have a right to do what they will with the information obtained using access to information laws.

It might seem logical that if the human rights basis for obtaining information from public bodies is the right to freedom of expression, then once information has been released to a member of the public – and hence by extension into the entire public domain - the recipient of the information is free to use it in any way consistent with freedom of expression principles, and hence has a right to disseminate the information to willing recipients.

Such uses would presumably include use publication of information received pursuant to an information request in any format (in broadcast media, newspapers, on the internet), presentation of information at a public forum to inform a debate, or inclusion of the information in publications and other packaging of information intended for commercial distribution, be it a book, database, video or other format which is being sold. It should also include the extraction of data and the inclusion of that data in, for example, a mobile phone application or on a website which permits people to know everything from the time of their next bus to school exam results to spending on a particular aspect of healthcare.

The two main limitations on reuse are laws on the processing of personal data and by copyright restrictions, whether it be the public body or third parties which hold the copyright.

Both limitations are signalled as acceptable by the Council of Europe Convention on Access to Official Documents which, in the Explanatory Report, states that “*generally requestors are free to use the information [obtained] for any lawful purpose. This includes disseminating the information and, for example, publishing it. Such use may for example be determined by laws such as those regulating intellectual property or data protection.*”<sup>88</sup>

No attempt is made in the Convention to explain this further nor to suggest how such limitations might be applied in practice, nor to give guidance to member states about how to ensure that any such limitations do not unduly restrict free expression rights. The Human

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<sup>87</sup> In addition to solving the legal issues around charging for government data, there will be a challenge of restructuring the budgets of the public bodies which currently rely on data sales for part of their income.

<sup>88</sup> Council of Europe, Convention on Access to Official Documents, Explanatory Report, Paragraph 19, here <http://conventions.coe.int/Treaty/EN/Reports/Html/205.htm>

Rights Committee General Comment 34 does not explicitly address the right to reuse information obtained.

With respect to processing of personal data, some limitations may be legitimate but others are not. The public interest test may argue for the release of information about public officials which would not be made available about private individuals. Such data might include the name, position, contact information, salary and career information, details of travel, even original receipts of meals eaten, as well as often their work email addresses.

If, for example, a list of salaries and email addresses were to be obtained, it would not be acceptable under data protection rules to spam all those earning over €50,000 a year with advertisements for luxury goods. But to use that same information about salaries to have a debate about public spending would be perfectly legitimate. As it would to post the names of the highest earners on a website.

There is a need for greater clarity as to when personal data obtained pursuant to information requests may be used and how. At present in most European countries where this author has experience, remarkably little guidance is given to requesters when information is released, leaving the recipient to second guess the authorities as to whether and how they may process or publish the information received.

With respect to intellectual property there is currently a serious lack of clarity about what kinds of limitations can be placed on reuse of copyrighted documents. This results in some absurd problems, such as the 2014 case of the German Ministry of Interior asking a civil society website to take down a document created by the Ministry because it was the copyright of that body.<sup>89</sup> The website, Fragdenstaat.de refused, and meanwhile the document was replicated on other websites globally. The absurdity comes from the fact that if a document can be released to one requester under the right of access to information, it has been deemed to be in the public domain, and hence should be released to all other requesters. Trying to prevent web publication in such a circumstance does not make sense.

The right to make full use of documents obtained from public bodies is an issue to be worked through in the coming years, as public authorities become accustomed to accepting that the right of access to information is indeed an inherent part of freedom of expression.

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<sup>89</sup> The story of this incident and the take down notice sent to the website Fragdenstaat.de can be found here <http://www.access-info.org/en/national-campaigns/533-fragdenstaat-statement>

#### **4. Conclusions: The Way Ahead**

With all these challenges facing the right to information, there is much work to be done by the transparency community in consolidating the phenomenal progress made during past two decades as this right has developed from one respected in a few isolated democracies to a fundamental human right with global reach.

The challenges mapped out here about how the right of access to information should be interpreted. These are questions of law and jurisprudence, but they are also very much practical, cultural, and political challenges.

The history of the right of access to information shows how it has evolved at the national level through pro-transparency victories which are then mirrored, supported, clarified, and endorsed by international human rights standard setting bodies, which in turn feeds back into national standards.

Much of the work done by civil society activists promoting and defending this right is to convince political leaders and bureaucrats of the benefits of the right of access to information and to use the existing tools of access to information laws, information commissioners, and the courts to turn these arguments into changes in transparency in practice. There is still much resistance, particularly from those who still perceive the right as something instrumental which serves to deliver administrative information to citizens, to voters and tax payers, but not one which gives the public full sovereignty over the ruling political class. Further progress in entrenching the right of access to information will depend upon the success of the rights advocates engaged in the fight for transparency in securing acceptance of open government as a feature of modern democratic societies.