

# The Right to Information and the Expanding Scope of Bodies Covered by National Laws since 1989

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## I. Introduction

Recognition of the right to information (RTI) has expanded dramatically over the past quarter century. In November 1989, only 13 countries had laws granting their citizens a right to information held by public authorities,<sup>1</sup> and the right had not been recognized as a human right by any intergovernmental body. Instead, the right to freedom of expression, codified in the leading human rights treaties, was interpreted to provide only a right to seek, receive, and impart information free from government interference or, at most, a right to receive government-held information that was necessary to protect a fundamental right.<sup>2</sup> At the national level, citizens might have been able to obtain certain information pursuant to administrative procedure codes and broad principles of government accountability, but denials of requested information were generally difficult to challenge.

The fall of the Berlin Wall gave impetus to a wave of enactments, beginning with adoption of laws by Hungary and Ukraine in 1992. From then until the present, 25 other countries in Central and Eastern Europe and the former Soviet Union, and 59 countries in other parts of the world passed access to information laws.<sup>3</sup>

By February 2014, 99 countries had national-level right to information laws or regulations in force—including the population giants of Brazil, China, India, Indonesia, Russia, and the United States, nearly all of the countries of the Europe Union and Council of

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\* This article is based on information supplied by contributors from more than 60 countries, see <http://right2info.org/about#contributors>. Special thanks are due to Helen Darbishire, Executive Director of Access Info Europe for much of the information about European countries.

<sup>1</sup> See Open Society Justice Initiative (OSJI), *Countries with Access to Information (ATI) Provisions in Their National/Federal Laws* (April 2014), at <http://www.right2info.org/laws/constitutional-provisions-laws-and-regulations>. The 13 countries and dates of adoption are Sweden 1766, Finland 1951, USA 1966, Denmark 1970, Norway 1970, France 1978, Netherlands 1978, Australia 1982, Canada 1982, New Zealand 1982, Colombia 1985, Greece 1986, and Austria 1987.

<sup>2</sup> For instance, the European Court of Human Rights, in 1987, ruled that “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. . . . [It] does not . . . embody an obligation on the government to impart . . . information” (*Leander v. Sweden*, 9 Eur. Ct. H.R.433, 26 [1987]). See also, e.g., *Roche v. United Kingdom*, 42 Eur. Ct. H.R. 30 (2005).

<sup>3</sup> OSJI, *Countries with Access to Information (ATI) Provisions in Their National/Federal Laws*, supra note 1.

Europe, more than 70% of the countries of Latin America, 15 in Asia and the Pacific, 13 in Africa, and 3 in the Middle East.<sup>4</sup> Some 60 countries grant constitutional status to the right (either expressly or implicitly, as interpreted by their top courts).<sup>5</sup> More than 5.5 billion people now live in countries that provide an enforceable right, at least in law, to obtain information from their governments.<sup>6</sup>

Moreover, it is now widely recognized that the right to information held by public bodies is protected by the main human rights treaties and has developed into a norm of customary international law.<sup>7</sup> The African Commission on Human and Peoples' Rights issued a Declaration of Principles in 2002 making clear that the African Charter on Human and Peoples' Rights grants the right to information to everyone in the African Union's 53 member states; and the Inter-American Court on Human Rights, in 2006, authoritatively interpreted the American Convention to guarantee the right to information in the Americas.<sup>8</sup> The United Nations (UN) Special Rapporteur on Freedom of Expression (an independent expert mandate), along with experts of the Organization for Security and Cooperation in Europe (OSCE) and the Organization of American States, issued a joint statement in 2004 that the right to freedom of expression includes the right to government-held information, and in 2006, issued a further statement, joined by the recently appointed Special Rapporteur on Freedom of Expression of the African Commission on Human and Peoples' Rights. In 2011, the UN Human Rights Committee adopted a General Comment (considered an authoritative interpretation of the obligations imposed on states by the International Covenant on Civil and Political Rights) recognizing that Article 19 of the Covenant, declaring the right of "everyone" to freedom of expression, also guarantees to everyone the right of access to information held by public bodies.<sup>9</sup> The European Union has recognized a right to

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<sup>4</sup> OSJI, *Countries with Access to Information (ATI) Provisions in Their National/Federal Laws*, supra, note 1.

<sup>5</sup> For lists of countries whose constitutions guarantee the right and whose top courts have interpreted their constitutions to guarantee the right, see Constitutional Protections, <http://right2info.org/constitutional-protections-of-the-right-to>.

<sup>6</sup> This figure was reached by adding the population figures provided by Wikipedia for the 99 countries.

<sup>7</sup> Toby Mendel, *Freedom of Information: A Comparative Legal Survey*, 2nd ed. (UNESCO, 2008), 7.

<sup>8</sup> Declaration of Principles on Freedom of Expression in Africa, African Commission on Human and Peoples' Rights, 32nd Session, 17–23 October, 2002: Banjul, Gambia; and *Claude Reyes et al. v. Chile*, Judgment of Sept. 19, 2006, para. 77.

<sup>9</sup> UN Human Rights Committee, General Comment 34 on Article 19, U.N. Doc. CCPR/C/GC/34 (12 Sept 2011).

information held by Community institutions since 2001.<sup>10</sup> In 2008, the Council of Europe adopted the first multilateral treaty affirming and articulating an enforceable, general right to information,<sup>11</sup> and in 2012 the Grand Chamber of the European Court of Human Rights ruled that “freedom to receive and impart information and ideas” includes a right to receive information of public interest held by public authorities.<sup>12</sup>

The rapid proliferation of statutory, constitutional and international guarantees of the right to information is noted not in order to suggest that the public’s enjoyment of the right to information has in fact improved around the world. While there is some evidence that in most countries, save for the most autocratic, people tend to enjoy better access to information once a law is passed than previously,<sup>13</sup> the point made here is that the proliferation of national laws occurred in a short period of time, quickened by the collapse of the Soviet empire; and that the right to information, unlike many other fundamental rights, received explicit legal protection first at the national level and only recently at the regional and international levels.

While the right evolved first at the national level, it has only been since the right’s affirmation at the international level that consensus is developing concerning the contours of the right. The most important international instruments to address the *elements* of the right are the Model Inter-American Law on Access to Public Information (“Model Inter-American Law”) adopted by the OAS General Assembly in 2010; the General Comment issued by the UN Human Rights Committee in 2011; and the Model Law on Access to Information for Africa (“Model Law for Africa”) issued by the African Commission on Human and Peoples’ Rights in 2013.<sup>14</sup> As a result, the international standards now are more progressive than most national-level laws, in particular, the laws of established democracies that adopted their laws before the fall of the Berlin Wall. This paper addresses the discrepancies between the international standards and national law in one important area, namely, concerning the range

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<sup>10</sup> Regulation (EC) No. 1049/2001 of the European Parliament and the Council provides a right of public access to European Parliament, Council and Commission documents.

<sup>11</sup> Council of Europe Convention on Access to Official Documents, adopted by the Comm. of Ministers on 27 Nov 2008, opened for signature and ratification on May 27, 2009, ratified by six countries as of October 2013.

