STRUCTURAL AND CULTURAL CONTEXT:
Creating an environment for transparency
Shekhar Singh

The questions before the working group are: what are the environmental (infrastructural) and cultural factors necessary for the establishment, growth, and efficacy of a transparency regime that safeguards people's right to information? How can one promote these factors?

Elements of an Effective Transparency Regime
An effective transparency regime could have various elements. Chronologically, it is often preceded by the mobilisation of support within and outside the government, and in the media, legislature, and judiciary. This is important not only to ensure that a law facilitating the exercise of the right to information is passed, but also to influence the nature of legislation and to ensure that the law, once passed, is used.

Concurrently, it might be desirable to mobilise expert groups who can engage with the government and influence the drafting of the proposed legislation, and who can help mandate it among different stakeholders. Lobbying groups could be useful to pressurise governments to quickly pass the law, in the form suggested, and to then fight for the implementation of the law.

Perhaps the most critical element of an effective transparency regime is the existence of a reasonable right to information law with provisions for an independent appellate mechanism, for stringent penalties, and with strong *suo moto* provisions. Equally important is the appointment of fair and independent functionaries, especially to the independent appellate authority.

The next step might very well be to raise awareness among the public, especially on how the law can positively affect their lives. Often there is the additional need to dispel cynicism (and fear of adverse consequences) from the minds of the people.

Equally important could be the orienting and sensitization of the information providers, especially within the government. There usually is a need to develop institutional and individual capacities (and budgets) within the information providers (IPs). Of great advantage could be the development of improved systems of collecting, processing, storing and retrieving information among the IPs.

A parallel effort might be required to help develop the capacity of the people to use the act and to persist till information is actually provided. They also might need help to comprehend, contextualise and effectively use the information so accessed.

In order to ensure that the transparency regime becomes progressively more effective, it is perhaps necessary to set up an effective feedback mechanism so that problems with the law and with its implementation can be identified and corrective measures developed.

Finally, IPs could be expected to proactively (without being asked) put an increasing amount of information into the public domain.

Cultural and Structural Factors Affecting a Transparency Regime

Transparency regimes appear to do best where people feel a sense of empowerment, especially in terms of holding their government answerable and, where necessary, of challenging the system and the powers that be. However, for transparency to flourish, it also appears that this sense of empowerment needs to be tempered with an ability and inclination to resolve issues through reason and negotiation, rather than through violence. Additional advantage seems to be drawn from social institutional structures, where available, that have historically promoted a tradition to collectively support individual action and, where required, to act together.

Also of relevance seems to be the level of cynicism affecting the society and the expectations that the people have from the system (especially from the government).

Perhaps the most critical of the factors is the political system prevailing in a country, especially in terms of how democratic and representational it is. Independence of, and interaction between, the various wings of the government – especially the executive, legislature and judiciary (and, often, the armed forces as an independent power) – appear to be other critical factors.

Diversity of views, ideologies and approaches (and even conflicts) within each wing of the government sometime appear to contribute to a transparency regime, as do other aspects of cultural and ideological diversity. Of great importance might be the extent to which media is independent of government, corporate, and political interests, and how diverse are its loyalties and how progressive is its agenda.

Transparency regimes are often affected by the relative primacy of other laws antagonistic to transparency, especially laws protecting official secrets. How centralised or decentralised decision making is, is also sometimes a pertinent factor which determines whether those that influence the lives of the people are easily recognisable and approachable by the people.

Security and economic concerns are often a major impediment to transparency regimes. The role of (and cooperation and support from) the international community, including bilateral and multilateral donor agencies, can also be a significant influence.

Independent and proactive groups in society, including from the legal community, civil society groups – especially human rights and environmental groups, can contribute much to the setting up and maintenance of a transparency regime. As often can the larger international community.

The Questions Again
1. Are these the factors that affect transparency regimes – or are there some others?
2. How can we help promote these factors, where they are missing or weak?
3. Should transparency regimes be attempted if critical support factors are weak?
4. What, if any, could be the role of technology in facilitating a transparency regime?
5. What influence can the international community bring to bear on this issue – and how?
6. What role does culture play in the effectiveness of the right?
7. How can we deal better with the particular problems that arise in small societies?
8. Where do we go from here? What could be our next action?

Group Two

**Structural and Cultural Context:
creating an environment for transparency**

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Making the Law Work

The Challenges of Implementation

Laura Neuman and Richard Calland

Prologue: Unearthing the Goblet

Carlton Davis is Jamaica's Cabinet Secretary, the country's most se-
nior public servant. In July 1993, on one of his first days on the
job, he took a walk around his new domain and discovered a room
full of papers. There were piles and piles of documents. Rooting
around, coughing with the dust, he moved one particularly large
tower only to discover beneath it a silver goblet. Polishing it with
the sleeve of his jacket, he read to his amazement that it was a
special commemorative Olympic trophy that had been awarded
to the successful Jamaican athletics relay team decades before. It
was a national treasure, yet it had been literally buried in papers.
What other nuggets of history or critical information were lost in
the chaos of unorganized and discarded documents? A scientist by
training, he understood the value of learning from the past and the

importance of good documentation to make this possible, and was greatly concerned by what he had found. Looking back now, Davis traces his commitment to access to information to that moment. He recognizes the value of access as a human right and the role information can play in engaging citizens. But equally so, as a leader in Jamaica's quest for modernization in public service and more efficient governance, he believes that a well-implemented access to information law is an instrument that governments can use to learn from past successes and mistakes.

Introduction

Davis is one of a new breed of public servants determined to challenge a culture of secrecy, whose commitment will determine whether the host of legal and institutional changes described throughout this book lead to significant and lasting transformation in the relationship between those in power and the citizens they serve. Although there is now widespread international recognition of the importance of establishing effective information regimes, there has not been equivalent emphasis laid on the obstacles facing governments and citizens in responding to the challenge of implementing transparency law and policy. This demands leadership, resources, and the personal conviction of "transparency champions."

The actions of governments in the implementation phase are often related to the original motive or purpose for supporting a transparency law, and the manner in which the law was passed. When the law was passed as part of an integrated policy or to meet an inherent need or civil society demand, there has tended to be greater commitment to implementation. So for some governments like Jamaica's, it is the desire for efficiency and modernization that drives them to pass access to information (ATI) laws. For others, it is the need to rebuild trust with citizens through the sharing of information and creation of new political space, such as in Bolivia, which has initiated transparency mechanisms while waiting for the passage of enabling legislation, or in South Africa during its democratic transition. A commitment to the establishment of a new order based on human rights spurs the creation of a new access to information regime. In Sinaloa, Mexico, the governor passed a comprehensive access to in-

formation law because he wanted his citizens to have faith in the state government and therefore begin paying their taxes. In all of these cases, generally there has been a greater emphasis on implementation so that the benefits of the law are realized.

But where a government has passed the law to satisfy an international financial institution as a "condition" for loan or debt relief or to join an intergovernmental organization, regional trade group, or common market, its true commitment to full implementation may be in question. For example, in both Nicaragua and Honduras, the executive branch included the passage of an access to information law as one of the conditions to receive debt relief under the Highly Indebted Poor Countries Program of the World Bank and IMF. Until recently, both countries had suffered from a lack of enthusiasm from other sectors, most prominently the legislative branch, and passage of the law remains elusive.

Whatever the underlying reason for establishing a transparency regime, after a decade of proliferation of access to information laws, with around seventy countries now enjoying a legislated right to information, it is clear that the stimulus of both a supply of information and a demand is the key to meeting the policy objectives. This supply-demand intersection is a fundamental part of our hypothesis for effective implementation and use of the law. This chapter will focus on the government side of the equation—the "supply side"—where there is a new body of knowledge arising from the legislative explosion of the past decade. Examples from Latin America, the Caribbean, and South Africa will highlight the recent lessons learned.

Notwithstanding the emphasis on the "supply side," ensuring the success of an ATI law is a matter of co-responsibility. Not all the burden lies with government: citizens, civil society and community organizations, media, and the private sector must take responsibility for monitoring government efforts and using the law. Without an adequately developed "demand side," the law is likely to wither on the vine. In other words, the demand and supply sides must match, and where they intersect will determine the quality of the transparency regime.

Great focus continues to be placed on passing access to information laws; model laws have been widely distributed, with specific versions for Africa and most recently Latin America and the Caribbean,[1] and many countries around the world have heeded the call to enact them. Nevertheless, experience has proven that passing the law is

the easier task. Successful implementation of an open information regime is often the most challenging and energy-consuming part for government. And yet, without effective implementation, an access to information law—however well drafted—will fail to meet the public policy objectives of transparency.

Diagnosing the Implementation Challenge

Although the sheer number of civil servants engaged in the application of an access to information law may be immense—from all ministries and more than 200 agencies in Jamaica to approximately 100,000 public authorities in the United Kingdom that are mandated to apply the law—until recently little attention has been paid to the theory and practice of implementation.

In 2003, the Open Society Institute (OSI)'s Justice Initiative recognized the need to assess the success of implementation efforts and advance good implementation practices.[2] In five countries a pilot monitoring study was conducted. In each country, four different types of people—non-governmental organization representative, journalists, ordinary individual citizens, and "excluded person" (defined as someone who because of their social or economic circumstances faces serious obstacles to engagement, for example illiteracy, disability, or poverty)—submitted a total of approximately 100 requests to 18 different government agencies. The same request was made to each agency twice, by a different requester, in order to test whether the agency responded differently according to the type of person. In addition, there were three distinct classes of requests submitted, as determined by the pilot study organizers: routine, difficult, and sensitive.

The results illuminate the challenges of implementing transparency legislation, and coincide with the firsthand experiences of many implementers and users. Of the 496 requests for information filed in the five countries during the monitoring period, a total of 35.7 percent, or just over one in three requests, received the information sought. Approximately half of the requests (49.6 percent) received the information or written refusals within the time periods established in the respective laws.[3] This is clearly progress toward transparency. As the report noted, "the five monitored countries are all introducing new standards of government transparency,

while undergoing democratic transitions. In this context, both outcomes—compliance with international FOI [Freedom of Information] standards in almost 50 percent of the cases, and the provision of information in response to 35 percent of requests—can be seen as a solid basis for building greater openness."[4]

Unfortunately, the OSI report also records that over one third of requests met with complete silence from the authorities. In terms of these "mute refusals," as the survey refers to them, South Africa fared the worst, with 63 percent of the properly submitted requests completely ignored. As the country report on South Africa comments, "These results are of particular concern given that South Africa's FOI law, the 2000 Promotion of Access to Information Act (PAIA), the first of its kind in Africa, has been hailed as a model for other African countries."[5] Though the South African law may be the best drafted and most comprehensive among the five test countries, in terms of compliance with international standards and best practice, only 23 percent of requests were successful, compared with 34 percent for Macedonia, which had no legal right to access information, Armenia with 41 percent, and the best performing, Peru, with 42 percent. The OSI report on South Africa noted that "a common feature of the bodies which performed well in the monitoring was that they had made a serious commitment to implementing the law and believed in its potential."

Implementation of an access to information law is complex, and common challenges may include difficulty in adjusting the mindset of the bureaucracy and people who hold the information; a lack of capacity in relation to record keeping and record making; insufficient resources and infrastructure; inadequate staffing in terms of training, specialization, and seniority; and a lack of capacity building or incentive systems. The OSI monitoring exercise helps illustrate that even the best laws can be rendered meaningless when the myriad of implementation challenges are not addressed.

Enabling legislation for the right to information should be seen as a three-phase process: passage, implementation, and enforcement of the access to information law, the "transparency triangle." All three elements are crucial and interrelated, but experience indicates that the implementation phase is paramount and serves as the base of the triangle. Without full and effective implementation, the right to information becomes just another example of the "hyperinflation" of

new laws that serve no one.[6] While many of the chapters in this book describe struggles to pass laws, the focus in this chapter is on what happens after the bill is signed.

Setting the Stage

The successful implementation of an access to information regime depends on a variety of factors, both technical and political. The more technical aspects are discussed in detail below, but in realizing implementation of the right to information, three additional points are crucial: the degree of societal involvement in the demand for and drafting of the legislation, alternative approaches taken by the government, and embedding provisions for implementation into the law.

Instituting a New Information Regime: The Process

In terms of legitimacy, sustained monitoring, and usage, the process through which the new access to information law is conceived and promulgated is critical. As discussed above, governments may choose to provide this right to information for a variety of reasons: a new constitution is drafted; a new administration or a faltering ruler is seeking methods to raise their image in response to a government scandal, corruption, or public health crisis; to meet provisions for acceptance to multilateral organizations; or to comply with international treaties and agreements. But when civil society has played a significant role in advocating for the law and lobbying around the key provisions, the information regime has tended to truly flourish, thus overcoming the "check the box" syndrome. In countries such as South Africa, Bulgaria, India, Mexico, Peru, and Jamaica, widespread civil society campaigns or well-publicized efforts from highly influential civil society groupings augmented and encouraged the government efforts to pass enabling legislation. While implementation still has proved to be a challenge, in each case, civil society organizations that emerged from the campaigns for the law are monitoring and testing the system and urging greater government compliance. Through the campaign for a legislated right to information, organizations became vested in the law's success, there was

more significant buy-in from society, and in turn the laws have enjoyed greater credibility and use.

In Jamaica, for example, a diverse group from civil society worked together to seek amendments to the proposed law and to fight for more robust legislation. This coalition included such strange bedfellows as human rights and democracy non-governmental organizations (NGOs), journalists' associations, prominent media owners, private sector representatives, and the Civil Service Association.[7] Many of these same actors have remained engaged in monitoring the government's implementation efforts and in using the law, and as a special Parliamentary Committee considered additional changes to the legislation in 2006, the civil society monitoring efforts were the only statistics on implementation available for consideration.

In South Africa, the Open Democracy Campaign Group, which from 1995 to 2000 pushed for a strong law to give effect to the right to access information enshrined in the country's new 1996 constitution, included human rights NGOs, church organizations, environmental pressure groups, and the powerful trade union umbrella body COSATU.[8] These advocacy efforts translated into a constituency willing and eager to use the new instrument and prepared to monitor government's implementation and enforcement performance.

In countries where civil society was not engaged in the debate, the right to information has atrophied and the law has never been fully implemented. Belize passed its Freedom of Information law in 1994, one of the first countries in Latin America and the Caribbean to do so. It was accomplished with little public or parliamentary debate and no civil society involvement. For the past decade the law has been used only a handful of times, and rarely with success. When asked, NGO leaders indicated minimal knowledge of the law and little faith in its ability to promote greater transparency.[9]

In the worst cases, when there is no participatory process, laws are passed that are contrary to the principles of openness and limit freedom of information and expression, as in both Zimbabwe and Paraguay.[10] In contrast, Peru presently enjoys a comprehensive access to information law that was drafted with a wide sector of civil society involvement, support from the ombudsman's office, and extensive consultations with the armed forces. However, the right to information was not new to Peru. In response to the collapse of the Fujimori dictatorship and the pervasive allegations of government

corruption, in 2000, the interim president, Valentine Paniagua, is-sued a presidential decree supporting a right to public information held by the executive. Laudable in its purpose, this unilateral decree was not fully applied or utilized. Although the newly passed legisla-tion does not greatly expand on the decree, the manner in which it was promulgated, with civil society advocacy and debate, has led to increased legitimacy, implementation, and use.

Civil society alone may not be sufficient to ensure full imple-mentation of an access to information law. However, where there are strong advocates, government and information holders' failure to comply is more often noticed and challenged. Thus, committed civil society organizations serve as a counterbalance to faltering imple-mentation efforts. Through continued use of the law and monitor-ing, implementation problems may be highlighted and the govern-ment obligated to assign greater emphasis and resources to resolve obstacles. Without civil society engagement, administrators could simply allow the right to fade away from neglect and disregard.

Vanguard Steps

Like Peru's former president Paniagua, other government leaders are increasingly seeking means to demonstrate their commitment to transparency without waiting for completion of the law-making and implementation phases. If the process of passing the law includes consensus building and sufficient time for effective implementa-tion is afforded, it potentially could be years before anyone could exercise his or her right to information. Moreover, in some contexts the fragmentation, weakness, or skepticism of the legislature has blocked the passage of a comprehensive law. Thus, in an attempt to satisfy citizen desire for more immediate results and to learn critical implementation lessons earlier, executives are experimenting with tools other than legislation, such as Supreme Decrees and voluntary openness strategies.

