

Freedom of Information as an Internationally Protected Human Right

by Toby Mendel*

The right to freedom of information, and particularly the right of access to information held by public authorities, has attracted a great deal of attention recently. In the past five years, a record number of countries from around the world – including Fiji, India, Japan, South Africa, Trinidad and Tobago, the United Kingdom and a number of other European States – have taken steps to enact legislation giving effect to this right. In doing so, they join those countries which enacted such laws some time ago, such as Sweden, United States, Finland, the Netherlands, Australia and Canada. Intergovernmental bodies have also started to devote more attention to this issue, with significant developments at the UN and Commonwealth.

The importance of freedom of information as a fundamental right is beyond question. In its very first session in 1946, the UN General Assembly adopted Resolution 59(I), stating, “Freedom of information is a fundamental human right and ... the touchstone of all the freedoms to which the United Nations is consecrated.” Abid Hussain, the UN Special Rapporteur on Freedom of Opinion and Expression, elaborated on this in his 1995 Report to the UN Commission on Human Rights, stating:

Freedom will be bereft of all effectiveness if the people have no access to information. Access to information is basic to the democratic way of life. The tendency to withhold information from the people at large is therefore to be strongly checked.¹

These quotations highlight the importance of freedom of information at a number of different levels: in itself, for the fulfilment of all other rights and as an underpinning of democracy.

It is perhaps as an underpinning of democracy that freedom of information is most important. Information held by public authorities is not acquired for the benefit of officials or politicians but for the public as a whole. Unless there are good reasons for withholding such information, everyone should be able to access it. More importantly, freedom of information is a key component of transparent and accountable government. It plays a key role in enabling citizens to see what is going on within government, and in exposing corruption and mismanagement. Open government is also essential if voters are to be able to assess the performance of elected officials and if individuals are to exercise their democratic rights effectively, for example through timely protests against new policies.

It is increasingly being recognised that states are under an obligation to take practical steps – including through legislation – to give effect to the right to freedom of information. It remains somewhat unclear, however, precisely what the basis of this obligation is. The jurisprudence, both at the international and national levels, has been somewhat equivocal, variously grounding the obligation in the right to freedom of expression, the right to private and family life or the right to freedom of thought. In this article, I will present some of the mounting body of evidence in support of the proposition that States are under an obligation

to guarantee citizens a right to freedom of information. I will also argue that the most sensible source of this obligation is as part of the guarantee of freedom of expression. Finally, I will outline the ARTICLE 19 Principles on Freedom of Information Legislation.

In three key cases, the European Court of Human Rights (ECHR) has held that Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms,ⁱⁱ guaranteeing freedom of expression, “basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him”. In these cases, Article 10 did not “embody an obligation on the Government to impart such information to the individual.”ⁱⁱⁱ However, it is significant that in all three cases, the failure to provide information was considered to constitute an interference with private or family life, inasmuch as States were under a positive obligation to ensure respect for these rights. In the two more recent of the three cases, the Court held that the denial of access could not be justified and hence represented a breach of the respective States’ human rights obligations. In *Gaskin*, the Court held that an individual had a right to access records held by a local authority relating to the period while he was in foster care.^{iv} In the most recent case, *Guerra*, the Court went even further, holding that the government was under an obligation to provide certain environmental information to residents in an ‘at-risk’ area, even though it had not yet collected that information.^v

It would appear that the ECHR is reluctant to introduce positive obligations, and in particular an obligation to provide access to information, in the context of Article 10, guaranteeing freedom of expression. The reasons for this are unclear. It is possible the Court, which has always been quite conservative in its approach, may be concerned about the implications of reading a general right to access information held by public authorities into Article 10. It is also possible that the Court has failed fully to understand the implications of freedom of expression, and the need for full access to information, as underpinnings of democracy.