<sup>12</sup> *Gillberg v. Sweden*, no. 41723/06, Grand Chamber Judgment of 3 April 2012. See also *Társaság a Szabadságjogokért v. Hungary*, no. 37374/05, ECHR Judgment of 14 April 2009; and *Kenedi v. Hungary*, no. 31475/05, ECHR Judgment of 26 May 2009.

<sup>13</sup> See, e.g., Open Society Justice Initiative, *Transparency and Silence: A Survey of Access to Information Laws in 14 Countries* (2006), 11.

<sup>14</sup> Model Inter-American Law on Access to Public Information, Doc. AG/RES. 2607 (XL-O/10), adopted on June 8, 2010, Art. 3; General Comment, *supra* note 9; and Model Law on Access to Information for Africa, issued by the African Commission on Human and Peoples’ Rights, April 2013.

of bodies that are obliged to disclose information.

The first section, an overview, begins with an analysis of the requirements of the Model Laws and the General Comment, noting the few differences among them, and then surveys the trend over the past 20 years for right to information laws to be applied to a growing number and range of bodies. The section advances the contention that expansive coverage promotes not only consistency and predictability, but enjoyment of the right to information itself, given that exemption of whole agencies precludes access to information even of overriding public interest held by such agencies. Subsequent sections examine the expansion in coverage in various countries to virtually all executive and administrative bodies, including the intelligence and security agencies, heads of state, and cabinets; judicial and legislative bodies; and private entities that perform public functions or receive public funds regardless of the nature of the functions. These sections include considerable detail about good law and practice in the hope that readers may find examples that will be particularly persuasive in their own country contexts, and also advance policy arguments as to why right to information laws should apply to a full range of public and private bodies, with exceptions for withholding information based on the nature of the information rather than the body that holds the information. The last section makes the argument that right to information laws should apply to private bodies not only that perform public functions but also that receive public funds. While only slightly more than a dozen laws explicitly extend to such private bodies, the number is steadily growing and there are sound arguments for such coverage, including that citizens are entitled to know how public funds are used, and that regulators have a poor record of holding entities accountable in the absence of public scrutiny.

## **II. Range of Bodies Covered: Overview**

The basic principle set forth in international instruments, model laws and case law is that the public has a right of access to information held by public authorities and some private entities, subject only to a limited number of narrowly drawn exceptions that are necessary to protect legitimate interests. The public authorities and private entities that are obliged to provide information, however, vary across regions and among countries. The narrowest approach, somewhat surprisingly—at least to those who think that the United States has one of the strongest freedom of information (FOI) laws in the world—is exemplified by the US FOI Act (FOIA), which, by its terms, applies only to executive agencies of the federal

government.<sup>15</sup> Somewhat broader than that is the traditional European approach, reflected in the Council of Europe Convention on Access to Official Documents, which calls for laws to apply to government and administration at national, regional and local level; “legislative bodies and judicial authorities in so far as they perform administrative functions according to national law,” and “natural or legal persons in so far as they exercise administrative authority.”<sup>16</sup> The RTI laws of more than half of the 47 member states of the Council of Europe now apply to a broader range of information than required by the Convention, including legislative information (and not merely information related to the administrative functions of legislative bodies), and nearly one-third apply their laws to judicial information.

The Model Inter-American Law calls on states to adopt laws that impose disclosure obligations on all public authorities, including the executive, legislative and judicial branches at all levels of government, constitutional and statutory authorities, “non-state bodies that are owned or controlled by government,” and also to “private organizations which operate with substantial public funds or benefits (directly or indirectly) or which perform public functions and services,” but only concerning those funds, public functions or public services.<sup>17</sup> Most laws of the Americas are not as expansive as the Model Law. For instance, Mexico’s law, adopted in 2002 and considered among the most progressive in the world owing to strong procedural protections and a powerful information council, does not apply to private entities, even those that perform public functions.<sup>18</sup>

The Model Law for Africa sets forth a yet more expansive scope: it applies, in addition to the bodies listed in the Model Inter-American Law, to private bodies that (a) receive public funds (regardless of whether “substantial” as specified in the Inter-American Model Law) concerning those funds, and (b) to the extent that information they hold “may assist in the exercise or protection of any right.”<sup>19</sup>

India’s Right to Information Act 2005 is among the laws that apply to almost all of the bodies recommended by the Inter-American Model (although India’s law exempts some intelligence and security agencies listed in a schedule to the law, and “cabinet papers including records of deliberations of the Council of Ministers, Secretaries and other

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<sup>15</sup> FOIA 1966, as amended, 5 U.S.C. § 552(f)(1).

<sup>16</sup> Council of Europe Convention on Access to Official Documents, *supra* note 11, at Art. 2(a).

<sup>17</sup> Inter-American Model Law, *supra* note 14, Sec. 3.

<sup>18</sup> Federal Law on Transparency and Access to Public Government Information, Art. 3(IX).

<sup>19</sup> Model Law for Africa, *supra* note 14, Sec. 1 (definition of “relevant private body”) and Sec. 2(a) and (b).

officers”).<sup>20</sup> The laws of Liberia and Nigeria, adopted in 2010 and 2011 respectively, include most of the language of the Model Law for Africa, although they do not extend to private bodies that hold information that may assist in the exercise or protection of any right. Three countries that do cover such private entities are South Africa, Kenya (by its constitution of 2010), and Rwanda, although in terms slightly different than those used in the Model Law.<sup>21</sup>

The following sections discuss entities to which right to information laws apply, and demonstrate the trend toward expansion in the range of bodies covered by such laws. Of course, even as the range of bodies is expanding, exceptions continue to be applied, thus limiting effective access to information. Trends concerning interpretation and application of exceptions lie outside the scope of this paper.<sup>22</sup>

The term “right to information” (RTI), which is gaining increasing currency, is used in this article because it most aptly communicates the key element of these laws. The term “freedom of information” has been particularly associated with the laws of anglophone and US- or UK-influenced states, a few German-influenced countries (Germany, Austria, Switzerland), and has been understood in some contexts to refer only to the right to seek, receive and impart information free from government interference. “Access to” information (without express inclusion of “right”) is the term used in the titles of most laws in Europe, Latin America and Africa. “Right to information” is used in several of the most recently enacted laws and ordinances, including those of Albania (adopted 1999), Bangladesh (2008), Croatia (2003), Guinea (2010), India (2005), Mongolia (2011), Nepal (2007), Turkey (2003), and Yemen (2012).

RTI laws promote several objectives, expressly stated in many constitutions and laws, including to make possible the full exercise of the right to freedom of expression, enable the public to reach informed opinions concerning the functioning of government, foster democratic accountability and good governance, reduce corruption and maladministration, and increase public confidence in public agencies. Expanding the scope of bodies covered by

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<sup>20</sup> See India Right to Information Act, No. 22 of 2005, Art. 2(h); Liberia FOIA 2010; Nigeria FOIA, signed into law on 28 May 2011.

<sup>21</sup> South Africa’s Constitution, Sec. 32, and Promotion of Access to Information Act (PAIA) 2000, SS. 1, 9(a) and 12, and Kenya’s 2010 Constitution, Sec. 35(1) guarantee a right of access to any information that is held by any “person” and that is “required” for the exercise or protection of any right. Rwanda’s 2013 law, Art. 2(4), applies to a private body that holds information relevant to “rights and freedoms of people.”