For example, in Peru, Argentina, and Bolivia, supreme decrees that carry the weight of law were issued to promote transparency. Such decrees can be accomplished quickly, demonstrate government commitment and political will, begin the process of shifting the cul-ture of secrecy, provide implementation experience, and serve as a

platform for the more extensive legislation. But there are also striking disadvantages. First, supreme decrees apply exclusively to the executive, leaving aside the other branches of government and the private sector. Moreover, they often serve as a pseudo-panacea minimally satisfying the call for openness, but potentially slowing down the passage of a comprehensive right to information law. As they do not engage the legislature, they are rarely, if ever, accompanied by a budget for implementation. Compared with any other legislation that addresses information availability or disclosure, supreme decrees always will be the lowest on the totem pole, and their objectives will often be frustrated by older secrecy provisions that override the decree. Moreover, supreme decrees are rarely produced in an inclusive process of drafting and consultation, and thus provide less opportunity for building legitimacy and buy-in. Finally, if not effectively implemented, a supreme decree, like a law, can raise unrequited expectations and delegitimize positive government efforts.

In Bolivia, the passage of a Supreme Decree for Transparency and Access to Information has proved particularly detrimental. Following its issuance in January 2004, which provided a right of access to a limited class of documents, media representatives and some civil society groups strongly rejected the effort. Failure to consult with these relevant stakeholders and poorly drafted exemptions provided sufficient fuel for key groups to publicly denounce the decree. Since its initial announcement, there have been few efforts to systematically implement its provisions, and even fewer examples of its use. This damaging experience has caused some sectors, most strikingly members of the media workers' union, to distrust further access to information initiatives, including proposed comprehensive legislation. The decree in Bolivia became so distracting that the only issue under discussion was its reform or rescission, as the media refused to support the consideration of a comprehensive law until the other point was resolved. Four years (and three presidents) later, the media workers' union remains skeptical of any effort regarding access to information.

In Argentina, the Supreme Decree for Transparency, issued by President Kirchner in February 2004, initially enjoyed greater public support. In contrast to the Bolivia case, it was issued in response to more than five years of civil society demand for the right to information. In the wake of the 2002 economic collapse and presidential

resignations, fearful and disorganized members of the Lower House passed the draft access to information law. As the political parties regrouped and regained some legitimacy, they no longer saw the need for such a threatening piece of legislation and blocked its final passage in the Senate. The only recourse was a supreme decree. However, as with the Peru example, the decree has not satisfied the need for a law, and civil society groups continue their campaign.[11]

Short of a legally binding tool, governments are increasingly considering pilot projects as a vanguard to an access to information law. Voluntary Openness Strategies (VOS) and Codes for Transparency, such as the United Kingdom's Publication Schema, can begin the transformation from a culture of secrecy to one of openness and be a platform for the more comprehensive right to information legislation. Focusing the VOS on a few key pilot ministries and agencies that agree to provide an extensive range of information to citizens can help prepare for effective implementation of a transparency law, when ultimately passed. These pilot bodies have the opportunity to develop best practices and to become "islands of transparency."

Other pilot projects could include release of certain classes of documents across the government, or release of all information related to a particular theme. In India, the Ford Foundation agreed to fund a "model district" where intensive focus is placed on one district to "address all micro-issues and nuances involved in implementation" and demonstrate what is possible.[12] The World Bank, in response to activist demands, appears prepared to begin such a pilot project with a one-year experimental public release of key documents simultaneously with their submission to the board.[13] These pilot projects may satisfy some user demand while concurrently preparing governmental bodies for the more extensive rollout of transparency measures.

Drafting the Law: Taking Account of the Implementation Challenge

Finally, when writing an access to information law, it is important to consider the processes and procedures necessary for its effective implementation and full enforcement. It is easy to become overly

preoccupied with the exemptions section, to the exclusion of other key provisions. While national security exceptions may be more interesting and controversial than the implementation procedures, they are often much less important in determining the bill's overall effectiveness in promoting real transparency. In Peru, there were months of productive meetings between the Press Council and the armed forces to negotiate and agree on the national security exemptions. However, this same energy was not invested in designing the archival system or appeals process.

Focusing exclusively on the exemptions is misguided. In reality, if governments are determined to withhold information for whatever reason, they will do so regardless of the exactness with which the exceptions to access are written in the law. Thus, more emphasis must be given to the procedures for legal challenge when and if the exemptions are used to shield information. Issues such as mandatory publication of certain information, time limits for completion of information requests, administrative duty to assist the requester, costs for requests and copying, sanctions for failure to comply, reporting requirements, and appeals procedures must receive much greater attention. These practicalities ultimately will determine the value and usability of such a law for ordinary citizens.

For example, there needs to be greater detail in the law or regulations on the procedures for implementing and applying the legislation. In countries such as South Africa, where civil servants are accustomed to following laws with great deference, it proved critical to provide for all the implementation mechanisms within the law and limit discretion. Moreover, with greater exactitude in the law, it is easier to hold government departments to account for failure to properly implement it. In other words, it is easier to demand and get adequate implementation of systems and procedures where the law is clear and specific, with sufficient level of detail, than where it is vague or too general.

Two additional legislation-drafting issues deserve brief mention. First, principles for good record making and records management may be included within the access to information law, particularly when countries lack specific archiving legislation to guide the public administrators. The specifics can be detailed through regulations, but it is helpful to have clear statements of purpose related to information systems as part of the access to information mandate.

Second, the primacy of the ATI law must be clearly stated within the law's text. There is often other extant legislation that deals with information—whether it is on archiving, official secrets, the armed forces, banking, or public administration. Canvassing the multitude of laws that speak to the issue of information would be difficult and time-consuming for both the requester and the civil servant who must respond. Arguably, if a public servant were expected to review each potential law and article related to the subject matter of each request, the response time would be enormous and the result likely to be a denial. To eliminate conflict of laws, promote full implementation, and reduce confusion among stakeholders, it is critical that the access to information law is the overriding legislation. The ATI law should clearly state that it governs all requests and capture all exceptions to release.

The state of Sinaloa, Mexico has one of the most advanced and modern access to information laws in the region. Passed before the federal law, it has been in effect since April 2002. During the initial period of application, the government has identified the failure to explicitly state the primacy of the law as one of its major flaws. Because of the problems and delays encountered, such as confusion and opportunity to subvert the objectives of openness, the implementers are already requesting an amendment or modification to clearly state that in questions of information, the access to information law will govern. The same has proven true in Jamaica, where the Information Officers have joined civil society efforts to amend the Access to Information Act to unquestionably apply as supreme over all requests.

Implementation of the Law

Robust implementation is very difficult to achieve, and thus far insufficient attention has been paid to the multitude of obstacles and potential solutions. As the British minister responsible for its Freedom of Information law argued the year before it came into effect, "Implementation has been beset by three problems. . . . A lack of leadership. Inadequate support for those who are administering access requests. And a failure to realize that Freedom of Information implementation is not an event: it is a process which demands long-term commitment."[14]

The Politics of Implementation

POLITICAL WILL AND MIND SHIFT

Effective implementation demands political commitment from the top, both to ensure that the necessary resources are allocated and to overcome entrenched mindsets of opacity. The resource demands are significant, particularly in societies where a culture of secrecy has dominated the past and where there are no processes already in place to facilitate the archiving and retrieval of documents.

Most governments are accustomed to working in a secretive fashion. The notion of transparency is invariably far beyond the range of experience and mind-set of most public bureaucrats. Therefore, a fundamental mind shift is necessary, prefaced with political will for a change in approach. The mind-set of opacity is common; it seems that in general, bureaucrats have developed an ingrained sense of ownership about the records for which they are responsible. Releasing them to the public is akin to ceding control and, therefore, power.

Moreover, comprehensive information regimes can take an enormous amount of energy and resources. Daily, governments are faced with a myriad of priorities and the reality that there are not enough resources in the national reserves to meet all demands. In a recent study of efforts to implement the new law in Great Britain, the Constitutional Affairs Committee received a submission from the local government association stating "that resources are the single most important issue in FOI compliance."[15] It went on to explain, "By far the largest issue for local authorities is the lack of resources. They do not have the time, money, or personnel to easily organize information on a corporate basis in order to allow ready retrieval for FOI purposes." In the United States, recent efforts to improve the functioning of the Freedom of Information Act have not been accompanied with additional resources, leading many advocates to question the intention and increasing the potential for their failure.

Thus, once the access to information law is passed, some governments claim credit for the passage but fail to follow through to ensure that the law will succeed in practice. Others, realizing the enormity

of the tasks necessary to implement the law, fail to commit the appropriate resources or simply lose interest. Still others that have demonstrated the requisite political will may find it difficult to sustain. The indicators of political will vary from country to country, but some might include the government's preparedness to underpin the right to information in the constitution (as in South Africa and perhaps Bolivia), the government's willingness to accept and encourage citizen participation in the process of writing the law, or the provision of sufficient and continued resource allocations. Whatever the specific method, political will must be signaled clearly and from the very top, if the task of entrenching a new culture of openness is to survive beyond the implementation challenges and for the long term.

In Jamaica, Bolivia, Mali, and Nicaragua, we have had the privilege to lead implementation workshops for senior public servants. In these retreats of department directors, permanent secretaries, and information officers, we asked what would be necessary to ensure adequate implementation. The resounding answer in each country was resource allocation and political will. Interestingly, when asked what would be a demonstration of political will, the civil servants responded, "resource allocation." Unfortunately, in these and many other countries with new information regimes, national and ministerial budgets are not prepared with clear line items for access to information, thus mandating implementers to find monies from other pots, or take on additional responsibilities and costs without an increase in resources. As leading scholar Alasdair Roberts noted in his recent research, "The budget for central guidance of the British FOI implementation effort exceeded the budget of the Jamaican Access to Information Unit (with its staff of four); the government's Archives and Records Department; the other parts of the Prime Minister's Office; and the Jamaican Houses of Parliament—combined."[16]

A major part of the fight for financial resources entails determining the specific needs. This is not a simple task. However, in general, costs for a new information regime include three categories: start-up, ongoing, and exceptional. Start-up costs may include a study of the extant archiving and record-keeping system, development of a new archiving system, preliminary training of civil servants, equipment purchases for processing requests, like photocopiers and printers; and expenses related to hiring and setting up a new coordinating

unit for information. Ongoing costs would include annual salaries and benefits for information officers, ongoing training related to record keeping and the law, promotional and awareness-raising activities, overhead and rental for related offices, equipment maintenance fees, paper, and other costs related to provision of documents. The exceptional category may cover items such as extraordinary litigation costs or large seminars.

In practice, many of the resources applied toward the needs of an access to information regime are drawn from existing budgeted items. For instance, rather than hire a new staff person, the administration gives already employed civil servants additional responsibilities; computers are used for more than one purpose; or overhead costs are not broken down. Specific cost information is available in only a few countries in the Western Hemisphere, and generally only in those like Mexico, where there is a separate line item in the overall federal budget. However, there are some cost figures that can guide the discussion. For example, in Mexico the first annual budget for the Federal Institute for Access to Information was US$25 million. This provides the "Rolls Royce" version of access to information, such as a brand new building, staff of over 150, and an advanced Internet-based system that would make major corporations jealous. In Mexico, the government expends approximately 0.033 percent of GDP on their access to information regime. Other countries have much more limited expenditures, such as the estimated U.S. 0.0007 percent of GDP or Canada's 0.004 percent.

The political fight for resources is easier to wage when the benefits are quantified, for example, in terms of money saved from reduced corruption. In Buenos Aires a transparency pilot project was initiated in the public hospitals whereby procurements for medical items, such as needles, bandages, surgical gloves, and plastic items were made public. The result was a savings of 50 percent, merely through the publication of contract bids. A similar exercise was conducted for Mexico's largest public university, with a like outcome due to greater transparency. This does not even take into account the benefit of increased foreign investment or increased confidence in government—not to mention greater efficiency in administration. In Mali, a recent internal organization of records of government employees and people receiving government salary demonstrated more than 1,000 "ghost employees" benefiting from government payroll

without doing any work. In Uganda, when the amount of monies destined for local schools was made public, the percentage that reached the schools went from an estimated less than 20 percent to more than 80 percent.

Nevertheless, in light of increasing social demands and worsening economies, governments continue to face the political dilemma of servicing the needs of the access to information regime over other programming, and articulating the overall benefit (versus cost) of good governance.

WHO LEADS THE EFFORTS

The choice of agency or individual to implement the new access to information regime is a political decision that may determine whether the law succeeds. Nominating a lead implementer with sufficient seniority, respect, and power will provide the foundational message to other parts of the administration, public service, and civil society that the government is serious in its efforts. As the Canadian Information Officer stated in his annual report to Parliament, the person charged with implementing the access to information must be sufficiently senior that he or she is confident in making the difficult decisions and must carry the weight to encourage others in promoting the objectives of transparency through the release of information. "Good policies . . . need champions if they are to be effectively implemented."[17] In identifying leaders, it is important to cultivate these "champions" at key nodal points in government. The political leadership of people such as Jamaican Carlton Davis or Mignone Vega, Director for Communications for the Presidency of Nicaragua, has assured that implementation efforts of a law or voluntary strategy continue, even in the face of political and logistical obstacles. Placing the key implementer in the ministry of the president or prime minister, as in Jamaica and Nicaragua, increases the likelihood of political support and acquiescence by the other ministries. On the other hand, when implementation is spread across line function ministries, as is the case in South Africa, there is a possibility that peer ministries will ignore directives and that implementation efforts will wane.

In South Africa, the initial impetus for an access to information regime came from the Deputy President's office just one year after the

transition to democracy in early 1995, when then Deputy President Thabo Mbeki appointed a task force to produce a white paper on access to information. The task force was high level, including one of Mbeki's most trusted lieutenants and one of the country's most highly regarded human rights scholars. Though its report attracted much attention, as the process of finalizing the law became protracted, the energy of the group dissipated. Ultimately, responsibility for the final passage of the law was transferred to the Ministry of Justice, one of the busiest departments of government and one that has proved singularly ill-equipped to master the challenge of implementation. Political leadership has been conspicuous by its absence. At a meeting between the then Minister of Justice Penual Maduna and a group of visiting deputies from Armenia in January 2003, the minister appeared ill-briefed on the implementation of the law and informed his visitors that his department was fully complying and had not been the subject of any appeals. This was inaccurate. Not only have there been several appeals against refusal, but his department was at the time the subject of two pieces of litigation under the act. This absence of leadership in implementation, seen also in Belize and Trinidad and Tobago, has led to inconsistent implementation and compliance with the law.

PUBLIC SERVANTS: ON THE FRONT LINE

Public servants are on the front line of implementation. These critical stakeholders must be engaged early and strategically in the process of establishing and implementing the law. Ultimately, this constituency will be responsible for making the law meaningful for users—and have the power to either facilitate the process or create unnecessary roadblocks.

Civil servants, as the face of government, have grown accustomed to being blamed for all range of problems and citizens' grievances; although they have no control over policy decisions, they are tasked with implementation. Moreover, public functionaries often must contend with contradictory roles and responsibilities and competing interests. An access to information law can add to the dissonance, as coordinators "on occasion, experience an uncomfortable conflict between their responsibilities under the access to information act and their career prospects within their institution."[18]

However, as developing democracies seek to professionalize public service, tools such as access to information can support this objective. In Bolivia during a recent workshop on access to information implementation, the civil servants identified an access to information law as a means of protecting themselves from arbitrary decision making by politicians and a way to diminish untoward political pressures. These more senior public functionaries also listed such benefits as increasing efficiency, reducing bureaucracy, and identifying and eliminating bottlenecks.

In Jamaica, the civil service association recognized the opportunity the access to information law provided to enhance customer service and more clearly demonstrate who was responsible for poor policy choices, i.e., the political masters. Thus, Mr. Wayne Jones, the President of the Civil Service Association, accepted a lead role in promoting the passage and implementation of a comprehensive access to information law. The union's stance also has led to greater buy-in from the relevant front line workers.

Government System Building: Developing the Supply Side

Governments must establish the internal systems and processes to generate and provide information and training of civil servants to ensure understanding and compliance—the mechanics of the supply side.

RECORD KEEPING AND ARCHIVING

If there are no records to be found, or they are so unorganized that locating them becomes an insurmountable obstacle, the best access to information law is meaningless. In order to respond to requests, an adequate information management system must be designed and established. This is not an easy task.[19]

Many countries that have recently passed ATI laws, such as Mexico and Peru, have rather precarious record-keeping traditions. In countries with previously authoritarian governments, such as South Africa, many records have been lost or deliberately destroyed. Government officials in Argentina tell of their difficulty in receiving doc-

uments necessary to complete their work, often due to inadequate record keeping and organization systems. In 2002, an analysis was undertaken by the Anticorruption Office (AO) of Argentina to determine the prevalence of civil servants receiving multiple paychecks. The AO found that the greatest obstacle to assessing and stopping this illegal practice that was costing the country millions of dollars was the lack of a functioning database and systematized records.[20] It proved nearly impossible to get the most basic information on the number of positions and the names of those employed in them.

