14. Freedom of information: a constitutive public good in democratic societies

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14.1 INTRODUCTION

Freedom of information, or in a broader sense, access to public information is a fundamental element of constitutional democracies and rule-of-law societies. It is a strong guarantee of transparent governance of public matters, and its efficient implementation is a precondition to exercising other rights, in particular freedom of expression and participation in democratic decision-making.

In the last two and a half centuries in the cultural West every progressive movement, new democratic legal order, profound societal reform or revolution raised the idea of, and demand for, freedom of information. In 1791 the founding fathers of the United States of America included in the core provisions of the First Amendment of the Constitution the prohibition against obstructing the exercise of certain individual freedoms, including freedom of speech and freedom of press—freedoms mutually presupposing access to public information. The French Revolution in the late eighteenth century did not only want to get rid of the privileges (and members) of the aristocracy but also wanted to abolish censorship and secret governing. When building the new world order on the ruins of the Second World War, the Universal Declaration of Human Rights, adopted by the United Nations General Assembly in 1948, included the right of everyone to seek, receive and impart information and ideas. For the so-called new democracies of Central and Eastern Europe—countries which achieved their independence through various armed and ‘velvet’ revolutions—freedom of information was one of the symbols of abolishing the dictatorial past during the great political changes around 1989.

Numerous well-known and less known quotations, declarations and essays show that access to information and its related ideals—freedom of speech, accountability of government, democratic participation in decision-making—have a crucial role in the great moments of history. According to a much quoted maxim by James Madison, the fourth president of the United States (US) and a drafter of the Constitution, ‘A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both.’ The Declaration of the Rights of Man and of the Citizen, born in the heat of the French Revolution, proclaimed that ‘Society has the right of requesting an account from any public agent of its administration’ (Article 15). According to László Majtényi, the first Hungarian Parliamentary Commissioner for Data Protection and Freedom of Information, in the turbulent period of the great political changes in 1989 ‘the demand for freedom of information was a central axis around which the world has turned’ (Majtényi et al. 2005, foreword).

It is not only at the major historical moments that the ideas of freedom of information (commonly shortened as FOI), transparent governance and the accountability of the state have relevance. The initial euphoria of great social and political changes may fade (Szekely
2007), rational counter-interests and counter-arguments may arise, and critics may try to prove that enforcement of existing FOI regimes is limited in practice or otherwise deficient or contradictory (Cain 2016, Lewis 2016). Nevertheless, FOI has a durable and important role in democratic political systems (and also in regimes which do not fully deserve this qualification). A formal proof of this claim may be that today more than 125 countries have FOI laws or regulations in force (although the actual provisions and the enforcement of these laws, together with their use in society, are dispersed on a wide spectrum).

Constitutional democracy is more than a form of government or a legal system; the existence of certain public goods is indispensable for such political and social regimes. Angela Kallhoff (2011), from an holistic ethical perspective, attempts to construct a coherent system of public goods, incorporating both their economic and non-economic forms. Charles Raab (2012), Alistair Duff (in this volume) and others argue that privacy is also a public good, or social value, that is recognized by a number of authors and is gaining ground in the discourse and practice of information and other forms of privacy. Authors who investigate public goods in an extended sense, separated from their original economic meaning, attempt to define a core set of such goods without which a Western-type liberal democracy cannot be maintained. Martha Nussbaum (2000) writes about ‘central public goods’, which are based on the people’s ‘central functional capabilities’. John Rawls (1971 [2003], p. 54) defines the list of ‘social primary goods’ as follows: ‘the chief primary goods at the disposition of society are rights, liberties, and opportunities, and income and wealth’. Ian Loader and Neil Walker (2007) introduced the notion of ‘constitutive public goods’, focusing on security in a broad sense, which the authors define as a global public good. Jones et al. (2018) analysed the system of public goods and the core set of constitutive public goods in the context of surveillance and resilience. If we regard the importance of FOI in democratic societies in light of the above theories and analyses, we can reasonably state that FOI is one of the constitutive public goods in society.

14.2 AN OVERVIEW OF CONCEPTS AND TERMINOLOGY

Although the general concept of a transparent, accountable state and an interested citizenship actively participating in discussing and shaping public matters—underpinned by the free press serving as a moderator—are common elements in the various sister concepts, their actual content are not the same: there are significant differences between these concepts in the areas of law, policy and practice alike. It is worthwhile therefore briefly clarifying their actual content, identifying similarities and differences.

