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# Amending Access to Information Legislation: Legal and Political Issues

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WORKING PAPER

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# Acronyms and Abbreviations

ATI	access to information
MP	member of parliament
NGO	nongovernmental organization
OIC	Office of the Information Commissioner



# Executive Summary

This paper is about efforts to amend the legal framework for the right to information, with a particular focus on access to information (ATI) laws. It looks at the main substantive issues such reform attempts have targeted and what legal forms they may take. It also examines the role different actors—civil society, the media, oversight bodies, parliaments, and political leaders—can play in helping support the adoption of reforms that promote openness and defeat those that erect barriers.

The paper is an initial attempt to examine this issue, based on the growing body of experience globally in this area. As an initial attempt, its conclusions are tentative, with the exception of one: there is a need for more empirical study and research in this area. At the same time, its conclusions, hopefully, will provide guidance to openness campaigners and direction to researchers studying transparency issues.

Understandably, the range of issues targeted by reform efforts in different countries is wide. Two areas, however, have attracted the most reformist attention. The first area is changes to the regime of exceptions to the right to information, which can be seen as the mechanism for defining the scope of an ATI law in terms of information covered. A particularly contested issue has been the extent to which access to deliberative information (which is often polit-

ically sensitive) should be limited. The second area is the extent of coverage of the law in terms of public authorities. There is a trend to extend coverage to include private bodies that are funded or controlled by government.

A number of factors appear to support positive reform efforts and to limit negative ones. Strong civil society campaigns, spearheaded by leading organizations or coalitions, can have a very significant effect on the reform process. The support of senior political figures (including legislators) and such key actors as information commissioners and the media can significantly bolster wider civil society efforts.

There appears to be a correlation between clear international standards on a particular substantive issue (which tend to be strongly supportive of openness) and the ability of campaigners to secure positive reform results in relation to that issue. Perhaps it is surprising, given this link, that there has been relatively little use of constitutional litigation as a means of achieving ATI law reform—although there would appear to be significant potential for this. More generally, the wider political context seems to have an important bearing on the success of positive reform outcomes.

The positive trend in favor of openness, however, is not cause for complacency. On the contrary, the evidence clearly demonstrates

that if positive reform efforts have won out more often than not, there is never any lack of attempts—usually by government or by politicians—to try to roll back openness through negative reforms of ATI laws. It is only through

constant vigilance and effort that civil society and other pro-openness advocates can maintain and expand respect for the right to information.

# 1

## Introduction: Reforming Access to Information Regimes

Contestation over the content of the human right to access information held by public authorities—over its scope, exceptions, procedural rules, and so on—normally starts long before an access to information (ATI) law is first adopted. It continues, with varying degrees of intensity, more or less ever after. An important part of this contestation takes the form of attempts—by civil society, by government, by political leaders, by the bureaucracy—to secure changes to the legal framework for the right to information. This paper is about these attempts: what they focused on, who has motivated them, what the results have been, and what the trends are.

The issue of amending the legal framework for the right to information is an important and topical one—and one that, so far, has not received much attention in the literature. In many instances, proposed and adopted amendments have a significant impact on openness, whether of a positive or negative nature. Seemingly minor changes, such as increasing the fees for making access requests, can very negatively impact openness, and tweaking exceptions—for example, by adding a public interest override—can significantly enhance the provision of information on matters of public importance.

The rapid growth in the number of ATI laws globally means that, at any given time, a significant number of serious attempts to secure amendments are in progress. And we now have an important track record of such attempts and their outcomes. The present report is an initial effort to examine this issue. It charts some emerging trends and draws some preliminary conclusions on the experiences to date. In doing so, it is hoped that useful guidance about key focus areas and potential strategies will be provided to those people who are promoting the right to information.

When an ATI law has been adopted, a number of different actions affect the exercise of the right to information. These actions include pure implementation efforts—such as training public officials, appointing information officers, and setting up internal systems for managing requests—as well as the adoption of guidelines, recommendations, and/or practice notes (for example, by oversight bodies such as information commissions and decisions by courts). Other actions affecting the right include the adoption of formally binding regulations (for example, by a minister), amendment of the ATI legislation, and amendment (or authoritative interpretation) of constitutional rules recognizing the right of

access. This paper is concerned only with formal changes to the legal framework for the right to information—namely, the last three types of actions listed above: constitutional reform, legislative reform, and adoption of binding secondary legal rules.<sup>1</sup>

This paper is divided into two main parts. The first part provides an overview of some of the reform initiatives that have been achieved or attempted in countries around the world—law reform, constitutional reform, and reform of secondary legislation—and with an analysis of their key thematic focuses and some legal process issues. The second part of the paper provides an assessment of the role of different players in these reform initiatives—players such as civil society, oversight bodies, parliaments, and political champions—with a particular focus on factors that promote the success of positive reforms. The second part also analyzes some of the wider political factors that seem to be associated with positive reform efforts.

To ensure a uniform understanding among readers, some clarifications of terminology are

needed. Legislation giving effect to the right to access information held by public authorities goes by many different names. Some of the more common terms are “right to information,” “freedom of information,” and “ATI laws.” In this paper, the term “AIT law” is used to refer to this genre of laws,<sup>2</sup> and the term “the right to information” is used to refer to the underlying right that gives effect to these laws.

Throughout this paper, reference is made to “positive” and “negative” amendments to ATI laws. These terms are used primarily to indicate whether a particular amendment brings the law into greater alignment with international standards on transparency or moves it away from these standards.<sup>3</sup> For the most part, the relevant international standards are strong statements in favor of openness. Thus, in general, an amendment that enhances transparency is described as a positive amendment, and an amendment that increases secrecy or creates obstacles to access is described as a negative amendment.

# Amending Access to Information Legislation: Legal Issues

This part of the paper focuses on the more technical legal aspects of efforts to reform the legal framework for the right to information. The primary focus is on reform of access to information (ATI) laws, given that the law in most countries provides the main framework for practical implementation of the right. This part also looks at constitutional reform, given that constitutional guarantees sit at the pinnacle of the legal system; and, where they guarantee the right to information, they set out the overriding values of society relative to this right. Finally, some comments are directed to the issue of reform of secondary regulations governing the right to information, given that they may establish important rules relating to issues such as fees, requesting procedures, and record management, among other things.

## 2.1 Law Reform

There have been numerous successful attempts to amend ATI laws—both positive and negative in nature—in countries around the world. There have also been a number of cases where relatively sustained or intense efforts to secure amendments—efforts by civil society actors as well as by governments—have not been successful.

For the most part, these efforts have sought to change the rules of the game, either to extend or to limit access. In a few cases, by contrast, amendments could better be described simply as attempts to modernize access regimes to take into account developments that have occurred since the law was first passed (for example, developments of a technological nature or changes in the existing public authorities). The relative paucity of amendments falling into the latter category could be partly a result of the fact that many ATI laws are relatively new. It could also be partly caused by the flexible nature of many ATI laws that makes it possible for them to accommodate changes. For example, many laws include a descriptive definition of which public authorities are covered under the law, rather than a fixed list. This means that the law remains relevant even when new authorities are created and others are terminated. As a result, the law does not need to be amended to respond to the creation of new public authorities.<sup>4</sup> Even the advent of the era of electronic communications and records often has not necessitated changes in (older) ATI laws.<sup>5</sup>

This section of the paper looks at amendments to ATI laws through various lenses—namely, the issues those amendments focus on and the approach to amendments (whether more systematic, piecemeal, or indirect, such as

through the amendment of other laws). It then provides a thematic analysis of the various amendments canvassed, assessing why some types of reform appear easier to achieve than others. Finally, this section highlights a number of procedural issues that distinguish amendments from the adoption of a new ATI law.

### **Key Amendment Issues**

Two key issues have been dominant among the various efforts at ATI law reform reviewed here. The first issue is the scope of the exceptions to the right of access, which is central to the overall question of the scope of the law. The second issue is the range of public authorities to whom the law applies—again an issue relating to scope.

### **Exceptions**

Changes to the regime of exceptions have been a dominant theme for amendments to ATI laws in countries around the world. In an ATI law, the regime of exceptions describes the public and private interests deemed important enough (subject to certain conditions) to override the right of access—interests such as national security and privacy. Almost by definition, changes to the regime of exceptions are game changers rather than mere adaptations or modernizations. This is because the approach to governance in most countries has not changed significantly enough to warrant the addition of new exceptions or the subtraction of existing ones (that is, public authorities are not undertaking new tasks that require new exceptions). As a result, changes to the regime of exceptions usually have the effect of extending or reducing the effective scope of secrecy.<sup>6</sup>

Attempts to amend the regime of exceptions can take many forms. In some countries, governments or politicians have sought unsuccessfully to add new exceptions or broaden

existing exceptions. For example, the Indian government sought to amend the law in 2006, almost immediately after it had been adopted, to add “file notings”<sup>7</sup> to the list of exceptions, to expand the exception in favor of cabinet documents, and to add a new exception to protect examination and evaluation processes. This attempt was unsuccessful as a result of massive civil society advocacy efforts. However, there are ongoing attempts in India to achieve essentially the same result by amending the law to provide protection for internal deliberative processes (now apparently renamed “information about discussions and consultations of officers”).<sup>8</sup>

There are also examples of the government (sometimes with the support of other vested interests) successfully expanding the scope of exceptions. Thus, 2003 amendments to the Irish law significantly expanded the scope of exceptions—particularly in relation to cabinet documents and deliberative process documents, but also regarding a number of other issues.<sup>9</sup> These are, of course, more politically sensitive types of documents, similar to the Indian “file notings.” Amendments to the United States law in 1986 significantly expanded protection for law enforcement documents. Amendments in the United Kingdom in 2010 expanded the scope of protection for communications with the royal family by removing the possibility of a public interest override for communications with the heir and second in line to the throne (the monarch herself had already been so protected).<sup>10</sup> It may be noted that earlier versions of the 2010 proposals in the United Kingdom sought to impose a blanket ban on access to cabinet documents, again along the lines of the Irish and attempted Indian amendments, although these proposals were later dropped.<sup>11</sup>

At the same time, there are numerous examples of amendments being introduced to



limit the scope of exceptions. Some examples include the following:

- Amendments to the U.S. law in 1974 limited exceptions by requiring the release of reasonably severable material.
- Amendments in Slovenia in 2005 introduced a public interest override for exceptions the first time since the law's inception in 2003.<sup>12</sup>
- Amendments in Bulgaria in 2008 also introduced a public interest override.
- Regulations in the United Kingdom in 2004 abrogated or limited various preexisting statutory exceptions.
- The 2010 amendments in the United Kingdom reduced the timelines for release of much historical material from 30 years to 20 years.
- In 2010, the Scottish government similarly made a commitment to reduce historical protection from 30 years to 15 years.
- Reasonably comprehensive reforms in Peru in 2003 significantly clarified the scope of the previously quite vague exceptions; in practice, this resulted in a narrowing of the scope of exceptions.

### *Public Authorities Covered*

A second law reform issue that has attracted attention is the scope of the law in terms of the public authorities covered by it. ATI laws normally define which authorities are bound by obligations of openness. Good practice suggests that this definition should be wide, including not only executive bodies but also the legislature and judiciary, state enterprises, and other bodies controlled or funded by the state or serving public functions.