Governments generate millions of tons of paper each year. In some countries, a lack of record-keeping processes and space constraints have translated into huge bonfires of critical documents. Until a few years ago, Bolivia burned most of the more than 192 tons of paper that the executive branch generated each year. In other countries, such as Jamaica, where there has been a long history of secrecy but emphasis on document retention (both passed down from the British colonial rule that ended 40 years ago), "the practice of retaining all records created contributed to the congestion in the system, as dormant and obsolete records were shelved with current files, further compounding the problem of timely retrieval."[21]

In many places, until the advent of access to information regimes, national archivists and record keepers had been considered more akin to untrained secretaries than to degreed professionals, and were not provided the resources or respect necessary to fulfill their mandate. As one records manager stated, "Traditionally, record-keeping in the Jamaican public service has been an arcane and often overlooked field. Records management continues to be perceived as a low-level administrative/clerical function, largely focused on the management of public records at the end of their life cycle (i.e. the disposition phase)."[22]

In fact, in many government agencies, the secretary was responsible for filing and maintaining all critical documents. However, as computers have become more commonplace, secretarial staff have been reduced, further depleting record-keeping resources.[23] A recent report of the United States Interagency Committee on Government Information addressed the need to improve accountability for records management. The report highlighted the "low priority assigned to information and records management" and recommended that "agencies must have an expectation that their actions have important

positive or negative consequences, and there needs to be an effective mechanism for evaluating agency actions."[24] The committee suggested that appropriate incentives be established for proper management and protection of records as "valuable Government assets."

Perhaps more damaging to the establishment and maintenance of files is the widespread misconception by civil servants and elected officials that the documents they generate belong to them. We have heard this view from Argentina to Bolivia to Jamaica and Belize, all the way to the U.S. state of Georgia. Thus, when leaving their post or retiring, they take the files home with them—and they are forever lost to the archiving system.

Even when past documents are available, the task of ordering them is monumental, and potentially unrealizable. In terms of human and financial resources, the start-up costs can become astronomical for the organization of hundreds of years of documents. Rather than allow this to become an insurmountable obstacle to the government's willingness to pass the law, some advocates pragmatically suggest that in the initial stages of an information regime, governments ignore past documents and establish an archiving system for future information. In terms of citizen needs, often the contemporary documents such as budgets, policy decisions related to education and health, and information on crime and justice are of greatest value. Governments concerned with scarce resource allocation, such as Nicaragua, have considered focusing their record-keeping reforms on current and future generated documents, and then, over time, ordering the vast quantity of historical information.

Electronic documents have created a new set of problems and needs for record keeping and archiving. A comparative study of the implementation of access to information laws in the Commonwealth of Australia, New South Wales, Queensland, and New Zealand found that "across all four jurisdictions, we encountered concern bordering on alarm at the implications of the growth of email. We encountered few examples of systematic filing and destruction of email, nor of any central protocols for how emails should be stored."[25] As the modern trend of electronic communication and documentation continues, record-keeping systems will need to respond.

Part of this process of organizing and identifying records involves the creation of "road maps" of the documents that exist. This

is as important for the holders of information as it is for the potential requesters. Without knowing what records there are and where they are located, an implementation regime seems unlikely to be anything other than frustrating for both holders and requesters. Six months after the Jamaican law came into effect, senior civil servants stated that one of the greatest advantages of the law, thus far, was their own increased knowledge of government and the records that various agencies hold. For this reason, many modern ATI laws such as the South African, Mexican, Trinidadian, and Jamaican include provisions mandating the creation of such "road maps."

Record keeping—the management of documents on a daily basis—is inextricably linked to the archiving of historical or critical information. Unfortunately, in some countries the archival laws are inconsistent with modern record-keeping systems (particularly in relation to electronic records) or conflict with access to information laws. In Jamaica, for example, the archivist has discretion whether to release documents, and the decision is not based on public interest or principles of transparency. Thus, there also exists a need to ensure consistency within the record management policies. As the U.S. electronic records policy working group has pointed out, "To be accountable for information and records management requirements, agencies must have a clear understanding of what needs to be done and how to do it. . . . If agencies are provided with a clear set of standards that are made understandable through the educational opportunities and there are effective mechanisms for evaluating agency actions, the odds for a successful outcome are significantly improved."[26]

RECORD MAKING

There is no value in a right to access to information if no reliable document exists. Record-making standards also must develop and mature. One Bolivian public administration expert commented that most of the documents presently generated by his government are trash, created simply to satisfy some administrative requirement with no clear understanding by the public servant of its use or importance: "That which is certain is that the public entities generate and accumulate incalculable volumes of information that for the

most part have no utility from the perspective of efficacy, efficiency, and economy of its operations."[27]

On the other end of the spectrum, as governments become aware of the depth and breadth of information that is open to the public, there is sometimes a backlash to information generation. Fear of embarrassment or mistakes may portend the rise of "cell phone governance." Important policy decisions are made at lunches, made via telephone, or simply not recorded. An Arkansas appeals court recently ruled that the Fort Smith board of directors and city administrator violated the state's freedom of information act and open meetings provisions when a decision to purchase property was made via telephone. The court found that telephone conversations are a "meeting" under the terms of the act, holding that "It is obvious that [the board's] actions resulted in a consensus being reached on a given issue, thus rendering the formal meeting held before the public a mere charade. . . . By no reasonable construction can the FOIA be read to permit governmental decision-makers to engage in secret deal-making."[28]

As this practice becomes more common, access to information laws will need to respond with more detailed provisions for record making. Similar to the rule-making procedures in the United States and the Financial Management and Accountability Act of 1997 in Australia, to curtail the deleterious effects of cell phone governance, policy makers must be mandated to keep records that, at a minimum, detail who made a decision, when, and why, and list the relevant sources used.[29]

AUTOMATIC PUBLICATION

The best approach for dealing with vast amounts of information is simply to make as many records as possible automatically and unconditionally available. This limits the need for government decision making and is therefore less of a drain on resources. Moreover, it is clearly better for the "demand side," as proactive disclosure reduces the number of requests and delay in information receipt. Indeed, the best implementation model is not only to categorize as much information as possible as automatically disclosable but also to publish the information at the point the record is created. This is what in the freedom of information lexicon is known as

the "right to know" (RTK) approach. Information and communication technologies makes this easier and cheaper. In Peru, for example, during the transitional authority in 2001 when greater transparency was a watchword of the interim government, the Department of Finance led the way with a Web site-based approach to transparency, publishing huge volumes of information. A focus on automatic publication through the Internet has continued, with the National Office of Anticorruption tasked with monitoring the development of public body Web sites and periodically issuing reports. The most recent report, the sixth of the series, found that all government ministries were in compliance with the automatic publication provisions of the access to information law, and 37.3 percent of the decentralized public agencies were in full compliance. In comparison, in the municipalities there was only 2.1 percent complete compliance.[30]

Clearly, using government Web sites is an important way of adopting an RTK approach, but there are dangers too. It should not be seen as a panacea, especially in the developing world, where few people have access to the Internet.[31] Moreover, with the changing technologies, even the most current advances may quickly become outdated. Thus, any electronic record-keeping or publication scheme should be seen as a companion to hard copies and traditional publication, rather than as a substitute. Finally, one must be vigilant that governments not interpret automatic publication requirements as license to make whole databases or reams of documents available without organization and consideration—making it impossible for interested people to understand and use.

INTERNAL SYSTEMS

Internal Procedures (the "Internal Law"). It is crucial that governments develop—and users understand—clear guidelines for the civil servants charged with implementing the law. To ensure consistency and efficiency in implementation, the guidelines should cover records management, assessment of requests for information, provision of documents, and interpretation of the law.

For users, applying to access the record of the internal system is one way of discovering the extent to which a government agency is

taking the implementation issue seriously.[32] Things to look for would be training and the development of a manual for line managers and information officers and/or their units, and internal rules relating to good practice and important procedural matters such as compliance with time limits. Also, there should be a thorough internal system for recording requests, such as an electronic database that can itself by subjected to public and parliamentary scrutiny.

Given its history and role in the oppression perpetrated by the apartheid state, it is somewhat surprising and ironic that of the twenty-six national government departments in South Africa, the Department of Defence has shown the greatest commitment to implementing the law properly. A Johannesburg-based NGO, the South African History Archive (SAHA), already had discovered that Defence was performing surprisingly well when, in contrast to other departments, it dealt with many of the requests SAHA submitted efficiently and courteously. SAHA's diagnosis accorded with that of the OSI study and ODAC (Open Democracy Advice Centre)'s own assessment. The Department of Defence had put in place a number of specific steps to implement the act that could be emulated in other agencies, including:

- a manual and implementation plan;
- a register of all requests;
- human resource allocation to the Promotion of Access to Information Act (PAIA) even though there is no special budget;
- designation of the CEO as the Information Officer and all division chiefs as Deputy Information Officers, with assistants handling PAIA requests;
- establishment of a PAIA subcommittee that deals with major issues—e.g., disclosing information on arms procurement contracts, sensitive information, and large-volume requests;
- provincial departments sending the requests to the head office to process.

In contrast, bodies performing badly either had not instituted systems or had systems that were not functioning.[33]

Information Officers and Training. In addition to internal systems, there is a need for line managers responsible for implementation and responding to requests. Most modern ATI laws create information officers

or similar positions. In Canada, access to information coordinators has been the backbone of implementation and administration efforts. Similarly, the Mexican, Peruvian, and draft Bolivian and Nicaraguan access to information acts call for the establishment of designated information units or officers in each public body to serve as the front line respondents assisting applicants.

One obvious indicator of the strength of implementation is whether such officials have in fact been appointed and whether they have received specialist training.[34] A comparative study of four commonwealth jurisdictions found that "there was universal agreement that a significant investment had to be made in training," which should "encompass both general staff (at all levels) and FOI coordinators/specialists (where such existed)."[35] Moreover, training should not end when the law goes into effect. Staff changes, lessons learned, and amendments to internal policies and procedures dictate the need for continual training of information officers and other relevant civil servants.

The public needs to know whom to contact and how to reach them. Most modern ATI laws include such requirements. The South African law, for example, requires government to have the name and contact details of the information and deputy information officers listed in all telephone directories.

These information officers can work together, through the establishment of networks or working groups, to share best practices and lessons learned. In Jamaica, the information officers meet periodically and serve as a mutual support system. Such networks also serve to demonstrate the value and professionalism of the position.

Implementation Plan: The Value of Strategic Planning and Consensus Building. If governments are wise, they will consult with the potential user community when they draw up their implementation plan. One of the causes for optimism in the Jamaican case is that despite its government's historical culture of secrecy, the access to information implementation unit carried out a consultancy exercise with civil society in August 2002, soon after the law was passed, and again in March 2003.[36] This process enabled government officials to share, in a positive and confidential setting, their own concerns with colleagues across government and individuals from civil society, and afforded the latter group an opportunity to develop a better understanding of the obstacles facing civil servants and to hold them to account.

The first workshop asked the simple question: What needs to happen to effectively implement the new access to information law? The workshop identified a lack of political will and resources—human and financial—as the chief obstacles to effective implementation. The second workshop focused on prioritizing key activities. It found that some aspects, such as the appointment and training of access to information officers and passage of the necessary regulations to operationalize the act, had been neglected. These sessions of shared experiences and problem solving allowed government to take the necessary decision to postpone implementation with less fear of civil society reprisal.

As the Jamaica example demonstrates, it is often managerial weaknesses rather than flagging political will that slows implementation or creates the greatest obstacles. The delay in putting the Jamaica law into effect had much more to do with lack of preparedness than government fear. In Great Britain, Parliament heard evidence from government departments that a failure to share best practice across sectors led to delays and inconsistent messages.[37] Identifying key managerial or logistical weaknesses, sharing lessons learned, and providing consistent guidance will allow administrators to apply resources more wisely, in a focused and efficient manner.

Specialized ATI Implementation Oversight and Coordination Units. Specialized units and oversight bodies have proven critical to ensuring full implementation and compliance with the law. "Without a continuous oversight body, government efforts are dispersed and diluted with no clarity in responsibilities or guidelines and reduced ability to conduct long-term planning and to promote best practices, thus costing governments more in terms of human and financial resources."[38] Moreover, when there is no implementation monitoring and coordinating body, users are forced to navigate the systems on their own and public servants are burdened with additional responsibilities, but often must handle them with less training and resources.[39]

For that reason, countries such as Mexico, Jamaica, and Canada have established access to information units or oversight commissions responsible for assisting and monitoring implementation, raising awareness about the new right to information, and providing a clear focal point for all efforts. A designated specialist unit, such as

the Mexican Federal Institute for Access to Information (IFAI) or the Jamaican Access to Information Unit, allows the government to provide a uniform and focused response to problems and demonstrates clear commitment. In contrast, in Peru, each ministry or agency is to have a designated access to information person, but there is no federal coordinating body. In the United States, agencies set their own policy, creating a patchwork system and uneven implementation of the law that provides users vastly different experiences across government. In South Africa, no special unit has been established to oversee implementation; the responsibility for the ATI law has been simply added to the long list of responsibilities ordinarily carried by the director-general (permanent secretary) of each line function ministry or agency.

The IFAI has a mandate emanating from the access to information law, whereas the Jamaica unit was created spontaneously as a means for addressing all implementation issues. As the IFAI is authorized by statute, it is a "legal" body and has enjoyed a budget sufficient to meet its objectives and tasks. This has not been the case for Jamaica, where the ATI Unit has been dependent on monies from the Information Minister in the Office of the Prime Minister, and its existence depends on the good will of the minister.

Experience has demonstrated that specialized coordination units are necessary beyond the implementation phase, particularly for education, training, and monitoring. In Trinidad and Tobago, the Freedom of Information Act went into force on February 20, 2001. Shortly thereafter, a Freedom of Information (FOI) Unit was established to provide technical and legal guidance to government bodies, raise citizen awareness of the new law, and monitor and report on implementation efforts. The Cabinet initially authorized the FOI Unit for one year and then extended it until September 30, 2003, when the unit was disbanded. Even before its termination, the size of the staff was being reduced. Although there have been no quantitative studies to determine the effect of the unit's discontinuance, some statistics serve to indicate its importance and continued need. In the period of August–November 2001, when the FOI Unit was active in training civil servants and educating citizens, there were 37 requests for information and 88 quarterly reports received from government, representing 55 percent of all agencies mandated to submit reports. For the same period in 2002,

when the unit was still engaged, there were 63 requests for information and 32 reports received, representing 20 percent of all agencies. By November 2003, when the contract of the last member of the unit expired, there had been only 6 information requests, and a mere 8 percent of all agencies were still complying with the reporting requirements.

Civil Servant Sanctions and Incentives. Political will within a democratic framework and managerial effectiveness within a bureaucracy both require clear incentives for action and disincentives for inaction. In all access to information laws in Latin America and the Caribbean, as well as in South Africa, sanctions exist for any public servant who destroys, alters, or damages documents or provides exempt documents contrary to the provisions of the law. What is less common are explicit disincentives (sanctions) for those who fail to meet implementation deadlines, delay provision of documents to requesters, or create unwarranted difficulties for users. The draft Bolivian law has added sanctions for these "process" and implementation-related failures, as well as for documented related illegal actions. The Canadian government, as it considers amendments to its twenty-year law, has recommended adding penalties for failure to respect deadlines. In Great Britain, senior managers were named to lead the implementation effort and oversee the efforts of the FOI officers. Months before the law was to go into full effect, the British Parliament heard that "many FOI officers were having difficulty getting senior managers to take the requirements of FOI implementation seriously . . . One explanation has been that the penalties for non-compliance are not clear."[40]

But rewards for good behavior are just as important. In Canada, the Treasury Board, which is responsible for ensuring continued implementation of the federal access to information law, has begun a system of public awards and certificates for exemplary civil servants. Additional incentives would include pay raises based on performance evaluations that contain specific implementation criteria, promotions, and bonuses.

Phased-in Effectiveness of Law. The establishment of processes and the necessary mind shift from the culture of secrecy to openness takes an enormous amount of time and energy. The pressure on governments to implement access to information laws quickly is unfortunate. In Jamaica,

Mexico, Peru, and South Africa, the governments gave themselves one year or less to put the law into effect. In each case, they soon discovered the many obstacles. Although most of these countries pushed through the implementation in the prescribed time, many of the necessary procedural details had not been resolved. In Jamaica, the government was forced to postpone the date the law would come into effect three times and amended the enabling legislation to allow for phased commencement.

