



**Open Government:  
A Journal on Freedom of Information**

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# Complete issue 1 Volume 1

**Editorial : Inaugural Issue**

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Editor

Open Government: a journal on Freedom of Information

[editor@opengovjournal.org](mailto:editor@opengovjournal.org)**Volume 1 issue 1 March 2005****Welcome**

Welcome the first issue of "Open Government: a journal on Freedom of Information", it is the start of a project I hope those involved with Freedom of Information around the world will find to be an excellent source of high quality research, discussion and debate.

The idea for the journal came about from researching journals based on freedom of information and open government around the world. I noticed that there appeared to be for a gap in the market for a journal that would take a broad perspective on the topic of freedom of information legislation.

The journal this issue contains articles on the latest Freedom of Information newcomer, the UK, whose Freedom of Information Act was fully in force on the 1<sup>st</sup> January 2005. Ibrahim Hasan assesses the implications related to procurement. Alasdair Roberts meanwhile offers his viewpoint on the new UK Government Clearing House for Central Government requests. Graham Sutton discusses the interaction between privacy and freedom of information laws. While Peter Slough and Charmaine Rodrigues assess the new Right to Information Bill in India.

David Goldberg reports from the Third International Conference of Information Commissioners.

### **Contributions**

I welcome articles from around world on the topic of Freedom of Information legislation. Here are the aims and scope of the journal:

Aim: Publish research and communications related to Freedom of Information (FOI) legislation from the perspective of academics, practitioners and FOI users.

Scope:

- Freedom of Information legislation and information provision for citizens
- Comparative views of international freedom of information legislation
- Freedom of information legislation and the open government debate
- The impact of Freedom of Information on public administration
- Case studies from public authorities by FOI practitioners
- Information Systems for managing records and FOI requests
- The relationship of Freedom of Information legislation and other access to information legislation

The main focus of journal is upon detailed research and case studies that will be fully peer reviewed, whilst welcoming viewpoints and shorter

communications. If you wish to discuss any details relating to submission please contact me at the email address below.

### **The FOI spotlight falls on the UK**

The UK Freedom of Information Act (2000) finally came into force on the 1<sup>st</sup> January 2005. The Act has generated substantial news headlines, using the Lexis Nexis news database the following data can be observed:

UK National newspapers: 391 stories 1<sup>st</sup> January – 15<sup>th</sup> March

The Business 3 stories

Daily Mail 50 stories

Daily Star 3 stories

Daily Telegraph 42 stories

Express 21 stories

Guardian 88 stories

Independent 79 stories

Independent on Sunday 19 stories

Mail on Sunday 15 stories

The Mirror 22 stories

News of World 0

Observer 17 stories

People 3 stories

Sunday Express 8 stories

Sunday Mirror 2 stories

Sunday Telegraph 10 stories

Sunday Times 0 stories

The Times 0 stories

23 articles mentioned Freedom of Information Act in the headline

All UK Newspapers (including local) in headline 39

The following themes have emerged in the months of January to March in the UK:

- Use of the Freedom of Information Act as a political tool in the run up to the probable general election later in 2005
- The Government refusal to release the Attorney General's advice on the legality of the war in Iraq
- Use of proactive release and websites to post requested material
- Controversy in the media surrounding deleted and shredded material prior January 2005
- Release of new health information such as MRSA rates and heart surgeons' performance

I look forward to receiving articles about the UK experience and comparisons with other jurisdictions.

### **Freedom of Information around the world**

As already mentioned India is moving towards enacted Freedom of Information legislation and also Germany has published a Draft Bill (available at <http://www.informationsfreiheit.info/en/drafts/>)

In the United States a Bill has been proposed to "to establish an advisory Commission on Freedom of Information Act Processing Delays"

(<http://www.cornyn.senate.gov/FOIA/>).

I also welcome contributions on these areas and other worldwide developments in Freedom of Information.

### **Thank you**

There are many people I would like to thank for helping get this project from the drawing board to reality: The School of Business Information at Liverpool John Moores University for supporting the project financially, Scholarly exchange for their technical help, the authors for agreeing to write for a new publication and the many members of the editorial board.

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Open Government: a journal on Freedom of Information

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**Title:** India's Right To Information Movement Makes A Breakthrough  
**Volume 1 Issue 1**

**Abstract**

The article analyses the Indian *Right to Information Bill 2004* that was tabled in Parliament in December 2004. The article provides a brief history of the development of the Bill within India, including the civil society activities which spurred the Indian Government into tabling the new Bill, which replaces the *Freedom of Information Act 2002*. It then proceeds to summarise the key provisions in the new Bill and detail the key deficiencies still remaining in the Bill. Finally, it provides a status report on where the Bill is now, and the anticipated process for enactment.

**India's Right To Information Movement Makes A Breakthrough**

*In a government...where all the agents of the public must be responsible for their conduct, there can be but few secrets. The people...have a right to know every public act, everything that is done in a public way, by their public functionaries...The responsibility of officials to explain or to justify their acts is the chief safeguard against oppression and corruption.*

- Justice K K Mathew, Supreme Court of India (*State of UP v Raj Narain*, AIR 1975 SC 865.)