The 1974 amendments in the United States expanded the definition of an “agency” to include any executive agency, military de-

partment, and government-controlled corporation. Amendments in Canada in 2006 expanded the scope of coverage of public companies. Israel's 2008 amendments extended coverage for the first time to government-owned corporations, including security industries. And the 2003 amendments in Peru brought defense agencies within the ambit of the law. Consultations are ongoing in Scotland regarding the extension of the scope of the law to a much wider range of authorities—particularly, private bodies (mostly contractors) who build and maintain public sector facilities, such as hospitals, roads, prisons, and schools.<sup>13</sup> A similar discussion is ongoing in the United Kingdom, although concrete proposals for extensions remain modest.<sup>14</sup>

In the United Kingdom, repeated attempts to limit the scope of the law as it pertains to parliament and members of parliament (MPs) began almost as soon as it came into force in 2005. Starting in 2006, there was an attempt through a private members' bill to amend the law by removing both houses of parliament from the ambit of the law and creating a new exception in favor of MPs' correspondence with public authorities. The primary goal of the amendments appears to have been to prevent the mandatory disclosure of MPs' expenses. A combination of civil society and media advocacy, as well as a lack of support from the House of Lords, defeated the attempt. Almost incredibly, in January 2009—after losing battles before the information commissioner, the Information Tribunal, and the High Court—the government again tried to introduce legislation to block detailed disclosure of MPs' expenses. This attempt failed when Conservative Party support for the measure was withdrawn.<sup>15</sup>

Detailed information on MPs' expenses was finally leaked to the *Daily Telegraph* newspaper, which started to publish it on May 8,

2009 (nearly two months before it was due to be formally released by the House of Commons on July 1, 2009). The information provided a clue as to why MPs had fought so hard to keep it confidential. There were numerous cases of scandalous expenditures, and many more examples of inappropriate claims.<sup>16</sup> Dozens of MPs announced that they would not seek reelection as a result of the exposure of inappropriate expense claims, and Speaker of the House Michael Martin was forced to step down after blocking reforms—the only time this has happened in the 300 years the institution of the speaker has existed.<sup>17</sup>

Perhaps it is no coincidence that the two issues that appear to be most prominent in efforts to reform ATI—the regime of exceptions and the range of public authorities covered by the law—relate to the key issue of the scope of the law. The exceptions define the line between openness and secrecy, and thereby define the scope of the law in terms of information covered; defining the public authorities subject to the law defines its scope in terms of bodies covered. The scope of the law is, rather obviously, a key issue for both openness advocates and for those who wish to limit transparency.

### **Reform Approaches**

Approaches toward reform of ATI laws can take different forms. In many cases, reform is wide ranging in nature, representing an attempt to address a number of problems with the ATI system at one time. In other cases, reform is more piecemeal in nature, focusing on just one or two issues.

Most wide-ranging reform efforts may either be triggered by a sense that the regime is not working well and needs to be reformed—such as with the 1974 U.S. amendments after the impeachment of President Richard Nixon and with current efforts to amend the

Canadian law. Or they simply may be part of a general effort to overhaul the right to information regime—as with current efforts to amend the laws in Armenia, Israel, and Slovenia; and with the amendments in Ireland in 2003, in Slovenia in 2005, and in Bulgaria in 2007 and 2008.

On occasions, omnibus reform efforts include measures that both enhance and limit access as a result of a political compromise. Thus, the 1986 amendments in the United States—a result of political negotiations—both extended the exception relating to law enforcement and introduced fee rules that lowered the costs of access for the media and civil society.

In some cases, more wide-ranging reforms have simply limited access. A notable example is the reform of the Irish law in 2003 which, as noted above, significantly expanded the scope of the exceptions in a number of areas and added provisions to address the “problem” of “serial” or frequent requesters and to impose hefty new fees.<sup>18</sup> A report by Emily O’Reilly, the Irish information commissioner, noted that the impact of the amendments had been to reduce the rate of requests by 50 percent, to decrease requests (other than those for personal information) by 75 percent, and to cause a drop of 83 percent in requests by the media—all within one year (Office of the Information Commissioner, Ireland 2004).

The Canadian experience might also be counted here, albeit as an instance of a failure to pass much-needed reforms. Despite the agreement of almost everyone—including the media, civil society, the information commissioner, and even the parliamentary standing committee that examined the issue<sup>19</sup> that wide-ranging reform is urgently needed, the government has refused to amend the law. The standing committee made 12 concrete recommendations for reform, including to ex-

tend the right of access to everyone (instead of simply to citizens); to give the information commissioner binding order-making powers (instead of only the power to make recommendations); to expand the mandate of the commissioner to include public education, research and, the provision of advice; to extend coverage of the law to the administration of parliament and the courts; and to require the approval of the information commissioner for extensions beyond 60 days.

In most of the cases studied, however, the more wide-ranging sets of reforms have largely been directed at enhancing the regime of access. The 2005 amendments in Slovenia, for example, resulted in the addition of a public interest override to exceptions, greater clarity on fees, and the right of applicants to challenge the classification of documents. Current proposed reforms there would allow requesters to challenge fee claims, would enhance implementation of the decisions of the commissioner, and would limit the ability to lodge administrative law appeals relating to ATI primarily to requesters.

The 2007 Bulgarian amendments were especially interesting in this regard. Proposals to limit access introduced by a group of MPs included measures like requiring proof of an interest in the information, substantially increasing fees and timelines for responding to requests, and doing away with the provisions on severability. All the proposals were rejected. In their place, a set of positive amendments—including a requirement for both national and local public authorities to appoint information officials and to establish proper reading rooms for purposes of granting ATI—were adopted. A further set of positive amendments bringing new public authorities within the ambit of the law, introducing proactive publication obligations for the first time, limiting the definition of a trade secret, and making the

provision of partial access mandatory were introduced the next year (2008).

In contrast, a number of amendments have addressed issues in a more or less piecemeal fashion. Thus, amendments to the U.S. law in 2002 sought to limit the ability of foreign agents to access information, proposed amendments in the United Kingdom in 2006 would have increased the applicable fees for access, and 2009 amendments in Bosnia and Herzegovina added sanctions for public authorities who failed to fulfill their obligations under the law. In Canada, amendments in 1999 similarly added sanctions for obstruction of access, amendments in Israel in 2006 enhanced proactive publication obligations, and amendments in 2006 in South Africa introduced sanctions for failing to produce certain mandatory publications.

### ***Reform of Other Laws***

ATI laws do not exist in a vacuum. Rather, they are part of an often complex patchwork of rules that either support or limit openness. Many countries have both dedicated legislation on secrecy and secrecy provisions in numerous other laws. Similarly, openness provisions are often found in different sectoral laws. Thus, an ATI law may implicitly be amended or changed through the adoption of other laws that affect the right to information.

Good practice is for ATI laws to establish minimum standards of openness that other laws may extend, but not restrict. In line with this, ATI laws aligned with good practice override secrecy laws to the extent of any inconsistency, although most do not. Even where the access law does provide for such an override, it is not clear how this will be interpreted in light of the later adoption of a law containing an explicit provision on secrecy. Rules of legislative interpretation in most countries give priority to subsequent laws,

presuming that the legislature had intended to amend the earlier law, even if it did not state this explicitly.

In some cases, the ATI law is somehow dependent on secrecy legislation. For example, the Bulgarian ATI law does not include its own regime of exceptions to the right of access, referring instead to other laws for this purpose. Thus, the adoption of the Classified Information Protection Act in 2002<sup>20</sup> had a very significant effect on the right to information. Similarly, an act on the protection of classified documents was adopted in Hungary in 2009, with important implications for the right to information. There are currently debates in South Africa around a protection of information bill that might seriously affect the ATI law.<sup>21</sup>

As noted above, other laws can also enhance openness. Laws extending proactive publication obligations in different sectoral areas (such as health, food safety, the environment, and governance) are in place in many countries. In Nepal, for example, section 212 of the Local Self-Governance Act places extensive proactive publication obligations on local government bodies.<sup>22</sup>

Developing sector-specific rules on openness is an important way of going beyond the minimum rules applicable to all public authorities established by an ATI law, particularly in the area of proactive disclosure. Such rules are often not limited to public authorities (are the focus of ATI laws) and place proactive disclosure obligations on private actors—for example, the labeling rules for food that apply in most countries.

### ***The Role of International Standards***

Evidence seems to suggest some sort of connection between the international standards and comparative practice in relation to a certain issue and the ability of campaigners to

promote positive amendments and prevent negative ones.

Such a correlation would not be entirely surprising, and two factors may help explain it. First, the growth in the number of ATI laws over the last 20 years has been accompanied by strong normative developments at the international level—for example, in the form of binding decisions by international courts; sets of principles by leading international non-governmental organizations (NGOs) and international organizations; and, more recently, the first international treaty on the right to information,<sup>23</sup> which collectively set out in some detail standards for ATI laws. These standards, in turn, are likely to have some effect on legislative reform efforts.

Second, there is an international network of right to information activists that regularly shares information about good practices and successful approaches.<sup>24</sup> Thus, campaigners often look to the experience of other countries when seeking to reform their legislation, or they rely on support from other actors when seeking to fend off negative amendments.

Where international standards are clear and well defined, there seems to be more responsiveness to them in reform efforts. Thus, for example, the need for rules on severability and sanctions for obstruction of access are set out strongly and clearly in international standards. These rules are reflected in national laws; and some of the less controversial amendments have also been in these areas, such as the addition of rules on severability to the U.S. and Bulgarian laws and the addition of rules providing sanctions for obstructing the right of access to the laws in Bosnia and Herzegovina and in Canada.

Broadly speaking, the same is true of the need for a public interest override (amendments in Bulgaria and Slovenia added a public interest override to the law); the need for

broad proactive publication rules (note the addition and extension of such rules, respectively, in Bulgaria and Israel); and the idea that overall time limits for the release of historical documents should be as short as possible (timelines were shortened in Scotland and the United Kingdom). Another example is the attempt to introduce a requirement that requesters demonstrate an interest in the information they are seeking—a requirement that is clearly contrary to international standards and that was comprehensively defeated in Bulgaria.

International standards also make it quite clear that private bodies owned, controlled or funded by the state, including state corporations, should be subject to openness obligations. In quite a few countries—including Bulgaria, Canada, Israel, Peru, and Scotland—the scope of the law in terms of public companies or private bodies working on public contracts has either been extended or is being considered for extension. That is partly the result of the growing perception of a need to impose openness obligations on these actors, as reflected in international standards and based on factors such as their growing importance in public life<sup>25</sup> and expanding attitudes toward the role of the right to information in society.

International standards and practices become increasingly less clear, however, as we start to look at the issue of fees, where international standards provide guidance but not clear rules. Thus, it is established that fees for access should not be excessive and should not exert a chilling effect on the right to information. But at what point this starts to happen in a particular society depends on local economic considerations. Even the question of whether fees should be charged simply for lodging a request is not settled. Although most openness advocates are strongly opposed to fees simply

for lodging requests, some argue that these improve the quality of requests and create a sense of ownership on the part of requesters.

The question of charging fees for ATI has also been relatively contentious in the amendments reviewed here. Proposals to increase fees were defeated in Bulgaria and the United Kingdom, and fee hikes in Ireland have been blamed for significantly undermining ATI (see McDonagh [2003] and Office of the Information Commissioner, Ireland [2004]). On the other hand, more progressive fee rules were introduced in Slovenia and the United States. The literature suggests that the fee hikes in Ireland might have been motivated by a desire to undermine what until then had been a flourishing right to information regime, and this perhaps also played a role in the Bulgaria and United Kingdom proposals.

The most contentious reform issue may be attempts to limit the scope of the ATI law in relation to politically sensitive information. Into this category fall the attempts to exclude file notings and a greater range of cabinet documents in India and the successful expansion of exceptions relating to internal deliberations and cabinet documents in the Irish law. The unsuccessful attempt, in the United Kingdom to exclude parliament and MPs from the scope of the law can be included here.

Perhaps it should not be much of a surprise that such an important focus of attempts to amend ATI laws is on exceptions and, in particular, exceptions relating to politically sensitive information.<sup>26</sup> But it is significant that international standards and comparative practice are relatively unclear on the question of whether and, if so, how to protect internal deliberations. There are convincing reasons for protecting a “space to think” within government and the free and frank provision of advice. At the same time, there is no question that



the internal deliberations exception is subject to serious abuse in many countries. Most countries do provide some sort of protection for internal deliberations, although the scope of these exceptions varies considerably. The ongoing contestation over attempts in India to introduce a file notings exception reflects the lack of international consensus on the issue. It may be that some sort of compromise that is broadly acceptable to many stakeholders will be reached in India—for example, through the crafting of a narrower exception, perhaps with some safeguards against abuse. But it remains the case that international standards and comparative practice do not provide clear guidance on this issue.

### ***Processes for Amending Laws***

When ATI legislation is originally adopted, it normally goes through a fairly robust process of consultation and public debate. Indeed, civil society actors often provide a key impetus for the adoption of the law in the first place. The process often involves the publication of and consultation around a policy paper, which then leads to the development of actual legislation. For example, in 1997, the U.K. government published a policy paper (known as a “white paper”) titled “Your Right to Know: The Government’s Proposals for a Freedom of Information Act” (Cm 3818). That paper was followed by a period of formal public consultation before an actual draft law was produced. Public consultation around an ATI law is appropriate, given its importance and direct public impact. Indeed, because these laws are designed to give effect to a human right, one might argue that extensive public consultation is required.

