[Global corruption report 2003] reedom of information legislation

Freedom of information legislation: progress, concerns and standards

Toby Mendel

Freedom of information (FOI) includes the public's right to access information held by public authorities and imposes an obligation on public authorities to publish key categories of information. Many recently adopted constitutions include specific guarantees of FOI, reflecting a growing acceptance of this fundamental human right. Examples include the 1994 Malawi constitution and the Thai equivalent three years later, as well as many recent European constitutions.

Experience shows that constitutional provisions are not enough to ensure the right to FOI in practice; implementing legislation is required. Countries around the world are adopting such legislation, with Bosnia-Herzegovina, Britain, Kyrgyzstan, Poland and South Africa among those to have done so since 2000. Draft laws are under consideration in Guatemala, India, Indonesia and Nigeria and numerous other countries.

The trend is not limited to states: a number of intergovernmental organisations (IGOs) have recently adopted FOI policies. The EU adopted the Regulation Regarding Public Access in May 2001 and the World Bank revised its Policy on the Disclosure of Information in September 2001.

Not surprisingly, legislation and practice vary considerably. Where laws provide a good basis for openness, attention must now focus on implementation. Some governments have responded to pressure to adopt legislation but limited the right as much as possible. An extreme case in point is the recently adopted Zimbabwean Access to Information and Privacy Act, which is more about controlling the media than securing access to information.

Areas of concern

Key issues to consider in assessing whether legislation provides for effective exercise of the right to FOI include exceptions and exclusions, secrecy laws and the right of appeal.

◊ **Exceptions** are the most controversial issue in most FOI laws. All FOI laws include a number of exceptions, many of which protect important social interests such as national security and personal information. If exceptions are too broad, however, they can effectively undermine the legislation. Two safeguards can help prevent this problem.

Facing obstacles in Nigeria: the ongoing struggle for access to information

When he was elected in 1999, Nigeria's President Olusegun Obasanjo promised that 'all rules and regulations designed to help honesty and transparency in dealing with government will be restored and enforced' under his administration. Civil society groups were therefore surprised when he failed to promote freedom of information legislation and they responded by launching a campaign. With the support of other NGOs, Media Rights Agenda (MRA) – an organisation that focuses on press freedom and freedom of expression in Nigeria – has been spearheading efforts to promote a draft freedom of information bill. Since its introduction in July 1999, however, the bill has made only negligible progress through parliament.

Sponsored by three members of Nigeria's lower legislative chamber, the bill seeks to provide the public with a legal right of access to government records. If passed, the bill will specify time frames within which such information – except that excluded under the law – must be released to anyone who makes a request. In particular, the bill is expected to address problem areas such as access to declarations of assets by public officers. The 1999 constitution had established a code of conduct bureau that is responsible for receiving asset declarations by officials. Yet the lack of provisions under which journalists and other members of the public may obtain information about asset declarations has severely limited the bureau's impact.

The civil society campaign in support of the freedom of information bill involved writing letters to each of the 469 members of the National Assembly and informal meetings with at least half of them, including the leadership of both legislative chambers and members of their relevant committees. MRA also distributed briefing documents on a range of relevant issues and invited legislators to seminars, conferences and workshops on freedom of information. The advocacy strategy also involved a media campaign, which included placing advertisements and articles in newspapers and magazines to heighten public awareness of the issues.

Despite this vibrant campaign, the freedom of information bill found little support in parliament. While progress was slowed by a drawn-out political crisis between the executive and the legislature, the initial enthusiasm with which legislators received the bill waned as they became apprehensive about the consequences for their own political security. Legislators recognise that a regime of freedom of information would subject them to greater public scrutiny.

MRA's experience is symptomatic of the situation in most African countries. To build on the lessons learned by other civil society groups dealing with the issue, ARTICLE 19 and MRA, in collaboration with the Institute for Democracy in South Africa, held an African regional workshop in Abuja in September 2001. The meeting brought together the Bank Information Center, a Washington, D.C.-based World Bank watchdog with a focus on freedom of information; Partnership Africa Canada, a Toronto-based organisation that has conducted pioneering research on the role of the illegal oil and diamond trade in fuelling conflict and corruption; the Commonwealth Human Rights Initiative, based in India; and the Access to Information Programme in Bulgaria. The workshop underscored the fact that civil society organisations have an important role to play in promoting freedom of information legislation.

With less than one year before the present legislature in Nigeria reaches the end of its term in mid-2003, NGOs are recognising that, if the process of passing the freedom of information bill is not hastened, the campaign may have to start afresh.

Edetaen Ojo

First, exceptions should include a 'harm test'. It is not legitimate, for example, to exclude *all* information relating to national security; only information that would actually *harm* national security should be covered. In practice, although harm tests are found in most recent FOI legislation, they do not apply to all exceptions.

Second, all exceptions should be subject to a public interest override. This approach provides for the release of information, even if it falls within the scope of an exception, in cases where the overall public interest is served by disclosure, for example where the benefits of disclosure outweigh the harm. The public interest override should apply, for example, where personal information regarding a civil servant exposes a ring of corruption. Governments have proved reluctant to include public interest overrides in legislation, and many FOI laws do not contain them. This issue proved divisive in Britain, and the law finally adopted contains only a limited override.