In the mid-twentieth century the general understanding of FOI was the free, uncensored flow of news, ideas and ideologies across borders and political regimes. (This idea was rejected or at least criticized in the Soviet bloc for ideological reasons, in Western European countries for reasons of potential US informational dominance and in the developing world for reasons of protecting culture.) The United Nations Educational, Scientific and Cultural Organization’s 1945 Constitution (UNESCO 1945 [2020]) specifically calls on the organization to ‘promote the free flow of ideas by word and image’, and this mission is reflected in the organization’s medium-term strategies in the early twenty-first century, aimed at the achievement of ‘universal access to information and knowledge’ (UNESCO 2017). Those laws and other legal documents, which concretized and transformed the concept into norms since the 1960s, defined freedom of information as an individual right and/or an obligation of public agencies
to provide information to the requesters. In the 1966 US Freedom of Information Act (FOIA) ‘each agency, upon any request for records . . . shall make the records promptly available to any person’ [§ 552. (a) (3) (A)]. The 2005 federal Freedom of Information Act of Germany prescribes that ‘everyone is entitled to official information from the authorities of the Federal Government in accordance with the provisions of this Act’ [Section 1 (1)]. The Council of Europe Convention on Access to Official Documents (2009) requires that ‘each Party shall guarantee the right of everyone, without discrimination on any ground, to have access, on request, to official documents held by public authorities’ [Article 2 (1)] (italics by the author).

Today most laws, regulations and policy documents, especially in the European context, use the term ‘access to information’ (ATI). It is important to define, however, what kind of information, what specific content, created by whom, in connection with which activity, available in what form, are subject to these access provisions. It would be a mistake to presuppose that ‘every’ piece of information is public as a main rule, and only the exceptions can be withheld: information not belonging to the public sphere or public functions—first and foremost information pertaining to the personal private sphere—is not open to the public as a main rule, and for such it is publicity that is the exception. For example, personally identifiable information relating to the official activities of persons fulfilling public functions is open to the public, as is personal information the public availability of which is prescribed by law. (Nevertheless, publicly accessible personal data and information retain their personal nature, at least in the formal sense, according to the General Data Protection Regulation (European Union 2016) Article 4 (1).)

An important difference between the European and US practice is that individuals seeking access to information about themselves use FOIA in the US, while citizens in Europe use data protection or privacy acts for the same purpose.

Similarly, in a market economy private sector data about economic activities of companies are not available publicly as a general rule (a host of specified secrets are included in civil law, such as business secret, banking secret, tax secret, and so on) and the mandatory publicity of such data (e.g., the audit reports of business entities) can be regarded as the exception. However, there exist exceptions from this general rule, too, derived from the concept of freedom of information: if a company is entering into a business relationship with the state, that is, it receives public funds (or performs a public task in the form of a company), data relating to this business activity are subject to FOI provisions. (The actual place and legal context of such provisions depend on the legal and administrative traditions of the country concerned, or the requirements of international law.)

In the genealogy of FOI-related terms and concepts, two branches can be observed: in one branch the subject of FOI has been concretized while in the other it is the title of access. In the first branch the term ‘access to public information’ has become widely used in FOI legislation (see, e.g., the Access to Public Information Acts—APIAs—of Argentina, Bulgaria or Slovenia) but the term itself does not explain whether it is about access to information which has already been publicized, or information that is public by nature. The first interpretation, naturally, would significantly narrow the actual meaning of the term. In some new democracies of the Central and Eastern European (CEE) region, such as Hungary, Romania, Russia, but also in Australia and some African countries, FOI law and public policy introduced the term ‘access to information of public interest’, in order to avoid the traps of arbitrary interpretation. This term extends the content of FOI in two directions: first, it opens the space for speculative interpretation whereby an office or an officer could decide what is in the public interest, and
access would be provided only to that information (again, narrowing down the scope of the term), and second, it opens up the range of organizations obliged to grant access to information beyond the public sector. Under a separate heading but based on a similar interpretation of public interest, several national and international legal documents, such as the Aarhus Convention (UNECE 1998) or the Emergency Planning and Community Right-to-Know Act (ECPRA 1986) in the US provide free access to environmental data. This requirement indirectly broadens the scope of organizations which are obliged to provide access to information of public interest, including private sector entities.

