

Right of Information

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The right to information is one of the basic values for the person, which is construed with particular reference to the right to respect for private life on the one hand and the right to freedom of expression on the other. It has been recognized as a fundamental human right, intimately linked to respect for the inherent dignity of all human beings. The right to information is also a crucial underpinning of participatory democracy – Article 19 has described information as "the oxygen of democracy"²⁶³ – for without information citizens cannot possibly make informed electoral choices or participate in decision-making processes.

There is a growing body of authoritative statements supporting the right to information, made in the context of official human rights mechanisms, including numerous special laws, giving effect to this right have, in the last few years, been adopted in all regions of the world. Many intergovernmental organizations now have in place information disclosure systems which are reviewed and updated on a regular basis.

The right to information is also essential to accountability and good governance; secrecy is a breeding ground for corruption, abuse of power and mismanagement. No government

can now seriously deny that the public has a right to information or that fundamental principles of democracy and accountability demand that public bodies operate in a transparent fashion.

The first section of this survey looks at the increasing recognition of the right to information, first at the international level, and then goes on to look the content of the right to information, both as an explicit constitutional guarantee and through judicial interpretation.

1. Freedom of Information, an Internationally Protected Human Rights

1.1 Introduction

Freedom of information, including the right to access information held by public bodies, has long been recognized not only as crucial to democracy, accountability and effective participation, but also as a fundamental human right, protected under international and constitutional law. Authoritative statements and interpretations at a number of international bodies, including the Organizations of United Nation, the Council of Europe, the Organization of American States (OAS), as well as national developments in countries around the world, amply demonstrate this.

The right to access information held by the State has been recognized in Swedish law for more than two hundred years, but it is only in the last quarter of a century that it has gained widespread recognition, both nationally and in international organizations. In this time period national governments, intergovernmental organizations and international financial institutions have adopted laws and policies which provide for a right of access to information held by public bodies.

²⁶³ The public's right to know: principles on freedom of information legislation (London: Article 19, 1999), preface. Online at www.article19.org/docimages/512.htm

The primary human rights or constitutional source of the right to information is the fundamental right to freedom of expression, which includes the right to seek, receive and impart information and ideas – although some constitutions also provide separate, specific protection for the right to freedom of information or access information held by the State. In a more general sense, it can also be derived from the recognition that democracy, and indeed the whole system for protection of human rights, cannot function properly without freedom of information. In that sense, it is a foundational human right, upon which other rights depend.

It is now clear that the right to freedom of information can only be effective if it is guaranteed by law, and if the modalities by which it is to be exercised are set out clearly in legislation or, for international governing bodies, in binding policy statements. Over time, authoritative statements, court decisions and national practices have elaborated certain minimum standards which such laws and policies must meet.

These include, among other things:

- a strong presumption in favor of disclosure (the principle of maximum disclosure);
- broad definitions of information and public bodies;
- positive obligations to publish key categories of information;
- clear and narrowly drawn exceptions, subject to a strong harm test and a public interest override; and
- effective oversight of the right by an independent administrative body.

1.2 International Standards

A number of international bodies with responsibility for promoting and protecting human rights have authoritatively recognized the fundamental and legal nature of the right to freedom of information, as well as the need for effective legislation to secure respect for that right in practice.

1.2.1 The United Nations

Within the United Nations (UN), freedom of information was recognized early on as a fundamental right. In 1946, during its first session, the UN General Assembly adopted Resolution 59(1) which stated:

“Freedom of information is a fundamental human right and ... the touchstone of all the freedoms to which the UN is consecrated”.

In ensuing international human rights instruments, freedom of information was not set out separately but as part of the fundamental right of freedom of expression, which includes the right to seek, receive and impart information.

In 1948, the UN General Assembly adopted the Universal Declaration of Human Rights (UDHR), in which *Article 19* guarantees freedom of opinion and expression as follows: expression, states:

“Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers”.

The International Covenant on Civil and Political Rights (ICCPR), a legally binding treaty, was adopted by the UN General Assembly in 1966. The corresponding provision in this treaty, Article 19, guarantees the right to freedom of opinion and expression in very similar terms:

1. Everyone shall have the right to freedom of opinion.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art or through any media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities.
It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
 - a. For respect of the rights or reputation of others;
 - b. For the protection of national security or of public order, or of public health or morals.

1.2.2 Council of Europe

The Council of Europe (COE) is an intergovernmental organization, composed of 47 Member States. It is devoted to promoting human rights, education and culture. One of its foundational documents is the European Convention on Human Rights (ECHR), which guarantees freedom of expression and information as a fundamental human right at Article 10:

1. *Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.*
2. *The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.*

The European Court of Human Rights has considered claims for a right to receive information from public authorities in at least three key cases, *Leander v. Sweden*²⁶⁴, *Gaskin v. United Kingdom* and *Guerra and Ors. v. Italy*. In each case, the Court rejected the notion that the guarantee of freedom of expression under the ECHR included a right to access the information sought.

The following interpretation of the scope of Article 10 from *Leander* features in similar form in all three cases:

The right to freedom to receive information basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him. Article 10 does not, in circumstances such as those of the present case, confer on the individual a right of access... nor does it embody an obligation on the Government to impart... information to the individual.

By using the words, "in circumstances such as those of the present case", the Court has not ruled out the possibility of a limited right to access information held by the State under Article 10.

However, given the specific nature of the requests which were rejected in these three cases (see details below); it would be a very limited right.

²⁶⁴ *Leander*, the applicant was dismissed from a job with the Swedish government on national security grounds, but was refused access to information about his private life, held in a secret police register, which had provided the basis for his dismissal. The Court held that the storage and release of the information, coupled with a refusal to allow the applicant an opportunity to refute it, was an interference with his right to respect for private life. The interference was, however, justified as necessary to protect Sweden's national security

The European Court of Human Rights has not, however, denied redress in these cases. Rather, in all three cases, it found that to deny access to the information in question was a violation of the right to a private and family life, life under Article 8 of the Convention.