Amendments to ATI legislation, however, are often the subject of far less consultation; and civil society groups and others may need to keep a close watch on developments if they

wish to participate in the process. Amendments may be, or may seem to be, too minor in nature to justify a lengthy and costly process of consultation. However, they may have a greater impact than at first seems to be the case; and there is a strong argument for consultation on any measures that affect basic human rights.

In democracies, laws are adopted by the legislature, and the process for this should always be open. However, there is a great difference between openness, which requires the legislature to inform the public about the laws it is proposing to debate and to make available drafts of these laws, and going through a consultative process that involves creating spaces and forums through which the public may air its views on draft legislation.

Even where a legislative process is fully open, it may be difficult for all but the most specialized NGOs to make their views known. In the absence of any formal process of consultation, getting one’s views on the table often involves an understanding of the (sometimes complex) legislative process. It may also require knowledge of who the key players are in terms of debating the legislation (whether in the governing party or the opposition), as well as how to maintain their attention.

The further along a draft law is in the legislative process, the more difficult it normally is to engage. As a draft law goes into the final stages of adoption, it may no longer be possible for outside parties (that is, those who are not elected representatives) to intervene. Changes may even be made in the legislature as the draft law is actually being debated.

In some cases, a conscious effort may be made to limit consultative opportunities. This appears to have been the case with the 2003 amendments in Ireland. These were prepared by a high-level review group. That group did not engage in public consultations before

making its report, which was then translated directly into a bill and placed before the legislature—again without the benefit of public consultation or even consultation with the information commissioner. The parliamentary committee overseeing the legislation did hold public consultations and made wide-ranging recommendations to change the proposed amendments; but the bill was ultimately rushed into law without any changes, just over a month after it had first been tabled. It is perhaps not by chance that the lack of consultation on the Irish amendments coincided with a law reform that was widely seen as seriously undermining the right of ATI.<sup>27</sup>

Similarly, when the Indian government sought to amend its law in 2006, the process was characterized by extensive secrecy. Draft amendments to the law were never officially released to the public, although campaigners managed to obtain a copy through a leak. The Commonwealth Human Rights Initiative, which was involved in the campaign, noted

*The secrecy that surrounded this process contrasted with the openness and civil society participation that characterized the exercise of drafting the RTI Bill in 2005.*<sup>28</sup>

In this case, the amendments were never formally tabled in parliament, at which time they would presumably have been made public.

This limited number of experiences seems to suggest that governments aiming to introduce negative amendments to ATI laws may wish to do so with a minimum of consultation. The reasons for this are not hard to discern. It may be assumed that, in general, the public (and particularly the media community) will not look favorably on attempts to roll back openness. Engaging in extensive consultation will simply expose this fact and make it

politically more difficult for the government to adopt the amendments.

Governments introducing positive reforms, on the other hand, may wish to bask in the strong public support they may expect for these efforts. Failure to consult can often attract strong criticism,<sup>29</sup> which they would wish to avoid. Furthermore, the type of political will that makes positive reforms possible is almost naturally oriented toward gaining public input. In many cases, government will have worked with civil society to develop the proposals in the first place.

An example of more fulsome consultations on ATI law reform is a recent exercise in Canada, where proposals for reform of the ATI law were put forward in June 2009 by the Parliamentary Standing Committee on Access to Information Privacy and Ethics.<sup>30</sup> Before preparing its report, the committee held open public hearings at which members of the public were invited to give their comments. The proceedings were streamed live and transcripts were available online. The committee recommended wide-ranging positive reform of the law. Unfortunately, its recommendations were rejected by the government.<sup>31</sup>

In some cases, amendments (either explicit or implicit) may be triggered by “external” events, such as the ratification of an international treaty. Thus, Hungary amended its law after ratification of the Council of Europe’s Additional Protocol to the Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data.<sup>32</sup> It is even more difficult for civil society and other stakeholders outside of government to engage in the process of treaty negotiation, given its international dimensions.

The introduction of amendments to ATI laws can have a profound impact on their effectiveness and reach. Given that these laws relate to a human right, wide public consultation

should be conducted before they are amended. However, this is not always done. Civil society groups interested in openness may have to carefully monitor legislative reform efforts in this area if they wish to ensure that they have an opportunity to provide input.

## 2.2 Constitutional Reform

The constitution sits at the pinnacle of the legal system, and reform of constitutional provisions on the right to information is potentially the most important type of reform in terms of impact on the exercise of the right. In most countries, legislation may be challenged on the basis that it does not conform to the standards set out in the constitution, and thus a strong constitutional guarantee provides a basis for indirectly reforming national legislation. By the same token, amendment of the constitution is the most difficult type of reform to achieve, from a legal and political perspective.

Legally, the process for achieving constitutional reform depends on the rules set out in the constitution itself.<sup>33</sup> In some countries, constitutional reforms may be passed by a simple majority or super-majority of the national legislature or parliament. In federal countries, constitutional reform often requires some sort of approval by both (or all) levels of government. In Mexico, for example, constitutional reform requires both a two-thirds vote by the national legislature (the Congress) and the approval of at least one half of all state legislatures (article 135). In Canada, constitutional reform requires (within a three-year period) the approval of the national legislature and an affirmative vote by at least two thirds of the provincial legislatures (that is, 7 of the 10), representing at least 50 percent of the citizenry.<sup>34</sup>

International courts have held that general guarantees of freedom of expression include the right to information, and courts in some countries also have come to the same conclusion for national constitutions.<sup>35</sup> One might also seek to locate a right to information in constitutional guarantees of democracy and the right to vote and/or participate, on the basis that the genuine exercise of these rights is impossible if this right is not respected.

In recent years, specific protection for the right to information has often been included when new constitutions were adopted. Thus, many of the new constitutions adopted in Eastern and Central Europe after the demise of the Soviet Union included right to information provisions, as did many of the new constitutions adopted by African countries around the same time.<sup>36</sup> However, there have also been a few cases where constitutional reforms have been adopted to add an explicit right to information clause to preexisting bills or charters of rights from which they had hitherto been absent.

These added guarantees are mostly fairly generic in nature. An example is article 100 of the Norwegian constitution, which guarantees freedom of expression. Reforms adopted in 2004 added the following clause to that article, which had not previously included explicit reference to the right to information:

*Everyone has a right of access to the documents of the State and of the municipal administration and a right to be present at sittings of the courts and elected assemblies. The law may prescribe limitations to this right in regard of the right to privacy or other weighty considerations.*<sup>37</sup>

The most recent development in this regard is Amendment XVIII of the Constitution of Pakistan, passed by the National As-



sembly of Pakistan on April 8, 2010. As in the Norwegian case, this amendment added a right to information in a new article 19A, just following the preexisting general guarantee of freedom of expression, as follows:

*19A. Right to information: Every citizen shall have the right to have access to information in all matters of public importance subject to regulation and reasonable restriction imposed by the law.*

A notable exception to more generic constitutional amendments on the right to information are the very detailed constitutional amendments adopted in 2007 in Mexico. The 1917 Constitution of Mexico did not provide for a specific right to information, although article 6 guaranteed the right to freedom of expression. Constitutional amendments in 1977 added a very general guarantee of the right to information, although this was vague and was not made effective through implementing legislation. Amendments adopted in 2007 introduced a second part to article 6, containing seven detailed provisions on the right to information. These provisions include, among other things, establishment of the right in accordance with the principle of maximum disclosure, free of charge and through expeditious mechanisms. The article also requires public authorities to maintain their records in good condition and calls for independent specialized oversight bodies.<sup>38</sup> So far, no other country has introduced constitutional reforms of this breadth on the right to information.

### **Constitutionally Permitted Limitations**

The right to information, like the wider right to freedom of expression, is not absolute. Under international law, restrictions on these rights may be imposed by law where neces-

sary to protect certain overriding interests—namely, the rights and reputations of others, national security, public order, and public health or morals.<sup>39</sup>

There is a tendency in many constitutional amendments to provide for a far less rigorous test for restrictions on the right to information than on the wider right to freedom of expression. The Norwegian constitution, for example, only permits restrictions on freedom of expression where “this can be justified in relation to the grounds for freedom of expression, which are the seeking of truth, the promotion of democracy and the individual’s freedom to form opinions.” This is a strong test, linked to the very rationale for protecting the right in the first place. In contrast, the constitution allows apparently any legal limitations on the right to information (as opposed only to “justifiable” ones), where these relate to privacy or other “weighty considerations”—a much more permissive test.

Similarly, the core right to freedom of expression in Pakistan may be limited only by “reasonable restrictions imposed by law” to protect the interests listed in article 19 of the constitution. The right to information may be subject to reasonable restriction to protect any interest. Furthermore, the right only extends to information on “matters of public importance,” a significant and unfortunate limitation because it is so vague.

The relative weakness of many constitutional amendments on the right to information is difficult to explain, although the pool of cases is small and the Mexican case is an exception to the trend. This trend (of allowing wider restrictions) is not so apparent in the newer constitutions that have incorporated a guarantee of the right to information from the beginning. In South Africa, for example, the right to information is subject to the same regime of limitations as all other rights.<sup>40</sup>

One reason could be that the right to information is still not seen as a “real” right, unlike freedom of expression and other more established rights. Another reason may be that it might genuinely be difficult to accommodate all of the accepted limitations on the right to information within the traditional framework of restrictions on freedom of expression. For example, most countries have a deliberative process exception. The only ground for restricting freedom of expression that might be able to accommodate this limitation would be public order, but that ground would require a wider interpretation of this notion than courts normally have given. A similar problem arises regarding “ability to manage the economy,” another common exception in ATI laws.

### **Constitutional Challenges**

At least in theory, many countries’ constitutional guarantees of the right to information provide the basis for challenging ATI legislation and thus, potentially, amending it. The nature of such challenges is limited only by the scope of the constitutional guarantee. One area that would appear ripe for challenge in many countries is the regime of exceptions, which arguably is often overly broad. ATI laws that fail to provide for a right of appeal to an independent administrative body might also be open to challenge on the grounds that the law fails to provide an effective remedy against denials of the right.

Constitutional challenges are potentially an important alternative route for amending ATI laws and may be relatively accessible to certain civil society actors. They are not or should not be dependent on political will, although their success may depend on a certain degree of judicial engagement or even activism. They also do not depend on one’s ability to reach out to the wider public or to count on the support of important social players. The ability to engage

in a constitutional challenge does, however, depend on having the requisite resources—both financial and human—to mount a legal case in the appropriate forum (possibly a dedicated constitutional court or the supreme court).

In practice, there has been relatively little constitutional litigation aimed at amending or clarifying the scope of ATI laws in countries around the world.<sup>41</sup> This is surprising, given the large number of countries where this right is constitutionally recognized either explicitly or implicitly and the potentially high impact of constitutional litigation as a strategy. Even in Mexico, which has a very extensive constitutional guarantee of the right to information, there has been little to no constitutional litigation.

In South Africa, there have only been two constitutional challenges since the ATI law was first adopted in 2000. One challenge was effectively dropped; in the other, the Constitutional Court ruled that the 30-day limit to bring a case to the court following a refusal by a public authority to provide information was unconstitutional, extending it to 180 days.<sup>42</sup> One reason for the small number of challenges, at least in South Africa, may be that when a player with the resources to engage in constitutional litigation (for example, an NGO) gets involved in a case, the issue is often resolved in favor of openness without recourse to the courts. Even when a matter does go to court, the case is often decided in favor of openness without the need to refer to the constitution.

Similarly, in India—despite an enormous groundswell of support for and engagement on the ATI law—there have been very few, if any, constitutional challenges. The relatively recent vintage of the law (2005) and its progressive nature may militate against constitutional challenges. In essence, campaigners and activists in India are winning many of their

battles without the need to go to court, let alone to mount a constitutional challenge. It may also be that society is still exploring the contours of the existing law and that more constitutional challenges will come later.

The situation may be different in Canada, where the Supreme Court recently held that existing constitutional guarantees of freedom of expression include a limited right to information.<sup>43</sup> In that case, the Court held that there was no need to amend the underlying legislation because it conformed to the constitutional guarantee. However, the Court did prefer an interpretation of the law that could be understood as an implicit amendment.<sup>44</sup> Furthermore, it may be that, armed with this new constitutional recognition, more challengers will emerge. This may result in courts effectively “amending” laws.