The user (and the external observer) needs to pose the question: access to exactly what? Access to information only in the narrow sense, in a rigid bureaucracy, may result in a situation where only the requested information is communicated (i.e., selected and interpreted) by an officer, and the original documents are not made available to the requester. In turn, access to official documents only in the narrow sense may trigger the authorities demanding the exact identifiers of the documents from the requester; a simple outlining of the subject would not be sufficient. Consequently, in well-working FOI regimes both information and documents are subject to free access.

In the other branch of the genealogy of FOI-related terms and concepts the term ‘freedom’ of information has been gradually replaced by the ‘right’ to information. As Toby Mendel wrote in the foreword to the second edition of his comparative legal survey, prepared for UNESCO: ‘Even the terminology is starting to change ... the term “right to information” is now increasingly being used not only by activists, but also by officials ... This version of the book, while retaining the original title, consistently refers to the right to information rather than freedom of information’ (Mendel 2008, p. 3). The right to information (RTI, more precisely, right to information held by public bodies) implies that granting access to public information is not a privilege but a right of everyone, irrespective of citizenship, nationality or profession.

In parallel with the attempts to define the content of FOI ever more precisely, a very broad sister concept emerged: ‘the right to know’. Naturally it is a sort of moral right rather than right in the legal sense, encompassing access to all information that is necessary for fighting against all forms of social injustice, poverty, famine, disease, exploitation of the environment—in sum, a precondition to survival. The term emerged in the US in a narrow sense as workplace and community environmental law, according to which individuals have the right to know the hazardous chemicals they may be exposed to in their daily living. (One of the worst industrial disasters in history, the 1984 Bhopal disaster led to the adoption of the ECPRA, see above.) However, the right to know became a fundamental demand and slogan of various grassroots movements, from the surviving family members of victims of dictatorial regimes to activists fighting against structural corruption. Several documents and publications upheld this concept, among others, the Open Society Justice Initiative’s Ten Principles (OSJI 2008), The Game developed by the civil organization Article 19 (2019) and Ann Florini’s book on ‘transparency for an open world’ (Florini 2007). As author and activist Aruna Roy put it, ‘The right to know is the right to live’ (Calland & Tiley 2002).

FOI and all its sister concepts protect the citizen against excessive information power. In this respect FOI is similar to the right to information privacy: both serve the weaker party in the environment of information inequality.¹ This inequality is growing mostly due to the application of modern information technology: the stronger side becomes even more powerful, the weaker even more vulnerable. As I have argued elsewhere,
One branch of the arising problems originates from the changes in the information boundaries of the private sphere, i.e. from the concentration of information power as a factor in monitoring and influencing the individual, while the other main branch stems from the changes in the information status of the individuals, which determines their participation in society, i.e. from the concentration of information power as a monopoly on handling public information. (Szekely 2009, p. 294, italics in the original)

Therefore, in order to mitigate the adverse effects of these inequalities, in Western liberal societies both FOI and information privacy are guaranteed by law and information policies alike, although these guarantees are naturally imperfect in many respects. In a dictatorial regime the situation is the opposite: ‘While the Western political ideal is based on the autonomous, self-determining citizen and the transparent, accountable state, the communist ideal was based on the self-determining party-state leadership and the transparent, accountable citizen’ (Szekely 2007, p. 117). Even the change of the political system cannot cure information inequalities simply by encouraging freedom of speech: as a Russian participant noted at an international workshop on data protection and FOI, in the period of Glasnost (Openness) in Russia, there was freedom without information; in his words ‘Freedom of expression minus access to information equals Glasnost’ (Sirotkin 1997, p. 2).

However, even in a Western constitutional democracy the efficient enforcement of FOI is not in the interests of all members of society (except at the level of philosophy); in practice people and groups are fighting either for extending or restricting FOI, according to their position, individual and group interests. In multiparty regimes the governing power usually attempts to restrict, while the opposition wants to strengthen the right to access to information held by public bodies. David Flaherty, former Information Commissioner of British Columbia, Canada, noted in 1997, during his visit to Hungary: politicians simply love the idea of FOI before and after being in power. A few years later, John Reid, Federal Information Commissioner, Canada, expressed a similar view in a speech delivered in 1999: ‘It amuses me to see the profound change in attitude about access to information which occurs when highly placed insiders suddenly find themselves on the outside. And vice versa!’ (quoted by Tromp 2020, p. 40).

