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FREEDOM OF INFORMATION AND CORRUPTION

Paper for the Global Forum on fighting corruption and safeguarding integrity

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Transparency is the key way to deter and detect corruption and to safeguard the integrity of government. Greater transparency can be achieved in various ways, but one of the most systematic is through a general right of access to official information – a freedom of information (FOI) law. This paper highlights some of the distinctive features of such legislation, and offers some recent examples of disclosure of financial impropriety obtained under them.

Over 20 countries now have laws providing the public with a general right of access to government records.¹ Unlike other types of disclosure laws, which generally identify the particular information which must be disclosed (for example, on public registers or in annual reports), FOI provides a right to all government held records, subject to exemptions. It is therefore a uniquely responsive provision, which can be focussed on any area of official activity in which the citizen takes an interest.

It is also a right which the individual exercises directly, without an intermediary. People seeking information do not have to persuade an elected representative to ask questions for them, search for a lawyer willing to waive his fees or hope that their situation involves the peculiar characteristics that the press deem newsworthy. It is a free-standing right, which the ordinary citizen uses in his or her own name.

One of its remarkable features is that the applicant is not required to justify his or her request or demonstrate any kind of ‘need to know’. The burden of proof is on the public authority, to justify withholding information. The only precondition may be that the applicant be a citizen or permanent resident.² Even this modest proviso is omitted from many laws, which permit the right of access to be exercised by “any person” even a foreign national applying from overseas.³

The basic elements of an FOI law

Most FOI laws involve certain common elements:

- A right of access to records held by public authorities, whether created by them or supplied to them by third parties. Typically the right applies to *records*, or recorded *information*, though some laws (eg New Zealand’s) extend to information *known* to officials but not recorded.
- Procedures to help people discover what information exists. Under the Swedish FOI law, the right of access is linked to a system of detailed registers of official documents, which are publicly available, and on which each day’s incoming correspondence is individually itemised. In other countries authorities are required to publish general information about the classes of records they hold,⁴ and details of how to make applications and challenge refusals. Some laws place authorities under a statutory duty to assist applicants in exercising their rights.⁵ The US FOI Act requires agencies to publish previously disclosed

¹ See Privacy International’s survey at <http://www.privacyinternational.org/issues/foia/foia-survey.html>

² Eg Canada’s Access to Information Act 1982, section 4(1)

³ This is the position under the Australian, Irish, US and UK FOI laws, amongst others.

⁴ For example, section 5(1) of Canada’s *Access to Information Act 1982* states: “The designated Minister shall cause to be published, on a periodic basis not less frequently than once each year, a publication containing...a description of all classes of records under the control of each government institution in sufficient detail to facilitate the exercise of the right of access under this Act”

⁵ For example, section 6(2) of Ireland’s *Freedom of Information Act 1997* states: “It shall be the duty of a public body to give reasonable assistance to a person who is seeking a record under this Act—(a) in relation to the making

documents which are likely to be sought by subsequent requesters. These must be made available for inspection and in electronic form.⁶

- Time limits within which authorities must provide requested information.
- Arrangements for fees. FOI laws generally allow the photocopying costs of supplying copies of records to be charged. However, some also allow charges to be made for the time spent dealing with a request. This may be based on the time spent searching for the documents, though other laws allow the time spent deciding whether to release them to also be included. Fees of this kind can become substantial obstacles to access. Many laws achieve some balance by requiring fees to be reduced or waived where disclosure is in the public interest or where charges could cause economic hardship.
- A list of exemptions setting out the circumstances in which information can be withheld. Exemptions usually apply where disclosure is likely to *harm* particular interests, such as defence, international relations, security, law enforcement, legal proceedings, the decision-making processes of government, commercial confidentiality or individual privacy. Some exemptions may protect classes of documents (eg cabinet papers), but the usual approach is to require the authority to show that disclosing the particular information would be harmful. The legislation can also specify that certain documents *cannot* be exempt, or must be published automatically. Where part but not all of a document is exempt, the legislation normally requires the remainder to be disclosed. Some FOI laws also permit voluminous requests to be refused if compliance would significantly disrupt the authority's work
- Under some FOI laws, exempt information must be disclosed where there is an overriding public interest in its release. This provision is particularly relevant in cases of improper or corrupt behaviour, where the public interest in disclosure will usually be substantial. The term 'public interest' is not usually defined,⁷ but would usually not be limited to cases involving malpractice. Other factors which might be given weight could include risks to public safety or the environment, danger of miscarriage of justice, the fact that the public had been misled, or the need to ensure full public debate on matters of substantial public importance.
- An appeals process, allowing applicants to challenge refusals. Often the first stage of appeal is to ask the authority itself to review its decision. After that, complaints go to an independent appeals body. In some countries this is the courts, but other jurisdictions provide less expensive alternatives. These allow appeals to be made to an ombudsman, or to a dedicated information commissioner or commission. In some countries this body can make binding orders; in others it can only recommend disclosure. In these cases, the legislation generally permits appeal to the courts as a final stage.