For more than two decades, the Supreme Court of India has recognised the right to information as a constitutionally protected fundamental right, established under Article 19 (right to freedom of speech and expression) and Article 21 (right to life) of the Constitution. (Constitution of India, 1950): The Court has recognised the right to access information from government departments is fundamental to democracy. Activists at the grassroots have famously relied upon the right to demonstrate that access

to information is also essential to ensuring effective participatory development. (Mishra, 2003)

Proponents of the right to information in India have long made it clear that the legal right to information simply recognises the moral fact that information held by the government on behalf of the public, collected with public money and accumulated by public servants rightfully belongs to the people. Information is not a gift, graciously bestowed by India's leaders – it is no less than every person's human right.

### **A hard fought battle**

Unfortunately, while the Indian public have increasingly been aware of the importance of the right to information, MPs have been reluctant to transform the right into a practical legal reality. The movement grew from the grass roots in Rajasthan, where people exercised their fundamental human right to information to highlight the gross discrepancies between money awarded to development activities in Rajasthan and the actual completion of such projects (Roy et al., no date). Over time, the campaign has spread throughout the country, with the Second National Right to Information Convention held in Delhi in October 2004 celebrating the 10 year anniversary of the right to information campaign in India.

During the last decade, some notable wins have been notched up by campaigners. Nine states have already passed right to information laws – in Tamil Nadu (1997), Goa (1997), Rajasthan, Karnataka, Delhi, Maharashtra (2002), Madhya Pradesh, Assam and Jammu Kashmir (2004). At the national level though the progress has been much slower.

Although the *Freedom of Information Act 2002* ("FOI Act") was passed by

Parliament in December 2002 and received Presidential assent in January 2003, a commencement date was never notified such that it has never come into force and remains a paper tiger. In any case, the FOI Act was a very weak law, which failed to give proper effect to the constitutional right to information. The exemptions were broadly drafted, no independent appeals mechanism was established and no penalties were included.

Consequently, even after the passage of the FOI Act, campaigners continued to advocate for the speedy implementation of an effective right to information law. In 2004, these efforts were bolstered when the newly-elected United Progressive Alliance (UPA) Government specifically promised in the Common Minimum Programme (CMP), which set out the Government's key objectives for its term, that it would make the FOI Act more "progressive, participatory, and meaningful" (Government of India, 2004)

The Congress Party, the biggest member of the UPA coalition, set up its own National Advisory Council (NAC) comprised of eminent civil society persons to oversee the implementation of the CMP. The NAC included in its member Aruna Roy and Jean Dreze, key figures in the Indian right to information movement and members of the National Campaign for the People's Right to Information (NCPRI). The NAC immediately took an interest in the right to information, discussing the issue at its very first meeting. Based on submissions by CHRI, the NCPRI and other civil society groups, as quickly as August 2004 the NAC submitted a set of recommendations for amending the FOI Act to the Prime Minister's Office.

On the 23 December 2004, the UPA Government finally tabled a new *Right to Information Bill* ("RTI Bill") in Parliament (Right to Information Bill, 2004) Unfortunately, between August and December 2004, it appears that the bureaucrats responsible for drafting the legislation got their hands on the NAC amendments and used this opportunity to remove and/or dilute some key recommendations in the final version of the Bill. This is not entirely surprising. The bureaucracy is probably well aware of the potential for the right to information to finally make them accountable to the public – and it is doubtful that they are keen to see that happen.

Despite these setbacks, campaigners remain hopeful that a stronger Act can still be passed by Parliament. It appears that a special group of Ministers is to be made responsible for reviewing the RTI Bill, and already, the Bill has been referred to the Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice for consideration. The public has been encouraged to write to the Committee, calling on members to recommend that the Bill be improved to bring it into line with best practice standards – and then passed as a matter of priority.

### **Key provisions in the new Bill**

The RTI Bill 2004 purports to set out to provide a 'practical regime of right to information for people to secure access to information...in order to promote transparency and accountability. (Right to Information Bill, 2004: preamble) It will come into force on the 120 day of its enactment – a step forward considering that the FOI Act was never implemented because the law itself omitted a date for it to come into force.

## Coverage

- Only “citizens” can request information from a “public authority”, defined as any body constituted under the Constitution or a law made by Parliament, or any body owned or controlled by the Central Government. This definition does not include private bodies which perform public services or which receive funds or concession from the Government. (Right to Information Bill, 2004: ss.3 2(g))
- The Bill covers only “public authorities” set up under the Central Government or the administration of Union Territories. It does not cover any State public authorities or extend to Jammu and Kashmir (due to the special constitutional status of that territory). (Right to Information Bill, 2004: ss.1(2), 2(g))

## Access and Its Limits

- The “right to information” is defined broadly, to include a right to copy and inspect records, take certified samples and inspect public works. Information which can be requested also includes information “relating to a private body that can be accessed by a public authority under any law in force” (Right to Information Bill, 2004: s.1 (d)).
- Public authorities must also proactively publish a wide range of information about their organisation, including information about: its decision-making processes; its rules and regulations; departmental budgets, including expenditure; the categories of documents it holds; consultation opportunities; recipients of subsidies; and proposed development activities (Right to Information Bill, 2004: s.4)