<sup>22</sup> For discussion of exceptions to access, see, e.g., David Banisar, *Freedom of Information Around the World: A Global Survey of Access to Government Information Laws*, Privacy International (2006); and Toby Mendel, “The Right to Information in Latin America,” elsewhere in this book.

RTI laws promotes these objectives. Including all bodies under one law, subject to carefully drawn exceptions, enables exceptions to be narrowly tailored so as to withhold only information whose disclosure would likely cause harm to important interests. Moreover, addressing transparency via a comprehensive RTI law rather than by a patchwork of laws promotes consistency concerning the scope of information covered and interpretation and application of exceptions. Exceptions to access are most consistent with the right to information when based on the nature of the information and not on the nature of the entity that holds the information.

### **III. Application of RTI Laws to All Levels of Government**

The RTI laws of unitary, nonfederated countries generally apply to all levels of government: national, regional (where applicable) and local. For instance, the Council of Europe Convention on Access to Official Documents, reflecting the law of most of the Council's 47 member states on this point, provides that the right to have access to official documents shall apply to "government and administration at national, regional and local level."<sup>23</sup> While the RTI laws of countries that grant considerable autonomy to subnational government entities—including Australia, Austria, Canada, Germany, Mexico, South Korea and the United States—have applied only to the federal (central) government, the states in most of these countries have also adopted laws that apply to state and local bodies (e.g., Australia, Canada, the United States).<sup>24</sup> Germany is the main exception; of its 16 *Länder* (states), five – whose populations account for nearly half of Germany's total population – have yet to pass RTI laws.<sup>25</sup> Moreover, a few countries with federal systems have applied their RTI laws to all levels of government; these include India (RTI Act adopted 2005) and Portugal (law amended 1999). A 2007 amendment to Mexico's Constitution expressly requires the state and local governments to adopt their own laws that meet certain basic transparency standards.<sup>26</sup>

### **IV. Executive/Administrative Bodies**

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<sup>23</sup> Convention on Access to Official Documents, *supra* note 11, Art. 1(2)(a)(i).

<sup>24</sup> All six of Australia's states and two of its territories, all of Canada's provinces and territories, and all of the states of the USA and the District of Columbia have freedom of information laws.

<sup>25</sup> Walter Keim, 30 August 2012, <http://home.altibox.no/wkeim/files/120830un.html>.

<sup>26</sup> *Constitucion Politica de los Estados Unidos Mexicano*, *Diario Oficial de la Federación* [D.O.], 20 July 2007 (Mex.).

Most RTI laws apply to most agencies of the executive branch of government. Some laws—such as those of Canada, Ireland, New Zealand and the United Kingdom—include a schedule that lists the covered bodies. A few—such as South Korea’s—refer to another statute that lists the covered bodies. Still other laws—such as India’s—list exempted agencies in a schedule to the statute or in regulations or laws expressly referenced in the statute. In many countries, the intelligence and special services, military and police forces, and the offices of the head of state, head of government and cabinets are exempted in whole or in part, although in modern statutes increasingly they are covered, subject to exemptions for national security, deliberative process and related grounds. For instance, India’s RTI Act 2005 applies to all three branches of the armed forces, the Ministry of Defence, the Coast Guard, the Department of Atomic Energy, nuclear power plants, aeronautics and space research organizations (except the Aviation Research Centre), and state civilian and armed police organizations.

#### ***A. Intelligence and Security Agencies***

There are several reasons why intelligence and security agencies should *not* be exempted from disclosure obligations. First, such agencies produce a lot of documents that are invaluable to researchers, scholars and the public that do not reveal anything about confidential government actions. For instance, in the US, the Central Intelligence Agency (CIA) held extensive documents concerning Saddam Hussein's history of human rights abuses.<sup>27</sup> None of these CIA documents reveal anything about US policies or CIA activities, but they do reveal a great deal of information of public interest about what Saddam Hussein did and what and when the US knew about his deeds. Second, in several countries, application of RTI laws has led to exposure of scandals or wrongdoing that might not have come to light but for the laws. Third, the national security exception has proved effective in keeping information secret (pursuant to RTI laws) that governments have sought to keep secret.

In Europe, the intelligence and special services are covered by the RTI laws of most countries, although much of the information they hold is subject to exceptions—in particular for national security, including protection of state secrets and diplomatic relations. In several countries, such as Bulgaria, courts have confirmed that the secret services are covered.

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<sup>27</sup> See “Saddam’s Iron Grip: Intelligence Reports on Saddam Hussein’s Reign,” *National Security Archive Electronic Briefing Book No. 167* (18 October 2005), [www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB167/index.htm](http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB167/index.htm).



The FOI laws of Australia, Canada, and the UK completely exempt some or all of the intelligence agencies from coverage.<sup>28</sup> A few countries, such as India, allow intelligence and/or security services to be exempted, but only pursuant to an order of the relevant minister. The United States has a more demanding process for allowing exemption of intelligence information: only “operational files” of intelligence agencies may be exempted from the FOIA, and only by a statute duly passed by both Houses.<sup>29</sup> For instance, a bill to exempt the operational files of the Defense Intelligence Agency was defeated in 2000 because the bill, if passed, would have shielded from disclosure the activities of foreign death squads, torturers and other human rights abusers.<sup>30</sup> While exempting only “operational files” is more narrowly tailored than exempting whole agencies, the term “operational files” has, in practice, been interpreted broadly.

Interestingly, several laws—including those of India, Brazil, Guatemala, Mexico, Peru, Uruguay, Albania and Romania—expressly provide that information about human rights violations, violations of law in general, and/or corruption may *not* be withheld.<sup>31</sup>

An increasing number of countries are publishing their intelligence budgets and/or staff numbers. For instance, Brazil, Canada, the Netherlands, Serbia and the United Kingdom have disclosed baseline intelligence spending information. In 2007, the government of France published its intelligence budget total for 2004. The US government has published the aggregate figure for all intelligence-related activities since 2007 pursuant to law, and did so also in 1997 and 1998. The fact that some countries, including those with substantial intelligence sectors, publish intelligence budgets for some years suggests that, as a general rule, suppression of such information is unnecessary to protect important interests.

Most armed forces and defense departments in European and other democracies are covered by their country’s RTI laws, except for agencies expressly exempted, such as intelligence offices. For instance, in the United Kingdom, the armed forces are covered, except for the special forces and “any unit or part of a unit which is for the time being

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<sup>28</sup> Paul Hubbard, “Freedom of Information and Security Intelligence: An Economic Analysis in an Australian Context,” *Open Government Journal* 1.3 (2005): 4.

<sup>29</sup> “Operational files” of several intelligence agencies—including the CIA—are exempted from the FOIA.

<sup>30</sup> The bill was defeated following strong opposition of the nongovernmental National Security Archive and several other NGOs. See “Archive Calls on CIA and Congress to Address Loophole Shielding CIA Records from FOIA,” National Security Archive Briefing Book No. 138, “Proliferation of the Problem” (15 October 2004).