14.3 PRINCIPLES, NORMS AND ENFORCEMENT MODELS

Freedom of information is a value, it is a demand in society and it is a right in legal systems. Between the abstract concepts of access to information of public interest and their practical realization there exist a number of levels and layers: the level of codified principles (that concretize the concept and transform it into separate, accountable requirements), the levels of legislation and regulation (that transform principles into binding legal norms) and the levels and branches of enforcement (that include internal regulations, the evaluating of the organizations’ compliance and imposing of sanctions, the mandate and practice of independent supervisory authorities and the education of bureaucrats and citizens). The voluntary, non-coercive practice of administrative offices and the moderating and facilitating role of civil organizations can also be considered here as best practices. Naturally, the most important level of the practical realization of FOI is the use of this institution by those entitled to use it—virtually every member of society—including the study, analysis of and feedback on the facts on who, how, how often and with what success rate are using the opportunities to access public information.
A transparent public sector presupposes an interested citizenry, willing to participate in public matters: this is the most important component of the *raison d’être* of FOI.

The extent of this chapter does not allow us to explore and analyse each level in detail—the literature already written on this subject would fill a whole library—but we will briefly scan their relationships and interdependencies.

In the field of information rights basic principles are usually established by international or intergovernmental organizations, or internationally active non-governmental organizations (NGOs), such as the Ten Principles on the Right to Know (OSJI 2008), or ad hoc coalitions of civil organizations committed to a certain cause, such as The Global Principles on National Security and the Right to Information (Tshwane Principles) (OSJI 2013). In the first case the principles serve as guidance or steers for countries which have not yet adopted legislation or regulation in the area concerned (implicitly indicating the expectations of the community of democratic countries), while principles drafted by the civil sector typically aim at the betterment of existing law and practice.

Similar functions are reflected in the various declarations and communiqués issued by either international bodies or civil organizations, typically connected to international meetings of decision-makers, politicians or professionals, such as the meetings of the International Conference of Information Commissioners (ICIC), which regularly publish its declarations, for example, the Declaration of Cancún (ICIC 2005), endorsed by civil organizations. Participants in expert meetings may also draft declarations, such as the 2008 Budapest Declaration on the Right of Access to Information (International Experts’ Roundtable Workshop 2008). In May 2010 the participants at the UNESCO World Press Freedom Day conference in Brisbane drafted and published the Brisbane Declaration ‘Freedom of Information: The Right to Know’ (UNESCO 2010). Rather than establishing new principles such declarations recognize existing ones and urge their implementation, calling on specific actors: member states of an international organization, professional associations, media outlets and industry, or international organizations such as UNESCO, to promote free access to public information in the context of the declaration.

Although it is not the task of principles and declarations to establish detailed rules of implementation, in extraordinary circumstances, such as the recent coronavirus pandemic, there are examples of lower level recommendations focusing on a specific problem, such as the ‘Ten Recommendations on Transparency in Covid-19 Emergency Procurement’ prepared recently by five civil organizations (Access Info Europe 2020).

Despite the fact that these documents do not have binding force, not only activists and civil organizations but also politicians and drafters of public policies may refer to them, international organizations may grant their support depending on the compliance with such principles, educators may include the content of the principles in the curriculum—thus, in this respect these documents can be regarded as indirect elements of the enforcement of FOI.

Enforceability is best guaranteed if the principles are implemented in the form of legal norms. As known, the first FOI law was the 1766 Swedish ‘Freedom of the Press Act’ which, today in its modernized form, is one of the four fundamental laws of Sweden, acting in a manner similar to the constitutions of most countries. After a long silence, the second FOIA was adopted in Finland in 1951, followed by the US in 1966. Several countries included FOI provisions into their constitutions. However, if these provisions are not expounded and interpreted in laws and regulations, it is very difficult to enforce them in practice, since bureaucrats usually do not take constitutional provisions as the basic orientation for their work, but the laws
and other legal rules regulating their actual activities. Although there exists a court practice based on constitutional provisions, it is regarded as an exceptional practice, thus challenging concrete FOI-related administrative decisions in such countries is a difficult and lengthy task.

