ACCESS TO INFORMATION

A KEY TO DEMOCRACY

THE CARTER CENTER

Edited by Laura Neuman

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TABLE OF CONTENTS

FOREWORD

J Ca U

Times have changed. Public awareness about corruption and its corrosive effects has increased substantially since 1977 when I signed into law the United States Foreign Corrupt Practices Act, which prohibits bribery of foreign officials. Now many other countries are passing legislation to combat corruption and increase public confidence in government. Access to information is a crucial element in the effort to reduce corruption, increase accountability, and deepen trust among citizens and their governments.

Public access to government-held information allows individuals to better understand the role of government and the decisions being made on their behalf. With an informed citizenry, governments can be held accountable for their policies, and citizens can more effectively choose their representatives. Equally important, access to information laws can be used to improve the lives of people as they request information relating to health care, education, and other public services.

The Carter Center has collaborated in Jamaica and other countries to help inform the public debate about the need for strong access to information laws, to bring together the government and diverse sectors of society to discuss and promote the issue, to share the international experience, and to assist in overcoming implementation obstacles. We encourage every nation to ensure that citizens can exercise their right to know about the decisions of their government, and we stand ready to assist.

INTRODUCTION

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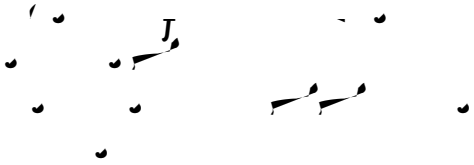
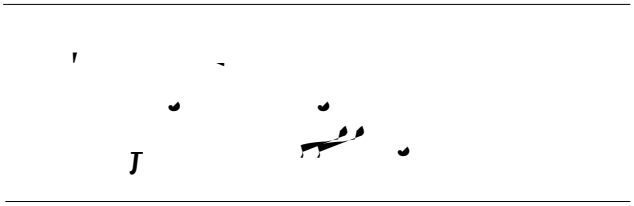
Citizens and their leaders around the world have long recognized the risk of corruption. Corruption diverts scarce resources from necessary public services, and instead puts it in the pockets of politicians, middlemen and illicit contractors, while ensuring that the poor do not receive the benefits of this "system". The consequences of corruption globally have been clear: unequal access to public services and justice, reduced



even Asia in the coverage of access to information and implementation. Nevertheless, the trend toward new legislation continues as developed and developing nations, as well as international funding institutes, recognize the importance of strong access to information laws that are appropriately implemented and fully enforced. Reaching this goal is complex, and we hope that the following chapters provide the reader with a number of ideas for ways in which to do so.

In [illegible], a paper originally written for The Carter Center's Transparency for Growth Conference in 1999, Dr. Alasdair Roberts sets out the international principles that govern many access to information laws. This article, premised on the notion that wholesale secrecy in government is no longer acceptable, includes a discussion about which government institutions should be covered by the law, when is it appropriate for the withholding of information, how costs can be controlled such that full implementation may be a reality, and the best mechanisms for enforcement. Dr. Roberts concludes with a reminder that the effectiveness of the law will only be determined through its use, and he encourages civil society organizations to build internal capacity so that they can take advantage of this important tool.

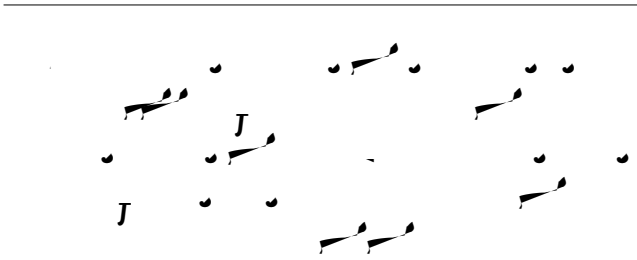


Marcela Guerrero for their time in painstakingly assuring that the author's voice and meaning was heard in the translation.