<sup>31</sup> See, e.g., India’s RTI Act, Sec. 24(2) and (4); Mexico’s law, Art. 14; Romania’s law, Art. 13; Albania’s Law on Classified Information, Sec. 10.

required by the Secretary of State to assist the Government Communications Headquarters in the exercise of its functions.”<sup>32</sup> Australia’s RTI Act includes similar language.<sup>33</sup>

Ireland is the only state in Western Europe that completely exempts the police from the coverage of its law. While many countries exempt information relating to criminal investigations by the police or judiciary, in most countries considerable information is subject to disclosure, at least in theory, including information about numbers and assignments of police, department budgets and results of disciplinary proceedings. The rule across Europe and Latin America is that restrictions on disclosure, even regarding security and criminal investigations, are better handled through exemptions based on the nature of the information rather than on the identity of the body holding the information.

### ***B. Heads of State/Government and Cabinets***

Traditionally, information concerning the deliberations of, and preparations for decisions by, the head of government and/or his/her close advisors was not available to the public. Such information continues to be expressly exempted from the access to information laws of several commonwealth countries (including Australia, Canada, South Africa and Uganda), and at least six European countries (Denmark, Greece, Iceland, Netherlands, Norway, Portugal). Minutes of cabinet meetings and other papers have routinely been withheld in other countries pursuant to exemptions for “documents in preparation” (“internal documents” or “policies under development”) and protecting “the deliberative process of a public authority” (“the free and frank exchange of opinions,” “predecisional advice”).

Nonetheless, several countries—by legislation, practice or court order—have begun to make some, even most, cabinet papers available, especially when the public interest in access overrides any justifications for secrecy. For instance, in New Zealand, the Official Information Act 1982 does not contain any blanket exemptions for cabinet confidences. Cabinet documents are routinely disclosed on the Internet and by other means and ministers are encouraged to proactively release such material.<sup>34</sup>

Section 8 of India’s RTI Act provides that “the decisions of the Council of Ministers, the reasons thereof, and the material on the basis of which the decisions were taken shall be made public after the decision has been taken, and the matter is complete,” subject to the

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<sup>32</sup> FOI Act, 2000, Schedule 1, Art 6.

<sup>33</sup> FOI Act, 1982, Sec. 11.

<sup>34</sup> See “New Zealand” in David Banisar, *Freedom of Information Around the World: A Global Survey of Access to Government Information Laws, Privacy International* (2006).

other exemptions in the Act. Japan's law provides that "Cabinet bodies and bodies under Cabinet jurisdiction that were established by law" must disclose their administrative documents.<sup>35</sup>

In Bulgaria, agendas and summaries of the meetings and decisions of the Council of Ministers have been available online on the website of the Council of Ministers since at least 2005. Since August 2009, when the new prime minister ordered the internal information system of the Council of Ministers to be made accessible online, all decisions, meeting records and minutes of the Council of Ministers adopted since 1990 are publicly available.<sup>36</sup>

Hungary's Constitutional Court, in 2006, addressed one of the perennial obstacles to information access: the failure of governments to keep records. The Court ruled that the government is under an obligation to keep records, because failure to do so would otherwise directly and seriously restrict the right of access to public information and, accordingly, instructed the legislature to pass a law requiring records to be kept of government sessions.<sup>37</sup> The legislature duly passed such a law which, among other things, amended the law regulating the preparation of minutes of cabinet meetings. However, the Constitutional Court's decision has not been fully implemented.<sup>38</sup>

The government of the United Kingdom decided in February 2010 to drop its proposal to exempt cabinet papers from the FOI Act.<sup>39</sup> This means that cabinet papers may only be withheld based on existing FOI exemptions for policy formulation and ministerial communications, which are subject to the Act's public interest test. As a result, information should be released if the public interest in disclosure overrides the reasons advanced for secrecy. Four of the six occasions, as of January 2013, on which the UK government vetoed decisions of the Information Commissioner were to block the release of cabinet or cabinet committee minutes: twice about the war in Iraq, and twice about devolution of power to Scottish institutions.<sup>40</sup> The veto is judicially reviewable, which provides some check on the government's veto power.

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<sup>35</sup> Law No. 42 of 1999 concerning Disclosure of Information Held by Administrative Organs, Art. 2, para. 1.

<sup>36</sup> Information supplied by Access to Information Programme, email dated 8 December 2009, on file with the author.

<sup>37</sup> Constitutional Court, 13 July 2006, *Magyar Közlöny* (Official Gazette) 2006/84.

<sup>38</sup> Email from Adam Foldes, then with Transparency International–Hungary, 27 October 2009, on file with the author.

<sup>39</sup> Campaign for FOI (UK), press release, 25 February 2010.

<sup>40</sup> Parliamentary and Constitutional Centre, House of Commons Library, "FOI and Ministerial vetoes," 28 January 2013.

The US FOIA applies to the Executive Office of the President,<sup>41</sup> but does *not* apply to the president, his immediate staff, and entities within the Executive Office of the President whose functions are limited to advising and assisting the president (including the vice president, the National Security Advisor, the National Security Council, and the White House Counsel).<sup>42</sup>

## **V. Legislative and Judicial Bodies**

Almost all of the RTI laws in Latin America apply to legislative and judicial bodies.<sup>43</sup> In addition, most RTI laws in other parts of the world, including several in the Commonwealth, apply to legislative bodies, and legislative bodies are covered by separate laws in several additional countries. Fewer RTI laws apply to judicial information. Other laws and fundamental fair trial principles provide grounds for judicial transparency but these do not afford as much access to documents as do the RTI laws.

Most countries in Europe extend the right to information to legislative and judicial bodies at least concerning their “administrative functions.” These are generally understood to require publication of information about the structure and organization of public bodies; their decrees, policies and regulations; budget, procurement and financial information; information about salary scales; and contact information for the public information officer.<sup>44</sup> However, within these broad categories, there is considerable variation from country to country. For instance, information about the judicial career (including selection criteria and procedures, promotion and disciplinary measures) in a number of countries is considered to be administrative in nature and thus subject to disclosure, while in other countries, such information is treated as nonpublic judicial information.

Sections A and B, below, describe the laws that apply to the legislature and judiciary and some of the issues that arise. Section C then examines, and rejects, the main reasons advanced for not applying RTI laws to these branches of government, and notes that, for good reason, the emerging trend is to apply RTI laws to all branches of government, including concerning legislative and judicial, not merely administrative, information.

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<sup>41</sup> FOIA, 5 U.S.C. § 552(f)(1).

<sup>42</sup> Dept. of Justice, FOIA Post (2002), <http://www.usdoj.gov/oip/foiapost/2002foiapost30.htm>.

<sup>43</sup> Mendel, “The Right to Information in Latin America,” elsewhere in this volume.

<sup>44</sup> See, e.g., Armenia’s Law 2003, Art. 7(3); Dominican Republic’s Law 2004, Art. 5; Germany’s Law 2005, Sec. 11; Honduras’s Act 2006, Art. 3.9 and 4; Ireland’s FOI Act 1997, Sec. 15(1) and 16(1); Mexico’s Federal Law, Art. 7 and 9; Slovenia’s Act 2005, Arts. 8 and 10.