Freedom of information may therefore involve complex legislation, whose success may depend on a variety of factors, involving the details of the legislation, whether charges or delays are allowed to become a serious obstacle and the accessibility of the enforcement process.

The precise drafting of the exemptions may be of considerable importance. Where there are serious concerns about corruption, the exemptions which protect commercial confidentiality are particularly significant. There may be separate tests for information provided to the government in confidence and information whose disclosure would cause commercial harm. The former may be open to abuse where the supplier of the information and the government agree to confidentiality precisely in order to ensure that the information falls within such an exemption. In common law jurisdictions, this exemption may operate by reference to the common law

of the request under section 7 for access to the record, and (b) if the person has a disability, so as to facilitate the exercise by the person of his or her rights under this Act.”

⁶ US Freedom of Information Act, 5 U.S.C. § 552(a)(2)(D).

⁷ An exception is section 20(6) of Canada's *Access to Information Act 1982*, which provides a public interest limited to considerations relating to “public health, public safety or protection of the environment”.

obligation of confidentiality, which – though extremely broad – does permit disclosure where a clear public interest is established. Some other laws have sought alternative ways of narrowing the scope of any such exemption.⁸

The commercial harm test also varies from country to country. The recent UK FOI Act allows information to be withheld when disclosure would “prejudice” commercial interests.⁹ South Africa's law uses the same test.¹⁰ The corresponding New Zealand exemption refers to “unreasonably prejudice”,¹¹ a draft FOI bill about to be introduced into the Scottish Parliament refers to “prejudice substantially”¹² – and all of these exemptions (and those in other countries¹³) allow commercially harmful information to be disclosed on public interest grounds. The US Act, on the other hand has a more demanding exemption - whether disclosure would cause “substantial harm”¹⁴ – but no public interest test.¹⁵

Another important exemption is for personal privacy. Here also, an exemption which is too widely drawn could undermine efforts to protect against malpractice, for example, by treating improper expenses claims by public officials as private matters, or protecting the fact that a convicted child abuser had been appointed to a post involving close contact with children. Again, a public interest test may have an important part to play. In this case, the US FOI Act does provide such a test and the US Department of Justice has summed up the current judicial interpretation as follows:

“One purpose that the FOIA was designed for is to ‘check against corruption and to hold the governors accountable to the governed.’ Indeed, information that would inform the public of violations of the public trust has a strong public interest and is accorded great weight in the balancing process. As a general rule, proven wrongdoing of a serious and intentional nature by a high-level government official is of sufficient public interest to outweigh the privacy interest of the official.

By contrast, less serious misconduct by low-level agency employees generally is not considered of sufficient public interest to outweigh the privacy interest of the employee. Nor is there likely to be strong public interest in the names of censured employees when the case has not “occurred against the backdrop of a well-publicized scandal” that has resulted in “widespread knowledge” that certain employees were disciplined. And any general public interest in mere allegations of wrongdoing does not outweigh an individual's privacy interest in unwarranted association with such allegations.”¹⁶

What kinds of requests are likely?

Experience suggests that certain types of materials are particularly likely to be the subject of FOI requests:

⁸ For example, the test under the legislation in the Canadian province of British Columbia is whether disclosure would “result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied”. British Columbia, *Freedom of Information and Protection of Privacy Act 1996*, section 21(1)

⁹ UK Freedom of Information Act 2000, section 43(2)

¹⁰ South Africa Promotion of Access to Information Act 2000, section 36(1)(c)(ii)

¹¹ New Zealand *Official Information Act 1982*, section 9(2)(a)(ii)

¹² Freedom of Information (Scotland) Bill, section 32(1)(b)

¹³ Exemptions for commercial confidentiality are also subject to a public interest test in other FOI laws, including those of Belgium, Canada, Ireland, Netherlands, South Africa and Thailand.