Today more than 125 countries have FOI laws, thus the majority of the world’s population lives in an environment where, at least in theory, people have the right to access to public information. However, in jurisdictions where FOIA is but an imported, exotic piece of law, adopted solely for satisfying the requirements of the international community, and not harmonized with other laws and regulations of the legal corpus, the bureaucrats may arbitrarily interpret its provisions, or even decide over the mere applicability of the law. The best solution is a coherent system of access laws and regulations and a coherent supervision and interpretation of its provisions. This applies to binding international treaties too, such as the Council of Europe (CoE) Convention on Access to Official Documents, which are also promulgated as national laws.

In addition, certain international organizations, especially International Financial and Trade Institutions (IFTI), which are not subordinated to any jurisdiction and are authorized to establish their own rules of operation, introduced progressive regulations on access to information voluntarily (or fulfilling the expectations of the international community). Voluntary publication of data of public interest related to revenues from oil, gas and mining is urged by the global movement Publish What You Pay. These developments significantly contribute to the enforcement of FOI in specific sectors.

In order to review and evaluate the characteristics of the various solutions, it is expedient to classify the existing practice of enforcement into various models. Laura Neuman in the World Bank Institute’s Access to Information Working Paper Series identified three basic models: judicial review; an information commission(er) or appeals tribunal with the power to issue binding orders; and an information commission(er) or ombudsperson with the power to make recommendations (Neuman 2009). The case studies illustrating the three models were that of South Africa (Model One), Mexico, Scotland and India (Model Two), and Hungary (Model Three). It is important to note that these models are not mutually exclusive: judicial review is usually available in countries where an information commissioner or ombudsman is in office (their relationship and the combination of possible uses of the available options are regulated in FOIAs), and those ombudspersons who can issue binding orders may also issue non-binding recommendations. Mitchell W. Pearlman, in a presentation to Chinese government officials—focusing on the handling of denials of access—distinguished seven models as ‘the most prominent ones’: the judicial model, the Attorney General/Ministry of Justice model, the ombudsman model, the commissioner model, the FOI commissioner model, the FOI counselor model and the FOI Commission Model (Pearlman 2010). Toby Mendel (2008) in a comparative analysis did not define separate models but analysed FOI regimes according to seven aspects: the right of access, the procedural guarantees, the duty to publish, the exceptions, the appeals, the sanctions and protections, and the promotional measures. His analysis showed that although an ideal FOI regime is expected to enact and enforce all basic principles, in reality the extent of implementing the principles and their relative weight in practice highly depend on the cultural, legal and administrative traditions of a given country.

It would be difficult to argue that a certain model is superior to another: in a service-oriented administrative culture citizens’ ordinary requests for public information are fulfilled without binding rules, while in countries where the culture of secrecy permeates public administration, citizens have a difficult task in enforcing their right to information and may face arbitrary
denials, despite the existence of a FOI law. Naturally, legal guarantees are important in a FOI regime, but practical enforcement of the provisions of law is at least as important. (Critical observers may add that some rights are hardly worth the paper that they are written on.)

Not surprisingly, the civil sector, the FOI-advocating NGOs, also proved to be important actors in the enforcement of FOI: they help citizens submit their requests, assist them in court cases, digest and translate incomprehensible information, educate citizens and officials alike, and in general propagate the importance of access to public information. Experience shows that in countries where there is a well-working independent supervisory authority, the civil sector is relatively weak in this area, and where the official supervisor is weak or subject to criticism, the NGOs attempt to take over its tasks.3

14.4 MEASURING FREEDOM OF INFORMATION

Considering that below the level of abstract principles the landscape is mixed, depending on the traditions and historical experience of the countries, and that the current level of access to public information needs to be evaluated with regard to these different circumstances, one has to ask the question: is it possible to measure the level of FOI on an objective scale at all?