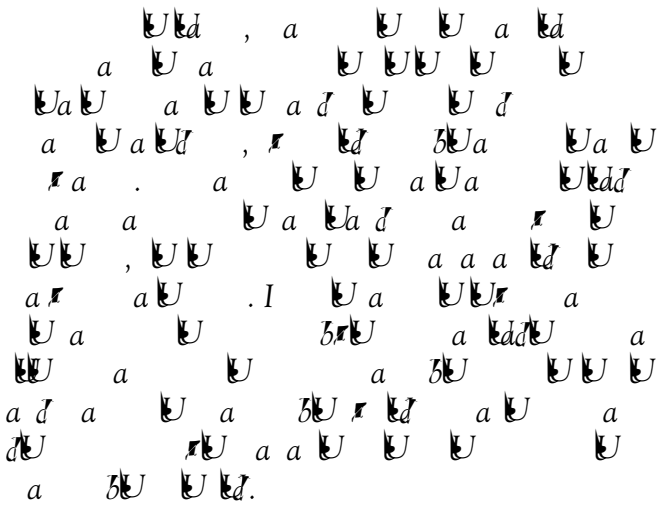
1 World Bank. 2000. World Development Report, Washington, Table 1.1.

2 Statement of Miloon Kothari, Special Rapporteur on adequate housing as a component of the right to an adequate standard of living to the Third United Nation Conference on the Least Developed Countries, Brussels 14-20 May, 2001.

3 UNDP Human Development Report 2002, p. 10.



INFORMATION, DEMOCRACY AND ACCOUNTABILTY



Edetaen Ojo, Executive Director: Media Rights Agenda, Lagos, Nigeria, October 2000.

THE CASE OF SOUTH AFRICA

Secrecy is a function as well as an effect of undemocratic rule. Throughout the *a a* era, South Africa's increasingly paranoid white minority government suppressed access to information— on social, economic, and security matters— in an effort to stifle opposition to its policies of racial supremacy. Security operations were shrouded in secrecy. Government officials frequently responded to queries either with hostility or misinformation. Press freedom was habitually compromised, either through censorship of stories or through the banning and confiscation of publications. Information became a crucial resource for the country's liberation forces, and their allies in international solidarity movements, as they sought to expose the brutality of the *a a* regime and hasten its collapse.

Consequently, opposition groups came to see unrestricted access to information as a cornerstone of transparent, participatory and accountable governance. This consensus was ultimately captured in South Africa's new constitution. A democratic parliament then gave further shape to the right of access to information by passing enabling legislation– a process in which civil society organizations played an unusually influential role.

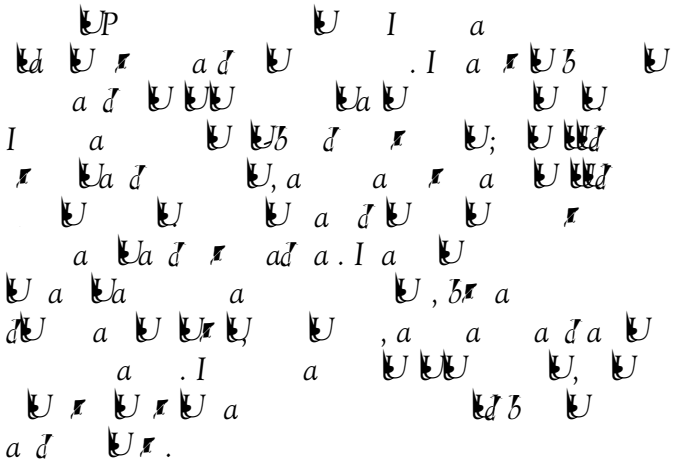
One of the most important aspects of the interim constitution that guided South Africa's transition to democracy was the introduction of a Bill of Rights designed to ensure equal protection for a broad range of human, socio-economic and civil rights, irrespective of race, gender, sexual orientation, disability, belief, and other factors.[2] Among the rights upheld was that of access to publicly-held information. Section 23 of the interim constitution stated: "Every person has the right of access to all information held by the state or any of its organs in any sphere of government in so far as that information is required for the exercise or protection of any of their rights."