Given that a stumbling start may undermine a law's legitimacy, longer lead times for implementation are preferable. The time period must be long enough to build public-sector capacity and inform citizens of their rights, but not so long as to reduce momentum or make the government appear to be faltering in the commitment to transparency, as occurred during the UK's five-year implementation period. During this phase, government will generally focus on establishing procedures, passing regulations, and preparing or updating record management.

But government leaders and civil society groups need to ensure that a longer lead time is not used for mass record destruction. In Japan, a "surge in the destruction of documents eligible for disclosure under the Freedom of Information Law by 10 central government offices" was reported in the lead up to the law coming into effect. The report claims that, for example, "the agriculture ministry scrapped 233 tons of documents in fiscal 2000, a 20-fold increase on the 11 tons destroyed in fiscal 1999."[41]

A potentially successful model for implementation is a phased-in system whereby the law becomes effective first in a few key ministries and agencies and then is phased in over a specified period of time until all of government is online. This approach creates models that can be more easily amended or altered to address emerging problems, before they overwhelm the entire information system. As Maurice Frankel of the Campaign for the Freedom of Information in Great Britain told a Constitutional Affairs Committee reporting on Britain's progress toward implementation, "I think [the big bang approach] is bad verging on potentially catastrophic . . . central government could have done this much earlier, had a lot of experience . . . and could have dealt with a lot of the problems which are going to come up relatively easily. Instead of that, every single authority in every sector is confronting the same problem simultaneously with no opportunity to learn from anybody."[42]

During the initial phase, responsible civil servants should meet regularly to discuss systems capability and lessons learned, and ensure that these are widely shared and applied by the next set of agencies in which the law goes into effect. The government should capitalize on this time to complete and approve any necessary regulations and internal policies. And interested NGOs and citizens should become more familiar with the law's value and defects, make requests, learn how to effectively monitor government implementation efforts, and engage positively with the first-round implementers.

A potential disadvantage to the phased-in approach is that governments may choose to put nonessential ministries or unimportant agencies in the first round of implementation, thus sending a signal that they are not serious about transparency. Alternatively, they may find that citizens are making more requests than expected or soliciting the most sensitive and embarrassing information. This reality check could cause the government to delay further implementation. Moreover, citizens may become frustrated as requests are transferred to government entities not yet in effect. Therefore, in a phased-in approach, we encourage timelines for each phase to be established as part of the enacting legislation or regulations, clear rules relating to transfer of requests to "non-phased in" bodies, and intense public education explaining the approach.

Sustaining the Demand Side

Although the focus of this chapter is the "supply side," without an equivalent demand for information, government will inevitably stop directing human and financial resources toward the implementation and administration of an access to information regime. Thus, the response from civil society needs to be energetic, committed, and long term. Through recent experience, we have seen that strong campaigns have formed around the issue of passage of the law, only to disintegrate during the implementation and usage phase. Without a demand for information and vigorous monitoring of government implementation and enforcement efforts, the hard-won right to information can quickly atrophy.

Thus, notwithstanding the distinct obstacles to effective usage in South Africa exposed by the OSI study (see above), demand for

access to information through the law remains and is led by the ODAC, alongside other NGOs such as SAHA and the Treatment Action Campaign (TAC). For example, painstaking effort by the field-workers of the ODAC has shown how ATI can make a material difference in the lives of poor people. In Kouga, in rural Western Cape, despite a ministerial decision to allocate resources, the municipality had "borrowed" for another area the forty houses that had been earmarked for one community. Pressing for access to the minutes from the meeting at which the decision was made by the municipality led to a reversal of the decision. In Emkhandwini in remote Kwa-Zulu Natal, the villages wanted clean water; they were tired of the five-mile trek to collect it from the nearest town. The municipality was arrogant: the villages had no right to any information about water access. ODAC pressed the District Council, and it was revealed that there was a plan: to phase in piped water over five years, with a weekly delivery by truck of a large barrel of clean water in the interim. It was a good plan; the villagers were content. ATI, properly implemented, can be good for government as well as citizens. By corollary, secrecy, as the Emkhandwini case shows, is harmful to both.[43]

Conclusion

The challenges that face countries wanting to implement access to information policies include a lack of education and awareness, a lack of capacity, a lack of political will, and a culture of bureaucratic secrecy. As this list demonstrates and this chapter asserts, although there are technical aspects to good implementation, it is not simply a question of getting the mechanics right. Adjusting the mind-set—changing, as they say in Spanish, the *mentalidad* (the mentality)—is a far more important and challenging priority for policy makers and activists alike. The obstacles are immense and the pitfalls many, but the rewards equally monumental. But as our own understanding of the theory and practice of good implementation grows, so the capacity to diagnose implementation problems increases immeasurably. Properly implemented, an access to information law can change the rules of the game not just for civil society but also for government, and serve to enhance democratic politics.

NOTES

1. See Article 19 Model Law and Socius Peru 2003, British Council.

2. One of the authors, Richard Calland, participated in the development, testing, and refinement of the methodology. The Open Democracy Advice Centre, Cape Town, coordinated the South African part of the survey in 2003, and in 2004 coordinated the African regional portion that includes six countries: South Africa, Mozambique, Kenya, Senegal, Nigeria, and Ghana. The five countries included in the pilot study were South Africa, Macedonia, Bulgaria, Peru, and Armenia. The pilot study was refined and in 2004 the first full study was conducted in sixteen countries. At the time of writing, the findings were not yet available.

3. Macedonia, which did not have an ATI law, applied a twenty-day time limit for the purpose of the exercise, above the international average of fifteen days.

4. Open Society Institute, Justice Initiative, "Access to Information Tool: Overview 2003," unpublished paper.

5. Open Society Institute, Justice Initiative, "Access to Information in the Republic of South Africa, Access to Information Tool: South Africa 2003," www.opendemocracy.org.za.

6. In the authors' work in Bolivia, we often heard of the failure to implement well-drafted laws. Moreover, one scholar suggested that his country, Ecuador, counts more than 800,000 laws, as none are removed from the books. According to him, only a small percentage of these laws are implemented and enforced.

7. For a more detailed account on the passage of the law in Jamaica, see Laura Neuman, "The Carter Center Access to Information Project: Jamaica Case Study," in Laura Neuman, ed., *Access to Information: A Key to Democracy* (Atlanta, GA: The Carter Center, 2002).

8. For a more detailed account of the campaign, see Mukelani Dimba, "A Landmark Law Opens Up Post-Apartheid South Africa" (2002), http://www.freedominfo.org/reports/safrica1.htm.

9. The authors of this paper visited Belize in 2003 and had the opportunity to meet with civil society leaders, media representatives, and members of government and opposition parties to discuss the Freedom of Information Act of Belize.

10. For a more detailed account of the Zimbabwe situation, see Article 19/MISA-Zimbabwe, "The Access to Information and Protection of Privacy Act: Two Years On," 2004.

11. See America for the Sanction of Access to Information Law in Argentina, a campaign led by Poder Ciudadano and other leading Argentine NGOs such as el Centro de Estudios Legales y Sociales and el Centro de Implementacion de Politicas Publicas para la Equidad y el Crecimiento, as well as media and environmental NGOs, which called on interested actors throughout the region to send letters to the Argentine Senate requesting the passage of the access to information law. More information regarding the campaign is available from http://www.poderciudadano.org, or in English from http://www.redinter.org/InfoRID/22538.

12. Yashwantrao Chavan Academy of Development Administration (YAS-HADA), Action Research Project; see "Prune Newsline," *The Indian Express*, December 15, 2004.

13. IFTI Watch Update, "World Bank Poised for Breakthrough on Disclosing Draft Documents" (2004), http://www.freedominfo.org/ifti/world-bank/20040528.htm.

14. House of Commons Constitutional Affairs Committee, "Freedom of Information Act 2000—Progress Towards Implementation," vol. 1, November 30, 2004, quoting Lord Falconer of Thornton, speech to Campaign for Freedom of Information, March 1, 2004. Available from The Department of Constitutional Affairs, http://www.dca.gov.uk/foi/bkgrndact.htm#top.

15. House of Commons Constitutional Affairs Committee, "Freedom of Information Act 2000—Progress Towards Implementation," vol. 1, November 30, 2004. Available from The Department of Constitutional Affairs, http://www.dca.gov.uk/foi/bkgrndact.htm#top.

16. Alasdair Roberts, *Blacked Out: Government Secrecy in the Information Age* (New York: Cambridge University Press, 2006).

17. Office of the Information Commissioner of Canada, *Annual Report Information Commissioner 2001–2002* (2002). See Chapter I: Performance Overview.

18. Office of the Information Commissioner of Canada, *Annual Report Information Commissioner 2000–2001* (2001). See Chapter III: v) Recognizing, Fostering, and Protecting the Coordinators.

19. "Good recordkeeping is a pre-requisite for the successful administration of the Access to Information Act as well as a central component of good governance." See Office of the Information Commissioner of Canada, *Annual Report Information Commissioner 2002–2003* (2003). See Chapter II: Addressing the Crises in Information Management.

20. Nestor Baragli, "Acceso a la Información y la Lucha Contra Corrupción" (Access to Information and the Fight Against Corruption), in *La*

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38. Laura Neuman, "Mechanisms for Monitoring and Enforcing the Right to Information Around the World," in Laura Neuman ed., *Access to Information: Building a Culture of Secrecy* (Atlanta, GA: The Carter Center, 2006).

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E-government around the world: Lessons, challenges, and future directions

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1. E-government around the World

As demonstrated by the articles in this symposium, e-government can create significant benefits for citizens, businesses, and governments around the world. "Although still in its adolescence, the core transformative capacities of the Internet include its potential for radically shrinking communications and information costs, maximizing speed, broadening reach, and eradicating distance."[1] E-government is a key method for achieving many of these goals. The articles in this symposium issue have presented a number of diverse e-government projects that are currently demonstrating the potential benefits of e-government.

Gupta and Jana offer an adaptable framework that can be used to assess tangible and intangible benefits of e-government and, by applying the framework to an e-government initiative in New Delhi, India, suggest that the model offers the most information when applied to mature e-government initiatives. Kuk examines the relationship between the quality of local e-government services and the levels of Internet access in the 12 regions of the United Kingdom, finding that lower quality of local e-government services correlate with low levels of Internet access. Wang investigates electronic tax-filing systems in Taiwan, discussing the implications of technology acceptance and perceived credibility of the systems as factors that influence adoption of e-government services. Each of these articles contributes to the understanding of e-government by focusing on particular issues related to e-government in specific parts of the world. The initiatives discussed in this symposium provide a better understanding of e-government in each location and offer lessons that can be applied to e-government efforts anywhere.

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2. Future challenges for E-government

Though this symposium issue has presented discussions of interesting and innovative e-government initiatives, e-government still faces many challenges as it continues to develop. In designing and implementing e-government sites, a government must consider elements of policy, including regulatory issues, economic issues, and the rights of users.[2] One U.S. General Accounting Office report specifically listed the challenges to implementing e-government as "(1) sustaining committed executive leadership, (2) building effective E-Government business cases, (3) maintaining a citizen focus, (4) protecting personal privacy, (5) implementing appropriate security controls, (6) maintaining electronic records, (7) maintaining a robust technical infrastructure, (8) addressing IT human capital concerns, and (9) ensuring uniform service to the public."[3] Other scholars have noted additional broad challenges, such as defining the parameters of e-government[4] and making e-government function so that it does not conflict with other laws.[5]

A recent U.S. government study found that the biggest concerns for e-government managers were not technical issues, but instead were policy issues, including coordination and collaboration between agency leaders, agency-centric thinking rather than focusing on the overall goals and functions of e-government, and communication to better understand and foster inter-relationships between e-government projects.[6] Along with complex policy issues, some of the greatest challenges to maximizing the potential of e-government may involve social dimensions of information policy related to the Internet.

Whether e-government in the future will be a method for including more citizens in a government or excluding less technologically educated citizens remains a concern. Many information policy issues are likely to present significant challenges to the development of e-government. The issues addressed by articles in this symposium include:

- **Ensuring ability to use required technologies.** Quite simply, "electronic governance relies on the use of information technology."[7] As the Wang, Kuk, and Gupta and Jana articles note, if a person is unable to use the technologies that e-government relies upon, for lack of education or limited ability, that person cannot be denied access to government information and services. "If less-advantaged segments of the population are less able to access government on the Web, their other channels to government must not be closed off or contracted."[8]
- **Educating citizens about the value of e-government.** Each of the articles in this symposium issue notes the needs for governments to work to make citizens aware of the benefits of using e-government. Unless citizens know what is available from the e-government, they will not likely seek to use the e-government, defeating the purpose of the development of e-government information and services. As Wang concludes, the people who are more aware of and comfortable with an e-government initiative will be more likely to use that initiative.
- **Ensuring access to useful information and services.** "The initial informational presence of government on the Web is helpful and will remain important, but it is only a beginning."[9] In both the Kuk article and the Gupta and Jana article, the availability of meaningful content is an important concern. In order for e-government efforts to

succeed, there must be both universal service, which indicates the necessary level of telecommunications infrastructure, and universal access, which indicates a minimum standard of ability to access the services offered through the telecommunications infrastructure.[10] The content available on e-government websites needs to be more than just a vast amount of information; e-government planning and implementation should focus on activities that use e-government to expand current services and promote new ones.

- **Coordinating local, regional, and national e-government initiatives.** As the Kuk article details, the lack of coordination between different levels of government can have a significant impact on the success of e-government efforts. Kuk demonstrates that e-government initiatives can be further complicated by conflicting goals for e-government between different levels of government. In order to achieve effective e-governance, the different levels of government in a nation must work in cooperation to develop and implement an e-government strategy.

- **Developing methods and performance indicators to assess the services and standards of e-government.** A central point of each article in this symposium is the need to develop ways to measure and evaluate the success of e-government initiatives. So far, the limited amount of assessment of the "demand, benefits, and service quality" of e-government initiatives "remains a major weakness."[11] In order to create e-government services that account for the needs of citizens, assessments should examine citizens' "needs, capacity to find, digest and use relevant information."[12] Assessments of e-government should also investigate information behaviors that inhibit the use of e-government.[13] The articles in this symposium all examine ways to measure and evaluate the effectiveness of e-government initiatives.

Further important information policy issues that are likely to influence the development of e-government include:

- **Providing consistent and reliable electricity, telecommunications, and Internet access.** Often, "the problems of Internet access are common to the problems of access to other communication and information technologies."[14] Tremendous gaps in availability to basic information technology exist in many areas of the world, both across national boundaries and within individual nations.[15] There is a potential to let e-government grow at the expense of more basic services. "The danger exists that the digital divide will deepen because efforts are too one-sidedly directed at the realization of e-government."[16] For e-government to be effective within a nation, the necessary technological infrastructure must be present and provide service to all citizens.

- **Addressing issues of language and communication.** Many nations have more than one language spoken by the populace. Effective e-government requires standardization of spellings, word use, and a common language or languages in which citizens are comfortable communicating. Significant variations in spelling and word use in a nation's official language, as well as illiteracy or a sense of pride in local dialects or languages, may lead people in many areas to avoid the Internet as a medium that reduces variation in languages used in communication.[17] As a nation develops its e-government, addressing issues of linguistic variation must be considered.

- **Preventing e-government from lessening responsiveness of government officials.** In many ways, it is easier to ignore a piece of email than it is a human being. Electronic interaction with a government cannot be allowed to become a way for government employees to be less responsive to citizens. If government officials become less responsive because they are not physically seeing or speaking to the citizens they serve, then e-government would be serving to make government administration less transparent and responsive.
- **Preventing e-government from lessening responsibility of government officials.** E-government creates ways in which government officials could use technology to avoid taking responsibility for their duties. As anything available on an e-government site can be taken down or altered with little evidence that corrections were made, there may be a reduced effort to perform duties correctly. Furthermore, the technology of e-government has the potential to become a standardized excuse for government officials as an explanation for all problems.
- **Including individuals with disabilities in e-government.** The Internet is an environment that is, for the most part, not designed to consider the needs of individuals with disabilities. Both e-commerce[18] and e-government[19] generally have very low levels of accessibility for individuals with disabilities. The ongoing exclusion of individuals with disabilities from most e-government information and services has the potential to leave a large portion of the world's population unable to access e-government.[20]

These are just a sampling of the many information policy issues that must be considered as e-government develops.