### ***A. Legislative Bodies***

RTI laws provide access to *administrative* information held by legislative bodies in virtually all European countries. Norway is one of the few countries in Europe that does not grant a right of access to at least administrative information held by its parliament.<sup>45</sup>

In addition, the public has a right of access to at least some legislative information held by legislative bodies in at least 24 countries in Europe. In 19 countries, legislative information comes within the scope of the RTI laws themselves.<sup>46</sup> In at least 5 other countries—the Czech Republic, France, Georgia, Germany and the Netherlands—the public has a right of access to legislative information pursuant to laws other than the RTI law. Of the 14 countries of Latin America with RTI laws—Argentina, Brazil, Chile, Colombia, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Peru and Uruguay—all but Uruguay and Colombia expressly apply their laws to the legislature, although Mexico and Chile do so only to a limited extent.<sup>47</sup> The laws of at least 6 countries in Africa (Guinea, Liberia, Nigeria, Rwanda, South Africa, and Uganda) apply to legislative information, as do the laws of Australia, India, Israel and South Korea and the Constitution of the Philippines.<sup>48</sup>

In countries that recognize a right of access to information held by the legislative branch, a major question concerns the extent to which individual members of parliament (MPs) are, or should be, subject to disclosure requirements. RTI laws generally apply only to records by, or relating to, MPs and local representatives that are held by legislative or other governmental bodies. Thus, requests for information are made to the bodies that hold the desired information, and individual MPs may intervene to object to disclosure. Claims of MPs for expenses and reimbursement, including for food and travel, increasingly are treated

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<sup>45</sup> Norway's FOI Act 2006, Sec. 2.

<sup>46</sup> The 19 countries are Albania, Armenia, Bosnia & Herzegovina, Bulgaria, Croatia, Finland, Ireland, Latvia, Lithuania, Macedonia, Moldova, Montenegro, Romania, Serbia, Slovakia, Slovenia, Sweden, Switzerland and the United Kingdom.

<sup>47</sup> See Mendel, "The Right to Information in Latin America," elsewhere in this volume. Note, however, that Mendel counts only 13 countries in Latin America as having RTI laws. This is explained by the fact that he does not include Argentina, which has an executive decree rather than a full fledged law. Argentina's decree is counted in this chapter because it is judicially enforceable, and is functionally similar to laws, such as the law of Colombia, that apply only to the executive branch.

<sup>48</sup> For texts of these laws, see <http://www.right2info.org/laws/constitutional-provisions-laws-and-regulations>.

as subject to RTI laws.<sup>49</sup> Arguably, elected representatives should themselves be covered, subject to exceptions to protect privacy and independence of political parties, if the presumption is accepted that entities that perform public functions or are funded by public monies should be covered by RTI laws.

## ***B. Judicial Bodies***

Countries are increasingly recognizing a public right of access to significant amounts of judicial information, including final and interim judicial decisions; case files; and transcripts of, and documents offered in, public court hearings. Judicial information now appears to be covered by the RTI laws of at least 34 countries, including India, South Korea, three countries in Northern Europe (Belgium, Netherlands and Sweden), at least 6 countries in Africa (Guinea, Liberia, Nigeria, Rwanda, South Africa, and Uganda), 10 in Latin America (Brazil, Chile, Dominican Republic, Ecuador, Guatemala, Honduras, Mexico, Nicaragua, Panama and Peru) and 13 in Central and Eastern Europe (Albania, Armenia, Belgium, Bosnia & Herzegovina, Bulgaria, Croatia, Latvia, Macedonia, Moldova, Montenegro, Romania, Serbia, Slovenia).<sup>50</sup> At least another 13 countries plus Hong Kong apply their laws to *administrative* information held by the judicial branch: Australia, New Zealand, and 11 countries in Europe (the Czech Republic, Denmark, France, Georgia, Germany, Hungary, Ireland, Norway, Slovakia, Turkey and the United Kingdom).

In most countries whose RTI laws do not apply to judicial information, access to some such information is nonetheless provided pursuant to constitutional principles of “transparency,” “publicity” or “democratic accountability”; criminal and civil procedure codes; laws on public procurement and ethics; judicial regulations; or simply the court’s own conclusion that transparency is desirable. In these countries, however, access tends to be

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<sup>49</sup> Information commissioners and courts in several jurisdictions—including Israel, Japan, South Korea, Scotland and the United Kingdom—have established that claims of MPs for expenses and reimbursement are subject to disclosure. The Scottish parliament has for several years proactively published on its website detailed travel claims of members in a searchable database. The High Court of England and Wales required the disclosure of actual claim forms and supporting documentation submitted by MPs. See *Corporate Officer of the House of Commons v. The Information Commissioner & Ors* (2008) EWHC 1084 (Admin) (16 May 2008). The Tokyo District Court ordered Tokyo’s governor to disclose details of travel costs he and a group of legislators incurred in July 1996. *Legislators’ Foreign Travel Expense Receipts*, Tokyo District Court. The decision was upheld by the Supreme Court. Information supplied by Prof. Lawrence Repeta.

<sup>50</sup> See <http://right2info.org/laws> (links to the respective countries’ laws); see also Due Process of Law Foundation, *Access to Judicial Information in Latin America* (2007).

more restricted than in countries with applicable RTI laws. Moreover, judicial information is often withheld, both in countries with and without applicable RTI laws, on various grounds, including the privacy of the parties and witnesses; the prevention, investigation and prosecution of criminal activities; the equality of parties in court proceedings; the effective administration of justice; and the protection of minors. Categories of important information that often are not subject to disclosure include interim as well as final judgments (often owing to privacy concerns); transcripts of court proceedings; information in case files, including information referred to in open court; information about judges' qualifications and the processes and criteria by which they are selected, promoted and disciplined; and statistics, e.g., concerning the number and length of cases handled by each judge or court, and information about procedures courts follow in handling cases.

### ***C. Reasons for Extending Full Coverage to Legislature and Judiciary***

The rationales that call for transparency of the executive—including public financing, and the public's right to accountable governance—apply with equal force to the legislature and judiciary. The arguments for exempting legislative and judicial bodies can be fully addressed through a combination of appropriate exceptions and mechanisms to address any separation of powers concerns.

Opposition to applying an RTI regime to legislative and judicial authorities stems principally from two notions.<sup>51</sup> The first is that existing mechanisms, such as the right to a public trial or the right to attend meetings of legislative bodies, adequately ensure transparency of the activities of the legislative and judicial branches. Many countries, especially mature democracies, do indeed have traditions of openness concerning the conduct of legislative and judicial proceedings. In the case of judicial authorities, however, it is generally only the courts that carry out some of their business in public, and not other bodies in the judicial branch, such as those that make decisions regarding selection, promotion and discipline of judges. Furthermore, openness in the judiciary is limited to what is necessary to ensure the fairness of trials and does not take into account wider considerations of the public interest. In the case of legislative bodies, meetings and their records are usually open to the public, but this is generally not true of the documents and reports on which legislators base

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<sup>51</sup> The broad arguments in this section are drawn from a paper titled "Briefing Regarding the Elaboration of a Council of Europe Treaty on Access to Official Documents," by Access Info Europe, ARTICLE 19, and OSJI, issued by the Council of Europe Steering Committee for Human Rights, DH-S-AC(2006)009bil (10 November 2006), 8.

their decisions. In any case, the fact that a considerable degree of openness exists already in the legislative and judicial branches should argue in favor of, rather than against, extending the scope of RTI laws to these branches.