By entrenching an independent right of access to information, rather than leaving it to be protected by the right to freedom of expression as has generally been the case in international human rights instruments, the drafters underscored its significance in South Africa's constitutional order.

Following the historic general election of 1994, the interim constitution's broad right of access to information was expanded further. Section 32(1) of the final constitution, enacted by the National Assembly in 1996, guarantees "everyone...the right of access to any information held by the state and any information that is held by another person and that is required for the exercise or protection of any rights." Not only is the right of access to publicly-held information no longer qualified by the stipulation that the information be needed for the exercise or protection of a right, but a qualified right of access to information has also been established with respect to private bodies and individuals. The legislation was, however, permitted to include "reasonable measures to alleviate the administrative and financial burden on the state." To balance, in other words, the state's potentially competing obligations to

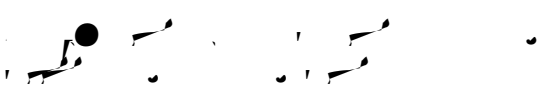
protect citizens' information rights and to provide fair, efficient, and cost-effective administration.

THE SOUTH AFRICAN LAW



Priscilla Jana ANC MP, National Assembly, Feb. 2000.

The South African Promotion of Access to Information Act 2000 (POATIA) begins by "recognising that the system of government in South Africa before 27 April 1994 resulted in a secretive and unresponsive culture in public and private bodies which often led to an abuse of power and human rights violations." As was noted in the section above on the history of the Act, the right to access to information is a part of the new set of human rights designed to prevent a repeat of history and to ensure that South Africans can fulfill their potential as human beings.

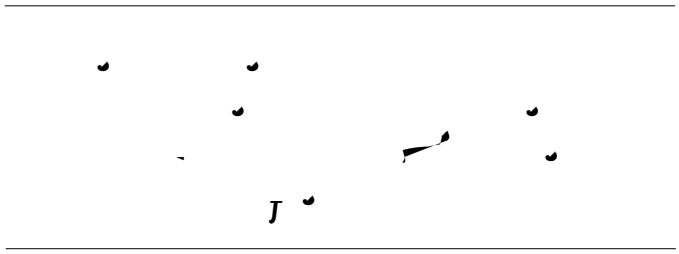


1. To give effect to the Constitutional Right to Access Information (section 32 of the Constitution), and to generally promote transparency, accountability and effective governance of all public and private bodies, by establishing procedures to do so.
2. To enable requesters to obtain records held by the State and by private bodies as swiftly, inexpensively and effortlessly as reasonably possible in a way that balances this right with the need for certain justifiable limitations, such as privacy, commercial confidentiality and effective, efficient and good governance.

In addition, the Act's objects include the empowerment and education of everyone so as to:

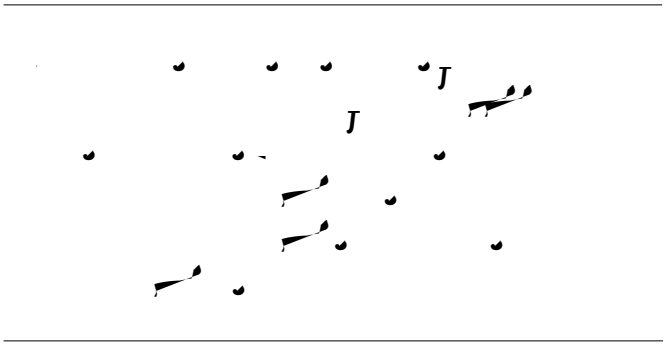
1. understand their right to access information
2. understand the functions and operation of public bodies
3. effectively scrutinize, and participate in, decision-making by public bodies that affect their rights.

Beyond the fleshing out of the right to access records, the South African (SA) Act, in meticulous detail, creates a system for using the law. This is vital for its success. There is no point in having a law that provides for the right to access to information, if there is not at the same time a clear and workable system of mechanisms to enable citizens to use the law.