Despite the range of information policy and other issues related to e-government that must be resolved in the future, it seems very likely that e-government growth will continue. Governments, in light of all the potential benefits, will further expand the size and scope of e-government. The eventual impacts of these increases in the size and scope remain unknown. Historically, "increases in access to information about politics have not been connected with increased engagement."[21] If e-government breaks this trend, then e-government may be demonstrating fulfillment of some of its potential to promote egalitarianism and participation in government.[22]

3. Future directions

The planning and implementation of e-government, as it continues to develop and grow around the world, will have to focus on finding methods to address varied issues. Some of the most important sources of information about meeting challenges to effective e-government are actual e-government initiatives that are currently operational. The lessons that can be learned from ongoing e-government projects, both in what works and what does not, will provide meaningful guidance in developing and refining e-government. Furthermore, the examination of e-government projects from different levels of government and different parts of the world offers a method to share knowledge about e-government. In many ways, the future directions of e-government will be confronting the important policy issues that remain

unaddressed. Studies such as those in this symposium issue are valuable to the conceptualization and application of current and future e-government projects, regardless of where the projects occur.

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Privacy rights and protection: foreign values in modern Thai context

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Abstract. The concept of privacy as a basic human right which has to be protected by law is a recently adopted concept in Thailand, as the protection of human rights was only legally recognized by the National Human Rights Act in 1999. Moreover, along with other drafted legislation on computer crime, the law on privacy protection has not yet been enacted. The political reform and the influences of globalization have speeded up the process of westernization of the urban, educated middle-class professionals. However, the strength of traditional Thai culture means that a mass awareness of the concept of privacy rights remains scarce. This paper explicates the Thai cultural perspective on privacy and discusses the influence of Buddhism on privacy rights, including the impacts of globalization and the influence of Western values on the country's political and legal developments. The paper also discusses the legal provisions regarding privacy protection, and the debates on the smart ID cards policy and SIM cards registration for national security.

Key words: Buddhism, data protection, human rights, privacy protection, privacy rights, smart ID cards, Thai culture

Introduction

The concepts of liberal Western values dramatically entered into Thai consciousness and culture as a result of the 1932 coup with the abolition of absolute monarchy and the introduction of a parliamentary system under a Constitution based on liberty, equality and freedom. However, the democratic development was short-lived and Thailand went through a series of coups and military regimes. After the Cold War, the influences of economic expansion, globalization and subsequent political struggles have changed Thailand into a country with a modern, industrialized and cosmopolitan outlook. But the traditional Thai values and culture are not conducive to the assimilation of the concepts of human rights, privacy rights and protection, as Thai culture is based on collectivism and non-confrontation. For the new generations, changes are taking place in the new cultural space. By observing various web-board discussions, the issue of privacy protection is fast becoming one of the hot topics among the educated, urban middle-class and Internet surfers or netizens, especially regarding the issues of 'smart' ID cards (that would contain personal and medical information) and the enforced registration of prepaid SIM cards for mobile phones. The first part of this paper discusses the Thai conception of privacy and the influences of Buddhism on privacy rights and the background to the development of privacy legislation. The second part discusses the

legal provision on privacy rights and the debates on the smart ID cards project and the control of SIM cards for national security.

Thai perspectives on 'privacy'

Most writers on the concept of Thai privacy agree that the western concept of 'privacy' is not applicable to Thai social reality. But this may be changing in the age of the Internet, insofar as culture is forever dynamic and as some argue, a desire for privacy is a panhuman trait.[1] According to Thais, the first connotation of privacy is negative in the sense that the loss of privacy would bring shame, disrespect or loss of face in public. The word 'private' was assimilated into Thai culture around the reign of King Rama V (1868–1910) as the Thai word 'pri-vade' (modified from 'private') was used for 'shud-pri-vade' which means casual clothes vis-à-vis military uniforms; 'shud-pri-vade' are clothes people would wear at home, which could range from pyjamas, dressing gowns or old tatty clothes to informal attire. Normally, these clothes would be quite casual or 'unrespectable' so that one would be embarrassed if caught wearing them at formal occasions or in public. During the period of Kings Rama IV and V (1851–1868),

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[1] B. Moore. *Privacy: Studies in Social and Cultural History*. Almonde, New York, 1984.

Western military uniforms, costumes and royal regalia were much admired and assimilated into Thai culture. So, this meaning corresponds to the concept of 'privacy' in Thai language of 'being private' or 'living privately' (*khwam pen yu suan tua*).

It is important to further notice that this conception of privacy is basically *collectivistic* – not, as Westerners tend to assume, *individual*. That is, as Ramasoota makes clear, 'being private' in traditional Thailand applies primarily to the shared family space in which family members undertake a wide range of activities – including rituals, cooking and eating, and sleeping – as demarcated from the world outside: "It is the kind of privacy that is shared by *intimate members of the same household*. By this token, individualistic privacy is said to have no place in traditional Thai culture."[2]

Niels Mudler likewise points out that privacy and individualism are Western concepts that are not applicable to Thai society, for Thai life is played out in public.[3] However, a person's private affairs should be kept private which implies that a Thai has both a right and obligation in the sense that he has to hide his own psychological problems within the bounds of expected behavior; this includes the right to expect other people to respect his private affairs which would cause him to lose face if made public.

The second meaning of 'privacy' in Thai culture connotes the right to be left alone or non-interference which can be equated to 'private affairs' or 'my private affairs' or 'my business' ('*rueng-suan-tua*' or '*rueng-suan-tua-khong-chan*' or '*tu-ra-khong-chan*'). Personal or private businesses or affairs should not be interfered with in Thai culture, e.g., quarrels within the family, the punishment of a child by his parents, and so forth. This notion is the legacy of the feudal heritage of Thai society where the master or lord of the household owned and commanded the lives and destinies of all his subordinates under his autocratic rule.

The lack of a Thai word for 'privacy' reflects the traditional Thai village life and the heritage of the feudalistic values in Thai history. The traditional Thai village house consists of a large room which is used as kitchen, living room, dining room and bedroom. This one-room house is where all members of the immediate extended family share their social lives. For this lifestyle to be kept in order and harmony, necessary cultural values and norms had been established, evolved and shared among people for generations. According to Holmes and Tangtongtavy, the two cornerstones of Thai culture are conflict avoidance and the hierarchical society.[4] In order to create strong relationships and to maintain them, conflict avoidance or non-confrontation is diligently observed, because the result of a confrontation can be disastrous as it results in 'losing-face' ('*siar-na*') by either side of the conflict. 'Face' represents one's social and professional position, reputation and self image, so that a loss of face is to be prevented or avoided at all costs – which further means that face-saving or '*koo-na*' has to be instigated at critical junctures. This intense need for gaining, and not losing, face has been explained in terms of cultural collectivism from which members are afraid of being excluded.[5] Consequently, power and status within a group depend on respect and admiration accumulated through gaining 'face'. The more 'face' a person has, the higher his credit rating – so much so that he can buy goods from local shops on credit and exert substantial influence in a group's decision-making.

The second cornerstone, the hierarchical society, is the product of Thai feudalism or *Sakdi-nar* which was established during the 15th century and abolished by King Rama V less than 300 years ago. *Sakdi-nar* was a system of ranking each individual according to the size of allocated land or rice-field; therefore a person's power and rank depended on his level of *Sakdi-nar* (*Sakdi* = power, ranking; *nar* = rice field). The patronage system existing within the vertical networks of relationship helped in maintaining the flexible and interdependent structure of Thai society. Several values and norms for supporting this hierarchy includes 'to know who's high, who's low' ('*roojak thee soong, thee tum*'), 'to give respect or show honor' ('*hai-kiad*') to high-ranking superiors, while the high ranking *Sakdi-na* shows benevolence ('*parame*') and gives favor ('*boon-khun*') to those under their patronage. Thai society can be perceived as an affiliation society whose members depend upon each other and seek security in dependence and patronage.[6] Therefore, a low ranking person's behavior would be very polite and submissive in order to avoid any transgression which could be construed as showing disrespect and lead to 'losing face'.

Asian countries generally stress the importance of abiding by the rules of politeness protocols, including the face-saving rituals of bowing ('*wai*' for Thais),

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profuse apologies, formal turn-taking during negotiations and other deferential yet obligatory protocols.[7]
In Thai culture, there is a whole series of protocols ranging from body language, spoken and written communications, and prescribed manners – all aiming at 'showing respect' or 'saving face'. Therefore, the notion of privacy in traditional Thai society could be close to 'saving face' ('*raksa-na*') in which '*hai-kiad*' (to give honor or respect) represents the valuable currency. The more '*kiad*' and '*na*' (honor and face) a person receives, the higher the status, power and social credit the person has acquired in that society.

The combination of privacy as 'private affairs' ('*rueng-suan-tua*') and the right of 'non-interference' works in support of 'saving face' – and hence, interference by outsiders is interpreted as a 'disrespect' that is dangerous insofar as it can lead to 'losing face'. In this light, the Thai Prime Minister's reactions of outrage against the US Congressional report on human rights violations during the country's 'war on drugs' was perceived by most Thais as quite justifiable.[8] Paradoxically, the interference in 'private affairs' is welcome and acceptable when conducted with 'saving face' ('*raksa-na*') motivation. Frequently, a third party (who has a lot of 'face') may be asked to help in reconciling a high level of confrontational negotiation which, if not properly managed so as to 'saving face' on both sides, may slide into an aggressive and violent conclusion, e.g. the disputes between neighboring countries over frontiers and claims to natural resources in Asia.

Buddhist perspectives on privacy rights

According to Buddhism, human beings have no rights in the sense that we are not born with automatically endowed human rights such as privacy rights and protection. In Buddhism, the rights of ownership of land, water, lake, trees, natural resources and even our own bodies are all illusory, but which we accept as necessary for operating at this realm of existence. They are social conventions for getting on with life and the pursuit of personal development, self-improvement and ultimately enlightenment. So, the concepts of human rights and privacy rights are perceived as man-made, whereby the corresponding social and legal norms have been developed to enable the achievement of personal and societal objectives. But this does not mean that Buddhism ignores the sanctity of life, animals, other living beings or the whole of nature. Indeed, Buddhists texts are full of teachings on moral and respectful conduct towards all sentient beings and the law of karma warns the transgressors of the results of bad karma (actions).

The Buddhist precaution reflects the fact that man-made rules and laws would inevitably be in conflict within themselves as these are created to serve human avarice; so these mechanisms are fragmented and reflect the prevailing force in the society. This would lead to further competition and aggressive posturing for protecting and furthering the interests among various groups. Phra Dhammapitaka points out the underlying flaw of Western approaches by the example of the concept of 'equality'.[9] This concept should be democratically interpreted as sharing together in times of '*suk-lae-duk*' (happiness and sorrow), that is, in times of plenty and poverty. But – in what to Buddhists appears to be a central contradiction or paradox – the general application of 'equality' in the capitalistic world implies the competition or struggle for an equal share in the stake. By contrast, the Thai concept of equality is reflected in '*ruam-duk-ruam-suk*' (sharing-suffering-sharing-happiness) which has the same spirit of 'in sickness and in health; for richer, for poorer'. Thus, Phra Dhammapitaka stresses the importance of educating people to respect other people's rights while being aware that all these rights are the means for human development and that they are not ends in themselves, lest we would become so attached to the concepts of rights that we would forget the purpose of Life.

Thus the Buddhist approach to human rights which includes privacy rights is more practical and spiritual at the same time. The Buddha's teaching, which is especially conducive to the protection of human rights, includes the teaching on the Ideal person, the Virtuous Person, the Social Benefactor and the King's Duties.[10] These teachings cover all aspects of righteous bodily conduct, righteous speech and mentality with comprehensive details so that the practice of these teachings can significantly contribute towards human rights protection. Instead of creating and assigning rights, Buddhism prescribes the ground rules for conducting a moral and virtuous

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[10] Phra Dhammapitaka (P.A. Payutto). *A Constitution for Living: A Handbook for Living*. Buddha-Dhamma Foundation, Bangkok, 2004.

livelihood in which all types of transgressions and bad karma are forbidden and subject to the law of karma.

The influence of Buddhism in Thai culture is amply reflected in the elements of *kreng-jai*, *nam-jai*, *hen-jai* and *sam-ruam*, including the law of karma. The quality of *kreng-jai* refers to an attitude of having consideration for others and being thoughtful in maintaining a smooth social atmosphere. So, *kreng-jai* facilitates avoiding unpleasantness and interpersonal confrontation. Holmes and Tangtongtavy observe that the manifestation of *kreng-jai* can range from complying with others' requests to the avoidance of asserting one's opinion or needs in order to maintain a cooperative relationship.[11] *Nam-jai* (water-heart), one of the most admired values in Thai culture, means 'water from the heart' – that is, genuine kindness and generosity without expecting anything in return. This reflects the Buddhist teaching on kindness (*Metta*) and compassion (*Karuna*). On the other hand, *hen-jai* (see into the heart), which means understanding, sympathy and empathy, which can be practically expressed by being willing to listen, being flexible and forgiving, and accommodating towards one's fellow human beings in time of distress.

The term *sam-ruam* refers to moderation in expressions and conduct which is based on the Buddhist teaching on equanamity (*Upekkha*) and appreciative gladness (*Mudita*). When a person is *sam-ruam*, he would restrain his emotions, whether being elated or in grief or in anger so as to avoid excessive display of emotions which could cause embarrassment and discomfort to others. The law of karma ensures that Thais are generally very motivated towards righteous conduct, for fear of the results of bad karma and for counting on the benefits of good karma as well. Therefore, the major task for practicing Buddhists is to encourage more inactive Buddhists to become diligent practitioners, thereby increasing the level of human rights protection in Thailand and in pursuit of spiritual liberation.

Background to the development of privacy legislation

The legal recognition of the 'right to know' and the 'right to privacy' in Thailand was the result of turbulent political struggles for democracy. The first seed of democracy was planted by the coup in 1932 after which the People's Party replaced absolute monarchy with a parliamentary system and National Constitution based on democratic principles.[12] The old social framework and networks of power depended upon *Sakdi-nar* and corvee were destroyed and replaced by a democratic ideology of equality, liberty and bureaucratic State.[13] However, the development of political rights in the modernized Thai state was short-lived and the country became plagued with a long series of coups and military regimes.[14]

After the Second World War, Thailand started to open up for foreign investments as economic development became top priority in which the most powerful influences affecting Thai society were the US involvement in Vietnam.[15] Consequently, the spectacular growth of Thai economy since the 1960s brought about the expansion in urbanization, industrialization, an explosion in the demand for education, and an increase in professional and middle-class city dwellers, including the rapid growth of consumer culture.[16]

A major socio-political trend of the 1990s was the opening of political space after the end of the Cold War and the collapse of military rule; political movements for democracy have come of age, through the bloody experiences in 1973, 1976 and the successful overthrow of military dictatorship in 1992.[17] The financial crisis in 1997 motivated the big businesses to control the state in order to protect themselves from the impacts of globalization while civil society pushed for more democratization. The strength of the democratic movement and the results of the financial collapse helped in clinching the passage of the National Constitution in 1997. The Constitution allows more public participation in government policy-making, provides mechanisms for good governance and introduces more radical changes to the political structures that may lead to

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[11] In their book *Working With the Thais* [see note 4], variations of *kreng-jai* can be differentiated in terms of *kreng-jai* towards junior people and towards government officials.

[12] E. Murashima, N. Mektrairat and S. Wanthana. *The Making of Thai Political Parties*. Joint Research Programme Series No. 86, Institute of Developing Economics, Tokyo, 1991.

[13] The key members of the People's Party responsible for the coup were educated in Europe at the expense of the King, some of whom did the planning of the coup while studying in Paris.

[14] S. Prasertkul. The Development of the Relationship between State and Society in Thailand. In A. Laothammatad, editor, *The Reform of Political Economy*, pp. 87–151. Amarin Printing, Bangkok, 1995.

[15] N. Mudler. *Inside Thai Society*. Silkworm Books, Chiengmai, 2000.

[16] J. Ungpakorn. *The Struggle for Democracy and Social Justice in Thailand*. Arom Pongpangan Foundation, Bangkok, 1997.

[17] P. Pongpaichit and C. Baker. *Thaksin: The Business of Politics in Thailand*. Silkworm Books, Chiengmai, 2004.

future political crisis.[18] This is the first Constitution in Thailand that guarantees fundamental rights and liberties, human dignity and human rights. A point of interest: the Official Information Act, motivated by the need to limit the power of state officials and government, was enacted in September 1997, one month ahead of the Constitution.