◊ **Exclusions** refer to bodies entirely outside the ambit of the law and under no obligation to disclose information. The bill currently before the Indian parliament, for example, excludes all intelligence and security organisations, as does the British law. In some countries, exclusions are provided for by an excessively narrow definition of public bodies. On the other hand, some laws – such as the Polish FOI act – apply to a broad range of public bodies.

In principle, all public bodies should be under a prima facie obligation to disclose information, subject only to the regime of exceptions.

◊ **Secrecy legislation** should not be permitted to extend the regime of exceptions in an FOI law, which should be sufficiently comprehensive to protect all legitimate interests. Wide-ranging secrecy laws can significantly undermine FOI legislation and should, therefore, be subordinate to it. Unfortunately, this is rarely the case in practice. A disturbing trend in European countries is the adoption of secrecy laws as a precondition for NATO membership. NATO refuses to disclose even the document that sets out its secrecy standards, though there is no reason to keep such information secret.

◊ **Appeals** processes enable individuals to contest any refusal to disclose information. Independent oversight is essential where public officials refuse to disclose information, especially if they are hiding corruption or other wrongdoing. Individuals in most countries have the right to appeal to the courts, but this remedy is often inaccessible and the process excessively time consuming. Many FOI laws provide for an appeal to an administrative body, but these bodies can only be effective if they are truly independent. In Japan, members of the appeals body, the Information Disclosure Review Board, are appointed by the prime minister after the approval of both houses of the legislature, a process that prevents control by any single political party.

Revealing corruption through Japan's Information Disclosure Law

Since the Information Disclosure Law came into force in Japan in April 2001, the civil society groups that campaigned for its introduction have started putting it to use. The law guarantees citizens the right to access official information held by administrative agencies and the possibility of appeal to an Information Disclosure Review Board when the government decides not to disclose certain information. The provisions have enabled civic groups to expose several cases of corruption.

One came to light when the newspaper *Asahi Shimbun* requested the records of *watashikiri* expenses for post offices. *Watashikiri* expenses, which total approximately US $60 million each year, are allocated to pay for operational, promotional and other disbursements. However, the *watashikiri* budget is typically allocated in a lump sum that does not require strict accounting.

When details of the use of *watashikiri* expenses were published in December 2001, several examples of fraudulent accounting were discovered. Records from one post office revealed that invoices had been issued by a company that did not exist. In another case, the post offices in Kyusyu district were found to have bought promotional goods from what was effectively a corporation owned by the postmasters themselves – for more than 70 years. The corporation was estimated to have made almost US $9 million each year.

Following these revelations, the post office's internal inspectors launched an investigation that led to the disciplining of several postmasters and officials and the abolition of the system of *watashikiri* expenses in the postal service.

The Information Disclosure Law also helped the local citizens' group Sendai Citizen Ombudsman (SCO) uncover a case where government funds were fraudulently spent. In early 1999, an official working in the public prosecutor's office tipped off SCO that colleagues in his office were forging receipts from non-existent informers to create a hidden fund for their own use. Acting on the tip, the SCO requested access to the office's 'investigation activity expenses'.

Although the details of budget expenditures were not disclosed, the overall figures for fiscal years 1998–2000 were, along with the totals disbursed every month. The figures looked suspicious because the exact allocation for investigation activities was spent as regularly as clockwork every month – a sure indication of fraudulent accounting. One official in the prosecutor's office confessed to the wrongdoing and further admitted that some district offices had considered returning the money associated with the accounts. The justice ministry rejected this suggestion but, to avoid future misappropriations, it now publishes a handbook with guidelines for managing investigative expenses. It has also reduced the budget for such expenses.

While the Information Disclosure Law enables citizens' groups to expose corruption, the arbitrary application of the law remains an obstacle. Government officials still retain discretionary powers in deciding which information is eligible for disclosure. The Information Disclosure Law is to be reviewed by 2005. The review will provide civil society groups with an opportunity to press for loopholes to be closed. In the meantime, civil society groups need to continue to be vigilant and to campaign to ensure that the existing law is fully implemented.

Yukiko Miki

The need for standards

One reason for the varied effectiveness of FOI laws is the lack of clear, authoritative standards. The non-governmental organisation (NGO) ARTICLE 19 has taken a step towards defining FOI standards with its publication 'The Public's Right to Know: Principles on Freedom of Information Legislation'. The UN's special rapporteur on freedom of opinion and expression and the Committee of Ministers of the Council of Europe have also advanced general FOI principles, but much more needs to be done. The adoption of a declaration on FOI by the UN would go some way to addressing this problem and would help to provide an impetus for the adoption of national legislation.

Greater openness also needs to be promoted within IGOs such as the World Bank, the International Monetary Fund and the World Trade Organization, as well as regional bodies like the European and African Unions. Institutions of global governance, no less than national governments, need to be transparent. The need for corporate openness is increasingly crucial, particularly among transnational companies. Standards need to be developed for corporate transparency and corporations need to be convinced to implement them. ARTICLE 19 also proposes a global campaign involving NGOs and supportive governments around the world to promote FOI goals. Civil society needs to work together to elaborate authoritative FOI standards and to ensure that governing bodies, both national and international, respect them fully.