Challenges under international law—particularly human rights challenges—are another way of amending ATI laws, analogous in many respects to constitutional litigation. A dramatic example of this was the challenge to the Chilean rules on ATI before the Inter-American Court of Human Rights, which not only led to the first clear international case recognizing a right of access, but also resulted in the wholesale reform of Chilean law in this area.<sup>45</sup> However, as with constitutional litigation to reform ATI laws, there has been relatively little international litigation to this end.<sup>46</sup>

## 2.3 Secondary Rules

Secondary legislation and regulations<sup>47</sup> have a status that is inferior to statutes or primary legislation, but they are still legally binding rules. The process for adopting such secondary rules varies considerably,<sup>48</sup> but amendments normally are authorized by the primary legis-

lation and, most commonly, ministers hold the power to adopt them. In most cases, secondary rules, once adopted, must be published officially—for example, in the official gazette. Most countries also grant the legislature the power to consider (and potentially reject) proposed secondary rules.<sup>49</sup>

In some countries, the administrative oversight body has the power to adopt binding rules. For example, the Mexican oversight body (the Instituto Federal de Acceso a la Información Pública [Federal Institute for Access to Public Information]) has the power to adopt rules (*lineamientos*) that are binding, although they have a status below that of secondary rules adopted by a minister.<sup>50</sup>

Secondary rules are normally used either where flexibility is needed (because they can be amended much more easily than primary legislation) or where the level of detail required is such that it is more efficient to leave the matter to be elaborated by a minister rather than by the whole legislature.

Despite their technically inferior status, secondary rules can contain important provisions. Thus, many ATI laws give ministers the power to set rules and rates for fees. Although this may be justified (to allow for adjustments to keep up with inflation and various economic changes, among other things), it is an important power because increasing fees can exert a chilling effect on making requests.<sup>51</sup> The standards for record management, where flexibility is again required (for example, to keep up with changing technologies), are also normally contained in secondary legislation. Once again, this is an issue that directly affects ATI in practice because poor records management means that public authorities will struggle to provide information to requesters. More detailed procedural matters, such as the processing of requests and notice requirements as well as what must be included in the

annual reports of public authorities, are often left to secondary legislation.

In some countries, secondary rules are considered so important that the law cannot come into force without them. This can have very serious consequences. The failure of the Ugandan government to adopt implementing regulations, for example, has meant that the ATI law has remained a dead letter since the time it was written.

The question of what matters are left to be decided by secondary rules, as well as the actual content of those rules, is thus quite important. A balance needs to be struck between achieving the necessary degree of flexibility

and not delegating to ministers excessive powers over the implementation of the law.

Regardless of the process, the adoption of secondary rules almost always is a far-lower-profile action than is the adoption of primary legislation. Their adoption is also far less likely to be the subject of formal consultations or gathering of public feedback, making it more challenging for civil society and other stakeholders to provide input. To do so will probably require active monitoring of developments, along with knowledge about how to provide input into the process and how to publicize issues.

# Amending Access to Information Legislation: Political Context

Assessing the political context in which amendments to the legal framework for the right to information take place is complex. A large number of players, and an even larger number of factors, potentially impact these processes. Often, the underlying motivations of different players are not explicit, and the power structures to which they are responding may not be evident.

A few broad generalizations can be made about the wider political context for law reform in this area. First, the right to information is a “motherhood and apple pie” notion<sup>52</sup> that almost inherently invites wide public support, whereas secrecy seems almost inherently wrong. Thus, this famous remark by U.S. Supreme Court Justice Louis Brandeis appeals to our innate sense that secrecy is dirty, a carrier of disease: “A little sunlight is the best disinfectant” (Brandeis 1914, p. 92). This belief lends strong support to those campaigning for greater openness and is partly the reason for the tremendous achievements in this area that have occurred in the last 15–20 years. The advent of new information technologies has further strengthened popular support for the right to information. Generations now growing up with access to the Internet have a sense of entitlement to information that earlier generations lacked. Francis Bacon’s famous phrase,

“knowledge is power,” has been replaced by the idea that “information is ours” (and for free).

Second, the right to information is of practical benefit to a wide range of social actors, at least in a democratic setting. There are the obvious candidates—the media, political parties, human rights nongovernmental organizations (NGOs)—and the less obvious ones—members of parliament (MPs),<sup>53</sup> businesses,<sup>54</sup> socially oriented NGOs,<sup>55</sup> and potentially even civil servants.<sup>56</sup> Campaigns in many countries, whether seeking to have an ATI law passed in the first place or promoting positive amendments to an existing law, have been able to attract wide support from these groups.<sup>57</sup> The right is also an important tool to empower individuals seeking to assert claims against the state.

Third, although governments are often broadly hostile to greater openness, they are not monolithic in nature; openness champions can often be found among the political elite and senior bureaucrats. These individuals can play a crucial role in shepherding amendments through the required formal processes (such as tabling a law in the legislature or making sure it proceeds through committee stage) and in breaking down internal government opposition.

Fourth, the context for amending an ATI law includes the fact that the law already exists. Outside of extreme cases of radically bad or unimplemented laws, this means that society has already recognized the imperative of providing ATI at least to some extent. It also means that the various players involved already have a sense of the impact of openness. For opponents, experience with implementing the law often mitigates their concerns and fears, which can be exaggerated prior to actual experience with openness. Finally, it gives proponents a clearer sense of what reforms they wish to prioritize, based on their experiences so far.

At the same time, one should not underestimate the extent of opposition to greater transparency within government and the bureaucracy. Even maintaining consistent levels of openness has proved to be a continuous struggle in countries with a longer track record of implementing ATI laws, such as Australia, Canada, and the United States. In most countries, openness proponents have to work hard and imaginatively to secure proper implementation of the law, let alone to bring about positive amendments.

It is beyond the scope of this paper to engage in a country-by-country analysis of political factors behind reforms of the legal framework for ATI. Instead, it focuses on the different roles played by different actors, along with an assessment of wider contextual factors.

### 3.1 Actors and Stakeholders

This section of the paper looks at the roles of different kinds of stakeholders in the process of amending ATI legislation. It assesses the contexts in which such stakeholders play an important part in this process, as well as the

extent to which these players may have a positive impact on reform efforts.

#### **Civil Society**

There is no doubt that where civil society is well organized and resourced, it can have an important impact on reform processes by promoting positive reforms or by preventing negative ones. Thus, in a number of countries with well-organized civil society advocacy campaigns—such as Bulgaria, India, Israel, and the United Kingdom—attempts to introduce negative amendments have been successfully fought off and/or positive amendments have been introduced. The scope of actions by such civil society organizations is limited only by the imaginations of those involved. This paper does not describe these actions in detail, but does outline a few key strategies.

#### **Key Strategies**

One important indicia of successful civil society efforts is the presence of a central NGO or network of NGOs that leads and coordinates civil society efforts, often with the support of the media. For example, there is the Access to Information Programme<sup>58</sup> in Bulgaria, the Movement for Freedom of Information<sup>59</sup> in Israel, the Open Democracy Advice Centre in South Africa,<sup>60</sup> and the Campaign for Freedom of Information<sup>61</sup> in the United Kingdom. In India, a united front in the form of the National Campaign for People's Right to Information<sup>62</sup> brought together representatives from leading advocacy groups to provide central direction.

On the other hand, in countries like Canada and Ireland where civil society is not unified or strong, the reverse is true; and attempts to introduce positive amendments and to prevent negative amendments, respectively, have failed. It is not possible to draw a precise causal link between these developments and the lack



of a strong civil society movement, but it is reasonable to postulate that they are related.<sup>63</sup>

Several actors have noted the need to bring on board as wide a range of players as possible in amendment efforts.<sup>64</sup> Businesses should not be forgotten because they can play an important role in pushing for reform and can sometimes exert influence in places civil society groups cannot easily reach.<sup>65</sup>

In many cases, civil society actors have used litigation to support their advocacy efforts. In Israel, for example, campaigners have used litigation to force the government to implement amendments to ATI legislation that had already been adopted. They also believe that their ability to use litigation has enhanced their overall status and influence.<sup>66</sup> When promoting reforms to address the serious problem of delay in the ATI system in the United States, the National Security Archive made extensive use of litigation.<sup>67</sup> Litigation has been valuable not only in the specific case at hand, but also in terms of building credible evidence that the system is flawed and in need of wider reform. In Peru, litigation was combined with other types of advocacy (including a media strategy and civil society advocacy) to push through reforms.<sup>68</sup>

In general, there is a need for solid evidence to provide support for reform measures. Building campaigns on a solid evidential platform can substantially boost the chances of success. Similarly, providing concrete and practical solutions to the problems identified (including in the form of draft amendments to legislation) is an effective strategy.

A number of surveys have been conducted in India, including one by civil society, looking at implementation after a period of two or three years.<sup>69</sup> These surveys provide invaluable information about what is working, what is not working, areas for improvement, and so on. In the United States, the National Security

Archive conducted a series of government-wide audits that demonstrated clearly that there were major problems with the system—most particularly, serious and systemic delays.<sup>70</sup>

In some cases, civil society groups have managed to work directly with officials to amend ATI legislation. For example, the Freedom of Information Centre of Armenia worked with officials to draft proposed amendments to their country's ATI law, and those amendments are currently before the legislature.<sup>71</sup> Where possible, this clearly is a very direct route of influence.

It is also important for civil society to be prepared to work over the longer term. Thus, in Canada, the need for reform of the ATI law has been recognized by at least some actors since 2002.<sup>72</sup> Significant reforms have still not been adopted, and the need for a strong campaign is as great as ever.

Finally, civil society campaigns need to be adapted to the particular circumstances of the country. In India, when the government tried to introduce amendments to the law shortly after it was adopted, civil society groups started a "Save the RTI Campaign." This involved a range of campaign tactics, including sending signed postcards, circulating petitions, holding demonstrations, conducting impromptu ballots on street corners and holding a *dharna* (a sit-down protest). A detailed critique of the proposed amendments and their potential impact was produced. The campaign also mobilized the media and undertook direct lobbying of influential individuals and political parties (see Singh [2010]).<sup>73</sup> In due course, both of the communist parties, that support the government (that is, the Communist Party of India [Marxist] and the Communist Party of India) and the main opposition party announced publicly that they were opposing the amendments, and the government eventually withdrew its proposals.

## Media

Particular note should be made here of the role of the media. The media have an important agenda-setting role in relation to all public issues. But they can be particularly essential in supporting campaigns to open up government. This is an issue that the media are generally prone to support because it directly enhances their ability to do their work. In many countries, journalists—in particular, investigative journalists—are a significant user group for ATI legislation.

At the same time, the media in some countries initially has been reluctant to support general openness campaigns for two reasons.<sup>74</sup> First, they have sometimes feared that a formal system for providing ATI held by public authorities will undercut the informal systems they traditionally rely on to obtain information, perhaps introducing rigidities and delays that they do not currently face. Second, journalists have sometimes feared that, with open access, their special role as purveyors of information will be undermined. If everyone can access information freely, what is their role?

Neither of these concerns is borne out in practice. Traditional media sources are rarely affected by the addition of a new means of obtaining information; and, indeed, most journalists continue to get most of their information from traditional sources. Distilling and presenting the news in focused media products continues to be an important media value added, even if individuals have greater access to public information through direct means.

Most civil society campaigns involve at least some media element; and, in many cases, the media are credited with leading the campaign. For example, in the United Kingdom, when regulations to increase fees and give officials wider powers to reject requests were proposed,

the media reacted strongly; most national media published critical editorials. The *Press Gazette* initiated a “Don’t Kill FOI” campaign that led to a petition signed by 1,200 editors and journalists and sent to the prime minister (Gundersen 2008, pp. 236–37).<sup>75</sup>

The media publicizes ATI issues in at least two different ways. First, outlets report on them as they would any other issue of public interest, as a matter of news and current affairs. Thus, a proposal to amend ATI legislation—whether proposed by government or by civil society—should be covered in the same way as a proposal to amend environmental legislation. Equally important, through their reporting the media can demonstrate directly the importance of the right to information. This can be done, for example, by indicating that the law has been used as a source for a story, when that is appropriate.<sup>76</sup> In some countries, there are journalists with dedicated ATI or secrecy beats who produce regular columns or shows based on these themes.