The Official Information Act 2540 (1997)

The Official Information Act (1997) guarantees all citizens the 'right to know' and 'right to privacy' and protection under Article 58 which states: "A person shall have the right of access to public information in possession of a State agency, State enterprise or local government offices."[19] But there is the usual exception, i.e. when the disclosure of official information shall affect the security of the State. The 'right to privacy' is recognized in Article 34 which states: "A person's family, rights, dignity, reputation and the right of privacy shall be protected." However the law is applicable to only public sector entities and official information in their charge. The Privacy protection in the private sector is partly recognized in the law of torts as a part of the rights to one's personality. Therefore, personal data protection provided by the Official Information Act does not extend to those data collected by businesses, financial institutions and other private organizations.

The Act protects individuals from violations of privacy by State agencies whereby 'personal information' is defined as information relating to all particular private matters of a person which further contain indicators that can be used to identify that person; thus the concept of 'personal information' is taken to be synonymous with 'privacy'. The protected personal information includes financial status, health records, criminal records, employment records, fingerprints, photographs, recorded sounds and all the personal particulars. The rights to access and correct personal data held by State agencies are protected under Sections 7, 9, 11 and 12 of the Act. The Act provides for the protection of personal data in official databases under Section 23: "A State agency has to provide an appropriate security system for personal information system in order to prevent improper use or any use to the prejudice of the person."

The underlying motivation of the Official Information Act was to ensure the accountability and transparency of public sector organizations and to transform representative democracy into participatory democracy.[20] The Official Information Act 1997 which encompasses the freedom of access to official information runs counter to traditional bureaucratic practice, that is, Thai officials who would normally keep 'official information' secret have to make transparent such 'secret official information'. On the other hand, the 'right to privacy' is a strange concept to the majority of Thai people in the agricultural sector, whose culture and lifestyle are largely played out in the public. Moreover, Thai officials still exhibit the *Sakdi-nar* attitude of being in a 'high place' (*tee-soong*), so that they have a 'superior right' to access or make use of all official supplies or instruments, including personal data in the databases within their range of command. So, to demand an official record to be disclosed is declaring a confrontational stance and causing the official to 'lose face'. Although there are several successful test-cases in disclosing official information, most Thai people are reluctant to engage in confrontational legal wrangling with State officials which can result in adverse consequences.

The demand for data protection in modern Thailand

The younger generations in Thailand – especially teenagers and university students – have become aware of privacy rights as altered photos of their favorite film stars and singers, as well as private video clips, have been circulated via the Internet and details of public figures' lives have been posted on web-boards. The exposure of these sensitive pictures in newspapers gave rise to debate that spilled over onto TV talk shows and heated discussions in popular chat-rooms. On the other hand, some ordinary middle-class taxpayers have experienced the horror of having their credit cards details published on various web-pages and their email accounts inundated with spams. The government's desire to benefit from globalization has been translated into a huge budget for national infrastructure for ICT, policies on e-Government, e-Citizen, e-Commerce, and the smart ID cards project.

As the brave new world of electronic transactions gathers pace in Thailand, more and more

[18] K. Kaewtep and N. Trirat. *2540 (1997) Turning Point for Thailand.* Friedrich Ebert Stiftung, Bangkok, 2001.

[19] The Official Information Act B.E. 2540. House of Parliament, Bangkok, 1997.

[20] K. Prokati. Information Access and Privacy Protection in Thailand. In *Proceedings of the Conference of Freedom of Information and Civil Society in Asia*, 13–14 April 2001. Information Clearing House, Japan, 2001.

people have realized that information technology is like a double-edged sword: whatever its benefits, obviously IT can also be dangerous in the hands of corrupt officials and computer hackers. Among civil society activists, academics and professionals, human rights workers and concerned citizens, the implementation of the smart ID cards project, especially *without* the prior enactment of the drafted Data Protection Law, means a big blow to the 'right to privacy' – especially to those who have health conditions (i.e. HIV/Aids and chronic diseases), and to those with criminal records and/or bad driving records.[21]   The delay in passing the relevant computer laws also hampers the progress in electronic commerce and diminishes the private sector's confidence in the government's commitment to protecting privacy rights.

A survey of websites' privacy policies was conducted in February 2003 by the ICT Laws Development Project.[22]   The result indicated a very low level of awareness in privacy protection: among government agencies, only 3 out of 159 official websites had a published privacy policy. About 10% of the total 759 websites contained a privacy policy; 26% of financial institution websites and free services portals adopted some kind of privacy policy. The explanation for the results were the low 10% of Internet penetration and 22% teledensity in Thailand.

The data protection legislation

A powerful driver of the development of privacy law among developing countries is the desire to engage in global e-Commerce and the recognition of trust as being a fundamental component of the new economy.[23]   Privacy and data protection legislation have been the important components of public policy discussions and internal economic forums, such as the Asia Pacific Economic Cooperation (APEC)'s con-

ference in Thailand, February 13, 2003, entitled ''Addressing Privacy Protection: Charting a Path for APEC.''

Thailand's Data Protection Law has been drafted by the National Electronic and Computer Technology Center (NECTEC) in accordance with the OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data and the European Union Directives 95/46/EC on the protection of individuals with regards to the privacy of personal data. The drafted law has been ready for the Cabinet's approval but some technical delay has kept passage of the law in abeyance. With the beginning of the full implementation of smart ID cards project by mid-2005, questions were raised among the public whether the enactment of the Data Protection Act should come before the start of government's distribution of smart ID cards.

Debates on smart ID cards in Thailand

The smart ID cards project was approved by the Cabinet in September 2002. The Ministry of ICT (Information and Communication Technology) is in charge of the production of the cards with the initial budget of 1.82 billion Thai Baht (Bt.) for 33,198 card reader-writer machines, Bt. 132.79 million for 33,198 fingerprint reading machines, and Bt. 126 million for card lamination.[24]   The three-year project of producing over 64 million cards has a total budget of Bt. 7910 billion. The information on these cards will gradually be expanded to include information from at least six official agencies, i.e. the population registration bureau, the social security department, the health and welfare department, the drivers license bureau, the civil servants commission, and the farmers' financial units. The personal data to be on the cards consists of name, address(es), date of birth, religion, blood group, marital status, social security details, health insurance, driving license, taxation data, the Bt.30 healthcare scheme, and whether or not the cardholder is one of the officially registered poor people.

The initial target groups are the people in the three provinces in the South (where insurgency and acts of sabotage have become normal over the past two years), the three IT cities of Phuket, Chiengmai and Khonkaen, and officially poor people. Moreover, new legislation will require newborn babies to be issued smart ID cards within 60 days and children under 15

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[21] An Attorney-at-Law for the International Legal Counselors Thailand pointed out that the drafted legislation did not address the data controllers and processors who are government officials. See also Asina Pornvasin. *The Nation*, November 20, 2003 and Pennapa Hongthong. E-Citizen cards: doctors: data open to abuse. *The Nation*. Mar 10, 2004.

[22] T. Koanatakool. Thailand Perspective Toward Self-Regulation and Government Enforcement on Privacy Issues, APEC Electronic Commerce Steering Committee, 23 May 2003. Bangkok. < http://www.export.gov//apeccommerce/privacy/2003workshop/Thanweesak_paper.html >

[23] J. Demsey, P. Anderson and A. Schwartz. *Privacy and e-Government*, a Report to the United Nations Department of Economic and Social Affairs. Center for Democracy and Technology. Washington D.C. May 23, 2003.

[24] P. Srivalo. Big budget sought for 22 million cards. *The Nation*. December 12, 2003. < http://www.nationmultimedia.com/search/page.arcview.php?clid = 90397&usrsess >

would have to apply for the ID cards within one year.[25]

The debates on smart ID cards cover three main themes, namely, the planning of the project, the lack of data protection legislation, and the negative repercussions of privacy violations. Gartner's analyst has expressed concern over the inadequate planning, complex funding structure of the project and the lack of proper consultations with experts and non-existence of any pilot schemes.[26] Civil rights groups and legal experts have pointed out that Data Protection Law has not been enacted so there is inadequate legal protection against unauthorized access and misuse of personal data which lead to the 'loss of control' over personal data. The civil rights groups' utmost fear is that personal data could be accessed by unauthorized persons and government agencies.[27] The repercussions could be disastrous in financial terms and personal security in cases where data of credit cards and bank accounts and over 60 million people's fingerprints got into the wrong hands. Voices from a chatroom reflected the fear of having their fingerprints stolen and left at the crime scene while others were concerned about identity theft as there is already a brisk business in selling false ID papers to illegal immigrants. One sophisticated netizen was worried about the possibility of a false positive matching of his fingerprints by the police, thus rendering him a potential suspect. The other anxiety reflected among concerned citizens is the slide towards a Big Brother State whereby the centralized control of personal data can lead to the erosion of liberty and freedom.

Still more interesting opinions were articulated at the seminar on 'Smart Cards and Society' at Chulalongkorn University, November 11, 2004. A National Human Rights Commissioner questioned whether the smart ID cards project was against the National Constitution (1997) and whether the government should obtain people's consent before collecting their personal data. Furthermore, the existence of a national register or database meant that personal data are no longer protected. On the other hand, the Deputy Secretary to the Ministry of ICT pointed out that even without the smart cards project, personal data were at risk of being violated as personal details have already been scattered among various agencies. The Head of the ICT Laws Development Project, a NECTEC representative, commented that the drafted Data Protection Law would take a long time to be enacted by Parliament. Therefore, the reporter concluded that Thai citizens would continue to be at risk for privacy violations.[28]

Questions were also raised by a philosopher at the seminar whether the government had given people in the South accurate and relevant information before issuing them smart ID cards, and whether the scheme would increase the State power beyond expectations. Representatives from civil society groups were concerned with the accuracy of the recorded data and impacts on people in the countryside – especially the impacts on the hill tribe people and ethnic minority people whose proofs of nationalities can be problematic. The Director of the Office of the Population Registration Bureau responded to doubts over the security of computer systems by giving technical details of the 11 steps of the registration process and of the security system.[29] The seminar on 'Smart Cards and Society'[30] was unexpectedly well attended by senior government officials, academics, researchers and private sector professionals, civil rights activists and NGOs, and ordinary taxpayers, including ten journalists, indicating a growing awareness of the importance of privacy rights and data privacy protection among the educated urban, middle-class professionals.

Debates on the registration of SIM cards

The latest government measures in combating insurgency in the four provinces in the South include the registration of SIM cards for prepaid mobile phones – because the majority of bombs in the insurgents' attacks have been set off by mobile phones.[31] Over 22

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[25] *The Nation*. Smart Cards: Children to get their ID card at birth. May 8, 2004. < http://www.nationmultimedia.com/search/page.arcview.php?clid=3&id=98467&date=2004/05/08 >

[26] CNETNews.Com, October 16, 2003. < http://www.zdnet.co.uk/ >

[27] *The Nation*. First Smart ID Cards to be delivered in June. May 3, 2005. < http://www.nationmultimedia.com/search/page. acrview.pho?clid=3&id=11528&usrsess >

[28] N. Tongbaiyai. Smart Cards and Society: Blind Spot of Privacy Violations. *Thairat*, November 24, 2004.

[29] Hi-tech Dictator. *Consumerthai.org*. December, 9, 2004. < http://www.consumerthai.org/careful_board/view.-php?id=217 >

[30] The Round-Table Seminar on 'Smart Cards and Society' was co-sponsored by the Faculty of Political Science, Chulalongkorn University and the British Council in Bangkok. The keynote speaker was Prof. Jim Norton, a senior policy adviser on e-business and e-government for the United Kingdom Institute of Directors. The three panels consisted of the panel on public management and services, the panel on ethics and human rights and the panel on impacts on society. There were about 150 people in the audience.

[31] *Bangkok Post*. Consumer law to cover SIM. April 26, 2005. < http://www.bangkokpost.net/news/26Apr2005_-news13.php >

million prepaid mobile phone users have had to register and provide personal information to mobile phone operators from May 10, 2005, at the cost of having their mobile phone signals terminated temporarily; these measures would also apply to foreigners going to the South. Serious objections to the government plan include the questions regarding the effectiveness of the measures in increasing national security and the fear of the misuse of personal data.[32] Furthermore, the government registration scheme of initial enforcement in the Southern provinces has irked local people. The vice-president of the national Muslim Youth Council pointed out that the insurgents could switch to using remote controls or timers.[33] Insurgents would also likely opt for Malaysian SIM cards, as the black markets on both sides of the Thai–Malaysia border continue to do a brisk business and contraband mobile phones have been smuggled through check-points.[34]

On the other hand, the National Human Rights Commission has warned against the scheme on the grounds of human rights violations. The Upper House of Parliament's Select Committee on Justice and Human Rights has expressed the concern that owners of stolen mobile phones would become potential suspects during the first 7 days of arrest and police investigation. However, the Deputy Prime Minister insisted that the government could proceed with the scheme for safety and security reasons.[35] The registration of SIM cards for prepaid mobile phones has significantly raised public awareness of privacy rights, as the 22 million users come from all cross-sections of the society, i.e. farmers, fishermen, laborers, housewives, traders, bar-girls and dancers, hair dressers and masseurs, and so on. The debates on this topic in the press and some web-boards have been somewhat divided between those who see that 'security is worth the cost of inconvenience' and those who think that 'the government has done it again'. Some overseas telecommunications experts and

expatriates living in Thailand have also joined in the debate and contributed some policy and technical recommendations.[36] There was also a hint of some cynicism in the sense that the scheme was designed as a ploy to make the mobile phone markets less competitive and to drive out small operators who could not bear the costs of creating and managing databases of mobile phone users.

The delay of the enactment of Data Protection Law has discredited the government's intention regarding the protection of human rights. Had the Law been enacted, the smart ID cards project would have faced serious legal hurdles and been subject to several modifications with regards to privacy protection for both the public and private sectors. This would have allayed the criticisms against the registration of SIM cards, which has no legal basis for enforcement.[37] This fact has made small operators fearful of legal actions by consumers and they have urged the government to put the order in writing instead of verbal announcement. After the 'September 11' tragedy, the government's measures for combating terrorism would likely infringe upon basic human rights and civil liberties in the name of national security and public security.[38]

Conclusion

Thailand's four Southern provinces had been relatively peaceful until the government volunteered Thai troops to Iraq upon the request of the US – for humanitarian purposes, but without waiting for the UN General Secretary's deliberation on the matter. Many findings on the problems in the South stressed the root causes as cultural factors – specifically, as the actions of government officials, police, and military showed blatant disrespect for Muslim religion and culture. The consequences of misunderstanding another culture and the gross insensitivity of policy-makers, high-ranking executives and administrators led to fatal clashes and inevitably to insurgency. So, understanding culture is vital to promoting a peaceful atmosphere and harmony in society.

[32] U. Mongkolporn and P. Srivalo. Anti-Terror Measures: Mobile ID Plan Flawed, say experts. *The Nation*. April 19, 2005. <http://www.nationmultimedia.com/search/page.arcview/php?clid=2&id=114624&usrsess>

[33] *The Nation*. Muslim irked about plans for all phones. April 20, 2005. <http://www.nationmultimedia.com/search/page.arcview/php?clid=3&id=114683&usrsess>

[34] *Bangkok Post*. Targeting the bombers. April 21, 2005. <http://www.bangkokpost.net/education/site2005/wnap2605.htm>

[35] *Prachathai*, April 28, 2005. <http://www.prachathai.com/news/> See also: P. Srivalo. Law allows registration of SIM cards, *The Nation*, April 21, 2005. <http://ww.nationmultimedia.com/search/page.arcview.php?clid=3&id=114740&date=2005/21/03>

[36] The section of 'Letters to the Editor' in *The Nation* often includes witty and lively letters on the topic. For example: on April 22, 24 and 25, 2005. <http://www.nationmultimedia.comsearch/page.arcview.php?clid=13&id=114907&usrsess>

[37] *Prachathai*, April 27, 2005. <http://www.prachathai.com/news>

[38] National Human Rights Commission. *National Human Rights Commission Strategic Plan*. Bangkok, 2002. <http://www.nhrc.co.th>

Fortunately, on the other side of the coin, the ethnic Chinese living in Thailand share very similar cultural values with Thai people – in part, because they have been influenced by Buddhism. The Thai values of patronage, 'saving face', and reverence for elders and people in 'high' places, are similar to Confucian values of ancestor reverence, respect for 'face', responsibility, loyalty, modesty and humility. Both cultures seek to avoid confrontation and would strive to 'save face' by showing respect or *kiad* to elders and people of high rank (*tee-soong*) – all in order to create harmony and balance in society. The Chinese and Thais also have elaborate ceremonies and social rituals to 'give face' or honor others and to 'save face' in order to maintain social relationships.