The second objection is that an overarching access to information regime for all three branches of government would contravene the principle of separation of powers. Governments can readily address this objection by adopting measures that comply with their own legal systems and traditions. Some countries have separate laws that address the legislative and judicial branches but basically mirror the substantive and/or procedural protections of the general RTI law. For instance, the laws of Mexico and Chile apply the substantive provisions of the RTI law to judicial and legislative bodies, but require the judiciary and legislature to establish their own procedures for overseeing the law's implementation.

Regarding the judiciary, a third argument is often advanced that judicial authorities should be exempt because they hold mainly sensitive information, such as materials in case files and criminal investigations. However, documents that need to be withheld to protect legitimate rights or interests may and should be withheld on those grounds, rather than on the ground that they are held by a particular institution.

The European Court of Human Rights has implicitly ruled that judicial and legislative information of public interest is subject to disclosure.<sup>52</sup> The applicant in the case, the Hungarian Civil Liberties Union (HCLU), had sought access to a pleading filed by an MP with the Constitutional Court calling on the Court to invalidate recent amendments to the Criminal Code.<sup>53</sup> The government did not contest that there had been an interference with the applicant's right to information of public interest under Article 10 of the European Convention on Human Rights, but asserted that the interference had been justified in order to protect the MP's privacy. The Court dismissed this justification and, in a landmark judgment, ruled that "freedom to receive and impart information and ideas" includes a right to receive information of public interest held by public authorities. Hungary's Constitutional Court has both judicial and legislative functions. It is not, strictly speaking, part of the judicial branch, but it does interpret and apply the law to particular facts. It is also an institution whose

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<sup>52</sup> *Társaság a Szabadságjogokért (HCLU) v. Hungary*, Application No. 37374/05 (14 April 2009).

<sup>53</sup> The Hungarian Constitutional Court had, until that time, interpreted the right to freedom of expression expansively. See P. Molnar, "Towards Better Law and Policy against Hate Speech," in I. Hare and J. Weinstein, eds., *Extreme Speech and Democracy* (Oxford: Oxford University Press, 2009).



decisions affect law-making and legislative policy. The judgment thus is significant not only for establishing the existence of a right to information under the European Convention but also for applying that right to information of judicial and legislative character.

## **VI. Private Entities That Perform Public Functions or Receive Public Funds**

Most RTI laws now provide for access to information held by some public corporations and/or private entities that perform public functions or provide public services, and increasingly the more modern laws, and the model laws for Africa and the Americas, also apply to entities that receive public funds, as least as regards the use of those funds. In addition, the laws of South Africa and Rwanda, the constitutions of South Africa and Kenya, and the Model Law for Africa apply to information held by private entities that a person needs to exercise or protect a right.<sup>54</sup> Precisely which entities are covered, however, often is unclear given the multiplicity of kinds of entities that perform public functions or receive public funds.

First, there are state-owned enterprises (SOEs), also called government-owned or public corporations, which are legal entities created by a government to undertake commercial or business activities on behalf of the government. The defining characteristics of these SOEs are that they have a distinct legal form and are established to operate in commercial affairs. Most SOEs are established by government, but some commenced as private entities that were then nationalized. SOEs can be fully or partially owned by the government.

SOEs are generally fully guaranteed by the government; for example, in Finland, state-run corporations, even though responsible for their own finances, cannot be declared bankrupt. In contrast, the state may own an interest, even a controlling interest, in ordinary limited-liability corporations (discussed below as private entities that receive government funding).

SOEs are covered by most RTI regimes in Europe, the Americas and Africa, by 6 of the 11 countries in Asia with RTI provisions (India, Japan, Nepal, the Philippines, South Korea and Thailand, and also Hong Kong), and by Israel, Jamaica and New Zealand. However, China's Disclosure of Government Information regulations, which entered into

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<sup>54</sup> See supra note 21.

force in May 2008, do not apply to SOEs,<sup>55</sup> and Indonesia's Law on Public Information Transparency, passed in April 2008, applies to SOEs only to a limited extent, pursuant to a compromise reached after civil society strongly objected to the government's proposal to exclude SOEs entirely.<sup>56</sup>

Second, there are private entities that exercise administrative authority, perform public functions, provide public services, or receive public funds. These elements are closely related, and there is considerable lack of precision concerning what is understood to constitute "administrative authority" and "public functions," as well as concerning the amount of funding that subjects an entity to general disclosure requirements. The following sections discuss those concepts.

#### ***A. Entities That Exercise Administrative Authority, Perform Public Functions, or Provide Public Services***

"Administrative authority" generally means the authority to regulate, for instance, by professional licensing and standard-setting bodies. "Public functions" generally include "administrative authority" and the provision of statutory services and any other important public services, for instance, those that protect public safety and security, and may encompass a broad range of other services, e.g., including health care. Trash collection is considered a public function in most jurisdictions, but not in all. Armenia's RTI law enumerates functions of "public importance" expansively to include "sport, education, culture, social security, transport, communication and communal services."<sup>57</sup>

Most entities that perform public functions also exercise administrative authority. Notable exceptions are government-financed broadcasters which, although they may not exercise administrative authority, are considered in many countries to perform a public function. Virtually all entities that perform public functions or exercise administrative authority receive substantial public financing, but some—such as professional licensing boards in some countries—may be all or substantially funded by membership dues. Moreover, an entity could receive substantial public funding and yet perform duties other than public or administrative functions. For instance, private institutions that receive funding for scientific research generally are not considered to perform a "public function" although

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<sup>55</sup> See Provisions of the People's Republic of China on the Disclosure of Government Information 2007, adopted by the State Council, 17 January 2007, effective 1 May 2008, Art. 37.

<sup>56</sup> See Indonesia's Act No. 14/ 2008, Art. 14.

<sup>57</sup> Armenia's FOI Law, Art. 3.

their work furthers the public interest.

Information held by private bodies that exercise “administrative authority” or perform “public functions” appears to be covered by the RTI laws of most European countries (though not the United Kingdom), as well as at least 17 other countries: in Africa (Angola, Guinea, Liberia, Niger,<sup>58</sup> Nigeria, Rwanda,<sup>59</sup> South Africa); 7 in the Americas and Caribbean (Antigua and Barbuda, Belize, Ecuador, Guatemala, Nicaragua, Peru, and Trinidad and Tobago), and 3 in Asia and the Pacific (Australia, New Zealand and South Korea).<sup>60</sup> The right has constitutional as well as statutory protection in Kenya, Poland, Serbia and South Africa, and a 2004 amendment to Panama’s Constitution created a constitutional right to information held by private companies involved in work of a public nature.<sup>61</sup> In a few additional countries, e.g., Israel and Jamaica, application of the RTI law to private bodies requires an order of the Minister of Justice or other responsible minister.<sup>62</sup> The laws of several of these countries—including the Czech Republic, Hungary, Iceland, Ireland, Liberia, the Netherlands, Peru and Slovakia—as well as the Model Laws for Africa and the Americas specify that only information related to public functions is subject to disclosure obligations.<sup>63</sup> Hungary’s law usefully extends coverage so as also to include “matters related to [the entities’] financial management,”<sup>64</sup> an extension which appears to be implicit in most of the other laws.