¹⁴ This is the interpretation of part of exemption 4 of the US Freedom of Information Act adopted by the Court of Appeals for the District of Columbia Circuit in *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

¹⁵ Many countries also separately protect ‘trade secrets’

¹⁶ US Department of Justice, Freedom of Information Act Guide, May 2000, Exemption 6

Personal files

For the ordinary citizen, the legislation's most useful feature may be the right to see the personal files held on them by public bodies, for example dealing with health, education, housing, immigration status, or police files. Requests will be most likely when someone feels they have been unfairly treated or denied a benefit to which they believed they were entitled. Access allows the individual to check that the file contains is complete and accurate. Some laws give individuals the right to correct errors on their own file or set out their views about a disputed matter.

Files may also contain subjective pejorative comments, which unjustly bias officials against the individual concerned. The prospect of access may deter the recording of unprofessional remarks. Indeed, some governments have reported that FOI has led to an improvement in the quality of their record keeping, which has become more precise and objective. A further benefit may be a reduction in ill-founded appeals, as access allows people to appreciate that they have in fact been dealt with correctly.

Regulatory bodies

Private bodies are not themselves generally subject to FOI laws (though South Africa's law permits access to a private records where these are "required for the exercise or protection of any rights".¹⁷) Information about private bodies held by government, is subject to the legislation. Such information may have been obtained as a result of an authority's licensing or regulatory functions, or during consultations or negotiations.

FOI requests can therefore be used to document the extent of a problem or to check whether the authority is adequately enforcing its standards. The range of issues is wide: it may include planning, pollution control, public safety, consumer protection, food hygiene, anti-discrimination measures, company law, audit and many other matters. Requests may be made for information about the frequency of visits to premises, reports of inspections, results of sampling or analyses, the levels of complaints received and the authority's response to them, whether breaches of requirements were detected, what action resulted and whether the regulated body then rectified any problem. Data may be used to build up a national overview or check whether standards are uniformly applied. Such requests may expose an authority's enforcement policy to intense scrutiny, highlighting any shortcomings. This is likely to be particularly valuable to communities whose safety or welfare depends on the proper administration of these requirements.

Administrative manuals

Most FOI laws include 'active' disclosure measures, requiring authorities to publish certain types of information, including the internal manuals used by officials in taking decisions affecting the public or businesses.¹⁸ This may apply to a wide variety of different activities, including matters such as applications for grants or benefits, how school places or hospital beds are allocated, procedures for awarding contracts or assessing tax or other liabilities. This

¹⁷ South Africa, Promotion of Access to Information Act 2000 Section 50(1)

¹⁸ Section 9 of Australia's *Freedom of Information Act 1982* requires each agency to make available for inspection and purchase "documents that are provided by the agency for the use of, or are used by, the agency or its officers in making decisions or recommendations, under or for the purposes of an enactment or scheme administered by the agency, with respect to rights, privileges or benefits, or to obligations, penalties or other detriments, to which persons are or may be entitled or subject, being: (a) manuals or other documents containing interpretations, rules, guidelines, practices or precedents including, but without limiting the generality of the foregoing, precedents in the nature of letters of advice providing information to bodies or persons outside the Commonwealth administration; (b) documents containing particulars of such a scheme, not being particulars contained in an enactment as published apart from this Act; (c) documents containing statements of the manner, or intended manner, of administration or enforcement of such an enactment or scheme; or (d) documents describing the procedures to be followed in investigating breaches or evasions or possible breaches or evasions of such an enactment or of the law relating to such a scheme; but not including documents that are available to the public as published otherwise than by an agency or as published by another agency."

requirement may be crucial in exposing procedural defects or systematic bias. It allows citizens or companies to check that the procedures under which they will be dealt are even-handed and that they have been dealt with in accordance with established procedures.

Expenses claims

The expenses claims of politicians and officials are a common subject of FOI requests in some countries, often made by journalists or opposition politicians. In several countries, government ministers have been forced to resign as a result of such FOI disclosures. A notable example some years ago was a Canadian environment minister, who resigned after the press used the Access to Information Act to reveal that she had spent five days in Paris at public expense to attend a one-hour meeting.¹⁹ Such disclosures have a powerful deterrent effect on future conduct.

Contracts

The ability to monitor the value of contracts and standards of performance in meeting them is, in the context of impropriety, one of the most effective ways in which FOI legislation can be used. The potential is illustrated by the examples at the end of this paper.