An example of how important 'face' is among Thai politicians can be seen on their birthdays. The number and ranks of well-wishers would be noted by other guests and members of the press. It is not uncommon for a politician to receive between 500 and 1000 guests for the day: the VIPs would include members of the Cabinet, top civil servants, policemen and military commanders, businessmen and political parties' leaders. But the most important guest is the Prime Minister. His absence would generate political gossip and speculation on the relationship between the host and the PM. A third party, i.e. the spokesman or secretary, would provide probable excuses in order to soften the apparent loss of face, and to ensure a smooth working atmosphere in Parliament.

A recent national example of 'saving face' is the airport scandal in which one US-based company was involved in an allegation of bribery surrounding the deal on the purchase of explosive-detection machines for the new international airport.[39] This has been considered as such a grave lose of face by the government that the government was ready for a legal battle as a result of contract termination in order to protect the country's reputation and national honor.

These examples show the continued strength and importance of Thai cultural traditions and values – and they suggest that the existence of the Official Information Act, the National Constitution (1997), or the National Human Rights Commission (1999), by no means guarantees that privacy rights, even if seen as a basic human right, will be protected or easily assimilated into Thai culture and norms. As Pirongrong Ramasoota commented, while privacy has been a major area of debate in industrialized countries since the 1960s, Thais have less than ten years' experience of participatory democratic values.[40] However, the political reform and dynamics of globalization have brought significant changes in the socio-political structures, whereby urban, educated middle-class professionals continue to increase. The process of westernization has been quickening since the period of Western colonization.

Modern Thailand (previously known as Siam) and Thais (Siamese) are nowadays very westernized and exhibit Western values, from consumerism, to capitalism and democratic aspirations. However, old habits die hard, which means that those who seek confrontation with government officials (people in high places) are perceived as either black sheep or heroes (whether crazy or radical and revolutionary). The stakes are high, and the consequences can be costly. The advocates of privacy rights, human rights, and justice travel a lonely path. As the climate of fear and insecurity continues to spread locally and globally, the government can easily justify various repressive and autocratic policies in contradiction to the protection of human rights, liberty and freedom enshrined in the Constitution and Laws. As power tends to corrupt and information is power, therefore absolute information-control tends to corrupt absolutely. The contention between imported liberal democratic values and traditional Thai values has been creating rifts, cracks and powerful social forces that have dramatically changed Thai social and political structure in the past. The tendency of changes will continue towards the liberal democratic values whose seeds have been planted in Thai history. The consequences, directions and costs of this process lie in the hands of those in high places (*tee soong*) with powerful face.

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[39] P. Srivalo and S. Viriyapanpongsa. Airport Scandal: GEInVision faces govt ban if it fails to clarify claims. *The Nation*, May 7, 2005, Headlines.

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7

Dashed Expectations: Governmental Adaptation to Transparency Rules

ALASDAIR ROBERTS

1. TWO BOLD CLAIMS

IN JANUARY 2005, THE UNITED KINGDOM'S FREEDOM OF INFORMATION ACT CAME INTO FORCE, providing British citizens with a limited but justiciable right to information held by public bodies. The Blair Government promised that the new law would make two important contributions to British political life.

The first would be a fundamental change in the predispositions of officials regarding the release of government information. It had become commonplace to blame major policy failures—such as mismanagement of the BSE crisis (BSE Inquiry 2000: 248; Department for Environment 2001: 110) and the deaths of young patients at Bristol Royal Infirmary (Bristol Royal Infirmary Inquiry 2001: 271)—on the 'culture of secrecy' within the public service, and hence to regard the promotion of a 'culture of openness' as a critical reform. Tony Blair himself promoted the FOIA as a tool to break down the 'traditional culture of secrecy' within the UK government and produce a 'fundamental and vital change in the relationship between government and governed' (United Kingdom 1997: Preface). In 1999, Home Secretary Jack Straw lauded the law as a landmark in constitutional history that would 'transform the default setting' of secrecy in government (Straw 1999). Shortly before its implementation, Lord Chancellor Charles Falconer presented the FOIA as a 'challenge to a culture that was deeply ingrained in all too many parts of the public sector'. The statute, he predicted, would lead to 'a new culture of openness: a change in the way we are governed' (Falconer 2004a).

This fundamental 'change in the way we are governed' was expected to produce a follow-on effect: the restoration of public trust in government. As in most of the other advanced market democracies, trust has

been on a long decline in the United Kingdom (Pharr, Putnam et al. 2000;
Beetham 2005: 61–8). Measures to encourage openness were expected to
encourage a reversal of the trend. FOI legislation, Lord Falconer said in
February 2004, would let the public see 'that the Government has noth-
ing to hide', and this would lead to 'increasing trust in our public institu-
tions' (Falconer 2004b). The linkage between a 'vigorous commitment to
freedom of information' and the 'renewal of trust' (Falconer 2003) was
often made in the months before implementation of the law.

British policy-makers were not alone in claiming that FOI legislation
would produce these two benefits. In the Anglo-American democracies
that had already adopted similar laws, it was commonplace to suggest
that the aim was to encourage a 'culture of openness' in public institu-
tions. ('The culture of FOI', said an Australian High Court justice, 'is a
culture which asks not why *should* the individual have the information
sought, but rather why the individual *should not*' (Kirby 1997).) Shortly
after the adoption of the Irish FOIA, Information Commissioner Kevin
Murphy observed:

> The Freedom of Information Act has been variously described as heralding 'the
> end of the culture of public service secrecy' and as a 'radical departure' into a
> brave new world of public service openness and transparency. . . . [I]t is a fact
> that the enactment of the FOI Act does mark a radical departure from one style
> or culture of public service to another. (Murphy 1998)

Similarly a series of studies by the Organization for Economic
Cooperation and Development promoted the adoption of FOI laws by
OECD states as one way to restore flagging trust in government (OECD
2000; OECD 2002).

In practice, the probability that the adoption of an FOI law will lead
to cultural change or improve trust is small. Experience has shown that
the governing institutions in Westminster systems are particularly
resilient, and capable of rejecting alien transplantations such as FOI laws,
or of developing new routines designed to minimize the disruptive effect
of these new laws. The new right to information is either curtailed or
grudgingly conceded. Nor does the statutory acknowledgment of a right
to information necessarily lead to improved trust. Perversely, an FOI law
may encourage the emergence of a policy community whose campaigning
persuades the general public that government institutions continue to be
as secretive as ever before. Steps to improve governmental openness may
encourage, rather than satiate, the demand for greater transparency.

Yet the FOIA may fail to achieve either of these benefits and still
prove a worthwhile venture. The law *will* result in the release of informa-

tion that was previously withheld by government. Citizens and non-governmental groups will find FOIA to be a useful tool for extracting details about governmental decision-making. In this way, FOIA will deter arbitrary bureaucratic behaviour and create new opportunities to intervene in the process of governmental policy-making. Nonetheless, we should not forget the critical point: the FOIA is principally a tool for regulating the struggle for control of government information. It does not eliminate this conflict, or reduce the political salience of complaints about governmental secrecy.

2.   HOW GOVERNMENTS ADAPT

In making these broad claims about the likely effect of FOIA, policy-makers have underestimated the resilience of governmental systems. We know from experience that public institutions have an impressive capacity to resist innovations which challenge the status quo (Hay and Wincott 1998). Actors whose influence is threatened by a new policy do not cease to resist its impositions after its formal adoption. Rather than overturning institutional practices and cultures, new administrative procedures required by law may simply be tailored to fit within them. We have seen these patterns of resistance and adaptation in countries with older FOI laws.

The systemic responses that have followed the introduction of FOI laws in the Anglo-American democracies can be broken into two broad categories. The first comprises responses which attempt a direct challenge to the right to information, by amendment of the law or regulations. The second, less easily observed but perhaps more important, consists of informal administrative responses which, while maintaining a public pretence of conformity to the law, have the effect of limiting its significance in practice.

2.1   Formal Challenges to the Right to Information

Formal challenges to the right to information comprise those efforts which are aimed at an explicit elimination or restriction of the entitlement. Because these challenges sometimes require legislative approval, or at the very least (as in the case of regulatory changes) public notification, they often attract substantial public attention. They are, therefore, a politically costly way of resisting the demand for transparency.

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2.1.1   Legislative Amendment

Some governments have attempted to amend the legislation that creates a right to information. One illustration is the recent decision of the Irish government to restrict its FOIA, only adopted in 1997. The amending bill was introduced in March 2003, weeks before a provision of the law allowing access to five-year-old Cabinet records was scheduled to go into effect. The amended law extended the delay in releasing Cabinet records to ten years, and broadened the Cabinet confidentiality rule to include advisory committees that did not include a Cabinet minister at all. Ministers were allowed to block requests for information relating to other deliberative processes within the public service, and national security restrictions were toughened as well (McDonagh 2003).

The Irish amendments also introduced new fees for information requests: 15 euros for an application, 75 euros to have a department reconsider its decision to denial of information, and 150 euros for an appeal to the Information Commissioner. The fees had a predictably sharp impact on the demand for information. A year later, the Commissioner reported that requests for information had declined by over 50 per cent. Requests by journalists dropped more precipitously—over 80 per cent within the space of a year (Information Commissioner of Ireland 2004, 14–19).

The tactic of raising fees to squelch demand has been employed elsewhere. In 1995 a newly elected Conservative government in the Canadian province of Ontario used financial exigency as a pretext for amending its FOI law to increase fees, causing a one-third decline in the volume of requests (Roberts 1999). A decision by the Nova Scotia government to increase fees for making requests or complaints about the refusal of information produced a comparable drop in usage (Auld 2003).

Security concerns have also created a 'window of opportunity' (Kingdon 2003) for policy-makers to restrict FOI laws. After the attacks on the World Trade Center and the Pentagon of 11 September 2001, US security and intelligence agencies renewed their efforts to have certain classes of 'operational records' excluded from the US FOIA. The Homeland Security Act of 2002 included restrictions designed to ensure that certain kinds of 'homeland security information' would be protected from disclosure under the FOIA as well (Roberts 2004). In 2002, the Canadian government also amended its Access to Information Act (ATIA) to allow the Attorney General to block any independent review of decisions to withhold national security information.

2.1.2   *Interpretation and Litigation*

Policy-makers may also attempt to restrict the meaning, if not the actual language, of FOI legislation. In Canada, for example, the Liberal government of Prime Minister Jean Chrétien exploited ambiguity in the language of the ATIA relating to the coverage of ministerial offices under the law. In 2001, the government issued a formal notice that it considered many ministerial advisers to be exempt from the law (Treasury Board Secretariat 2001); it then engaged Canada's Information Commissioner in prolonged and costly litigation to attain judicial support for its position (Roberts 2002: 654). In the United States, Attorney General John Ashcroft issued a directive in October 2001 to government departments that they should take a restrictive view of their obligations under the law; Ashcroft's Justice Department then engaged in a series of court cases intended to affirm a narrow interpretation of the US FOIA and other open government laws (Podesta 2003). As Patrick Birkinshaw notes in Chapter 3 above, Ashcroft's efforts were part of a broad effort by the Bush administration to reverse a variety of disclosure requirements imposed on the executive branch of the US government over the preceding three decades.

2.2   **Informal Methods of Resistance**

Because these direct challenges to the right to information are done in the open, we sometimes think that they constitute the main forms of resistance to FOI law. This is far from being the case. Other changes in bureaucratic practice—in methods of record-keeping, processing FOI requests, and organizing delivery of services—have also had the effect of undercutting the right to information. These effects may be more pervasive and substantial than the more easily observed challenges to the law itself.

2.2.1   *Changes in Record-Keeping*

For example, the right to information may be subverted by corrosion of the quality of records kept by government institutions. Most disclosure laws do not recognize a right to information that has not been incorporated within a paper or electronic record; to put it another way, there is no right to information which is known to officials but not put down in a record. A disclosure law cannot be effective if records are incomplete or non-existent.

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2.2.1.1   Decline in Candour   There is surprisingly little good research on
the effect of transparency on the record-keeping practices of public institu-
tions. The widely held view is that transparency causes officials to become
more reticent in recording potentially controversial information. There is
evidence which bears this out. A recent and small survey of Canadian
government officials whose email had been targeted by information
requesters found that a large majority had begun to write messages more
carefully (Roberts 2005b). Similarly, a study of the US Federal Reserve's
Monetary Policy Committee found that its members became less likely to
voice dissenting opinions after the decision was made to publish a record of
their discussions (Meade and Stasavage 2004).

    The evidence, however, is not always supportive of this view. An early
study of the Australian FOIA, based on interviews with government offi-
cials, found no significant impact on the frankness of official advice
(Hazell 1989: 204). A 2001 study by Canada's National Archives reached
a similar conclusion. The archivists' expectation was that the ATIA would
be found to have had 'a significant and negative influence on record-
keeping' within the federal bureaucracy. However, the researchers were
surprised to conclude from their research that there was 'no evidence . . .
that the Access to Information Act has altered approaches to record-
keeping in the Government of Canada' (National Archives of Canada
2001).

2.2.1.2   Manipulation of Records   Disclosure laws can also be subverted
by the destruction or manipulation of government records. This is an uncom-
mon but not unknown practice. In Canada, officials destroyed tape record-
ings and transcripts of meetings in which public servants debated how to
manage threats to public safety posed by contamination of the blood supply
by HIV and hepatitis C in the late 1980s, a few days after receiving an ATIA
request for the records (Information Commissioner of Canada 1997). In
1997, another inquiry concluded that Canadian defence officials had altered
and attempted to destroy documents relating to the misconduct of Canadian
forces in Somalia, which had been sought by journalists under the ATIA and
by the inquiry itself (Somalia Commission of Inquiry 1997). In 1998, the
Canadian Parliament amended the ATIA to make it an offence for officials
to 'destroy, falsify or conceal a record' in an effort to thwart a request for
information.

    Recently, a third federal inquiry has revealed yet another effort to
manipulate records sought under the ATIA. In 2004 the Canadian
government appointed a special commission, popularly known as the

Gomery inquiry, to investigate allegations of corruption within major advertising and promotional programmes over the preceding decade. One key issue was the extent to which officials had responded to ATIA requests filed by journalists attempting to cover the story. Testimony uncovered an instance in which officials had *created* expenditure guidelines for release in response to ATIA requests. The guidelines 'had cosmetic values and purposes'; they were intended to convey an impression of bureaucratic regularity regarding a decision-making process that was in fact deeply politicized (Gomery Commission 2004b: 3659).

2.2.1.3 Failure to Create Records   This was only one of the techniques of resistance to the ATIA documented during Canada's recent corruption scandal. A senior official responsible for management of the programme at the heart of the controversy testified in 2004 that he had agreed with Cabinet office staff that they would keep 'minimum information on the file' to avoid embarrassment through ATIA requests. 'A good general', the official told a parliamentary committee, 'doesn't give his plans of attack to the opposition' (Standing Committee on Public Accounts 2004). Indeed, Canada's Information Commissioner has argued that the 'troubling shift . . . to an oral culture' within senior levels of the public service constitutes one of the main challenges to the effectiveness of the ATIA (Reid 2005). The Commissioner has suggested that the federal government should adopt legislation that would create 'a duty to create such records as are necessary to document, adequately and properly, government's functions, policies, decisions, procedures, and transactions' (Information Commissioner of Canada 2001: 66).

Two caveats are needed when considering complaints about the rise of an 'oral culture'. The first is a matter of causality: the shift, to the extent that there is one, is not attributable only to the advent of FOI laws. The decline of departmental budgets in many countries throughout the 1990s also contributed to a decline in proper record-keeping. A combination of other factors may be important as well—such as the increased pace of work, which may leave less time for thoughtful recording of departmental activities (Scheuerman 2004); the general decline of a print-based culture (Postman 1986); and a similarly broad decline in respect for procedural formalisms. The Canadian Commissioner's complaint about an 'oral culture' is mirrored by concerns about the emergence of a 'sofa culture' within the Blair government, documented by the Butler Review of Intelligence on Weapons of Mass Destruction in 2004 (Butler Committee 2004): a culture in which 'formal procedures such as meetings

were abandoned [and] minutes of key decisions were never taken'
(Oborne 2004)—and which had apparently taken root well before the
implementation of the United Kingdom's FOIA.

A second caveat relates to the impact of new information technologies
on record production. In a sense, concern about the rise of an 'oral
culture' is profoundly mistaken: by sheer volume, modern bureaucracies
generate more digital and paper records than ever before. In part this is
because of technologies such as email which capture interactions which
had never been recoverable previously: conversations which once might
have been undertaken in person or by telephone are now 'a matter of
record'. (On the other hand, journalists have complained that officials
now routinely 'RAD'—that is, 'read and delete'—potentially sensitive
emails (Lavoie 2003; Weston 2003).) Internal databases also make vast
amounts of transactional data generated by government officials—such
as information about inspections, and regulatory or benefits decisions—
more easily available (Roberts 2006: 199–227). It is still possible that
certain kinds of critically important documents—such as analytic or
summative records which explain the rationale for government policy—
are less likely to be produced than in the past; what is less clear is the
extent to which this deficiency may be offset by the broader effects of
technological change.