Hence, the SA law requires government to ensure that a manual is produced. This is a crucial obligation, as it will provide both government and the requester citizen with a "road map" of the records held by that part of government. If the manual is well produced, it will enable government to categorise records and, thus, facilitate automatic disclosure or publication, as is encouraged by the Act. In addition, the Information Officer must ensure that the relevant contact details are included in the telephone directory.

In particular, the Information Officer must decide which records shall be automatically published. The evidence from other countries is that the more records that are automatically published or disclosed, the easier and cheaper it is for government to administer the law.



Furthermore, deputy information officers must be appointed in sufficient number to "render the public body as accessible as reasonably possible for requesters of its records." The SA Act envisages that deputy information officers will be the operational hubs of the new system of open information, reporting to the Information Officer who, in most cases, is likely to be the most senior person in the department or body (often the Director-General).

The SA law requires that a prescribed form be used so as to "provide sufficient particulars to enable an official of the public body concerned to identify the record or records requested." With this and with the request in general, the deputy information officers are under an explicit duty to assist requesters, thus enabling the requester to comply with the request procedures.

Most importantly, the SA Act provides for clear time limits: a decision must be made within 30 days (though the transitional rules extend this period for years one and two to 90 and 60 days respectively). The Act sets out the specific grounds for extending the period of the decision and declares a deemed refusal, where the time limit for making a decision is not met.

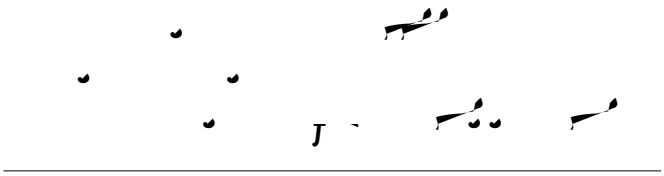
Powerfully, the South African law also creates the mechanism whereby an individual citizen may access privately-held information, so that he or she may meaningfully exercise other rights in the Bill of Rights. This applies especially to the group of rights in the constitution known as socio-economic rights, such as the rights to adequate health care, education and clean environment.

It is also important for the right to equality. The experience in other parts of the world has shown that in equality cases it is very difficult to prove discrimination due to a lack of evidence. Access to information will facilitate such a claim by allowing an open assessment of all the facts surrounding the alleged discrimination. Equally importantly, therefore, if such activity is open to scrutiny it may also serve as a deterrent to the continued violation of rights.

In terms of sectors such as banking and pensions, the opportunity to use the legislation to expose unlawful or unjust policies such as "redlining" now exist. In the realm of consumer protection there will be the opportunity to ask for information relating to safety testing. With product pricing– drugs, for example– there is the opportunity to get information relating to the production costs and profit margins and how these affect affordability and accessibility. In the sphere of the environment, there will be an opportunity to elicit the information pertaining to pollution testing. For example, a factory may be emitting pollution, causing endemic ill health in a community. It may be important, therefore, to access the testing records of the company. Science and industry develop thousands of new kinds of potentially dangerous consumer products, many of which are extremely complicated, leaving consumers puzzled and confused. Consumers' good health and safety are often threatened due to lack of information concerning the quality, safety and reliability of products and services that they buy.

Prices for essential services and products such as bank transactions, insurance policies, bus and train fares, fuel consumption, as well as for essentials such as foodstuffs, are often increased without prior notification and proper justification. Lack of information makes it extremely difficult for communities to decide whether price hikes are fair.

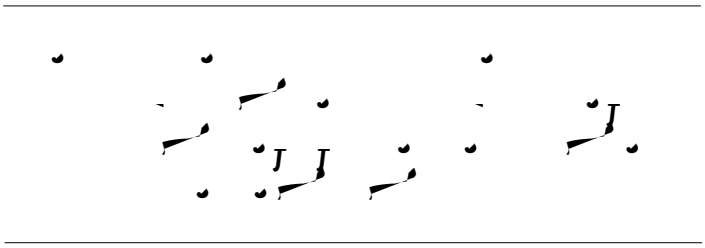
In some of these cases, an individual will be able to make the application for the information. Often, though, there will be no one with the wherewithal to make the application, to have the strength of purpose and the resources or to pursue an appeal if the request is refused by the private entity. Those whose rights are most seriously threatened will be powerless to obtain the information they most desperately need. This is why South Africa decided to permit the state to have the opportunity to make a request for privately-held information, whether directly on behalf of an individual or community, or in order to pursue a policy directed at protecting the rights of its citizens.