Since the 1990s numerous evaluating and rating methodologies have been developed and tested by civil organizations and intergovernmental organizations. Some of these methodologies served as a one-time investigation or a pilot project while others have been established for longitudinal research. Since the early 2000s the developers’ ultimate wish has been to establish a global rating methodology. Sheila Coronel in her ‘Survey of transparency ratings and the prospects for a global index’ (Coronel 2012) provided an excellent overview of the various methodologies developed so far, together with the criticisms that had been made of the respective methodologies and the results of the ratings, as well as the dilemmas the developers had to face. As she pointed out, ‘the most easily measurable and comparable component of government transparency is freedom-of-information legislation’ (Coronel 2012, p. 3).

Although other components, such as transparency as part of governance, access to information in practice, proactive disclosure, processing access requests, reasons for denials and so on are equally important—but more difficult to measure and compare—the most detailed existing methodology of global range is the RTI Legislation Rating Methodology, developed by the Center for Law and Democracy (CLD) and Access Info Europe. This methodology serves as the basis for the Global RTI Rating (2011), first launched on 28 September 2011, the International Right to Know Day (proclaimed in 2019 by UNESCO as the International Day for Universal Access to Information), and annually on the anniversary of that day since then (United Nations General Assembly 2019). The rating uses 61 discrete indicators, divided into seven main categories, with score ranges from 0–2 to 0–10, totalling 150 points. The last survey covered 128 countries, and an interesting finding was that not one Western country ranked in the first 25 countries, while Austria and Germany ranked in the bottom ten countries. The best rating was given to Afghanistan which received 139 points of the 150. This result shows that the quality of the laws had been improving over time, and latecomers may draft (or rather import) laws that better reflect the elements of an imaginary FOI inventory. Other authors suggest even more, 600–800 discrete indicators to precisely measure access to information in specific areas—in other words, they attempt to quantify and universalize elements the existence and weight of which are highly dependent of local traditions.
Nevertheless, these refined rating methodologies say nothing about the quality of the implementation. Therefore, the other main branch of methodologies focuses on monitoring and evaluating practice. In this area the Open Society Justice Initiative (OSJI) had a pioneering role: after a pilot study conducted in 2003, a larger scale study was conducted in cooperation with FOI advocacy organizations in 14 countries. In each country, seven different requesters (including NGOs, journalists, business persons, non-affiliated persons, and members of excluded groups, such as illiterate or disabled persons or those from vulnerable minorities) submitted twice up to 70 questions to 18 public institutions, that is, in total 1926 requests were filed (OSJI 2004). The aim of this study was not to establish a ranking order among the countries involved, but rather to identify gaps and deficiencies (and best practices, too), and formulate recommendations in order to improve the practice of access to information. The title of the report published in 2006 is telling: Transparency and Silence (OSJI 2006). The leading cause of unsuccessful requests for information was tacit or mute refusal: the public institutions did not deny access (that could have been challenged) but did not respond at all—this is particularly telling with regard to the participation of excluded groups in the study.

Although the methodologies of the ATI Monitoring Tool and that of the Global RTI Rating cannot be compared directly, and compliance with the law does not mean good implementation, and vice versa, there is some correlation between the ranking of countries on the one hand, and the conclusion that in practice ‘transition countries provided more information than mature democracies’ on the other (Coronel 2012, p. 6).

There are a lot of empirical data available to judge the level of FOI in various countries in various approaches (we mentioned but a few of the available studies), but who needs these data in such a quantity? Experience shows that activists, civil organizations, information commissioners, aid organizations, political forces and donor organizations may refer to these data as substantial sources. However, comparative rating among countries may also lead to ‘naming and shaming’ that can have adverse effects on the willingness of the countries concerned to comply with the requirements of the international community. We can agree with Coronel (2012, p. 12), who says that there are ‘Many measures but no “Super Index”’. 

14.5 ON SOME RECENT PROBLEMS OF FOI

As we have seen, great efforts have been made for developing standardized methodologies in order to measure the level of FOI ever more precisely, comparably and suitably for longitudinal research. However, the subject of measurement itself is not stable: FOI is a moving target. From among the numerous changes, shifts, general and specific problems let us highlight a few in the limited space available here.

A general phenomenon witnessed today is the change of perception of the borderline between public and private. One practical consequence of this change is that public matters are regularly outsourced to the private sector, and (if not guaranteed by law), information of public interest can then easily escape public scrutiny. It is important therefore to define the limits of legitimate business interests when the state and business sectors enter into business relationships.