Nor is it clear that the Canadian Commissioner's proposed 'duty to
document' would be an effective counter to the advent of 'oral culture'.
Many jurisdictions already acknowledge narrowly bounded 'duties to
document'—for example, by requiring the creation of records that
describe a department's organization, the expenditure of public funds, or
reasons for official decisions. As Canadian officials have noted, however,
a more general duty—encompassing, for example, a duty to describe
internal policy deliberations—would be difficult to enforce (Treasury
Board Secretariat 2004).

2.2.2   *Centralization of Control over Processing*

The Gomery inquiry provided evidence of other administrative practices
which have the effect of dulling the impact of disclosure law. Testimony
by government officials in the department responsible for the programme
in which abuse had occurred, Public Works and Government Services
Canada, showed that incoming requests were reviewed to determine
whether they were 'interesting'—a euphemism for 'politically sensitive'.

(An 'interesting' request was said to be 'one where media attention had been paid to the issue or there is a potential for the Minister to be asked questions before the House [of Commons].') A list of 'interesting' requests was reviewed weekly by a group that included representatives of the Minister's office and the department's communications office. Especially interesting requests required special handling by communications staff, whose task was to prepare a media strategy to anticipate difficulties following disclosure of information, and also review by ministerial staff before release. 'We lost control . . . of the process once Communications had it in their process,' the most senior ATIA officer told the inquiry:

> So once [the ATIA office] has completed the processing of the file we would send a package to Communications Branch . . . They would then circulate it to the deputy's office and the Minister's Office. When that was done we would get a coversheet back—it was a coversheet for their media lines—and that would be our notification that we could make the release. (Gomery Commission 2004b: 3659–65; Gomery Commission 2004a: 6537–639)

By 2004 it was clear that all major ministries in Canada's federal government maintained similar procedures. Politically sensitive requests were tagged and vetted by ministerial and communications staff before the release of information, and 'communications products' designed to respond to potential difficulties would be prepared. Requests from journalists and opposition party researchers were routinely tagged for sensitivity. In many cases the process of preparing a communications strategy and allowing ministerial review added substantial delays to the processing of these requests (Rees 2003; Roberts 2005a).

The practice of segregating politically sensitive requests is highly formalized: the Gomery inquiry showed that the Public Works department, like others, had detailed flow charts showing how these requests were to be dealt with. Furthermore, the process of political management is facilitated by technology. Each major department maintains an electronic case management system that is capable of isolating politically sensitive requests. In addition the Canadian government maintains a government-wide database which allows officials in central agencies—including communications staff in the Cabinet office—to monitor the inflow of requests from journalists and opposition parties. There is, therefore, the possibility of a second level of review, triggered when central agency officials consider that a request may raise political difficulties for the government as a whole (Roberts 2005a).

Other governments with established disclosure laws have developed comparable routines for managing politically sensitive requests. Research

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has not been done that would determine whether, in countries such as Australia and New Zealand, these routines are as highly institutionalized as in Canada. Nevertheless the practice of segregating sensitive requests to allow review by political and communications advisers appears to be widespread. Concern over sensitive requests is said to be part of a larger preoccupation with 'spin control' in the parliamentary democracies (Roberts 2006: 82–106).

2.2.3   Other Release Strategies

Some governments have developed even more aggressive tactics for mini-mizing the political consequences that might flow from disclosure. For example, Irish journalists have complained that government departments have encouraged other reporters to duplicate their requests for docu-ments—a step that improves the department's ability to ensure a 'more sympathetic spin' on the story (Rosenbaum 2004). Ireland's Justice Minister acknowledged in 2004 that he had 'pre-released' information requested by opposition politicians to friendly journalists, telling the Parliament that he would not allow 'my opponents to spin against me without having at least the opportunity to put my side of the story into the public domain' (Dáil Debate, June 1, 2004). One Irish department began posting details about new requests, including journalists' identities, on its website, a practice which the department defended as an advance in transparency but which journalists condemned as a tactic to reduce the 'scoop value' of an information request (Brennock 2003; Lillington 2003).

2.2.4   Under-resourcing of FOI Offices

There are more prosaic ways in which bureaucracies can undercut the right to information. The failure to provide adequate resources for pro-cessing FOI requests may mean substantial delays in the disclosure of information. In many cases the value of such information may be sharply diminished as a result of such delays. This is most obviously the case when the information is sought by journalists or opposition researchers for use in a current, but transient, policy debate.

The effect of under-resourcing became clear in Canada's federal government in the mid-1990s. Budgets for the administration of the ATIA were cut as a part of a broader programme of retrenchment in 'non-essential' spending that followed the election of the Liberal govern-ment in 1993. The result was a significant lengthening of the time

required for processing information requests. By 1997, Canada's Information Commissioner regarded the problem of delay as one of 'crisis proportions'. Paradoxically, the Commissioner's authority was also undermined by the cutbacks: the increased caseload within his office meant that the time required for resolution of delay complaints also grew (Roberts 2002). Under Canadian law, the Commissioner's own budget is set by the government as well. The Commissioner has complained for several years that his enforcement powers have been undercut by the unwillingness of central agencies to provide his office with adequate funding (Information Commissioner of Canada 2004: Ch. 6).

2.2.5   *Restructuring of Government Services*

Finally, FOI laws have been undercut by governmental experiments with new modes of delivering public services. The problem has at least two dimensions. Many countries have experimented with the use of quasi-governmental organizations, including industry-run associations, to provide services or perform regulatory functions. (Canada, for example, transferred air traffic control to a quango known as Nav Canada— one of many set up by the federal government in the late 1990s.) Most FOI laws are not designed to accommodate quasi-governmental organizations. In some countries, governments must make an explicit decision to include newly created organizations under the law, and have refused to do so.

The growing emphasis on contracting-out of service production raises similar difficulties. Most laws do not recognize a right to records held by contractors. Several governments have also negotiated contracts that contain confidentiality clauses intended to prevent the disclosure of contracts themselves. For example, Australian governments were sharply criticized for their willingness to accede to confidentiality restrictions while negotiating contracts for the operation of private prisons in the 1980s and 1990s (Freiberg 1999).

Experiments with private provision of public services have not been driven mainly by the desire to evade disclosure requirements. On the other hand, the emphasis on 'alternative service delivery mechanisms' *has* been motivated by a broad frustration with the burden which internal 'red tape' is thought to impose on conventional bureaucracies, and disclosure rules represent one part of this burden. The erosion of disclosure law is part of a broader crisis in public law: as the traditional public sector is fragmented into a multiplicity of organizational forms, it is difficult to

decide which forms should be subject to established accountability mechanisms such as FOI law, and which should not (Roberts 2001).

2.3 A Doctrine of Resistance

The effect of FOI law has not been to establish a 'culture of openness' in those countries which have had such laws for many years. It may well be that more information is released to journalists, opposition parties, or non-governmental organizations than ever before. But this may simply show that public officials respect the rule of law, and are subject to legal processes that require disclosure. Even when disclosure is made routine—for example, by the 'proactive' release of travel and entertainment expenses—this may not be a sign of cultural change within the public service. The establishment of new administrative routines in response to statutory requirements does not necessarily reflect a shift in official attitudes toward transparency.

On the contrary, experience suggests that the passage of time provides officials with the opportunity to develop a broader range of techniques for dulling the disruptive potential of new disclosure rules. Contests over official information are fought as fiercely as they were before the introduction of FOI law; it is simply that the terrain on which the battle is fought has shifted in favour of stakeholders outside government. Except in those areas where the contests over disclosure of information have been settled decisively, we are likely to see—as the Information Commissioner of Canada has recently said—a 'stubborn persistence of a culture of secrecy' (Information Commissioner of Canada 2005: 4).

Not only do government officials become more adept in managing disclosure requirements; they become more articulate in expressing their reasons for resistance. The argument, expressed in each country and in intergovernmental forums such as the Organization for Economic Cooperation and Development, echoes earlier concerns about the 'crisis of governability' that was thought to afflict developed democracies thirty years ago. The authority of the state has been weakened by globalization and the decline in public trust, while the surrounding environment is more complex and uncertain, as a result of the proliferation of advocacy groups, the breakdown of traditional media, and the advent of new information technologies. As a 1995 OECD report observed:

> Citizen demand is more diversified and sophisticated, and, at the same time, the ability of governments to deal with stubborn societal problems is being

questioned. The policy environment is marked by great turbulence, uncertainty and an accelerating pace of change. Meanwhile large public debt and fiscal imbalances limit governments' room for manoeuvre. Traditional governance structures and managerial responses are increasingly ineffectual in this context. (OECD 1995)

The groups that rely on FOI law are not, in this view, victims of state authority; on the contrary, they are more numerous and better organized than ever before, and increasingly skilled in using tools such as FOI law to advance their agenda. ('Requests are more probing than they used to be,' a Canadian ATIA officer observed in 2002. 'There are many more of them and their requests frequently involve far more, and more sensitive, records. The result is that [the Access to Information Act] is much more complex . . . more challenging for us and more threatening for government-side politicians'.[1]) A sense of feeling beleaguered rationalizes official efforts to constrain the effect of disclosure rules (Roberts 2006: 54–62, 98–103).

3.   THE RHETORIC OF SECRETIVENESS

FOI law will not produce a culture of openness. Nor is it clear the FOI will improve trust in government. Indeed, trust in government declined in both the United States and Canada even after the adoption of their FOI laws. The connection between openness and trust is tenuous for two reasons. The first is that the determinants of trust are multifarious, and it is likely that other factors—such as the degree of economic uncertainty or physical insecurity felt by citizens—play a larger role in influencing levels of trust. The second reason for caution in positing a correlation between openness and trust lies in political dynamics which will be set in play by the FOIA itself.

First, and most obviously, the sort of news that is generated by FOIA is unlikely to be flattering to government. The newsworthiness of a disclosure hinges on the degree to which it reveals internal bureaucratic conflicts or mismanagement, or contradictions between actual and professed policy; any public satisfaction that might be felt regarding the ability to gain access to this information is likely to be outweighed by indignation at the problems which are revealed. There is, remarkably, no

[1] Comment in a email released in response to Citizenship and Immigration Canada Access to Information Act request 2002–05225, p. 539.

research which attempts a content analysis of news reports that are gen-
erated from disclosures made under well-established FOI laws; but casual
observation suggests that the preponderance of coverage is not favourable
to government.

The law will also formalize conflicts that will themselves become the
object of media coverage. For example, both journalists and advocacy
groups will learn that the filing of an FOIA request is itself an event
around which a news story can be constructed; similarly a failure to pro-
vide information within a statutory deadline, or an outright denial of
information, or a decision to appeal against a denial of information, are
all pretexts for further news coverage. In several countries, it is common
practice for journalists or advocacy groups to conduct 'audits' in which
information requests are filed simultaneously with several different
government agencies, in a test of compliance with statutory requirements;
the audit is routinely followed by reportage which emphasizes weaknesses
in compliance and the persistence of habitual secrecy.

It is important to note that the processes that generate such news
stories are ones that lead, in aggregate, to the disclosure of more infor-
mation than in the past. The reporting also provides evidence that the
conflict over information is now formally structured; journalists and
other requesters have statutory rights and ways of enforcing those rights
against government. Yet the effect of the news coverage generated by this
conflict is likely to reinforce the public perception that governmental
secrecy is more deeply entrenched than ever before. In 2005, for example,
the Canadian Newspaper Association organized a journalistic 'audit' of
compliance with federal and provincial FOI laws across Canada. From
the point of view of broad policy, the audit was a testament to the extent
to which the principle of transparency had become entrenched in public
policy: only a few years earlier, there were still provincial governments
that had not adopted an FOI law at all. However the news coverage
emphasized weaknesses in compliance, presenting readers with the
conclusion that the right to information 'is a farce because of political
interference and the culture of secrecy in bureaucracies' (MacLeod 2005).

We might call this a 'rhetoric of secretiveness'—a stylized and widely
shared way of talking about disclosure of information which tends to
emphasize the persistence of secrecy and which construes secretiveness as
a deliberate policy—rather than, for example, the result of inadequate
training, preoccupation with other tasks, or internal disorganization. The
routine operation of FOI law, rather than discouraging this rhetoric, is
likely to create more opportunities for it to be expressed in popular

media. To the extent that perceptions of secretiveness corrode trust in government, FOI law may therefore have an effect that is quite contrary to that anticipated by policy-makers.

There is another reason why this may be true. The advent of an FOI law will also encourage the emergence of a specialized 'policy community' (Richardson and Jordan 1979) that is skilled in identifying weaknesses in FOI laws and advocating better laws. Some journalists will become FOI specialists; so, too, will researchers in public interest organizations and opposition political parties. Philanthropies may eventually provide funding to some parts of this community. In the United States, for example, the adoption of a national FOIA, as well as several other disclosure laws, has been followed by the emergence of a substantial and relatively well-funded community of organizations that specialize in the use of the laws (Roberts 2006: 119).

The law contributes to the emergence of this policy community in a more direct way: by creating the office of the Information Commissioner. As a quasi-judicial officer the Commissioner obviously must take a measured position on the question of secretiveness. But most commissioners recognize that they have an 'educative function', and make statements regarding proposed changes to government policy which are taken as cues for advocacy by other members of the policy community (Roberts 1996). The commissioner's rulings will also become the subject of news coverage, particularly when they conform to the rhetoric of secretiveness.

4.   IS THERE A CASE FOR FOI LEGISLATION?

It is difficult to make a case for FOI legislation which naturally appeals to ministers and senior bureaucrats. One of the intended effects of FOI law is to weaken their monopoly over governmental information, and therefore their power; unless bound by an unambiguous promise made while in opposition (as Britain's Labour government was in 1997) or by the imminent threat of parliamentary defeat (as Canada's Liberal government was in 2005), there is little incentive for policy-makers to take seriously the notion of introducing or improving law that guarantees a right to government documents.

The two arguments described at the start of this chapter—that FOI law will promote a culture of openness and improve trust—at least had the advantage of assuring policy-makers that they might reap *some* benefit from the law. These arguments seem to promise the advent of a

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world in which conflict over information is superseded. FOI law is
expected to produce a new and more harmonious relationship between
officials (who give up the practice of questioning why citizens should need
access to information) and citizens (who reciprocate by placing greater
trust in those officials). The central point of this chapter is that a happy
outcome is unlikely to be achieved. The modest gains that ministers and
bureaucrats hoped to derive from an otherwise unpalatable initiative will
not be realized.

Of course, the general public may still reap substantial benefits from
FOI legislation, for all of the reasons that are typically listed by advocates
of transparency. Access to information about the formulation of policy
allows citizens to exercise their political participation rights more fully.
Access to information about adverse government decisions may help cit-
izens to protect their right to fair and equal treatment. Transparency
might even allow citizens to protect their health and safety against threats
posed by government operations or lax regulation of the private sector.
As in so many other areas of FOI law, there is surprisingly little system-
atic research that shows precisely how large these benefits are, and how
widely they are distributed. Nevertheless there is anecdotal evidence to
suggest that these benefits are substantial. There are, in addition, benefits
which cannot be explained neatly in terms of fundamental citizen rights.
For the business community, for example, transparency might produce a
working environment that is less compromised by costly uncertainties.

Having said this, it is salutary to maintain a realist's view of the world
which FOI legislation is likely to create. It reminds us that policy-makers
have strong incentives to find ways of evading disclosure requirements.
Reluctant to absorb the political costs associated with an overt challenge
to these requirements, policy-makers may rely instead on less easily
detected methods of resistance, such as the adaptation of bureaucratic
routines for record-keeping or processing of FOI requests. For advocates
of transparency, a degree of vigilance regarding the FOI process itself is
therefore required.

In the long run, we might also expect that the tussle over official infor-
mation will *increase* in intensity, rather than decrease. At the tactical level,
information requesters will become more sophisticated in their tech-
niques for extracting documents, and officials will adopt more sophisti-
cated methods of resisting these demands for disclosure. At the level of
rhetoric, both parties to the conflict will develop more refined arguments
to rationalize these tactics—predicated either in deep distrust of govern-
ment officials (in the case of requesters) or in a fear about the growing

inability to govern effectively (in the case of officials). The polarization of conflict over access to information may limit the ability of policy-makers and policy advocates to agree on the adjustments that are periodically required in any policy in light of experience and changing circumstances.

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