Critics of this proposal saw it as a state intrusion into privacy– a fear of 'Big Brother State'.

Eight years later, the Thai government, in response to the demands of the relatives of those murdered in the uprising, released the report of an army investigation of the "Bloody May" massacre. The report provided previously secret information on what went on during those tumultuous days and the possible role of two political parties in the carnage. "Now the healing can begin," said an editorial in U a , the newspaper that in 1992 braved military censors by publishing photographs and accounts of the violence.

The release of the army report was a milestone in a country where the military remained a powerful and secretive institution that had so far not been held to account for its actions. For the first time, thanks in part to a new information law that allowed citizen's access to a wide range of official documents, the army was releasing information on one of its deepest and darkest secrets.



Thailand had come a long way. The 1992 uprising marked the formal withdrawal of the military from power and the end of the era of coups d'etat. In the following years, Thais laid the foundations– including a new constitution, media reforms and the information law– for what is now Southeast Asia's most robust democracy.

For the longest time, the rulers of Southeast Asia maintained political control through information control. Powerful information ministries muzzled the press, setting guidelines for what could be reported and what could not. A culture of secrecy pervaded the bureaucracy, making it difficult, if not impossible, for citizens to find out how their governments were doing their work and how public funds were being spent.

Since the late 1980s, however, democracy movements, technological advances and the increasing integration of regional economies into global trade and finance have challenged such stranglehold. In Indonesia, the Philippines and Thailand, the media have played an important role in providing citizens information on the excesses of authoritarian regimes. The power of an informed citizenry was dramatised in uprisings that took place in the streets of Manila in 1986, in Bangkok in 1992 and in Jakarta and other Indonesian cities in 1998.

Today, in these countries, a free press provides a steady stream of information on corruption, the abuse of power and assorted forms of malfeasance. Greater access to information has also shed light on the past, whether it is military wrongdoing as in the case of Thailand, or the thievery of deposed dictators, as in the case of the Philippines and Indonesia. Information has empowered not just the press, but citizens as well, allowing them to challenge government policy and denounce official abuse.

The first major case under Thailand's right to access information act revolved around the admissions process to Kasetsart Demonstration School, one of several highly regarded, state-funded primary schools. The admissions process to the school included an entrance examination, but test scores and ranks were never made public, and the student body was largely composed of U – children from elite, well-connected families. These factors created a widely held public perception that some form of bribery played a part in the admissions process.

In early 1998, a parent whose child had 'failed' to pass the entrance examination asked to see her daughter's answer sheets and marks, but was

refused. In the past, that would have been the end of the road– she and her daughter would have been left aggrieved, frustrated, and powerless. Instead, she invoked the access to information law.

In November 1998, the Official Information Commission ruled that the answer sheets and marks of the child and the 120 students who had been admitted to the school were public information and had to be disclosed. There was a period of public controversy, but eventually the school admitted that 38 of the students who had failed the examination had been admitted because of payments made by their parents.

The child's parents then filed a lawsuit arguing that the school's admission practices were discriminatory and violated the equality clause of Thailand's new Constitution. The Council of State, a government legal advisory body with power to issues legal rulings, found in her favour and ordered the school and all state-funded schools to abolish such corrupt and discriminatory practices.

In 1999, the South African government decided to declare a moratorium on the publication of crime statistics, which are the subject of considerable political controversy. The reason provided for the moratorium was to improve the collation and thereby the quality of the statistics.