The UN Special Rapporteur on Freedom of Opinion and Expression has been rather more progressive in his approach. In successive recent annual reports to the UN Commission on Human Rights, the Special Rapporteur has stated clearly that the right to access information held by public authorities is protected by Article 19 of the International Covenant on Civil and Political Rights (ICCPR),^{vi} as the following excerpt from his latest report, in 1999, illustrates:

[T]he Special Rapporteur expresses again his view, and emphasizes, that everyone has the right to seek, receive and impart information and that this imposes a positive obligation on States to ensure access to information, particularly with regard to information held by Government in all types of storage and retrieval systems - including film, microfiche, electronic capacities, video and photographs - subject only to such restrictions as referred to in article 19, paragraph 3, of the International Covenant on Civil and Political Rights.^{vii}

These views have been welcomed by the UN Commission on Human Rights, composed of 53 member States of the UN.^{viii}

Within the Commonwealth, there have also been moves recognising the importance of freedom of information. The Commonwealth Secretariat, with the assistance of ARTICLE 19, organised an Expert Group Meeting in March 1999 to discuss the importance of freedom of information legislation. The Group adopted a Final Document setting out a number of principles governing freedom of information of which the first is as follows:

Freedom of information should be guaranteed as a legal and enforceable right permitting every individual to obtain records and information held by the executive, the legislative and the judicial arms of the state, as well as any government owned corporation and any other body carrying out public functions.

This Final Document was endorsed by the Law Ministers Meeting in May and then by the Commonwealth Heads of Government Meeting in November 1999.^{ix}

National courts in a number of countries, particularly in Asia, have held that access to information held by public authorities is a fundamental human right. As early as 1969, the Japanese Supreme Court established the principle, in two high-profile cases, that the guarantee of freedom of expression found at Article 21 of Japan's constitution, included a "right to know" (*shiru kenri*).^x

In a seminal judgement in 1982, the Indian Supreme Court held that, "The concept of an open Government is the direct emanation from the right to know which seems to be implicit in the right of free speech and expression disclosure of information in regard to the functioning of government must be the rule and secrecy an exception justified only where the strictest requirement of public interest so demands."^{xi} In that case, the Supreme Court held that where the non-appointment of an additional Judge for a further term was challenged, correspondence between the Law Minister, the Chief Justice of the High Court, the State Government and the Chief Justice of India should be disclosed.

In a closely related development, the Supreme Court of Sri Lanka noted that a right to freedom of information, while not necessarily included within the guarantee of freedom of speech, for that "would be to equate reading to writing, and listening to speaking",^{xii} may well be part of the guarantee of freedom of thought and opinion. At issue in that case was the abrupt cancellation of a regular programme broadcast by the State broadcaster, the Sri Lanka Broadcasting Corporation, which included material critical of government. The petitioner claimed that his freedom of speech as a listener had been infringed by the stoppage inasmuch as the government had limited his access to information. The Court noted that, "information is the staple food of thought, and that the right to information, *simpliciter*, is a corollary of the freedom of thought".^{xiii}

There are a number of good reasons – both practical and principled – why the right to freedom of information should be read into the guarantee of freedom of expression, at least as spelt out in Article 19 of the ICCPR. Textually, Article 19 differs from the guarantees applied by the ECHR and the national courts noted above inasmuch as it includes "freedom to **seek**, receive and impart information and ideas of all kinds" [emphasis added]. It is arguable that freedom to *receive* information prevents public

authorities from interrupting the flow of information to individuals and that freedom to *impart* information applies to communications by individuals. It would then make sense to interpret the inclusion of freedom to *seek* information, particularly in conjunction with the right to receive it, as placing an obligation on government to provide access to information it holds.

More important, however, is the centrality of freedom of information to the key underlying rationales for freedom of expression in the first place. The importance of freedom of expression has been explained in three key ways, as an aspect of human dignity, as the best means of ascertaining the truth and as a fundamental underpinning of democracy. Freedom of information plays an important role in all three but it is as an aspect of democracy that it is perhaps most crucial. Democracy cannot flourish if governments operate in secrecy, no matter how much open discussion and debate is allowed. Indeed, the very nature and quality of public discussion would be significantly impoverished without the nourishment of information from public authorities. To guarantee freedom of expression without including freedom of information would be a formal exercise, denying both effective expression in practice and a key goal which free expression seeks to serve.