- The exemptions are quite broadly defined, with a relatively low standard of harm required, if any. In addition to common exemptions to protect national security, international relations, legally confidential or commercially sensitive information and privacy for example, the Bill also provides a blanket exemption for all documents of Cabinet or the Council of Ministers, and does not cover a range of intelligence and security agencies such as Intelligence Bureau, Central Reserve Police Force, National Security Guards, Directorate of Revenue Intelligence and Central Economic Intelligence Bureau (Right to Information Bill, 2004: s.21)
- A blanket public interest override has been included "if public interest in disclosure of the information outweighs the harm to the public authority" (Right to Information Bill, 2004: s.8 (3))

### **Applications**

- Citizens must request information in writing (including by email). Applications are submitted to a Public Information Officers (PIO) or an Assistant PIO who is appointed at the sub-divisional or sub-district level. An application fee will need to be paid (to be prescribed).
- Applications must be responded to within 30 days, except in cases concerning the life and liberty of the person where information must be provided within 48 hours. Where no response is received, this will be deemed to be a refusal. Applications must be rejected in writing.
- Where applications are approved, a fee will be imposed for accessing the information. However, if the application is not dealt with

in time, fees will not be collected. Where third party information may be disclosed, the third party must be given a right to make representations before a decision is made.

### **Appeals & Penalties**

- If a person feels they have been wrongly denied information, they can appeal to the officer immediately senior to the PIO in the concerned Public Authority (Right to Information Bill, 2004: s.16(1)).
- A second appeal can be lodged with an independent "Central Information Commissioner" (CIC), a newly established position under the law. The CIC and his/her Deputies constitute an independent, impartial appeals mechanism. They will have the powers of a civil court and can override public authorities and require disclosure. Their decisions are binding (Right to Information Bill, 2004: ss.16(2)-(11) and Chapter III).
- Penalties can be imposed on PIOs of up to Rs. 25,000 or a prison term extending up to five years for "persistently failing to provide information within the specified period" (Right to Information Bill, 2004: s.17).
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### **Implementation**

- The CIC must submit an annual report to Parliament on the implementation of the Act and can also make recommendations for improving implementation (Right to Information Bill, 2004: s.22).

- The Central Government is advised to develop educational and training materials on RTI for the public and for its officers. At a minimum it must provide a User's Guide for the public (Right to Information Bill, 2004: s.23).

### **Still room for improvement**

The RTI Bill 2004 is a major improvement on the FOI Act 2002. However, there are still a number of key deficiencies in the Bill which should be amended as a matter of priority. Amendments will improve the effectiveness of implementation by ensuring the public's right to access information is not unjustifiably fettered and by institutionalising incentives and sanctions for government officials to dispense with their historical culture of secrecy and seriously commit to implementing a regime of open government.

The biggest criticism of the Bill from civil society has been directed at the fact that the RTI Bill has narrowed the coverage of the law from what was originally contained in the FOI Act, by excluding State public authorities from its scope. This raises important constitutional questions which go to the nature of India's federal system of government. Notably, the interaction between State and Central access laws has been a point of conflict since the passage of the FOI Act 2002. After the passage of the Act, the Central Government appears to have taken the position that a Central law would override State laws, going so far as to distribute a circular to States requesting them to repeal their laws. However, since 2002, four States have actually passed right to information laws, with the

President actually going so far as to specifically assent to the Maharashtra *Right to Information Act*, which was passed in 2003.

Confusing the matter further however, the new Central Government has done an about-face and drafted a law which does not cover States bodies at all. It appears that the Government is concerned at how such a law would be implemented at the state level in practice. Doubt has been expressed as to whether state public officials, which are not under the direction of the Central Government, can be required to release information collected and managed using State resources. This issue is further complicated in the case of states which already have laws in place. If there is a clash, opinions vary as to how the conflicting laws will be applied. Nonetheless, civil society activists maintain that, considering the precedent set by the previous Central Government in respect of the FOI Act 2002, the Government has – and should exercise – the power to legislate for the whole country.

The Bill has also been criticised for only applying to “citizens” of India, a holdover from the FOI Act 2002. This is a particularly problematic requirement in the Indian context for two reasons. Firstly, many Indians may find it hard to prove that they are citizens considering that India does not have a very effective national identification system, such that many people may not have the necessary paperwork needed to meet this test. If officials use this requirement as a pre-condition for applications it could disempower large sections of the population. Secondly, the requirement for citizenship excludes permanent residents of India, refugees for example, from using the law to protect their rights.

The exemptions categories also remain far too broad. Although the inclusion of a public interest override is a huge step forward, the fact that the exemptions only contain a low level harm test requiring that relevant interests are only "harmed" or "prejudicially affected" could be used to block a lot of applications at the initial stages. Even more problematically, the blanket exemption for 18 specified intelligence and security agencies – a list which can be extended by regulation – has the potential to seriously diminish the important oversight benefits which the right to information brings. It is not appropriate that key government law and order agencies are put fully outside the law's ambit, particularly considering that the Bill allows for partial disclosure, which would allow sensitive information to be severed before information was released. It is also disappointing that the Government drafters did not even accept the compromise position suggested by the NAC, namely that these agencies could be exempted except where the information requested relates to corruption or human rights violations.