### ***B. Entities That Receive Public Funds Regardless of the Functions They Perform***

A smaller, but steadily growing number of countries extend coverage to entities that receive public funds without reference to whether or not they perform public functions. Among the countries whose laws apply to such private entities are India, Liberia, Nigeria and

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<sup>58</sup> Niger’s 2011 law applies, pursuant to Art. 3, to “bodies with a public interest function.”

<sup>59</sup> Rwanda’s law, by Art. 2(4), applies to private bodies that carry “any business in relation to public interest.”

<sup>60</sup> See Right2Info, “Private Bodies and Public Corporations,” (2013), <http://right2info.org/scope-of-bodies-covered-by-access-to-information/private-bodies-that-have-a-public-character>; and Mendel, *Freedom of Information*, supra note 7, 80, 90, 120, and 140.

<sup>61</sup> See constitutions of Panama, as amended 15 November 2004, Art. 45; Poland, Art. 61(1); Serbia, Art. 51(2); South Africa, Sec. 32.

<sup>62</sup> Israel’s FOI Law 1998, Sec. 2, definitions, para. J; Jamaica’s ATI Act 2002, Sec. 3, Definitions.

<sup>63</sup> Czech law, Art. 2(2); Hungary’s Act 1992, Art. 19(1); Iceland’s Information Act, Art. 1; Ireland’s FOI Act 1997, Sched. A, para. 2; Liberia’s FOI Act, Sec. 1.4(d); Peru’s Law 2002, Art. 9; Slovakia’s Act 2000, Art. 2(1); Inter-American Model Law, Sec. 3; Model Law for Africa, Sec 1 (definition of “relevant private body”).

<sup>64</sup> Hungary’s Act 1992, Art. 19(1).

South Africa; at least six countries in Latin America (Dominican Republic, Ecuador, Guatemala, Honduras, Nicaragua, and Panama); and at least four European countries (Denmark, Ireland, Montenegro and Serbia)<sup>65</sup> although the laws of two of these countries—Denmark and Ireland—provide that coverage may be extended to private entities only pursuant to a specific order issued by the relevant minister and, at least in Ireland, few such private entities have yet been so designated.

The amount of public funds required to subject private entities to RTI requirements varies. The laws of Denmark and Serbia suggest that more than 50% public funding is required.<sup>66</sup> India's Central Information Commission determined that a private entity will be considered to be substantially financed by the government if it receives grants or loans from the central or state governments totaling more than (a) INR 2.5 million (about US\$60,000) or (b) 75% of its total budget.<sup>67</sup> More recently, the Madras High Court found that receipt of 37% of total funding from public sources sufficed to subject a private college to the RTI Act; the Court interpreted "substantial" to mean "real or actual" as opposed to trivial.<sup>68</sup> None of the six Latin countries that apply their laws to private entities specify the amount or percentage of public funding required to trigger disclosure obligations.

The model laws for Africa and the Americas assert that RTI laws should apply to entities that receive public funds but only concerning the use of those funds. This is the approach taken by the laws of Ecuador, Nicaragua, Liberia and Nigeria.

The laws of the United Kingdom and the United States apply to private entities only to a very limited extent. The issue made headlines in the UK in 2007 when the government initiated a consultation on whether or not to extend the scope of the FOI Act to some private

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<sup>65</sup> India's RTI Act 2005, Sec. 2(h)(d); South Africa's PAIA, Sec. 8; Dominican Republic's ATI Law, Art. 1; Ecuador's ATI Law, Art. 3; Guatemala's ATI Law, Art. 4; Honduras's ATI Law, Art. 3(4); Nicaragua's ATI Law, Art. 4; Panama's ATI Law, Art. 1(8); for more relating to Latin American laws, see Mendel, "The Right to Information in Latin America," elsewhere in this volume; Denmark's Act 1985, Art. 1(3); Ireland's FOIA 1997, Sec. 2 and First Schedule, para. 1(5)(c); Montenegro's Law 2005, Art. 4; Serbia's Law, Art. 3(2).

<sup>66</sup> Denmark's Act 1985, Art. 1(3) (entity must be "mainly" funded by government); Serbia's Law, Art. 3(2) (entity must be "wholly or predominantly" funded by a state body).

<sup>67</sup> Central Information Commission, *Veeresh Malik v. Department of Sports, New Delhi*, 28/11/07, Appeal No. 163/ICPB/2006.

<sup>68</sup> *The Registrar, Thiagarajar College of Engineering, Madurai v. The Registrar, Tamil Nadu Information Commission*, High Court of India at Madras (Justice Manikumar), Writ Petition No.1253 of 2010, decided 30 April 2013

entities.<sup>69</sup> The Campaign for FOI, a leading nongovernmental FOI organization, submitted a paper that noted, among other things, the main categories of entities not currently covered by the FOI Act. These included more than 5,500 public–private partnerships, as well as private- and voluntary-sector bodies providing services under contract to government agencies in the fields of health care, social care (including residential care for the elderly, infirm and children), education, public housing, the justice system (including management of prisons and other custodial care facilities, prison escort services, and electronic monitoring), transportation (including air traffic control, the railroad network and the Port of London Authority), private security firms, self-regulatory bodies (including the Press Complaints Council, Solicitors Regulatory Authority, Advertising Standards Association), and standard-setting bodies.<sup>70</sup>

The United States FOI Act expressly applies to any “government corporation” or “government controlled corporation,”<sup>71</sup> but does *not* apply to private entities and any bodies that “are neither chartered by the federal government [n]or controlled by it.”<sup>72</sup> Even where the government contracts out government functions, the FOI Act does not apply to the contractor and the government has no responsibility to take possession of the information in order to make it available.<sup>73</sup> This is a major loophole in US law. However, the FOI Act<sup>74</sup> and other laws<sup>75</sup> do at least require government agencies to disclose certain information submitted to

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<sup>69</sup> UK Ministry of Justice, Consultation Paper on FOI Act 2000: Designation of Additional Public Authorities, 27 October 2007.

<sup>70</sup> Campaign for FOI, FOI Act 2000: Designation of Additional Public Authorities, 3 March 2008.

<sup>71</sup> 5 U.S.C. § 552(f)(1).

<sup>72</sup> *Forsham v. Harris*, 445 U.S. 169, 179–80 (1980).

<sup>73</sup> *Ibid.*

<sup>74</sup> 5 U.S.C. §552(f)(2)(B)). Information prepared by the private sector and submitted to the government, whether voluntarily or pursuant to other laws, is fully subject to FOIA (including exceptions). FOIA amendments passed in 2007 extended the Act’s coverage to information “maintained for an agency by an entity under Government contract, for the purposes of records management.” In addition, records that are created or maintained by a private contractor under contract with an agency may be considered “agency records” under the control of the contracting agency in certain circumstances, depending on the degree of government control over those records.