The moratorium hampered the work of concerned organizations committed to the transformation of criminal justice in South Africa. A newspaper, the Cape Argus, took up the argument with the government and finally launched an application for a specific set of statistics relating to car hijackings in and around the main Cape Town freeway. The newspaper argued that it and its readers had the right to the information because it was a matter of public importance and interest. A South African NGO, the Open Democracy Advice Centre (ODAC), intervened in order to strengthen the case by showing how service-providing NGOs, such as Rape Crisis, need the statistics for their work. ODAC mobilised support from a range of such organizations to submit a joint *a* application.

As a result of the action, brought using the

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sary information. ODAC assisted the Group in preparing a formal application under the South African Access to Information Act. The Government conceded that there was a policy document, but was nevertheless reluctant to release it.

Having failed to provide a copy of the document within the 90 day time limit, the Khulemani

information that they will have to make and the cheaper the new system will be to manage.

Fourth, through use of the legislation organizations can help shape the government's response. In the U.S., for example, the environmental lobby was so effective in using the legislation that the federal government created a whole new structure – the Environmental Protection Agency – which has subsequently been used by concerned organisations to facilitate community requests for information.

Fifth, organizations will need to be vigilant in terms of time delays, to ensure that government does not suffocate the law by taking forever to respond to requests.

Sixth, organizations will, as usual, need to find champions in government and strategic partners, from the specialist civil society sectors (whether it be environmental, HIV-AIDS, human rights groups, and so on), with unions, professional associations and with the media.

Finally, organizations will need to work together, to promote better and more effective use of Access to Information laws. For example, the new South African NGO, The Open Democracy Advice Centre,[7] is a collaboration among three of its largest NGOs, and is intended to provide a service to other NGOs in the use of the Access to Information Act. In the U.S., The Freedom of Information Clearinghouse is a joint project of *P*[illegible] *C* [illegible] and *Ra* *ad*[illegible] *C*[illegible] *S* [illegible] *R*[illegible] [illegible] *La* . It provides technical and legal assistance to individuals, public interest groups, and the media who seek access to information held by government agencies.[8]

KEY PRINCIPLES FOR A USEABLE AND USER-FRIENDLY ACCESS TO INFORMATION LAW

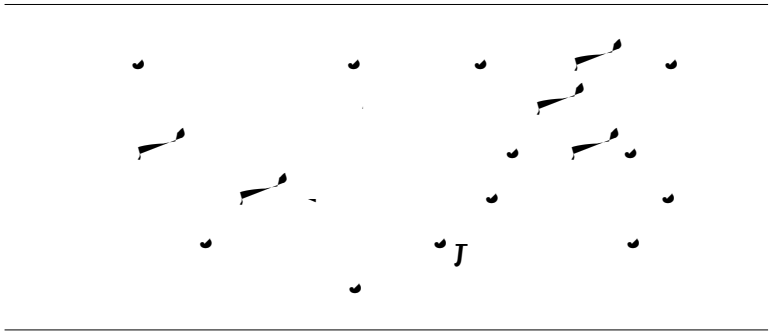
A Basic Matrix of Key Issues & Questions

Who does the law apply to? Which bodies will the law not apply to and why? Does the law cover records held by private bodies as well as public bodies? If not, are the records held by semi-governmental or semi-autonomous entities, like electricity boards, adequately covered by the definition of "public information"? Does it provide access to some internal government policy advice and discussion in order to promote public understanding, debate and accountability around public policy-making?

For example, all access to information laws around the world include provision for non-disclosure of records relating to national security; that is both inevitable and appropriate. But blanket exemptions – that is to say, an exemption that covers, automatically, a category or type of information – are unwelcome, often unnecessary, and risks serious abuse.

What information is exempt? Are the exemption categories tightly and clearly drawn? Are they reasonable and in line with international standards? Are the exemptions based on mi-autonomous enti-

have clearly drafted exemption sections for the [illegible] of record, rather than broad blanket exemptions for the holding department or entity. In the South African example concerning the unlawful moratorium in the publication of crime statistics, the preciseness of the national security exemption meant that it was, rightly, hard for the South African government to justify its unnecessary and unhelpful shift towards secrecy. Armed with a law containing blanket exemptions, the SA government would have been surely tempted to claim that the crime statistics were an "intelligence gathering" activity and thereby exempt without recourse to appeal.