While it is positive that the Bill has gone further than the FOI Act and included penalty provisions, the offences and sanctions included in the Bill fall very far short of even the minimum good practice standard evinced in the Maharashtra, Delhi and Karnataka right to information laws, which all include personal penalties for certain acts of non-compliance. The offence provisions are inadequate – with officials only being penalised for "persistently failing to provide information within the specified period". Such a provision is an insufficient deterrent to corrupt public officials who will be resistant to being held accountable for their actions. Furthermore,

no offences are included for unlawful destruction of records, deliberate provision of false/misleading information or obstruction of appeals. These are serious acts of non-compliance – the new Bill should ensure that officials cannot get away with such bad behaviour. Despite the precedents set in the Indian States of Maharashtra and Karnataka, there is also no penalty to be imposed for unreasonable delay in providing information. At the practical level, it is also problematic that it is not clear whether the appeals bodies can themselves impose penalties. The penalty provisions need to be substantially improved, At a minimum, they need to include a broader range of offences and give appeal bodies sufficient powers to punish officers who act against the law.

### **Where to from here?**

Although the RTI Bill 2004 has major shortcomings, it is an improvement on the FOI Act 2002 and should be passed – with amendments addressing key deficiencies – as a matter of priority. The Bill has been tabled in Parliament but referred both to a Parliamentary Standing Committee and a Group of Ministers for further consideration. The Standing Committee met in February 2005, but their recommendations are yet to be published. It is not yet clear what the process will be with regard to consideration of the Bill by the Group of Ministers At a minimum, it is essential that: (a) both bodies seriously consider the amendments suggested by civil society; (b) the provisions of the Bill are not diluted by either of these bodies; and (c) at the very least, they both complete their mandates promptly, so that the Bill does not languish in committee but instead is sent back to Parliament at the earliest possible stage.

Some reports indicate that the Bill may be considered in the current Budget Session of Parliament, which is scheduled to last until mid-May, but it remains to be seen whether the recommendations proposed by the two Committees will affect this timetable. If this opportunity is missed, the next opportunity for consideration of the Bill by Parliament will be in July – more than a year since the Common Minimum Programme pledged an improved law. It is to be hoped that Parliament will act promptly and effectively to pass this Bill, which will finally empower Indian's to effectively exercise their constitutional right to information. Further updates will be provided throughout the year as developments occur.

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**Title: The UK Freedom of Information Act (2000) and Procurement  
Volume 1 Issue 1 March 2005**

## **The UK Freedom of Information Act (2000) and Procurement**

The UK Freedom of Information Act 2000 is now fully in force. What impact will this have on public sector procurement? Already there are a number of issues that are causing concern amongst procurement professionals and their advisers.

### **Contractors' Compliance**

The Act applies to public authorities. This covers approximately 100,000 public sector organisations. It does not mention contractors, partners, PFI companies and arms length management organisations (ALMOs). So does this mean that these types of organisations are not covered by the Act?

Section 5 contains a provision allowing the Secretary of State to designate "Additional Public Authorities". Before he can do this, he has to be satisfied that each organisation:

- a) Exercises public functions, or
- b) Provides contracted out public authority functions

So far, there has been no order designating additional public authorities.

According to the DCA this will happen around January 2006.

However, the right of access applies to information which is held not necessarily owned by the public authority. If a public authority holds information about a contractor it may be accessible from the public authority. So what exemptions may be relevant when considering such a request?

### **Legal Obligations Exemption**

Section 44 of the Act provides:

“information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it

- (a) is prohibited by, or under any other enactment,
- (b) or it is incompatible with any Community obligation...”

Paragraph b of this exemption may apply to some information received during a procurement process conducted under the EU Procurement Rules. These rules apply to procurement carried out by most UK public sector organisations where the value of the contract is over certain thresholds (depending on whether goods, services or supplies are being sought) There are several references to confidentiality of information in the Public Works Contract Regulations 1991 (SI 1991/2680), the Public Services Contract Regulations 1993 (SI 1993/3228), and the Public Supply Contract Regulations 1995 (SI 1995/201) (all as amended). All three sets of regulations contain provisions relating to the information to be included in the Contract Award Notice and the information to be provided to an unsuccessful bidder on request. They also provide that

information may be withheld where the disclosure would be contrary to the public interest or would “prejudice the legitimate commercial interests of any person or might prejudice fair competition between suppliers.”

The above provisions suggest that up to and including the evaluation process, all the information provided by tenderers, to the public authority, is of a confidential nature. Beyond the evaluation process, the provisions of the Act will govern what a public authority is obliged to disclose (although the EU regime has its own disclosure provisions known as “de-briefing”). “Legitimate commercial interests” are not defined in the regulations, and would need to be considered in the light of general EC Treaty requirements of fairness of treatment, and transparency which arise under the requirements for effective provisions which act in a non-discriminatory manner.