## Oversight Bodies (Information Commissions)

In many countries, information commission(er)s have been quite involved in efforts to reform ATI laws. In some places, these bodies have played leading roles in advocating for reforms. In other cases, they have been just one of many players. Regardless, they have a certain authority on this issue because of their formal mandate and the experience they necessarily gain from it.

Slovenia presents an interesting example of reform processes being driven forward by the information commissioner. The 2005 amendments were motivated largely by the commissioner, although they were formally introduced by the minister for public administration. This



was the case even though an important element of the amendments was to merge oversight functions for information and privacy into one body (in other words, even though the amendments directly changed the role of the information commissioner). The commissioner again has been the impetus behind current discussions of amendments.

In Canada, the Office of the Information Commissioner (OIC) has also been active in promoting reform of the law. Discussions about reform have been going on since at least 2002, when the government-appointed Access to Information Review Task Force published its report, "Access to Information: Making It Work for Canadians."<sup>77</sup> The OIC provided an official response to the report, focusing on the need for legislative reform.<sup>78</sup> In October 2005, the OIC presented a draft open government bill to parliament, proposing comprehensive overhaul of the Canadian legislation.<sup>79</sup>

There have been low-level discussions about reform since that time. When the Parliamentary Standing Committee on Access to Information, Privacy and Ethics reviewed the ATI law in 2009, the OIC submitted a report, "Strengthening the Access to Information Act to Meet Today's Imperatives," containing a list of 12 recommendations for immediate reform. The recommendations were drawn from the wider reforms it had proposed earlier.<sup>80</sup> The committee's report largely mirrored the OIC's recommendations.<sup>81</sup>

### **Parliament**

The role of the legislature in adopting amendments to ATI legislation is obviously crucial. At the end of the day, amendments that change primary legislation have to be passed by the legislature, and it might also play a role in accepting or rejecting secondary rules.

In some cases, the governing party dominates the legislature. This was the case, for example, when the amendments to the Irish law were adopted in 2003.<sup>82</sup> In other cases, the biggest party relies on support from other parties to govern. This opens up interesting possibilities for advocacy.

In Israel, for example, government is always run by complex coalitions involving a number of parties, each promoting different interests. Amendments to the law to expand proactive environmental disclosures in 2005 were introduced by a parliamentarian belonging to a small left-wing party, although they passed by a strong majority; and amendments in 2008 to bring publicly owned corporations within the ambit of the law were introduced by a member from a right-wing party. This suggests that the right to information as an issue has appeal across the political spectrum.<sup>83</sup> In some countries, it also may also point to the strength of openness as a public concern, so that larger parties feel some pressure to support amendments when those amendments have been tabled in the legislature.

In Canada, since 2004, no government has held a majority of the seats in parliament; and successive governments have ruled from a minority position, rather than seeking to form a coalition to command a majority of the votes in parliament. This means that the government does not control parliamentary committees; and, until recently, the committee responsible for oversight of the ATI law (the Standing Committee on Access to Information, Privacy and Ethics) was chaired by a member of the opposition Liberal Party.<sup>84</sup> After a process of public consultation, the committee released a report, "The Access to Information Act: First Steps Towards Renewal,"<sup>85</sup> which largely supported all 12 of the recom-

mendations for reform made by the information commissioner.<sup>86</sup> Despite this, the government rejected the idea of amending the law at that time,<sup>87</sup> suggesting instead that the focus needed to be on training and enhancing internal guidelines. The other parties did not make a major issue out of it, and it largely died there.

This may be contrasted with the situation in the United States in 1974, when wide-ranging reforms to the law were adopted, creating a far more positive climate for openness. President Gerald Ford, who less than three months earlier had taken over as president following Richard Nixon's forced resignation, vetoed the amendments. The veto was overridden convincingly by a 371-to-3 vote in the House of Representatives and a 65-to-27 vote in the Senate,<sup>88</sup> with legislators making a clear statement that this reform was not going to be stopped by the executive.

In the United Kingdom, the upper chamber of the legislature, the House of Lords, has played a role in defeating negative amendments to the ATI law. A bill increasing secrecy for MPs was passed by the House of Commons in May 2007; but no member of the House of Lords would sponsor the bill in that chamber, so it was not passed (Gundersen 2008).

### ***Political Champions***

The role of political champions in promoting ATI law reform is important. For example, the 2007 adoption of amendments to the law in the United States—amendments that focused significantly on measures to reduce delays in responding to requests, enhanced reporting requirements, and introduced systems to facilitate the resolution of disputes—benefited from leadership and support from Senator John Cornyn, ranking Republican on the Senate Judiciary Committee. Cornyn pro-

moted the bill consistently from as early as 2003, even though the political climate at the time was not necessarily conducive to right to information reform.

The role of political champions has been highlighted in other countries as well. In Israel, the minister in charge of the public service has been a strong supporter. Even though he formally has no role in this issue, he has been promoting reforms proposed by civil society to establish some sort of oversight body and has used his political connections and influence to that end.<sup>89</sup>

In India, much has been made of the apparent rift between Prime Minister Manmohan Singh and Congress Party President Sonia Gandhi over the right to information.<sup>90</sup> Gandhi wrote to the prime minister in November 2009, stating her view that no amendments to the law were necessary. A response by the prime minister in December claimed that amendments were necessary, for example, to address cabinet documents and internal discussion, the independence of the judiciary, and various matters relating to the central information commission.<sup>91</sup> As noted earlier in this report, the first issue has been very controversial in India.

Although treated separately above, synergies between different sets of stakeholders—civil society, oversight bodies, parliament, and political champions—are often key to ensuring the success of positive reforms or the defeat of negative ones. Indeed, almost all of the examples cited above involved collaborations between two or more different players. Thus, in India, civil society activists were able to take advantage of Sonia Gandhi's position to mobilize support against the reform proposals. In Israel, similarly, civil society groups using the media, litigation, and various other tools liaised with supportive political leaders to achieve positive reforms.

## 3.2 “Objective” Factors

Objective factors—such as whether the law is actually working to ensure ATI while protecting necessary confidentiality interests—should play an important role in driving ATI law reform. Because this is a basic human right that (at least under international law) states are legally obliged to give effect to, objective assessments of whether the system is working should be acted on.<sup>92</sup>

There is no question that the identification of problems with an existing regime has played an important role in many reform efforts. Thus, as noted, the 1974 reforms in the United States were largely a response to the failure of the 1966 law to deliver on its objectives, and this was also an important motivation for the 2007 U.S. reforms.<sup>93</sup> As a generalization, it may be claimed that most of the reforms promoted by information commissioners, NGOs, and other civil society actors are based on at least a perception of a need for these changes to be adopted to realize openness goals.

This is also often true of amendments that would limit access. At the same time in at least some cases, these seem to be driven more by political interests than a desire to improve the right to information system. This seems a fair characterization of attempts by MPs in the United Kingdom—and particularly their last-ditch efforts in January 2009—to exempt themselves from the ambit of the law. Inasmuch as openness is almost inherently inconvenient to government and is often politically embarrassing, it is fair to postulate that these factors often color government-led amendment efforts.

Even where attempts to amend ATI laws are motivated by a concern to promote greater

openness, this does not necessarily mean that there is always a strong evidentiary basis for the specific reform efforts. Often, reform efforts are spearheaded by actors—whether information commissioners or civil society groups—that are deeply involved in transparency work. They therefore propose changes based on their specific experiences, despite a relative paucity of academic research to provide a wider grounding.

## 3.3 Wider Political Factors

It is often difficult to separate the roles of particular players from a wider analysis of political and other factors. To understand these factors properly in any given context requires a thorough analysis of that context. At the same time, some general observations may be made.

Underlying social belief in the importance of the right to information seems to be stronger in countries with more recent histories of excessive secrecy and the harm that it engenders. Thus, there is a good overall climate for positive openness reform in some of the more democratic countries of Central and Eastern Europe—even if implementation is sometimes a challenge. The author is unaware of any studies specifically on this issue, but it seems reasonable to posit at least some link between the relatively widespread support for openness and the secrecy that was pervasive during communist rule and widely blamed for contributing to the abuses of that period.

In a number of these countries, civil society actors or other stakeholders have been able to convince the government or the legislature to support openness reforms. The case of Bulgaria in 2007, where an attempt to introduce

negative amendments was not only defeated but actually turned into an opportunity to introduce pro-openness reforms, is a good example of this.<sup>94</sup> In Armenia, as well, there appears to be wide-ranging support for current positive reform efforts, reportedly including support from the prime minister.<sup>95</sup> Similarly, in Mexico, the successful heralding in of the right to information in both law and practice, with strong support from the political leadership, was surely affected by negative recent experiences with secretive government during the long period of one-party rule by the Institutional Revolutionary Party (see Sobel et al. [2006]).

The situation in India is arguably similar in terms of powerful and recent examples of harm from secrecy, albeit in the context of an established multiparty democracy. In India, successful socialization of the right to information is linked to the rejection of an overbearing, paternalistic, and corrupt civil service. Powerful examples of using ATI to expose abusive practices by officials who denied the poorest of the poor the wages they needed to survive propelled the right to information to political stardom, linked it to a strong grassroots narrative, and drew the connection between ATI and basic livelihoods—indeed, the very right to life.<sup>96</sup>

These experiences may be contrasted with the political environment of more established democracies, including those with longer-standing right to information regimes (such as Canada and Ireland). In both of those countries, civil society has mounted what can only be described as lukewarm efforts to promote positive law reform (or counter negative reforms). The opposition in both countries, too, has failed to put forward a concerted attempt to make an issue out of what might otherwise be considered low-hanging fruit in the political sense.<sup>97</sup> The convincing need for reform in

Canada, where almost no major changes have been introduced since the law was first passed in 1982,<sup>98</sup> makes this even more surprising. In these cases, it may be that the lack of active engagement on this issue—among civil society, parliamentarians, and the general public—results in part from the fact that secrecy is not seen as a serious threat to democracy.

In a number of cases, positive reforms can be linked to what might be termed “special political moments.” A good example of this was the 1974 amendments in the United States. Problems with the law that had first been passed in 1966 had long been acknowledged by most stakeholders, including such abuses as charging requesters as much as \$7 a page of photocopying, mixing exempt information with nonconfidential information so as to “contaminate” a whole document, and extensive delays in processing requests.

Various reform efforts had been under way for some time, trying to address these problems. But the adoption of the 1974 amendments, including the dramatic attempt by President Ford to veto the legislation and the convincing override by congress, took place in the dark shadow of the Watergate scandal and was clearly heavily influenced by it. Although even a strong ATI law probably would not have prevented the events that led to Watergate, the facts that Nixon was obsessively and abusively secretive and that the specific abuses that ultimately forced him to resign were grounded in secrecy placed in stark relief the imperative for strong right to information reform (see National Security Archive 2004).

A similar political moment presented itself in India, albeit on the occasion of the adoption of the law, not its amendment. As Singh points out,

*In India, the change of government, the refusal of Mrs. Sonia Gandhi to become the*

*Prime Minister and the consequent acquisition of moral authority, the setting up of the National Advisory Council under her leadership, the unfamiliarity of the system with this first-of-its-kind council and its functions and powers, the hesitation to oppose proposals from this council, all led to a window of opportunity which allowed the RTI Act to “slip through” (Singh 2010, p. 21).*

Another wider political factor that seems to have an impact on openness reform is change of government either after a period of one-party rule or a long time in opposition. The adoption of an ATI law in South Africa was part of a package of reforms that were a direct consequence of the end of apartheid and the ushering in of democratic rule. In the United Kingdom, the Labour Party had been in opposition for nearly 18 years when it finally gained power in 1997. Adoption of an ATI law had been a feature of every Labour Party manifesto since 1974, and the party did deliver on this promise after it came to power—albeit somewhat reluctantly (see Gunder-son [2008]). Similarly, openness in Mexico was a key reform platform of the Vicente Fox government, which came to power in 2000 after 65 years of Institutional Revolutionary Party

(PRI) rule. Again, his administration delivered on this promise, adopting an ATI law in 2002. One reason these parties made such strong commitments to the right to information was no doubt because of its populist appeal. However, it is undoubtedly much easier for a party that has not been in power recently to make such commitments because, among other things, it has no official secrets of its own to hide (see Mendel [forthcoming]).

Although these examples refer to adoption of legislation in the first place rather than to reform of legislation, it seems reasonable to posit that similar political forces might have an impact on amendments as well.

