



BRIEFING NOTE SERIES ON FREEDOM OF EXPRESSION

The Right to Information

Centre for Law and Democracy
International Media Support (IMS)

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In 1913, Louis Brandeis, a famous United States jurist, noted: “Sunlight is said to be the best of disinfectants.” Although it has taken a bit of time for that sentiment to translate into legislative reforms to give individuals a right to access information held by public authorities or the right to information (RTI), the last 25 years have witnessed a virtual revolution in that respect. In 1989, there were just thirteen national RTI laws globally, today there are some one hundred. Over 5.5 billion people, 78% of the world’s population, live in a State which has provided legal recognition to the right to information.

There are several reasons why the right to information is of fundamental importance in a democracy. The underlying principle is that officials hold information not for themselves but, rather, on behalf of the public. There are also strong practical reasons to give legal effect to RTI. In order to participate effectively in decision-making, citizens need to be able to access the information that governments have used to come up with proposed decisions. The right to information is also an important tool in combating corruption and facilitating oversight of public bodies. Even where specific information disclosures do not directly reveal instances of mismanagement, fostering a culture of openness and accountability encourages responsible use of public resources. The right to information also serves to build public trust in State institutions. Access to information can serve social goals, including through giving individuals greater control over their personal information. There is also an important commercial value to RTI, since it increases the competitive nature of tenders and businesses often find creative ways of monetising public information, either to increase the efficiency of their business models or to develop innovative new products.

The right to information is now firmly recognised as a human right under international law. Article 19 of the *International Covenant on Civil and Political Rights* (ICCPR) protects not only the right to communicate, but also the right to seek and receive information and ideas, which serves as the jurisprudential foundation for the human right to information under international law.

The earliest formal recognition of the right to information as a general human right was in a 2006 case decided by the Inter-American Court of Human Rights, *Claude Reyes v. Chile*, in which the Court stated:

In respect of the facts of the present case, the Court considers that article 13 of the Convention, in guaranteeing expressly the rights to “seek” and “receive” “information”, protects the right of every person to request access to the information under the control of the State, with the exceptions recognised under the regime of restrictions in the Convention. Consequently, the said article encompasses the right of individuals to receive the said information and the positive obligation of the State to provide it, in such form that the person can have access in order to know the information or receive a motivated answer when for a reason recognised by the Convention, the State may limit the access to it in the particular case. The information should be provided without the need to prove direct interest or personal involvement in order to obtain it, except in cases in which a legitimate restriction is applied.

Both the European Court of Human Rights and the UN Human Rights Committee have subsequently recognised the right to information,

with the latter stating in its 2011 General Comment on Article 19 of the ICCPR:

Article 19, paragraph 2 embraces a right of access to information held by public bodies. Such information includes records held by a public body, regardless of the form in which the information is stored, its source and the date of production.

The core principle underpinning the right to information is the principle of maximum disclosure with limited exceptions. Maximum disclosure essentially means that States should endeavour to make as much information as possible publicly available, and that provisions granting access should be interpreted as broadly as possible. There should be a general presumption that all types of information held by all public authorities should be accessible, and that the right should apply broadly, so that non-citizens and legal entities enjoy a right of access.

However, the right to information, like the right to freedom of expression from which it is derived, is not absolute and governments may legitimately withhold certain information. It would not, for example, be reasonable for citizens to obtain access to a list of the names of undercover police informants or private information belonging to third parties. However, exceptions to the right should be crafted and interpreted as narrowly as possible.

A three-part test applies to any exceptions to the right to information. First, the exception must relate to a legitimate aim which is set out clearly in the right to information law. Although there is no universally recognised list of legitimate exceptions, these are generally understood as being limited to national security; international relations; public health and safety; the prevention, investigation and prosecution of legal wrongs; privacy; legitimate commercial and other economic interests; management of the economy; fair administration of justice; legal advice privilege; conservation of the environment; and legitimate policy making and other operations of public authorities.

Second, any decision to withhold information should be based on a harm test. It is not legitimate to withhold information simply because it relates to a protected interest. Rather, there should be an onus on the public body to demonstrate that disclosure of the information will cause specific harm to one of the listed interests. Moreover, if it is reasonably possible to sever or redact the sensitive information, the remainder of the document should still be released. Finally, there should be a public interest override, whereby the information is withheld only if the harm to the listed interest outweighs the overall public interest in disclosure. For example, if the information exposes corruption or human rights abuses, there is generally a very high public interest in favour of disclosure.

In addition to these basic principles, a strong RTI system will include a clear procedural framework designed to facilitate access in an efficient and affordable manner. This should include clear and user friendly procedures for making requests, along with quick timelines for responding to them (ideally between two and three weeks). It should be free to file requests, and public bodies should only be permitted to charge fees based on the reasonable cost of reproducing and delivering the information. If an information request is refused, the public body should be required to contact the requester and provide them with an explanation and information about their options for appealing the ruling.

A strong RTI system will also include a specialised oversight body, such as an information commission or commissioner, with the power to hear and determine appeals against refusals of access or other infringements of the law, as well as wider powers to support strong implementation of the law. The oversight body should have adequate resources and statutory powers to perform its functions, including the ability to order disclosure of information and to impose other structural remedies on public authorities which repeatedly fail to live up to their obligations under the law.

An effective RTI law will also include administrative rules aimed at facilitating effective

implementation. These should include obligations to appoint specialised officials to receive and process requests, to provide training to their staff, to maintain their records in good condition, and to report annually on what they have done to implement the law.

Proactive publication is also a critical aspect of the right to information. In the digital age, there is an increasing emphasis on open government, and on providing as much information as possible on a proactive basis, mainly via the Internet. In addition to facilitating greater public access to

information, proactive publication is an efficient use of public resources, particularly for information which is likely to be the subject of an access request. It is far easier to publish a document online than to respond to even one request for it. Information should be published in as user-friendly a manner as possible, in machine processible formats rather than scanned versions of a paper document, and with effective search facilities for finding the information.

FURTHER READING

- Andrew Puddephatt and Elizabeth McCall, “A Guide to Measuring the Impact of Right to Information Programmes”, United Nations Development Programme, April 2006: http://omec.uab.cat/Documentos/ddhh_comunicacio/0083.pdf
- Right 2 Info, a resource with right to information legislation and policies: <http://www.right2info.org>
- RTI Rating, a comparative analysis of right to information legislation around the world: <http://www.rti-rating.org>
- Toby Mendel, *The Right to Information: A Comparative Legal Survey*, UNESCO, 2008: http://portal.unesco.org/ci/en/ev.php-URL_ID=26159&URL_DO=DO_TOPIC&URL_SECTION=201.html