### **Personal Information Exemption**

Certain information supplied by bidders as part of a tender may be of a personal nature (e.g. bidders’ employee’s CVs) and would therefore be exempt from disclosure under the Data Protection Act 1998. Section 40 of the Freedom of Information Act contains an exemption for personal information. However as far as third party information is concerned, it is a qualified exemption so there may be a case where the public interest in disclosing outweighs the individual’s privacy rights.

### **Breach of Confidence Exemption**

Section 41 of the Act provides an absolute exemption where the disclosure of the information will constitute an actionable breach of confidence.

Breach of confidence is a very tightly defined area of law. Just because a public authority has signed up to a confidentiality clause, or marked documents as confidential, does not make it a breach of confidence to disclose. It must be:

1. Information which has the necessary quality of confidence
2. Imparted in circumstances imposing an obligation of confidence
3. There is unauthorised use of the information to the detriment of the party communicating it

### **Commercial Interests Exemption**

Section 43 of the Act allows information to be withheld where it constitutes a trade secret or where disclosure is likely to prejudice the commercial interests of any person (including the public authority).

Trade secrets are defined by caselaw. The classic example is the recipe for Coca Cola. The second part of this exemption is probably more useful. For example if the public authority were to disclose the precise details of a winning tender to losing bidders this may have an adverse impact on the successful company and also effect the authority's future negotiating position.

It is important to note that section 43 is a qualified exemption. Therefore the public interest in disclosure has to be considered. So what kind of

commercial information may be withheld under this exemption? Cases from other jurisdictions seem to suggest that the overall price paid for goods or services is not confidential. The public have a right to know how their money is being spent. Details of working methods and specifications may also be disclosable as being less confidential. However the precise profit or loss on a particular item may be more confidential for a contractor.

The Information Commissioner states that in balancing commercial interests with the public interest the following factors need to be considered:

- Accountability of public money being spent
- Protection of the public from unsafe products or rogue traders or practices

Circumstances in which the information was received Timing is also an important factor to be considered when deciding whether to release information. Information about a contract let out ten years ago may not be confidential as the market may have moved on.

### **The Code of Practice**

There is a Code of Practice on Discharge of Public Authority Functions under Part I of the Act. The most relevant points from this code, in terms of confidentiality clauses in contracts, are set out below:

- Authorities cannot 'contract out' of their obligations under the Act.

- Where exceptionally, it is necessary to include non-disclosure provisions in a contract, an option could be to agree with the contractor a schedule to the contract which clearly identifies information which should not be disclosed. Authorities will have to take care when drawing up any schedule as its contents could still be overridden by the Act.
- It is for the public authority to disclose information pursuant to the Act, and not the private sector contractor.

## **Conclusion**

The Freedom of Information Act 2000 is going to lead to a massive increase in requests for information about public authority procurement and contracts. There is no blanket exemption for commercial confidentiality. Each request will have to be examined on its own merits and the provisions of the Act applied. Procurement professionals and those advising them have to be ready for the culture change of transparency which the Act is designed to introduce. The new public sector mantra is "Secrecy out; openness in"

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**Title:** What's wrong with coordination?  
Volume 1 Issue 1 March 2005

### **What's wrong with coordination?**

The United Kingdom's new Freedom of Information Act (2000) raises a host of difficult new policy questions for public authorities. In addition there is an understandable fear among officials that institutions may be played against one another -- that similar requests may be sent to different authorities with the hope of obtaining information from one that is withheld by the others. Conversely, institutions want to avoid looking foolish by withholding information when all other institutions have chosen to release it.

Officials are quickly realizing that the remedy for all of these problems is consultation among institutions about the best way of responding to complex or similar requests. FoI officers at all levels of government have been inventing informal and formal mechanisms for improving coordination. Within central government, the Department of Constitutional Affairs has established an FoI Clearing House, with guidelines that dictate when and how departments should seek advice on the handling of FoI requests (Department of Constitutional Affairs 2005). (In the first two weeks of FoI, the Clearing House had received requests for advice on over two hundred FoI requests.)

To most officials, it may seem curmudgeonly to challenge procedures that are designed to aid coordination in the handling of FoI requests. After all, coordination is supposed to be one of those unalloyed bureaucratic virtues: the more of it you have, the better off you are. Coordination, officials argue, ensures thoughtful and consistent responses, an outcome which is in the interest of citizens as well as bureaucrats. Perhaps so. But coordination done badly sometimes comes with an unacceptable price tag. And in the case of FoI, coordination runs a risk of aggravating two serious problems.

The first is delay. The tasks of referring requests to a central point, checking whether other institutions have received similar requests, and deliberating over how best to respond, may all take a substantial amount of time. And there is a real danger that coordination procedures will consume large amounts of time, resulting in a failure to respond to requests within statutory time limits. This is particularly true if the criteria for referring cases to a central coordination point are vague, so that too many are referred for consultation; or if the coordination point lacks adequate administrative capacity and becomes a bottleneck in the FoI process.

This has proved to be the case in Canada, which adopted its FoI law, the Access to Information Act (ATIA), in 1982. In 2003, I conducted a statistical study of the handling of over 25,000 ATIA requests received by major Canadian ministries in the preceding three years. The study attempted to explain how different factors -- including the breadth and complexity of a request, coordination requirements, and procedures for managing the "spin" around politically sensitive requests -- affected the

time needed to process information requests. (The full study appears in the Spring 2005 issue of the journal *Public Administration* (Roberts 2005).)