Another general phenomenon is that lay users routinely confuse the whole ‘internet’ with reliable sources of information, regarding the internet as an inexhaustible pool where ‘everything’ can be found—and this is a major reason why the masses are not interested in
demanding authoritative information through the available options of FOI. In addition, creating and consuming fake news and deepfake became a widespread practice, leading to what theorists call post-fact and post-truth society, the age of ‘alternative truths’, and the absence in many internet users of a desire to contextualize information. We can take the risk of claiming that information itself, something people have too much of, whose reliability is often questionable and which they rarely double-check, is losing its value in public perception.

Besides these generic phenomena, the practice of restricting FOI in emergency situations is a specific problem. When reviewing the most important legitimate reasons for restricting FOI, perhaps the third most important category (after the processing of personal data and national security) is emergency measures—a limitation that is particularly topical in the environment of the recent pandemic. However, well before the current Covid-19 epidemic, civil organizations, FOI advocates and independent supervisory authorities had already published reports, issued recommendations and worked out guiding principles urging governments to introduce only necessary and sufficient restrictions in times of emergency. In 2011 Article 19 published a report ‘Humanitarian Disasters and Information Rights’, containing ‘legal and ethical standards on freedom of expression in the context of disaster response’ (Article19 2005). The Tshwane Principles, released in 2013, address the balance between national security and the public’s right to know, in an age of combatting terrorism.

In response to the current situation, in April 2020 the Information Commissioner of Canada published the call ‘Access to Information in Extraordinary Times’ to heads of federal institutions to proactively disclose information (Maynard 2020). Article 19’s May 2020 report Ensuring the Public’s Right to Know in the Covid-19 Pandemic proposes a list of key information and data sets that should be proactively published by authorities to facilitate the fight against Covid-19 and ensure accountability (Article19 2020). The Global RTI Rating website, jointly maintained by Access Info Europe and CLD, has set up a Covid-19 Tracker page (2020) monitoring legal and practical measures which temporarily alter or even suspend FOI obligations due to the pandemic.

However, there have always been opinions that restricting the free flow of information per se causes harm to the values it intends to protect, among others, public health or national security. ‘Let the people know the facts, and the country will be safe’, said Abraham Lincoln, the 16th US President in 1861. Alasdair Roberts (2007) argues that improved openness may improve the capacity of societies to preserve security by making better policy decisions, improving agency coordination and fighting bureaucratic inertia. Mirco Nanni and his 40 (!) co-authors in their short paper declare: ‘Give more data, awareness and control to individual citizens, and they will help Covid-19 containment’ (Nanni et al. 2020). Yasheng Huang (2020) goes as far as to claim that ‘Autocracies Aren’t Better for Public Health’ criticizing, inter alia, the restrictive handling of public information on epidemics.

Numerous countries introduced FOI-related restrictions such as extending deadlines or suspending the handling of requests for information. Although restricting the free flow of information can also be used for strengthening the position of an autocratic regime or monopolizing control over the media in general, it should be noted that one part of FOI restrictions has been introduced in order to protect those officials whose task is to serve requesters but who under the present circumstances have to work from home without direct access to the requested documents. In theory, such protection of public servants can be regarded as legitimate; however, in an emergency situation when informing the public is crucial for securing the social, economic and cultural wellbeing of the population, it is strongly contestable.
From among the over 20 countries in the Covid-19 Tracker database which introduced FOI restrictions, some have recently taken exemplary measures: Argentina’s FOI oversight body, the Access to Public Information Agency, issued a resolution (Resolution 70/2020) stating that the suspension of deadlines in public administration does not apply to the procedures established under the right to information law; and Scotland’s Parliament amended the original Coronavirus (Scotland) Act (2020), removing the time extensions for responding to requests and most other FOI provisions.

14.6 CONCLUSION

Freedom of information, or any modality of free access to public information, is not an ideal state that has to be reached, but a process under ever-changing circumstances, societal demands, technologies and regulations. This process has various actors, and although their interests are not similar, their cooperation and mutual interests are indispensable for maintaining a well-working FOI regime. Existing democracies, and, within them, existing constitutive public goods are imperfect. Similarly imperfect are the FOI regimes, whichever methodology is used for evaluating them.