It may also be that such special political moments can open the door to negative amendments to ATI laws, although the evidence for this seems to be relatively weak. One example was U.S. Attorney General John Ashcroft’s adoption of a Memorandum on the Freedom of Information Act on October 12, 2001.<sup>99</sup> The memorandum effectively encouraged officials to use all available exceptions to deny access, and it was widely seen as an important rollback in terms of openness. There can be little doubt that timing of this memorandum, just one month after the terrorist attacks of September 11, was not mere coincidence.



## Conclusion

What motivates efforts to reform the legal framework for the right to information, and who are the key players? Answers to these questions vary considerably from country to country, making comparisons and conclusions difficult. A few tentative conclusions may be drawn from this initial survey of reform efforts. However, there is a need for more empirical evidence and study before firm conclusions may be put forward.<sup>100</sup>

Some of the questions raised and areas for further research on amending ATI legislation include the following:

- What is the nature of the relationship between a strong central civil society campaign and the ability to secure positive amendments to ATI legislation?
  - Under what conditions are strong central civil society campaigns likely to emerge?
  - What sorts of causal relationships exist between the clarity of international standards and the ability to secure positive ATI amendments?
  - How important is evidence of right to information shortcomings in promoting positive amendments?
  - What are good-practice approaches to consultations around ATI law reform, including in the adoption of secondary rules?
- Is there a widespread pattern of difference between constitutionally authorized limitations to the right to information, on one hand, and to freedom of expression, on the other hand? If so, what are the reasons for this?
  - How would a rigorous constitutional and international law analysis assess accepted ATI law standards (that is, to what extent have we come to accept rules in these laws that would not pass constitutional muster)?

The evidence reveals a strong pattern, albeit certainly not a uniform one, of positive amendments dominating negative ones or stalemates leading to inaction. This seems to refute the idea expressed by some campaigners that it is better to hold out for the best possible law at the point of first adoption, on the basis that it will be difficult to secure positive amendments later (although this may be true in some countries and contexts).

The positive trend seems to be based, at least in part, on the “motherhood and apple pie” quality of the right to information as a key democratic right and on the appeal that the right to information can garner across a wide range of stakeholders. It may also reflect the fact that amendments normally come after some track record of implementation of the



law, which may help reduce the sometimes irrational fears held by officials and others about the impact of opening up.

Some of the main outliers from this positive trend are established democracies like Canada and Ireland. The reasons for this are complex, but a lack of strong recent experience with the harm that secrecy can engender and weak civil society campaigns (perhaps along with a certain political culture of complacency) seem to be factors distinguishing these countries. They may be contrasted with countries like Armenia, Bulgaria, India, and Mexico, for example, where the threat of harm from secrecy is far more poignant.

In general, it is easier to secure reforms where the existing law is out of line with clear international standards and comparative practice. However, where international standards and comparative practice are less clear, there is likely to be more contestation around reform efforts. The clarity—particularly of comparative practice—tends to decline in relation to more politically sensitive ATI issues, which is also where ensuring pro-openness results has proved most difficult. It is unclear whether the high degree of political sensitivity has prevented the emergence of international rules, or whether this sensitivity is caused by some other factor but results in difficulties in promoting openness.

Campaigners should be ready to take advantage of any auspicious political moments because these moments appear to present major opportunities for positive reform. This often requires advance preparation for such moments, however, including through building

broad alliances that can lend political weight to a campaign even if not all members play an active role.

The evidence also suggests that where there is a central reference point for civil society efforts—whether this takes the form of a leading nongovernmental organization or a coalition of groups—positive rather than negative reforms are more likely to be adopted. More study is needed to determine the conditions likely to give rise to such reference points, but the willingness of a wide range of groups to support pro-openness campaigns suggests that this is an area that is often favorable for civil society development attention.

Relatively little use has been made of constitutional litigation as a strategy to reform the legal framework for the right to information, so this deserves more attention. Amendments to ATI laws—particularly where they take the form of secondary legislation—are likely to attract less public attention than will adoption of the law in the first place. As a result, civil society actors and others wishing to engage in these processes may need to monitor them carefully.

The overall picture that emerges is of the right to information as an active area of social engagement, where a wide range of players exert themselves over time to put forward an impressive flow of proposed amendments to the ATI law, both positive and negative. Although the former have tended to dominate in most countries, constant vigilance on the part of civil society and others who support the right to information is needed to ensure that this positive momentum continues.



# Appendix 1: List of Laws and Their Associated Web Sites

All links included here are to English versions of the laws, except where otherwise noted; and all were accessed on December 22, 2010.

## **Armenia**

Law on Freedom of Information, 2003; <http://www.foi.am/en/content/53/>

## **Bosnia and Herzegovina**

Freedom of Access to Information Act, 2001; [http://www.ohr.int/ohr-dept/media-d/med-recon/freedom/default.asp?content\\_id=7269](http://www.ohr.int/ohr-dept/media-d/med-recon/freedom/default.asp?content_id=7269)

## **Bulgaria**

Access to Public Information Act, 2000; <http://www.aip-bg.org/library/laws/apia.htm>

Classified Information Protection Act, 2002; <http://www.dksi.bg/NR/rdonlyres/070CA55F-EAD3-425D-BE41-A01AC62A005D/0/CLASSIFIEDINFORMATIONPROTECTIONACT.doc>

## **Canada**

Access to Information Act, 1982; <http://laws.justice.gc.ca/en/A-1/>

Constitution of Canada; <http://laws.justice.gc.ca/en/const/index.html>

## **Chile**

Law on Access to Public Information; <http://www.leychile.cl/Navegar?idNorma=276363&tipoVersion=0> (in Spanish)

## **Georgia**

General Administrative Code, Chapter III, 2000; <http://unpan1.un.org/intradoc/groups/public/documents/UNTC/UNPAN004030.pdf>

## **Hungary**

Act on the Protection of Personal Data and Public Access to Data of Public Interest, 1992; [http://abiweb.obh.hu/dpc/index.php?menu=gyoker/relevant/national/1992\\_LXIII](http://abiweb.obh.hu/dpc/index.php?menu=gyoker/relevant/national/1992_LXIII)

Classification Action, 2009; [http://www.complex.hu/jr/gen/hjegy\\_doc.cgi?docid=A0900155.TV](http://www.complex.hu/jr/gen/hjegy_doc.cgi?docid=A0900155.TV) (in Hungarian)

## **India**

Right to Information Act, 2005; <http://righttoinformation.gov.in/rti-act.pdf>

## **Ireland**

Freedom of Information Acts, 1997 and 2003; <http://foi.gov.ie/wp/files/2010/09/gd-final-reworked-sept-for-printers.pdf>

**Israel**

Freedom of Information Law, 1998; <http://www.freedominfo.org/documents/Israel—FOIL1998.pdf>

**Latvia**

Law on Information Accessibility, 1998; <http://www.humanrights.lv/doc/latlik/info.htm>

**Mexico**

Constitution of Mexico; [http://www.oas.org/juridico/MLA/en/mex/en\\_mex-int-text-const.pdf](http://www.oas.org/juridico/MLA/en/mex/en_mex-int-text-const.pdf)

Federal Transparency and Access to Public Government Information Law, 2002; <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB68/laweng.pdf>

**Nepal**

Right to Information Act, 2007; [http://www.nic.gov.np/download/rti\\_act\\_eng\\_official.pdf](http://www.nic.gov.np/download/rti_act_eng_official.pdf)

**Norway**

Constitution of Norway; <http://www.stortinget.no/en/In-English/About-the-Storting/The-Constitution/The-Constitution/>

Freedom of Information Act, 2006; <http://www.ub.uio.no/ujur/ulovdata/lov-20060519-016-eng.pdf>

**Pakistan**

Constitution of the Islamic Republic of Pakistan; <http://www.pakistani.org/pakistan/constitution/>

Freedom of Information Ordinance, 2002; <http://www.privacyinternational.org/countries/pakistan/pk-foia-1002.html>

**Scotland**

Freedom of Information (Scotland) Act, 2002; <http://www.legislation.gov.uk/asp/2002/13/contents>

**Slovenia**

Access to Public Information Act, 2003; <http://www.ip-rs.si/index.php?id=324>

**South Africa**

Constitution of the Republic of South Africa; [http://www.servat.unibe.ch/icl/sf00000\\_.html](http://www.servat.unibe.ch/icl/sf00000_.html)

Promotion of Access to Information Act, 2000; [http://www.dfa.gov.za/department/accessinfo\\_act.pdf](http://www.dfa.gov.za/department/accessinfo_act.pdf)

**Uganda**

Access to Information Act, 2005; [http://www.freedominfo.org/documents/uganda\\_ati\\_act\\_2005.pdf](http://www.freedominfo.org/documents/uganda_ati_act_2005.pdf)

**United Kingdom**

Freedom of Information Act, 2005; <http://www.legislation.gov.uk/ukpga/2000/36/contents>

**United States**

Freedom of Information Act, 1966; <http://www.justice.gov/oip/amended-foia-redlined-2010.pdf>

# Appendix 2: Table of Amendments to ATI Laws

## a. Amendments Adopted

<i>Country</i>	<i>Year</i>	<i>Main Features</i>
Bosnia and Herzegovina	2009	<ul style="list-style-type: none"> <li>• Added sanctions for public authorities who failed to respect their obligations</li> </ul>
Bulgaria	2007	<ul style="list-style-type: none"> <li>• Required both national and local public authorities to appoint information officials</li> <li>• Required both national and local public authorities to establish reading rooms</li> <li>• Enhanced the provisions on sanctions against officials obstructing access</li> </ul>
	2008	<ul style="list-style-type: none"> <li>• Added a public interest override</li> <li>• Expanded coverage of public authorities to include regional branches of public authorities, bodies receiving European Union funding and companies controlled or funded by the state</li> <li>• Introduced rule on proactive publication</li> <li>• Limited the definition of a trade secret</li> <li>• Made provision of partial access mandatory (instead of discretionary)</li> </ul>
Canada	1999	<ul style="list-style-type: none"> <li>• Added sanctions for obstruction of access</li> </ul>
	2006	<ul style="list-style-type: none"> <li>• Extended coverage to include public companies</li> <li>• Made duty to assist requesters explicit</li> </ul>
	2010	<ul style="list-style-type: none"> <li>• Recognized constitutional protection for the right to information (by court decision)</li> </ul>

continued

<b>Country</b>	<b>Year</b>	<b>Main Features</b>
Georgia	2001	<ul style="list-style-type: none"> <li>• Clarified the scope of coverage of private bodies receiving public funding</li> <li>• Amended the rule limiting classification of information to five years for different types of information (for example, professional information may be secret forever)</li> <li>• Clarified rules on entering data regarding documents into the public register</li> <li>• Added types of information to be included in annual reporting</li> </ul>
	2005	<ul style="list-style-type: none"> <li>• Added a requirement that public authorities seek written consent for release of information relating to a third party from that party</li> </ul>
	2007	<ul style="list-style-type: none"> <li>• Added a requirement that requesters appeal to the oversight body before going to the courts</li> </ul>
Ireland	2003	<ul style="list-style-type: none"> <li>• Expanded exceptions, including in relation to cabinet documents, the power of secretaries general to issue binding certificates to the effect that information is related to the deliberative process, the removal of the requirement of harm from the defense and security exception, and the addition of an exception to protect life and safety</li> <li>• Added rule to address “serial” requests</li> <li>• Increased fees significantly</li> </ul>
Israel	2006	<ul style="list-style-type: none"> <li>• Enhanced proactive publication obligations (especially in relation to environmental information)</li> </ul>
	2008	<ul style="list-style-type: none"> <li>• Extended coverage to state-owned companies, including security industries</li> </ul>
Latvia	2009	<ul style="list-style-type: none"> <li>• Eliminated oversight role of the Data State Inspectorate</li> </ul>
Mexico	2007	<ul style="list-style-type: none"> <li>• Elaborated and significantly strengthened constitutional protection for the right to information</li> </ul>
Norway	2004	<ul style="list-style-type: none"> <li>• Introduced explicit constitutional guarantee of the right to information</li> </ul>
Pakistan	2010	<ul style="list-style-type: none"> <li>• Introduced explicit constitutional guarantee of the right to information</li> </ul>
Peru	2003	<ul style="list-style-type: none"> <li>• Clarified exceptions that had been very vague</li> <li>• Extended coverage to include defense agencies and national police directly</li> </ul>