<sup>75</sup> Some laws require the government to collect information for the express purpose of making it available to the public. Examples include campaign finance information and the Environmental Protection Agency’s toxic release inventory. Other laws require private entities to provide information to the government—such as chemical facility worst-case scenario reporting—to which the public has limited availability. Private entities are required to make some types of information available *to the public* as well as the government. This category includes pharmaceutical product package inserts, and some tax forms and annual

them by private entities.

### ***C. The Proposed Standard: Private Entities That Perform Public Functions or Receive Public Funds***

Private entities that perform public functions (including by exercising administrative authority or providing public services) or receive non-trivial amounts of public funds or benefits should be covered by RTI laws, at least as to those functions, funds or benefits. What constitutes “public functions” or “non-trivial” funds should be clearly defined in law. Applying RTI laws to such entities makes good sense. The approach (a) is rational, given that the public should be entitled to obtain information from, and hold accountable, entities that perform public functions or receive public funds, (b) is fair, applying a common test across the board; and (c) promotes certainty, so long as terms such as “public functions” and “non-trivial” are clearly defined. In contrast, laws that are applicable to an enumerated list of entities comply with the interest in certainty but lack fairness.

The above standard meets the four main objections raised concerning the application of RTI laws to private entities. First, if disclosure obligations are too onerous, private entities could be discouraged from accepting public funds or performing public functions even though their work well serves the public interest. This objection is substantially met if disclosure obligations are limited to the public funds or services. A second objection is the possible chilling effect on investors, donors or members. This is a particular concern regarding nonprofit advocacy organizations and labor unions. For instance, the laws of at least five Latin American countries (Brazil, Ecuador, Guatemala, Honduras, and Panama) expressly apply to nongovernmental organizations that receive public funds or benefits, and Honduras’ law expressly applies to unions that receive public benefits. While such organizations should have no problem regarding disclosure of their budgets, including officer salaries, they could well have legitimate concerns that disclosing names of members or donors could expose those persons, or others associated with the entity, to harassment. Such concerns may, in some country contexts, be substantially addressed by limiting the scope of

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reports. For instance, nonprofit organizations are required to publish their annual Tax Form 990, which includes the salaries of top paid board and staff members and other major expenditure and income lines. Private companies are required to make public a great deal of consumer information—such as privacy policies, credit disclosure terms, food labeling and health warnings—even though not required to submit the information to government. Corporations are required to make public, in their tax forms and annual reports, audited financial data, compensation and benefits for top officials, and any events that may have a material effect on the value of their shares.

coverage to private businesses. A more consistent approach would be to include an exception to allow the withholding of information where disclosure could subject individuals to harassment, for instance, where there had been a history of such harassment.

Third, businesses often complain that transparency requirements introduce an unacceptable element of unpredictability, irrationality and/or unfairness. For instance, Armenia's RTI law applies to "private organizations that have a monopoly or leading role in the goods market."<sup>76</sup> What constitutes a "leading role"? And, if the phrase is to apply at all, why only to the goods market? Why not also to services? Making an RTI law applicable only to the public funds received or to private entities that receive *substantial* public funding (clearly defined, for instance, as more than 50% of their operating expenses, or over a certain absolute amount, or receipt of public assets of a specified value or at a specified percentage of value or amount below fair market value), responds to public and business interests in rationality, certainty and fairness.

Fourth, businesses often complain that transparency obligations impose unfair competitive disadvantages vis-à-vis non-obliged competitors. One response is that government funding gives entities a substantial competitive advantage; this is certainly true regarding SOEs, which, generally, are fully or largely indemnified by the government. A second response is that studies have shown that, in fact, transparency requirements do not place entities at a comparative disadvantage, or at least not a significant one.<sup>77</sup>

#### ***D. Private Bodies that Hold Information Necessary to Protect a Right***

One of the most important outstanding questions is the extent to which the right to information should apply to private bodies, regardless of whether they perform public functions or receive public funds, if a person needs the information to exercise or protect an important right. The justification for such an approach is three-fold. First, private bodies, especially large companies, have the potential to impact significantly the enjoyment of important rights. Second, around the world, governments increasingly are contracting out services to private entities, often precisely in order to evade government regulation and public scrutiny. Third, the concept of "public functions and services," even if generously defined, does not cover many "public-like" functions and services exercised by increasingly powerful

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<sup>76</sup> Armenia's Law, Art. 3.

<sup>77</sup> See, e.g., the 1990 report of New Zealand's Select Committee on review of the impact of the Official Information Act and Ombudsmen Act on SOEs.

private entities, such as Internet providers, arms manufacturers, and exploiters of natural resources.

The Model Law for Africa, the African Commission's Declaration of Principles on Freedom of Expression, access to information laws of South Africa and Rwanda, and the Constitutions of Kenya and South Africa all extend their coverage to private entities that hold information needed by persons to exercise or protect their rights.<sup>78</sup> This approach has not, by and large, been embraced outside of Africa. Even pro-transparency experts are concerned that the approach, while granting the right (at least in theory) to some important information, could result in demands for disclosure of information from advocacy and other non-governmental groups that could vitiate their ability to function. They note that it is wiser to advocate for laws that, at the least, will not increase the opportunities for harm. One partial solution would be to limit the right of access to information needed to exercise or protect an important right to business enterprises.

## **VII. Conclusion**

The right of access to information has expanded rapidly since the collapse of the Berlin Wall. Not only has the number of countries with national laws increased from 13 in 1989 to 99 in 2014, the range of bodies covered by the laws has expanded, so that coverage in many countries now extends to the most sensitive executive offices (including advisors to the head of government, and the security and intelligence agencies); judicial and legislative bodies concerning their judicial and legislative information; as well as private bodies that perform public functions or receive substantial public funds.

The area of least consensus concerns application of right to information laws to entities that receive trivial or no public funds. The argument for such coverage is that in many, if not most, countries large corporate entities impact most people's daily lives at least as much as government. On the other hand, extension of disclosure obligations to private

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<sup>78</sup> Supra note 19. South Africa's Constitution, Sec. 32, and Promotion of Access to Information Act (PAIA) 2000, SS. 1, 9(a) and 12, and Kenya's 2010 Constitution, Sec. 35(1) guarantee a right of access to any information that is held by any "person" and that is "required" for the exercise or protection of any right. Principle IV(2) of the Declaration of Principles, supra note 8, states that "[E]veryone has the right to access information held by private bodies which is necessary for the exercise or protection of any right." Rwanda's 2013 law, Art. 2(4), applies to a private body that holds information relevant to "rights and freedoms of people."



entities is a two-edged sword that could harm not-for-profit entities, and especially those that aim to hold powerful interests accountable.

Robust and effective government regulation of companies should, in theory, be able to protect the rights of individuals and the broader public to access information they need to protect important rights and interests. However, economic and other crises have demonstrated the inability and /or unwillingness of governments to do so. The trend of laws, at least in democracies, to provide greater public access to information held by private entities that perform public functions or receive non-trivial amounts of public funds aims to respond to the inevitable weaknesses of government regulation while strengthening the potential of public scrutiny to promote accountability and provide effective remedies for excesses by the powerful - be they public, private or something in-between.