Another common exemption found in many acts is the "deliberative process", which exempts from disclosure an official document that contains opinions, advice or recommendations and/or a record of consultations or deliberations. However, this exemption should clearly link the type of document to any form of mischief. Where such clauses appear, such as in the U.S. or South African law, they are linked to the notion of candour; the idea is that policy-makers should not feel restricted in terms of their candour with each other during the decision-making phase. If release of the document would not have a chilling effect on deliberation, the document should not be exempt from disclosure.

Finally, there should be a general public interest override covering the exemptions. Most laws around the world link a harm test to the notion of public interest, so as to trump the exemption when appropriate. This is critical to drafting a bill that accords with good international practice.

Is it user-friendly? Does it encourage application and openness? Are the bureaucratic procedures (such as request forms) fair, clear and reasonable? Do citizens have to pay a fee and if so, is the fee reasonable and affordable? Are there provisions for urgency? For example, time limits should be reasonably clear and public bodies should be required to provide guiding information such as the "road map" discussed above.

However, effective implementation depends largely on a combination of political will and adequate resources. Where there is any doubt about either – as there was and still is in South Africa – then the level of procedural detail prescribed by the Act needs to be increased. In this, as is the case elsewhere, the governing/implementing regulations will be very important.

Does the law mandate or encourage a "right-to-know" approach whereby as much information as possible is automatically disclosed in a user-friendly and accessible way? Will citizens be entitled to information in the form they request it? Is it an offence to shred records or lie about the existence of records in order to avoid disclosure?

How does the citizen enforce the right? Will he or she have to go to court, or will there be an independent commissioner, commission or tribunal? Is the enforcement route accessible, inexpensive and speedy? Are there firm timetables laid down for providing information and strong penalties for failure to meet them?

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THE CARTER CENTER ACCESS TO INFORMATION PROJECT: JAMAICA CASE STUDY

La a a

INTRODUCTION

Recognizing the challenges that corruption posed to democracy and development in the hemisphere, The Carter Center's Council of Presidents and Prime Ministers of the Americas asked that we convene political leaders, civil society organizations, scholars, media, and private business sector representatives to discuss each sector's role in addressing this multi-faceted

international experts, as well as Minister of Information Maxine Henry-Wilson. Nevertheless, there was still no indication that legislation was imminent.

In May 2001, fully one year later, Minister Henry-Wilson informed us that a number of changes had been made to the drafting instructions, including a name change to Access to Information. She hoped to have the act drafted and tabled in Parliament before the session ended in July, and then moved to a joint committee for further debate and to allow for public comment.

The Access to Information Act, 2001 was completed in the summer of 2001, but like its predecessors, it was never tabled before the Jamaica Parliament. Shortly thereafter, Minister Henry-Wilson was relocated within government and replaced by Minister of Information Colin Campbell. On November 28, 2001, a full 10 years from the first discussion of access to information legislation in Jamaica, Minister Campbell announced that the draft law would be tabled in Parliament on December 4 and then moved to the joint select committee. Following numerous full days of sittings of the joint select committee and more than 4 days of public hearings, the report was presented to the full House of Parliament on March 31, 2002. Debate, which lasted through two days of Parliamentary sessions, began on May 22 and concluded on May 28 with the passage of the Access to Information Act 2002.

CARTER CENTER JAMAICA PROJECT

Legitimacy is crucial to the ultimate success of access to information legislation. Engaging society writ large in deep debate, before the law is passed, is an important mechanism to assure that there is broad "buy-in" as well as that the law will be utilized. Education is, thus, critical. As a first step in the Jamaica project, we commissioned papers from distinguished Jamaican scholars on the existing anti-corruption laws and on the proposed Corruption Prevention Act and Freedom of Information Act. In October 1999, these articles were compiled and edited into *C ba C Ja a a: C U' d* and widely distributed for free. In partnership with the Media Association of Jamaica, the Center held public seminars on the issue and conducted working groups.