Coordination requirements proved to be one of the most critical factors in influencing processing time. For example, the need to consult with the Canadian cabinet office (known as the Privy Council Office, or PCO) regarding the application of the "cabinet confidentiality" exemption resulted in over *eight months* of added delay in processing requests received by one major Canadian ministry. In several other ministries, delays of about two months in dealing with requests that required PCO advice were common.

In other words, PCO has become a significant bottleneck in the processing of ATIA requests. And this bottleneck often means that requests are not dealt with by statutory deadlines, even though the Canadian law is liberal in allowing departments to extend deadlines in complex cases. PCO is not the only bottleneck in the Canadian system: significant delays may also occur when departments are required to consult with other departments on the application of particular exemptions -- for example, consulting with the foreign affairs ministry regarding the application of the intergovernmental affairs exemption.

The second problem may be the abuse of coordination procedures for political purposes. Routines that are set up for perfectly legitimate reasons -- to advise on FoI policy in difficult cases -- could soon be bent to serve illegitimate purposes. Political advisors at the centre of government may realize that coordination procedures provide a convenient window through which they can obtain a government-wide

view of the FoI process. They may broaden the criteria that trigger an obligation to consult to include purely political considerations, and they may insist that communications advisors, in addition to FoI specialists, should be involved in the central review of requests that are marked for consultation.

Of course, ministers and senior officials are entitled to know what sort of information is about to be released under FoI, and they are entitled to anticipate the consequences of release by preparing memoranda that provide the government's view of the information contained in released documents. But there is a question of balance here too: an excessive preoccupation with damage control and "spin" can (among other things) lead once again to unjustified delay in processing FoI requests.

FoI coordination procedures have been bent to suit the needs of government "spin-masters" in several Commonwealth countries. In Canada, communications officers regularly tap into software systems that were initially constructed to aid in the cross-government coordination on complex requests, pulling out particularly sensitive requests for special treatment. The result? Even more delay for the types of people most likely to make politically sensitive requests, such as journalists and party researchers. My 2003 statistical analysis found that such requesters were likely to experience *another* month of delay for their requests, on top of delays that were attributable to the breadth and complexity of their requests (Roberts 2005).

These problems can be avoided. Consultation mechanisms that do not cast too broad a net, and are adequately resourced and professionally managed, may succeed in achieving the benefits of coordination while

avoiding substantial delays in processing requests. It is certain that journalists and non-governmental stakeholders will watch emerging British mechanisms closely, and protest to the Information Commissioner if the drive for coordination appears to undermine the right of *timely* access to information.

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**Title:** Freedom of information and data protection: reconciling conflicting objectives

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## **Freedom of information and data protection: reconciling conflicting objectives**

Zealotry has no place in public affairs. Reconciling conflicting, but equally worthy, objectives to achieve a result that enhances the public good is what public administration is mainly about. Both data protection and freedom of information have their passionate advocates. Either side might argue that, at the rubbing point, their own favourite should prevail. It is, indeed, sometimes said, that in a particular FOI regime privacy trumps transparency or vice versa.

Headline writers might, indeed, portray data protection and FOI as being irremediably opposed: data protection prevents personal information from ever being disclosed; while, if personal information is held officially, FOI requires it always to be made available on request. That is a story which might sell newspapers, but inaccurate.

For many European countries, data protection rules are set by international instruments to which the countries concerned subscribe. At the heart of that legal regime is the European Convention on Human

Rights, Article 8 of which creates the right to private life and gives data protection its human rights pedigree. Membership of the European Union brings with it the requirement to give effect to that community's body of rules, known as the *acquis*, which includes the 1995 Data Protection Directive (95/46/EC). The 25 member states of the EU, and others besides, have also chosen to be bound by the broadly similar, but less prescriptive, rules in the Council of Europe's 1981 Convention on Data Protection (Convention 108) – an instrument which, although drawn up in Europe, deliberately refrains from calling itself a "European" Convention in the, I believe sadly still unfulfilled, hope that others outside that continent will formally adhere to it. Then, more widely, and slightly earlier still, there are the OECD's 1980 Guidelines on the Protection of Privacy and Transborder Flows of Personal Data.

It is a common feature of the three data protection specific instruments that they do not prohibit the disclosure of personal data. They do, though, set rules, known as the data protection principles, which must be respected in handling personal data, including, crucially for FOI regimes, making disclosures. If the disclosures can be made without breaching the data protection principles, there is nothing to stop them being disclosed in response to an FOI request. (There is a small wrinkle in the case of the Data Protection Directive, which, in limited circumstances, gives individuals the right to prevent disclosures and other forms of processing of their personal data even though they are fully compliant with the data protection principles.)