<b>Country</b>	<b>Year</b>	<b>Main Features</b>
Slovenia	2005	<ul style="list-style-type: none"> <li>• Added a public interest override</li> <li>• Prohibited charging fees where the information relates to the expenditure of public funds or execution of a public function</li> <li>• Allowed requesters to challenge the classification of documents</li> <li>• Merged into one body the responsibility for oversight in relation to privacy and information</li> </ul>
South Africa	2006	<ul style="list-style-type: none"> <li>• Introduced sanctions for failing to produce certain mandatory publications (that is, reports)</li> </ul>
	2009	<ul style="list-style-type: none"> <li>• Extended the 30-day limit to appeal refusals to provide access before the courts to 180 days (by constitutional decision)</li> </ul>
United Kingdom	2004	<ul style="list-style-type: none"> <li>• Abrogated or limited various exceptions (by regulation)</li> </ul>
	2010	<ul style="list-style-type: none"> <li>• Removed the public interest override for communications with heir and second in line to the throne</li> <li>• Reduced the timeline for historical disclosure from 30 years to 20 years</li> </ul>
United States	1974	<ul style="list-style-type: none"> <li>• Added a severability clause</li> <li>• Expanded the scope of public authorities covered</li> <li>• Limited the scope of exceptions</li> <li>• Required the production of annual reports by public authorities</li> <li>• Allowed agencies to reduce fees in the public interest</li> <li>• Ensured the availability of de novo review in court appeals and the awarding of legal fees and costs if the requester substantially prevails in court</li> <li>• Allowed courts to impose sanctions on officials who wrongly withhold information</li> <li>• Introduced stricter time limits</li> </ul>
	1986	<ul style="list-style-type: none"> <li>• Expanded exception for law enforcement</li> <li>• Introduced fee rules that lowered costs for media and civil society</li> </ul>
	1996	<ul style="list-style-type: none"> <li>• Extended the access rules to electronic documents</li> </ul>
	2002	<ul style="list-style-type: none"> <li>• Limited the ability of foreign agents to make requests</li> </ul>

continued

<b>Country</b>	<b>Year</b>	<b>Main Features</b>
	2007	<ul style="list-style-type: none"> <li>• Introduced measures to reduce delays, including limiting the power to extend deadlines and waiving fees in some cases of delay</li> <li>• requiring public authorities to appoint Public Liaisons and FOIA Requester Service Centers to assist requesters</li> <li>• Added a requirement that public bodies set up request tracking systems</li> <li>• Enhanced reporting requirements, including with respect to delays in processing requests</li> <li>• Added an ombudsman function, with the power to mediate disputes and make recommendations for reform</li> </ul>

## **b. Amendments Attempted, But Not Adopted**

<b>Country</b>	<b>Year (approx.)</b>	<b>Main Features</b>
Armenia	Ongoing	<ul style="list-style-type: none"> <li>• Clarify the main principles underlying the law</li> <li>• Enhance the rules on proactive publication</li> <li>• Add an exception for rare and valuable documents</li> <li>• Add a prohibition on refusing access where the person to whom private information relates has given his or her consent for release</li> <li>• Clarify the rules on procedure for payment of fees</li> <li>• Require free provision of information when the information relates to the requester or relates to rights</li> <li>• Clarify the fees that may be charged</li> </ul>
Bulgaria	2007	<ul style="list-style-type: none"> <li>• Require proof of interest in the information sought</li> <li>• Increase fees</li> <li>• Increase time limits</li> <li>• Do away with the severability rule</li> </ul>
Canada	Ongoing	<ul style="list-style-type: none"> <li>• Give the commissioner binding order power</li> <li>• Expand the mandate of the commissioner to include public education, research, and the provision of advice</li> <li>• Extend coverage to parliament and the courts</li> <li>• Require the approval of the commissioner for time extensions beyond 60 days</li> </ul>

<b>Country</b>	<b>Year (approx.)</b>	<b>Main Features</b>
India	2006	<ul style="list-style-type: none"> <li>• Add file notings</li> <li>• Expand the exception for cabinet documents</li> <li>• Add exception for examination and evaluation processes</li> </ul>
	Ongoing	<ul style="list-style-type: none"> <li>• Add an exception for “discussions and consultations of officers” (internal deliberative process)</li> </ul>
Israel	Ongoing	<ul style="list-style-type: none"> <li>• Add an oversight body</li> <li>• Expand coverage of public authorities</li> <li>• Limit fees</li> <li>• Reduce time limits</li> </ul>
Latvia	2008	<ul style="list-style-type: none"> <li>• Limit the impact of exceptions on the internal exchange of information (that is, among government departments)</li> </ul>
Scotland	Ongoing	<ul style="list-style-type: none"> <li>• Reduce the timeline for historical disclosure from 30 years to 15 years</li> <li>• Extend coverage to include a wide range of private corporations undertaking public functions</li> </ul>
Slovenia	Ongoing	<ul style="list-style-type: none"> <li>• Allow requesters to challenge fee assessments</li> <li>• Enhance implementation of the commissioner’s decisions</li> <li>• Limit the ability to lodge administrative court appeals mainly to requesters</li> </ul>
South Africa	Ongoing	<ul style="list-style-type: none"> <li>• Introduce a secrecy law that is likely to significantly impact the ATI law</li> </ul>
United Kingdom	2006–07	<ul style="list-style-type: none"> <li>• Remove parliament from the ambit of the law</li> <li>• Add an exception for the correspondence of members of parliament with public authorities</li> <li>• Increase the scope for refusing requests on the basis that they are too costly</li> </ul>
	2009	<ul style="list-style-type: none"> <li>• Block detailed disclosure of the expenses of members of parliament</li> </ul>
	2010	<ul style="list-style-type: none"> <li>• Impose a blanket ban on access to cabinet documents</li> </ul>
	Ongoing	<ul style="list-style-type: none"> <li>• Extend coverage to include private corporations undertaking public functions</li> </ul>

*Source:* Author’s compilation.





# Endnotes

<sup>1</sup>The negotiation and ratification of international treaties on the right to information could be included here because it also has general and legally binding impact in many countries. However, the dynamics around this differ considerably from the other actions. Furthermore, there are very few treaties that directly address the right to information, with the notable exception of the Council of Europe's Convention on Access to Official Documents, adopted on November 27, 2008.

<sup>2</sup> In this working paper, the term "access to information law" is used to refer to laws that provide general guarantees of the right to information, rather than to laws that may provide for access to certain kinds of information (such as environmental or health information).

<sup>3</sup> These standards are encapsulated in a number of principles on the Right of Access to Information documents, including decisions by international courts on the right to information and statements by authoritative bodies on this issue. An example of such a statement is the Principles on the Right of Access to Information, adopted by the Inter-American Juridical Committee at its 73rd regular session held in Rio de Janeiro, Brazil, on August 7, 2008 (OAS/Ser.Q, CJI/RES.147 [LXXIII-O/08]).

<sup>4</sup> The United Kingdom law, in contrast, does have a fixed list, along with a vested power in the responsible minister to extend the scope of authorities covered. This has resulted in a need for periodic extensions to the authorities covered. See, for example, Orders 2002 No. 2623, 2005 No. 3593, and 2008 No. 1271 adding new public authorities; and Orders 2003 No. 1883 and 2005 No. 3594 removing authorities. A list has the virtue of being clear and unequivocal, but the disadvantages of being potentially less comprehensive and needing to be updated over time.

<sup>5</sup> It could be argued, for example, that the Electronic Freedom of Information Act Amendments of 1996 in the United States simply clarified rights that were already inherent in the earlier law.

<sup>6</sup> Of course, laws may initially contain exceptions that were the result of a political negotiation and subsequently prove unnecessary. Perhaps the most obvious example of this was

the inclusion in U.S. law of an exception relating to geologic and geographic information concerning wells—added because of lobbying by the oil industry—that is not even subject to a harm test.

<sup>7</sup> "File notings" are the written remarks containing the observations, recommendations, and opinions of civil service officers in India. The notes are attached to a file as it is circulated both horizontally and vertically within government.

<sup>8</sup> E-mail correspondence from Venkatesh Nayak, programme coordinator, Access to Information Programme, Commonwealth Human Rights Initiative, India, April 13, 2010.

<sup>9</sup> A summary of the impact of the amendments, as described by the Department of Finance, is available at <http://www.finance.gov.ie/viewdoc.asp?fn=/documents/news/feb03/mcc1127.htm> (accessed December 22, 2010).

<sup>10</sup> See <http://foia.blogspot.com/2010/03/constitutional-reform-and-governance.html> (accessed December 22, 2010). There has been some speculation that this is to prevent further embarrassing allegations of political interference by Prince Charles. There was, in particular, concern about the fact that the prince had written to various government ministers regarding matters of public policy, something many commentators feel that, as heir to the throne, he should not do. See <http://www.guardian.co.uk/uk/2009/dec/16/prince-charles-letters-to-ministers> (accessed December 22, 2010).

<sup>11</sup> See <http://www.cfoi.org.uk/foi250210pr.html> (accessed December 22, 2010).

<sup>12</sup> The public interest override is a key element of a progressive regime of exceptions. It allows (or requires) the release of information even when the release will harm an interest protected by an exception if the release is in the overall public interest (that is, where the benefits of disclosure outweigh the harm to the protected interest).

<sup>13</sup> A formal period of consultation on this extension was held between July 28 and November 2, 2010. The consultation document is available at <http://www.scotland.gov.uk/Publications/2010/07/20123725/0> (accessed December 22, 2010).

<sup>14</sup> See <http://www.cfoi.org.uk/foi160709pr.html> (accessed December 22, 2010).

<sup>15</sup> See <http://www.cfoi.org.uk/mpsexpenses.html> (accessed December 22, 2010).

<sup>16</sup> A full list of the claims investigated by the *Daily Telegraph* is available at <http://www.telegraph.co.uk/news/newstopics/mps-expenses/5297606/MPs-expenses-Full-list-of-MPs-investigated-by-the-Telegraph.html> (accessed December 22, 2010).

<sup>17</sup> See [http://news.bbc.co.uk/2/hi/uk\\_news/politics/8057203.stm](http://news.bbc.co.uk/2/hi/uk_news/politics/8057203.stm) (accessed December 22, 2010).

<sup>18</sup> For an assessment of the harmful potential impact of these amendments, see McDonagh (2003).

<sup>19</sup> To read the 2009 report “The Access to Information Act: First Steps Towards Renewal,” visit <http://www2.parl.gc.ca/content/hoc/Committee/402/ETHI/Reports/RP3999593/ethirp11/ethirp11-e.pdf> (accessed December 22, 2010).

<sup>20</sup> Official Gazette No. 45/30.04.2002.

<sup>21</sup> The text of this bill is available at <http://www.iss.co.za/uploads/POIBILL.PDF> (accessed December 22, 2010).

<sup>22</sup> The act was adopted in 1999, before the ATI law; but the point is that numerous other pieces of legislation may affect proactive publication.

<sup>23</sup> The Council of Europe Convention on Access to Official Documents, adopted November 27, 2008, <https://wcd.coe.int/ViewDoc.jsp?id=1377737&Site=CM> (accessed December 22, 2010).

<sup>24</sup> It is known as the Freedom of Information Advocates Network, <http://www.foiadvocates.net/> (accessed December 22, 2010).

<sup>25</sup> For example, as formerly public functions are increasingly privatized, governments rely more and more heavily on corporate public authorities to conduct their business.

<sup>26</sup> Attempts by government to suppress politically sensitive information have been well documented. For example, see Roberts (2002).

<sup>27</sup> Irish Ombudsman and Information Commissioner Emily O’Reilly described the amendments as “pulling back on access to Government records. . . .” The report “Freedom of Information in Ireland—A Progress Report (09.10.2003)” is available at <http://www.oic.gov.ie/en/MediaandSpeeches/Speeches/2003/Name,422,en.htm> (accessed December 22, 2010).

<sup>28</sup> E-mail correspondence from Venkatesh Nayak, April 13, 2010.

<sup>29</sup> There was considerable criticism of the Irish reform process for this reason. See McDonagh (2003).

<sup>30</sup> See the committee’s report, “The Access to Information Act: First Steps Towards Renewal” at <http://www2.parl.gc.ca/content/hoc/Committee/402/ETHI/Reports/RP3999593/ethirp11/ethirp11-e.pdf> (accessed December 22, 2010).