At a more principled level, democracy is quintessentially about ensuring that governments perform in accordance with the will of the people. This sort of basic accountability is clearly impossible unless governments operate in an open, transparent fashion, including by allowing people to access the information they hold. But democracy is also about government's responsibility to the people and the idea that civil servants really should 'serve' the public. This includes the idea that public authorities have, in principle, no right to keep information they hold from the people, unless there is some overriding public interest reason to justify this.

In June 1999, ARTICLE 19 published, *The Public's Right to Know: Principles on Freedom of Information Legislation*,^{xiv} setting out a number of standards in this area, drawn from international and comparative national practice. A primary goal of this document is to help promote progressive and effective freedom of information legislation, particularly in those countries currently developing such laws. The ARTICLE 19 Principles have already been endorsed by a number of individuals and bodies and it is hoped that the UN Special Rapporteur on Freedom of Opinion and Expression will recommend them to the UN Commission on Human Rights at its 2000 session.

The first, foundational standard is that freedom of information legislation should be guided by the principle of maximum disclosure, establishing a broad presumption in favour of disclosure binding on a wide range of public bodies. Two principles note positive obligations on public authorities in this area. The first is to publish certain types of material, even in the absence of a specific disclosure request. Of particular importance here is information about the functioning and decision-making of the public body, and about the types of information it holds. The second is to actively promote open government, including through public education and training of officials.

A number of principles deal with access requests, including exceptions, processing of requests and costs. Requests may be refused only on the basis of exceptions listed in the legislation and only when the authority can show that disclosure would pose a real risk of substantial harm to the protected interest. Even in that case, the information should be disclosed in the public interest where the benefits of disclosure outweigh the harm. Any refusal to disclose by a public authority should be subject to an appeal to an independent administrative body with adequate powers to promote effective compliance with the law, and from there to the courts. The cost of making a request should not be excessive or deter legitimate requests.

Other principles deal with the issue of open meetings (government in the sunshine), protection for whistleblowers and the relationship of a freedom of information law to any secrecy legislation. In principle, the freedom of information law should provide for a comprehensive regime of exceptions and other laws should not be permitted to extend this regime.

The importance of an effective right to freedom of information, both in itself and to democracy and respect for other human rights, is beyond question and has a solid basis in international and comparative human rights law. Different courts have focused on a number of different bases for this right, but the most logical is the right to freedom of expression, as guaranteed in Article 19 of the ICCPR. To help elaborate the specific content of the right, ARTICLE 19 has published a set of Principles of Freedom of Information Legislation. We welcome any comments on these principles and urge readers to use them to lobby government to pass appropriate freedom of information legislation.

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ⁱ UN Doc. E/CN.4/1995/32, para. 35.

ⁱⁱ ETS, NO. 5, adopted 4 November 1950, entered into force 3 September 1953.

ⁱⁱⁱ *Leander v. Sweden*, 26 March 1987, 9 EHRR 433, para. 74. See also, *Gaskin v. United Kingdom*, 7 July 1989, 12 EHRR 36 and *Guerra and Ors v. Italy*, 19 February 1998.

^{iv} *Ibid.*

^v Note iii.

^{vi} UN General Assembly Resolution 2200 A (XXI) of 16 December 1966, entered into force 23 March 1976.

^{vii} UN Doc. E/CN.4/1999/64, para. 12.

^{viii} Resolution 1999/36, para. 2.

^{ix} Commonwealth Functional Co-operation, para. 20 in Commonwealth Heads of Government Meeting Communiqué, Doc. 99/68, 15 November 1999.

^x Repeta, L., *Local Government Disclosure Systems in Japan*, National Bureau of Asian Research, Paper Number 16, October 1999, p. 3.

^{xi} *S.P. Gupta v. President of India and Ors* [1982] AIR (SC) 149, p. 234.

^{xii} *Fernando v. Sri Lanka Broadcasting Corporation and Others*, 30 May 1996, SC Application NO. 81/95, p. 16.

^{xiii} *Ibid.*, p. 17.

^{xiv} This document is available through our website, www.article19.org.