Decision-making

FOI may be used to provide greater participation in decision-making. Particular interest groups may have privileged access to the decision-making process, being consulted at an early stage or even initiating proposals. Decisions may be based on figures and assumptions which they supply but are withheld from others who may be able to identify weaknesses in the data. By the time proposals are formally announced, it may be too late for such biases to be corrected or for others to make their voices heard.

Exposing the basis of decisions to a wider audience may bring in new expertise to bear from independent specialists, able to identify weaknesses in the data, or aspects of a problem which have been overlooked or dismissed. Local communities will have their own expertise. It may only be when the facts are in the hands of residents that the low pollution readings are recognised to have been taken on days the chemical factory was shut down; that officials' travel expenses are revealed to have been claimed on the days they were known to have been at home; or improved examination results explained by the fact that the school now rejects all but the most able pupils.

The prospect of greater scrutiny is itself likely to encourage greater rigour on the part of officials, who will be aware that any shortcomings in their own handling of an issue are likely to be revealed. It should also deter those involved in malpractice and strengthen the hand of those seeking to resist pressure to act improperly. The conscientious official will be able to argue that any questionable practice is likely to become public and should therefore be resisted for reasons of self-preservation as well as principle.

Greater openness about decision-making may be beneficial to government itself. The suspicions expressed about official motives may often be misplaced. Those who feel the wrong decision has been reached are often too quick to attribute bad faith to decision-makers. Greater openness may reveal that decisions were more complex than they had assumed; that officials had conscientiously explored the alternatives, and that there were sound reasons for the eventual decision. Such insights can enhance the public's confidence in the work of government, a factor often in short supply. Moreover, policies which have been discussed openly at each stage are likely to command greater public acceptance.

The users

Some of the potential users of FOI are implicit in the above discussion. The right of access

¹⁹ Robert Hazell, 'Freedom of Information in Australia, Canada and New Zealand', *Public Administration*, vol 67, Summer 1989, 189-210.

may be used by individuals seeking information about their own affairs and NGOs or community organisations concerned at the way local issues, involving pollution, planning, safety, job creation, public transport, health care or education are being addressed.

Journalists should be major users. FOI does not provide the instant access that reporters working on immediate stories need, but it is attractive to investigative journalists, documentary makers and specialist reporters with a continuing interest in particular subjects. They can obtain and analyse the 'raw data' from government files or extract the results of unpublished investigations. However, the value of an access law to the press is not simply reflected in the volume of requests made by journalists. Just as important is the flow of new stories that will be based on the requests made by NGOs and others who have used the law.

Politicians themselves may use the information, finding the FOI route slower, but eventually more effective than the procedures available in their own parliaments, which may be easily evaded. Some 200 requests a year are made by Members of Parliament under Ireland's recent FOI Act.²⁰ Canada's Information Commissioner has reported that "More Members of Parliament than ever before are using the access law to assist them in obtaining information from government...It did not take...[opposition] parties long to learn that question period and the order paper are poor means for obtaining full disclosure of primary records about issues. The Access to Information Act has become an important tool for improving parliamentary democracy."²¹

The fact that some FOI laws permit requests to be made from overseas may be particularly relevant in relation to international aid. Ideally, both the donor government and the recipient will have FOI laws. Anyone concerned to ensure that the funds are used effectively will be able to apply under both regimes, increasing the chances of detecting any mismatch between the intended and actual use of funds.

Finally, FOI may also be attractive to companies. A system in which transparency is based in law may help to reassure investors that it is safe to do business in the country, and provide information about contracts and business opportunities as well as greater insight into likely regulatory changes. Companies may use the legislation to check whether regulators are giving their rivals more favourable treatment than themselves. FOI may also help information companies obtain the raw data with which to provide 'value added' products. The importance of the US FOI Act to business was highlighted by a 1998 European Commission report which concluded that it had left European companies "at a serious competitive disadvantage compared to their American counterparts, which benefit from a highly developed, efficient public information system at all levels of the administration."²²

EXAMPLES OF FOI DISCLOSURES RELATING TO FINANCIAL MALPRACTICE

The following examples are based on recent newspaper reports from a number of countries. They illustrate the potential for exposing corruption or malpractice, or scrutinising the work of agencies responsible for preventative measures.

Thailand

An early case under Thailand's 1997 Official Information Act was brought by the mother of a girl refused entrance into a prestigious government elementary school. The mother used the law to obtain the examination results of the successful candidates, despite objections from the parents of those children who argued that it involved a breach of their rights. The case forced the

²⁰ Annual Report of the Information Commissioner for 1999, Government of Ireland, page 44.