There are fewer international constraints on the FOI side. I am not aware that the right of access to official information at large is enshrined in any binding international instrument, although some see the right to freedom of expression in Article 10 of the European Convention on Human Rights as playing a part in its genesis, albeit not in the direct line of parentage, but acting perhaps rather as a god-parent. Such binding instruments as exist are of limited extent. The 1998 Aarhus Convention on access to information, public participation in decision-making and access to justice in environmental matters (a United Nations instrument) and the 2003 EC Directive on Public Access to Environmental Information (2003/4/EC) create, as the latter's name makes clear, a right of access to officially held environmental information. Broader in scope, in that it applies to the generality of official documents, but non-binding, is the 2002 Council of Europe Recommendation on access to official documents (Recommendation R(2002)2). Crucially, all three instruments recognise the need for a happy union between FOI regimes and data protection regimes, by including the protection of privacy or personal data among the legitimate interests for which exemptions may be provided.

Within the flexible framework established by the international data protection and FOI instruments, all that is needed is an FOI law to create the right to official information - and a clever draftsman, for although it is easy to state the principle, making it work in practice, especially with a pre-existing data protection law as intricately structured as the UK's, can require drafting skills of the highest order.

In making the match, it is necessary to distinguish two separate categories of request for personal information: those which seek the requester's own personal information (known in the data protection jargon as a "subject access request"); and those which seek the personal information of other people. Different rules are required for each category.

For the former, perhaps the simplest approach, and that adopted in the UK Freedom of Information Act 2000, is to exempt such requests entirely from the FOI regime, and require them to be dealt with under the data protection rules. This is consistent with the Council of Europe Recommendation which says, in Article II 2, that the rules it sets do not affect the right of [subject] access or the limitations to [subject] access provided for in the Data Protection Convention.

The second category is the more difficult, since it requires a set of rules for the disclosure of third parties' personal data to be established that ensure that the disclosures are consistent with the data protection principles. The difficulty arises from the fact that the principles are themselves, deliberately, expressed in very general terms. They achieve their effect by their interpretation in the light of the prevailing circumstances. The UK approach has been to preserve this effect for FOI disclosures by simply reading the data protection principles in the Data Protection Act 1998 into the Freedom of Information Act 2000. Thus the judgement whether or not a disclosure of third party personal information can properly be made in accordance with the principles will have to be

made on a case-by-case basis having regard to all the relevant facts. That is precisely what the public authority would have to do even without the FOI legislation. The difference is that without the FOI legislation the authority had the discretion to refuse disclosure. Now, subject to other exemptions, it must disclose if the data protection principles do not prevent disclosure.

There are many other detailed points in the provisions of the Freedom of Information Act 2000 that deal with the disclosure of third party personal data. But the essence of the arrangements is that there is a duty to disclose if the data protection principles permit disclosure. It would be wrong to portray this as data protection getting the better of FOI or vice versa.

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**Conference Report**  
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**Title: Third International Conference of Information Commissioners**  
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**Conference Report: Third International Conference of Information Commissioners**

The Third International Conference of Information Commissioners (3ICIC) was held in Cancun on 20<sup>th</sup> – 23<sup>rd</sup> February 2005 at the invitation of the Mexican commission, IFAI - *Instituto Federal de Acceso a la Información Pública*

The first such conference was held in Berlin in 2003 and the second in Cape Town in 2004.

3ICIC was officially opened by Mexican President Vicente Fox Quesada, underlining the importance of the event and the issue to domestic Mexican politics, particularly in the run-up to the presidential election.

There was a very full programme (3ICIC, 2005), around 130 different plenary and parallel sessions, some going on into the mid-evening. (see the Programme as at 10<sup>th</sup> February).

Around 430 people registered from 50 countries, including 44 Commissioners and/or equivalents. The rather high number of Commissioners is because several Mexican state commissions have more than one commissioner (Dave Banisar, Deputy Director of Privacy International puts the global number of independent commissioners with order making powers at around 15).

The Mexican Commission had extended a wide and open invitation to civil society, NGOs etc., who made up more than 100 of the attendees. This meant that 3ICIC was perhaps the biggest FOI event ever, a not insignificant fact in itself.

Whilst most were positive about this, some commissioners would have preferred more prior consultation about this evolution and, in addition, that their number was more represented, particularly during the plenary sessions. Civil society participants also voiced this opinion, hoping to hear more informed discussion between commissioners concerning difficult issues brought before them. As it was, too many presentations were overlong rehearsals of the history, developments and activities of organisations and in jurisdictions.

Apart from the plethora of sessions, the main concrete outcome of the meeting was the adoption of the *Declaration of Cooperation*. The draft (only, for now) version is available on the conference website. It is a re-run of the 2003 Declaration adopted at the conclusion of the first International Conference of Access to Information Commissioners (see [http://www.informationsfreiheit.de/info\\_international/dokumente/Declaration.pdf](http://www.informationsfreiheit.de/info_international/dokumente/Declaration.pdf) ).

The operative paragraph reads: "In order to foster a broader, worldwide public awareness of Freedom of Information, to further analyse and define its vital elements, and to benefit from an exchange of experiences, the

undersigned agree to a continuous cooperation through the International Conference of Information Commissioners.

Not to be outdone, 58 ngo/civil society groups adopted the *Declaration of Cancún: Transparency and Accountability: A Commitment to Democracy* (see below\* for the text).

As a lasting legacy, it is hoped that (many of) the presentations (and the final version of the Declaration of Cooperation) will be put up on the 3ICIC website; certainly IFAI has promised to do this. Apart from that, the 3ICIC was notable for the number and variety of FOI advocates and implementers that one could network with in a short space of time.