As Jones et al. (2018) note, some constitutive public goods are societally related notions describing interrelationships between the members and groups of society, or state and society, while others consist of rules and institutions designed to ensure the prevailing of the former, such as democratic institutions, laws guaranteeing rights and freedoms, including the right to information. As we have seen, it is easier to evaluate the compliance of a society with Western liberal ideals such as FOI solely on the basis of the legal or institutional forms of public goods. We cannot examine here in great detail the interrelationships between these public goods and the place of access to public information within it, but experience shows that simple tools and solutions may have a measurable positive effect on their prevalence.

Let us conclude with a personal example. When at an informal programme organized at the Central European University (CEU) on the occasion of an International Right to Know Day students and visitors had to request information from a public authority of their own country on the spot, it was not equally easy for participants coming from various cultural environments to assume the role of citizens exercising their informational rights. The moderators—in this case professors at CEU—could significantly stimulate the interaction between those coming from different cultural background and their public authorities. At the same time, on the very same day, it had been a practice over several years at the Budapest University of Technology and Economics, where the author teaches, to encourage students to submit a request to a public office. Students generally ignored it saying ‘I don’t know what to ask for’. However, when recently (early 2020) distance learning was introduced under the pressure of necessity, and students were given the compulsory task of individually submitting a request for public information to the local self-government bodies of the students’ hometowns or districts through Alaveteli’s platform (an open source internet platform for making public FOI requests), even the professor was surprised at how creative and useful were the requests they came up with, and for which the majority of the responses arrived in time. Several of the students reported informally later that they were not aware how easy and useful this procedure was, and pledged that they would use it for their private purposes in the future, too.
Such a trigger or stimulating agent can be not only university professors but also civil society advocacy organizations, well-working and popular independent supervisors, service-oriented authorities, or—first and foremost—citizens themselves providing a model for their fellow citizens. This is when theoretical concepts may become a constitutive public good realized in practice.

Information policies in democratic political and societal systems should not only focus on the high-level legal regulation of FOI and the implementation of its provisions, or establishing and operating big public information infrastructures, but also on the capillaries through which citizens get access to public information. Civil organizations may also extend the scope of their activities beyond campaigning for better FOI legislation or the measurability of access to information, to participating more actively in the information ecosystem as actors moderating and facilitating the healthy flow of public information and its embeddedness in everyday practice. Investigating social practices and the techno-social environment that have an impact on micro-level consumption and use of public information may be a rich area for future research on freedom of information. The findings of such research projects and the resulting ideas and suggestions may provide useful feedback to policy-makers, citizens and the civil sector alike.

NOTES

1. As David Banisar noted in his comprehensive paper written for the World Bank Institute’s Governance Working Paper Series, ‘RTI and privacy often play complementary roles. Both are focused on ensuring the accountability of powerful institutions to individuals in the information age’ (Banisar 2011). In an earlier recommendation on data protection and freedom of information the Council of Europe stated that ‘the concepts are not mutually distinct but form part of the overall information policy in society’ (Council of Europe 1986). It is also telling that civil organizations advocating either of the two rights, after an initial period start to deal with the other right, too (see for example the Electronic Privacy Information Center which has also been dealing with issues of FOI, or the Access to Information Program, a Bulgarian NGO, which extended its competence to data protection issues, too).

2. It seems that governments are more willing to ratify treaties on the protection of personal data than on access to data of public interest: the CoE convention was adopted in 2009 but it would enter into force only when ten ratifications have been deposited with the Secretary General of CoE. The tenth country (Ukraine) ratified the convention in 2020 so the convention entered into force on 1 December 2020.

3. See, for example, the case of Hungary and Bulgaria after the change of the political system: in Hungary there was a highly visible, efficient ombudsman-type Parliamentary Commissioner’s institution operating, and the NGOs were mostly engaged with other important social problems, while in Bulgaria an NGO, the Access to Information Program (AIP) undertook the responsibility to fulfil a range of tasks of such an institution since 1996. Later, in the 2010s, the Hungarian commissioner’s office was abolished and a government authority established, consequently the civil organizations, for example, the Hungarian Civil Liberties Union, intensified their activities in this area, while AIP seemed to have overtaken the tasks of the state for the long term. (The only disadvantage of the Bulgarian solution may be that the state would never feel the urge to establish its own comprehensive system in this area.)
REFERENCES


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