<sup>31</sup> See note 87 and the surrounding text of this report.

<sup>32</sup> ETS No. 108, January 28, 1981, <http://convention.s.coe.int/treaty/EN/Treaties/Html/108.htm> (accessed December 22, 2010).

<sup>33</sup> Potentially, a constitution might not elaborate on the manner in which it may be amended. This would be a serious failing that lawmakers would have to resolve by reference to some other set of social norms (for example, entrenched traditions).

<sup>34</sup> Articles 38 and 39 of the Constitution Act 1982. This formula has set such a high barrier that none of the several attempts to amend the constitution since it was repatriated from the United Kingdom in 1982 (which is when the formula was added) have been successful.

<sup>35</sup> See, for example, a 1969 decision by the Supreme Court of Japan, outlined in Repeta (1999, p. 3), and the Indian Supreme Court decision, *S. P. Gupta v. President of India* [1982] AIR (SC) 149, p. 232. See also the Canadian case on this issue, *Ontario (Public Safety and Security) v. Criminal Lawyers’ Association*, June 17, 2010, 2010 SCC 23.

<sup>36</sup> See, for example, article 32 of the 1996 Constitution of South Africa (<http://www.constitutionalcourt.org.za/site/theconstitution/thetext.htm>) and article 37 of the 1994 Constitution of Malawi (<http://unpan1.un.org/intradoc/groups/public/documents/cafrad/unpan004840.pdf>).

<sup>37</sup> Norwegian Constitution, available at <http://www.stortinget.no/en/In-English/About-the-Storting/The-Constitution/The-Constitution/> (accessed December 22, 2010).

<sup>38</sup> The English translation of the new constitutional provisions is taken from Gómez Gallardo (2007), available at <http://www.juridicas.unam.mx/publica/librev/rev/comilawj/cont/10/lay/lay6.pdf> (accessed December 22, 2010).

<sup>39</sup> See article 19 of the International Covenant on Civil and Political Rights.

<sup>40</sup> The regime for limitations is set out in article 36. Even in South Africa, however, the constitution allows legislation giving effect to this right to “provide for reasonable measures to alleviate the administrative and financial burden on the state.” See article 32(2).

<sup>41</sup> One exception is Hungary, where there has been a flow of constitutional cases on this issue—one of which led to the breakthrough decision on access to information by the European Court of Human Rights, *Társaság A Szabadságjogokért v. Hungary*, April 14, 2009, Application No. 37374/05.

<sup>42</sup> See *Brümmer v. Minister for Social Development and Others* (CCT 25/09) 2009 (6) SA 323 (CC) (August 13, 2009).

<sup>43</sup> *Ontario (Public Safety and Security) v. Criminal Lawyers’ Association*, June 17, 2010, 2010 SCC 23.

<sup>44</sup> Basically, the Supreme Court said that the exercise of discretion by a public authority over whether to release a document, introduced by the term “may” in an exception (as in “a public authority may refuse to release information. . . .”) required the public authority to consider the overall public interest in disclosure before refusing to release

the information. For an analysis of the case, see “Supreme Court Upholds a Constitutional Right to Information,” available at <http://www.law-democracy.org/wp-content/uploads/2010/07/10.06.Winston.SCC-FOI-Decision.pdf> (accessed December 22, 2010).

<sup>45</sup> *Claude Reyes and Others v. Chile*, September 19, 2006, Series C No. 151.

<sup>46</sup> Once again, Hungary should be mentioned as an exception to this. See note 41.

<sup>47</sup> These go by different names in different countries: “statutory instruments,” “regulations,” “orders,” and so on.

<sup>48</sup> In Canada, for example, the Statutory Instruments Act, R.S.C. 1985, c. S-22, governs the adoption of secondary rules.

<sup>49</sup> Thus, regulations pursuant to section 82(2) of the U.K. access to information law must be positively approved by both houses of parliament, whereas regulations pursuant to section 82(3) must be placed before both houses of parliament, either of which may annul them. The positive approval process covers such regulatory powers as adding authorities that undertake public functions, extending the timelines for responding to requests, and repealing legal provisions on secrecy; negative approval covers everything else.

<sup>50</sup> See articles 15, 16, and 37(III), (IV), and (IX) of the Mexican access to information law. The rules adopted by the Instituto Federal de Acceso a la Información Pública (along with other legal rules relevant to the right to information) may be found (in Spanish) at [http://portaltransparencia.gob.mx/pot/marcoNormativo/buscar.do?method=buscar&\\_idDependencia=06738](http://portaltransparencia.gob.mx/pot/marcoNormativo/buscar.do?method=buscar&_idDependencia=06738) (accessed December 22, 2010).

<sup>51</sup> An attempt in October 2006 to increase fees in the United Kingdom through regulation, including the power of public authorities to refuse to process requests deemed to be too costly, was very controversial. A report assessing the impact of the proposed changes is available at <http://www.article19.org/pdfs/analysis/uk-foi-costs-07.pdf> (accessed December 22, 2010).

<sup>52</sup> That means it is inherently natural and positive.

<sup>53</sup> Access to information rules can increase the power of MPs relative to the bureaucracy because the latter holds far more information.

<sup>54</sup> Businesses are a very important user group in many of the more established access to information systems. A right of access creates information synergies between the public sector and businesses as it promotes government’s dissemination of the information that businesses need.

<sup>55</sup> Such NGOs range from environmental and consumer groups, to women’s groups, to development groups, and so on.

<sup>56</sup> Over time, openness can improve relations between the public sector and the general public. It can also serve to protect honest civil servants against being blamed for things that are not their fault. Thus, civil servants unions supported the campaign for an access to information law in the United Kingdom.

<sup>57</sup> This has often been recommended as a strategy. See, for example, Mendel (2009, p. 853). Also see Fuchs (2008).

<sup>58</sup> See its Web site: [http://www.aip-bg.org/index\\_eng.htm](http://www.aip-bg.org/index_eng.htm) (accessed December 22, 2010).

<sup>59</sup> See its Web site: <http://www.meida.org.il/> (accessed December 22, 2010).

<sup>60</sup> See its Web site: <http://www.opendemocracy.org.za/> (accessed December 22, 2010).

<sup>61</sup> See its Web site: <http://www.cfoi.org.uk/> (accessed December 22, 2010).

<sup>62</sup> See its Web site: <http://www.righttoinformation.info/> (accessed December 22, 2010).

<sup>63</sup> Expressed in e-mail correspondence on April 21, 2010, for example, this was the view of Maeve McDonagh, an associate professor at the College of Business and Law, University College Cork, and an expert in the Irish right to information.

<sup>64</sup> See, for example, Fuchs (2008) and Mendel (2009); also see Gundersen (2008).

<sup>65</sup> According to an e-mail received by the author on February 19, 2010, from Tom Susman, director of the Governmental Affairs Office of the American Bar Association, businesses played an important role in initiating the reform process in the United States in 1980.

<sup>66</sup> E-mail correspondence from Roy Peled, director, Movement for Freedom of Information in Israel, February 19, April 12, and April 20, 2010.

<sup>67</sup> See <http://www.gwu.edu/~nsarchiv/index.html> (accessed December 22, 2010).

<sup>68</sup> E-mail correspondence from Ricardo Corcuera, director, Observatorio de la Vigilancia Social, Peru, April 21, 2010.

<sup>69</sup> See PriceWaterhouseCoopers (2009) and RaaG/NCPRI (2009).

<sup>70</sup> They are still conducting these audits, with the most recent one published on March 15, 2010. They are available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB308/index.htm> (accessed December 22, 2010).

<sup>71</sup> E-mail correspondence from Shushan Doydoyan, director, Freedom of Information Center of Armenia, February 20, February 22, and April 14, 2010.

<sup>72</sup> In 2002, a government-appointed access to information review task force published its report, “Access to Information: Making It Work for Canadians.”

<sup>73</sup> E-mail correspondence from Venkatesh Nayak, April 13, 2010.

<sup>74</sup> Thus, in the early days, the media was reluctant to push for a right to information law in the Philippines, although they were eventually brought into the campaign. This has been observed in Paraguay.

<sup>75</sup> The *Press Gazette* is a British media trade magazine dedicated to journalism and the press.

<sup>76</sup> In Mexico, for example, there is a real sense that the law works because stories are published in the media every

week about releases that actually affect people. See Mendel (forthcoming).

<sup>77</sup> Available at <http://www.atirtf-geai.gc.ca/report2002-e.html> (accessed December 22, 2010).

<sup>78</sup> “Response to the Report of the Access to Information Review Task Force—A Special Report to Parliament,” <http://dsp-psd.pwgsc.gc.ca/Collection/IP4-1-2002E.pdf> (accessed December 22, 2010).

<sup>79</sup> See <http://www2.parl.gc.ca/Content/LOP/ResearchPublications/prb0555-e.htm#a10> (accessed December 22, 2010).

<sup>80</sup> Available at [http://www.infocom.gc.ca/eng/pa-ap-atia\\_reform\\_2009-march\\_2009-strengthening\\_the\\_access\\_to\\_information\\_act\\_to\\_meet\\_todays\\_imperatives.aspx](http://www.infocom.gc.ca/eng/pa-ap-atia_reform_2009-march_2009-strengthening_the_access_to_information_act_to_meet_todays_imperatives.aspx) (accessed December 22, 2010).

<sup>81</sup> The committee recommended that the minister give further consideration to one recommendation.

<sup>82</sup> In the 2002 elections, the Fianna Fáil party took 81 of 166 seats (an increase of 8 seats), with 41.5 percent of the popular vote.

<sup>83</sup> It may be noted, however, that the tendency in the United States has been for the Democratic Party to support greater openness and the Republican Party greater secrecy.

<sup>84</sup> The committee’s Web site address is <http://www2.parl.gc.ca/committeebusiness/CommitteeHome.aspx?Cmte=ETHI&Language=E&Mode=1&Parl=38&Ses=1> (accessed December 22, 2010).

<sup>85</sup> Available at <http://www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=3999593&Language=E&Mode=1&Parl=40&Ses=2> (accessed December 22, 2010).

<sup>86</sup> There was a partial exception to one recommendation on opening up cabinet confidences: the committee recommended further consideration by the minister.

<sup>87</sup> The government’s response is available at <http://www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=4139070&Language=E&Mode=1&Parl=40&Ses=2> (accessed December 22, 2010).

<sup>88</sup> In the Senate, a 60 percent majority was required.

<sup>89</sup> E-mail correspondence from Roy Peled, February 19, April 12, and April 20, 2010.

<sup>90</sup> See, for example, <http://timesofindia.indiatimes.com/india/PM-Manmohan-Singh-Sonia-differ-on-amendments-to-RTI-Act/articleshow/5645732.cms> (accessed December 22, 2010).

<sup>91</sup> Copies of the letters exchanged are on file with the author of this report.

<sup>92</sup> It may be noted that recognition of this right has been particularly strong within the inter-American system of human rights, so this effect may be expected to be stronger there.

<sup>93</sup> In February 2008, Meredith Fuchs stated that the National Security Archives had found the “US FOIA system to be in disarray” (Fuchs 2008, p. 2). A major factor identified by the National Security Archives was the massive delays in obtaining access, and the 2007 amendments focused heavily on addressing this problem.

<sup>94</sup> E-mail correspondence from Tereza Alexova, member of the legal team, Access to Information Programme, Bulgaria, March 2 and May 11, 2010.

<sup>95</sup> E-mail correspondence from Shushan Doydoyan, February 20, February 22, and April 14, 2010.

<sup>96</sup> The Mazdoor Kisan Shakti Sangathan in Rajasthan, India, played a leading role in this process. See some sample stories on its Web site: <http://www.mkssindia.org/right-to-information/>. See also Singh (2010).

<sup>97</sup> See McDonagh (2003) on Ireland, and notes 80–82 and the surrounding text on Canada in this working paper.

<sup>98</sup> Two significant amendments were adding in sanctions for obstructing access (1999) and expanding the scope of coverage of public companies (2005).

<sup>99</sup> Available at <http://www.justice.gov/archive/oip/foia/post/2001foiapost19.htm> (accessed December 22, 2010).

<sup>100</sup> One weakness in the methodology applied here is that it assesses only attempts to amend legislation, whether successful or not. It does not look at cases where there have been no attempts to amend even weak legislation on access to information.

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