1.2.3 The European Union

The European Union (EU), a body committed to furthering the political, social and economic integration of its Member States, has undergone a number of major institutional changes over the years. The EU's predecessors – the European Economic Community, the European Atomic Energy Community and the European Coal and Steel Community – were essentially completely opaque in terms of information disclosure. Meetings were often held in secret and minutes were not published. Moreover, public access to documents held by the Communities was not generally regulated by rules, but was a matter of wide, often arbitrary, discretion.

The Treaty of the European Union (the Maastricht Treaty), which came into force in 1993, represented the first major step towards openness and included a Declaration on the Right of Access to Information which stated: The Conference considers that transparency of the decision-making process strengthens the democratic nature of the institutions and the public confidence in the administration. The Conference accordingly recommends that the Commission submit to the Council no later than 1993 a report on measures designed to improve public access to the information available to the institutions.

This Declaration was put into effect by the Commission, the EU's executive body and The Council, the EU's main decision-making body, composed of ministerial representatives from Member States, through the adoption in 1994 and the Commission, the EU's executive body, put this Declaration into effect through the adoption in 1993 and 1994, respectively, of a Code of Conduct on public access to Commission and Council documents.

The Code of Conduct is guided by the general principle that "the public will have the widest possible access to documents held by the Commission and the Council." Access to any document must be refused where disclosure could undermine the protection of the public interest, privacy, commercial and industrial secrecy, the Community's.

In 1997, the European Parliament adopted its own rules on public access, which provide that "the public shall have the right of access to European Parliament financial interest, and/or confidentiality. Documents under conditions laid down in this Decision. *"Neither the Declaration nor the Code of Conduct explicitly confer a legal right to access official information held by the Commission and Council, and the European Court of Justice (ECJ) has refused to read in such a right"*.

However, the Amsterdam Treaty, which amended the Treaty of Rome and came into force in 1999, does effectively recognize this right in a new article, Article 255, which states:

1. Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to European Parliament, Council and Commission documents, subject to the principles and the conditions to be defined in accordance with paragraphs 2 and 3.

2. General principles and limits on grounds of public or private interest governing this right of access to documents shall be determined by the Council, acting in accordance

with the procedure referred to in Article 251 within two years of the entry into force of the Treaty of Amsterdam.

3. Each institution referred to above shall elaborate in its own Rules of Procedure specific provisions regarding access to its documents.

To give effect to this Treaty right, in May 2001 a new code of access was adopted by the European Parliament and the Council adopted a regulation on access to European Parliament, Council and Commission documents. It will replace the Code of Conduct and the European Parliament rules from 3 December 2001.

The preamble, which provides the rationale for the Regulation, states in part:

✓ Openness enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and accountable to the citizen in a democratic system.

✓ Openness contributes to strengthening the principles of democracy and respect for fundamental rights.

The Regulation has several other positive features, including a narrow list of exceptions, all of which are subject to a harm test and some which are subject to a public interest override. Article 4 states:

1. The institutions shall refuse access to a document where disclosure would undermine protection of:

(a) the public interest as regards:

o public security,

o defence and military matters,

o international relations,

o the financial, monetary or economic policy of the Community or Member State;

(b) privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data.

c) information which is classified as confidential or state secret from the Laws for Protecting Classified Information

2. The Content of the Right to Information

It is now clear that individuals do have a human right to freedom of information, including access to information held by public authorities.

A significant majority of states adopted freedom of information in their constitutions following the transition to democracy in the 1990s. The right of access to information held by public institution can be analyzed in four aspects or directions, which represent the content of this fundamental right. They are as follow:

every citizen shall have the Right to Information from public body;

it shall be the duty of the public body to maintain all records duly catalogued and indexed;

the public body shall be under a duty to make available to the person requesting information, as it is under an obligation to obtain and furnish and shall not withhold any information or limit its availability to the public except the information specified in Clause 4, and

all individuals whether citizens or not, shall have the right to such information that affects their life and liberty;

At the same time, there are some controversial aspects of the freedom of information, because the guarantee of access to publicly held information can be largely undermined by an excessively broad or subjective exceptions regime.

As no right can be absolute, the right to information has to have its limitations. There will always be areas of information that should remain protected in public and national interest. Moreover, this unrestricted right can have an adverse effect of an overload of demand on administration. So the information has to be properly, clearly classified by an appropriate authority.

Some information of a sensitive nature may be subject to withholding for a limited, specified time for the period it is sensitive. The exemptions should be limited in scope. The official who wishes to withhold the information must identify the harm that would occur for each case of withholding. The public interest in disclosure should be considered in each case.

There should be an adequate mechanism for appealing each refusal to disclose. This should include having an independent oversight body such as an Ombudsman or Commission which can investigate and order releases. The body should also promote and educate on freedom of information.

Government bodies should be required by law affirmatively to publish information about their structures, personnel, activities, rules, guidance, decisions, procurement, and other information of public interest ensuring easy and widespread access.

There should be sanctions available in cases where it is shown that an official or body is deliberately withholding information in violation of the law.

Literature

[1] Colin Braham, The Law of Freedom of Information: First Cumulative Supplement, Oxford

[2] Philip Coppel, Information Rights: Law and Practice

[3] Richard Clayton, The Law of Human Rights (Law of Human Right).

[4] Peter Carey, Data Protection: A Practical Guide to UK and EU Law

[5] Transparency: Freedom of Access to Information and Its Role in Society (Hardcover - 28 Dec 2007)