Finally, in a principled burst of transparency, the Rapporteur announced that the event cost around USD 600 000 to put on. Certainly, the hospitality was more than adequate, including a memorable dinner held on the hotel's adjacent beach under a velvety Caribbean night sky. Whilst next year's ICIC will be memorable, no doubt, in its own way, one can more look forward to a dinner beside the Manchester Ship Canal - yes, 4ICIC will be hosted by the UK Information Commissioner and take place during May 2006.

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**\* *Declaration of Cancún: Transparency and Accountability: A  
Commitment to Democracy***

The right of access to information has no meaning if people cannot use information to improve the quality of their lives. Access to information must not simply belong to elites, but must be a daily component of participatory democracy, equitable development, and the struggle against poverty and discrimination.

As civil society organizations we recognize and welcome the open and interactive nature of the Third International Conference of Information Commissioners

In recognition that access to information is a fundamental right and an essential condition for democratic governance, accountability and the development of participatory democracy:

We call on governments to promote the full implementation of access to information in line with the highest standards, including the establishment of access to information commissions. We urge those governments which have not yet adopted access to information laws to initiate adoption as rapidly as possible; we urge those governments whose laws do not conform with the minimum standards to improve their legislation. Principles of transparency should be applied to all government decision-making, budgeting, and administrative functions.

We demand that transparency principles apply to all institutions that operate with public funds and carry out public functions, including the executive, legislative and judicial branches, also political parties, autonomous and parastatal organizations, and to private businesses to the extent that the information is related to their public functions or use of public resources, or affects the enjoyment of human rights.

We urge that principles of transparency and access to information be adopted in the regulations and practices of all intergovernmental organizations, including financial institutions. The management, structure and policies of these organizations should be grounded in respect for transparency and access to information in accordance with the highest international standards.

We propose that non-governmental organizations and private businesses adopt the same standards of transparency as voluntary good practices.

In particular, we recognize the crucial role played by information commissioners and we offer our continued support and cooperation in promoting full enjoyment of the right of access to information at the national and international levels.

**Signatories:**

Academia Mexicana de Derechos Humanos (México)

Access to Information Programme (Bulgaria)

Acción Ciudadana (Guatemala)

Acción para la Democracia A.C. (Aguascalientes, México)

Alianza Cívica (México)

Article 19 (International)

Asociación DOSES (Guatemala)

Asociación por los Derechos Civiles (Argentina)

Campaign for Freedom of Information in Scotland (Escocia)

Centro Mexicano de Derecho Ambiental A.C. (CEMDA, México)

Center for Independent Journalism (Rumania)

Centro Nacional de Comunicación Social (CENCOS, México)

Centro de Servicios Municipales Heriberto Jara A.C. (México)

Consejo Ciudadano por la Transparencia y la Ética del Municipio de Guadalajara (México)

Convergencia de Organismos Civiles por la Democracia (México)

Colegio Oaxaqueño de Ciencias Políticas y Administración Pública (México)

Coalición Acceso (Ecuador)

Commonwealth Human Rights Initiative (International)

Consejo de la Prensa Peruana (Perú)

Consortio para el Diálogo Parlamentario y la Equidad (México)

Corporación Latinoamericana para el Desarrollo (CLD, Ecuador)

Corporación Participa Chile

Cultura Ecológica, A.C. (México)

DECA Equipo Pueblo (México)

Democracia, Derechos Humanos y Seguridad, A.C. (México)

Equidad de Género, Ciudadanía, Trabajo y Familia A.C. (México)

FEMU A.C. (Sinaloa, México)

Fundar, Centro de Análisis e Investigación A.C. (México)

Gente Diversa de Baja California A.C. (México)

Institute for Democracy in South Africa (IDASA, Sudáfrica)

Iniciativa de Acceso México

Instituto Prensa y Sociedad (Perú)

Instituto Mexicano de la Administración del Conocimiento A.C. (México)

International Budget Project (Internacional)

International Center for Journalists (Estados Unidos)

Libertad e Información México A.C. (LIMAC, México)

Mazdoor Kisan Shakti Sangathan (MKSS, India)

National Campaign for People's Right to Information (NCPRI, India)

National Security Archive (Estados Unidos)

Observatorio Ciudadano para el Libre Acceso a la Información  
(Guatemala)

Open Democracy Advice Center (Sudáfrica)

Open Society Archives (Hungría)

Open Society Justice Initiative (Internacional)

Open Society Foundation (Eslovaquia)

Open Society (República Checa)

Prensa y Democracia (PRENDE, México)

Presencia Ciudadana (México)

Privacy International (internacional)

Proética Perú

Providus (Latvia)

Proyecto Fronterizo de Educación Ambiental A.C. (Mexico)

Red Ciudadana de Chihuahua (México)

Sindicato Mexicano de Electricistas (México)

South East Europe Network for Professionalization of the Media (Europa)

Transparency International (Berlin)

Universidad de Buenos Aires (Argentina)

Unidad de Atención Psicológica, Sexológica y Educativa para el

Crecimiento Personal, A.C. (México)