Although the Corruption Prevention Act included controversial provisions, such as costly fines for anyone that published information related to civil servants' annual asset declarations, until that point, civil society had shown little interest in the draft legislation. However, when it became clear that the Corruption Prevention Act had wider implications that could adversely affect press freedoms, local media and human rights groups became more vocal. This same interest carried over to the debate regarding access to information.

In February 2002, The Carter Center published a second guidebook entitled *U a a U a d P U C Ja a a*. Again accompanied by international and local experts, the Center cosponsored a seminar to discuss the status of the two relevant pieces of legislation. Over 100 persons attended the seminar, including many influential legislators. Many of those present made submissions to the joint select committee, which resulted in significant amendments to the draft legislation. Following on the heels of the seminar and the joint select committee hearings, and with great continued interest from the media owners and a civil society consortium led by the human rights organization, Jamaicans for Justice, the access to information act was passed.

The implementation phase, which to some is even more critical then passage, is a time in which government and civil society can cement their joint interest in the effectiveness of the legislation. Governments play a critical role during implementation, as they must provide the neces-

sions. When the bill came before Parliament for final debate, the strategy paid off as the Minister himself initiated a change in accord with the wishes of the vocal civil society coalition.

Passing the access to information law may in fact be the easiest piece of the puzzle. As we all know, laws alone are only as good as the quality paper that they are printed upon. The legislation must be fully implemented and enforced, and these two factors should be considered early on – during the initial drafting of the law, rather than only after its passage.

It is easy, for example, when working on drafting the laws to become overly preoccupied with the exemptions portion of the bill, to the exclusion of other key provisions. While national security exceptions are clearly sexier than the implementation procedures, they are often much less important in determining the bill's overall value to citizens. Issues such as how the agencies will archive and retrieve information, time limits for completion of information requests, fees and appeals procedures are areas that must receive much greater public attention.

As the bill was in its draft stages, our local partner, Jamaicans for Justice, began considering not only how the law could be used to further their agenda, but also how they would monitor the effectiveness of the law. For our part, we considered equally the implementation and enforcement stages. For example, judicial remedies are available for persons denied their petition, thus allowing enforcement of the law. This strength of the appeals process lies in it accessibility. Therefore, prior to passage of the law, we met with local attorneys to discuss the role they may play in assuring representation for persons inappropriately denied information.

Finally, under this point, implementation cannot be based solely on the use of the internet. Although the internet can and should play an important role in disseminating governmentally held information, it is by no means the sole answer, particularly in societies where availability of the internet is not widespread.

Although passing the legislation is critical to developing an enforceable right to information, it is only through changing the pervasive culture of secrecy that the act will truly have meaning. Government employees who have always worked under a culture of secrecy may find the shift in focus extremely difficult. Moreover, as in Jamaica, they may have even signed an oath binding them to uphold the traditional Official Secrets Act. In cases where the culture has been one of secrecy, additional mechanisms may be necessary to ensure access to information or the default of withholding information will again become the rule.

Those tasked with completing access to information requests may look to their supervisors for guidance. Thus, full "buy-in" from the Ministers and Permanent Secretaries is critical and should be manifested early in the implementation phase. Continuing education of both access to information officers and the public will assist in transforming the traditional culture. Finally, as is discussed in greater detail in Dr. Calland's article, implementing a "right to know" system that automatically makes classes of information available removes discretion from the front line workers, thus avoiding the need for discomforting decision-making.

CONCLUSION

The Carter Center will remain engaged in the promotion of the access to information law in Jamaica. In addition to continuing assistance relating to implementation, we will provide expert advice to the Jamaica bar association and judges on the enforcement of the law, as they seek to enforce the right to information and uphold the tenets of the new law.

As a case study, the Jamaica project illustrates the many obstacles that face governments and civil society as they strive to pass and implement effective access to information legislation. Nevertheless, it also demonstrates that with political will and local "champions" and alliances, success is possible. Each country will face their unique challenges. The Carter Center joins other groups, both local and international, in encouraging access to information as a key to increased transparency and democratic participation.

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