²¹ Information Commissioner of Canada, Annual Report for 1995-96.

²² European Commission, Public Sector Information: A key resource for Europe. Green Paper on Public Sector Information in the Information Society, COM(1998)585, paragraph 3.

school to admit that some children who met the required academic standards were not accepted in favour of the children of well-connected parents or those who had made generous donations. The school's admissions process was later deemed unconstitutional.²³

The editor of a Thai business newsletter used the Official Information Act, amongst other sources, to reveal that a leading politician, and prime ministerial candidate, Thaksin Shinawatra, had used his maid, driver and security guard as proxy shareholders in his business empire, in order to conceal the extent of his wealth. The disclosure led to Thaksin, who subsequently became prime minister, being indicted on anti-corruption charges.²⁴

Japan

Documents disclosed to a newspaper under Japan's FOI law showed that the departments responsible for construction and transport took disciplinary action against officials for collusive ties with business in 22 cases between 1996 and 2000. The 22 collusion cases included ministry employees who had been treated to meals, golf excursions and other forms of entertainment by companies engaged in public works projects. The paper reported that "Although the ministry...withheld the names, sections and titles of those punished, it made public the nature of all the disciplinary actions for the first time."²⁵

USA

Thousands of pages of documents obtained by the Washington Post under the US FOI Act suggested that the Washington DC schools system had been paying a contractor millions of dollars for repairs and maintenance, under a contract meant exclusively for energy efficiency measures. The contract had been awarded without competition and involved payments to the contractor of 25% to oversee the work. More than \$10 million of the \$25 million paid over the three years to 2001 appeared to be unrelated to energy efficiency. In cases involving hundreds of thousands of dollars in payments, school officials were unable to provide documentation or invoices showing what repairs were done. The report has led to the dismissal of the official responsible for contracts and a federal investigation into the contract.²⁶

Documents obtained under the FOI Act by the Washington Times showed that a \$3.5 million car repair contract let by the Washington DC police department had illegally subcontracted business to the son of one of the company's senior staff. The paper reported that the son's company was not licensed to operate in the district, and did not pay sales tax, but was awarded repeated contracts without any bidding or oversight. The subcontractor was paid on average \$100 an hour, while the contractor's mechanics charged \$34 an hour and the police department's mechanics charged \$17 an hour. The arrangement appeared to breach the contractor's contract with the police department which said work would only be subcontracted where it could be done more cheaply. It was said the mismanagement of the contract led to budget overruns of about \$1 million.²⁷

Documents obtained the Detroit News revealed that money intended for six Detroit schools was "fraudulently spent". Auditors reports obtained under the Act shows that funds went to pay for staff parties and mobile phone bills, while computer equipment that had reportedly been purchased was not found on the premises. Some of the funds had been paid to a school principal as "loans". The audit suggested that some principals had violated Internal Revenue Service rules by paying staff from school money instead of through the district payroll department, which meant that taxes were not deducted from the wages. More than \$460,000 had been misspent.²⁸

²³ The Nation (Thailand), 26/1/99; Financial Times (London) 27/12/00;

²⁴ www.feer.com/_0103_01/p030region.html; Financial Times (London) 27/12/00;

²⁵ Yomiuri Shimbun, <http://www.yomiuri.co.jp/newse/20010513wo22>.

²⁶ Washington Post, 23/4/01

²⁷ Washington Times. <http://www.washtimes.com/metro/20010511-341612.htm>

²⁸ ClickOnDetroit.com. May 17 2001 <http://www.wdiv.com/det/news/stories/news-77996420010517-150524.html>

An investigation by Associated Press indicated that hundreds of companies prosecuted or sued for defrauding the government were still receiving government business, because agencies had chosen not to ban them. “The companies range from a Texas contractor convicted of selling faulty Coast Guard windshields to an environmental cleanup company convicted of bribery...The computer analysis by The Associated Press found many companies with a history of fraud turned right around and got new federal contracts. Some had multiple court cases against them...The AP identified 1,020 companies that were sued or prosecuted for fraud over the past five years. The companies were identified using court records, news stories, government documents obtained under the Freedom of Information Act and inspector general reports...[and] found 737 companies out of the 1,020 remained eligible for future contracts”.²⁹

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²⁹ Anniston Star Online, http://www.annistonstar.com/news/news_20000724_6337.html