

Implementation of the Right to Information: Lessons for India from Canada, Mexico and South Africa

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Introduction

The central objective of right to information legislation is to bring about a structural change in the approach to governance and in relations between government and the people. It is important not to underestimate the paradigmatic significance of this change. In most countries, and India is no exception, implementation of the right to information is the first real opportunity for citizens to engage in direct, horizontal, demand-driven accountability from government.

At the same time, realisation of the full potential of the right to information is a long-term challenge. The adoption of right to information legislation is often a hard-fought political battle but it is only a first step and implementation of the legislation is normally far more of a struggle. Change is always difficult, and imposing change often leads to resistance, normally in direct proportion to the magnitude of the change. Inasmuch as full realisation of the right to information represents radical change, significant resistance may be expected.

In the case of the right to information, bureaucratic resistance is augmented due to the fact that the right to information alters the power balance in favour of citizens and away from officials. Officials and politicians are increasingly concerned about their ability to maintain control of national governance in an era of rapid change and globalisation, and the right to information undermines their capacity to do so. It undercuts their ability to use spin to set the agenda, to control the timing and form of public communications, and to address problems internally, away from the glare of publicity. The experience of countries with longer-standing right to information regimes, like Canada, is that it is a process of constant struggle and effort to increase, and sometimes even just to maintain, the flow of information over time.

This Study looks at some of the key implementation challenges, and how they have been addressed and proposals for addressing them in other countries, with a particular focus on Canada, Mexico and South Africa. It is based primarily on a desk study of information available from the three countries in English. It may be noted that far more information is available in relation to Canada than the other two countries.

These countries have been chosen since they provide a range of different right to information experiences, all in the context of democratic countries with strong right to information laws, which are thus analogous to India. Canada is a wealthy, established democracy with a relatively long experience of right to information legislation. Success in implementing the system has been mixed; although a lot of information is certainly available, at the same time there have been serious allegations of political interference, as well as obstruction from the civil service.

This perhaps reflects Canada's historical traditions of bureaucratic secrecy, which were still very strong when the right to information law was adopted. Furthermore, access to information in Canada has always been seen primarily as a governance reform rather than giving effect to a fundamental human right. Although many individuals and groups advocate strongly in favour of access to information, this advocacy is rarely cast in the powerful language of human rights, and this has

arguably allowed for greater restrictions on access than would otherwise have been the case.

Mexico has a much shorter track-record with the right to information but it is already widely considered to be an important success story. It has a powerful oversight body which has played a very active role in promoting the progressive implementation of the law. The political context in Mexico has been relatively propitious, with the newly elected Fox administration putting in place right to information reforms following 65 years of rule by the Institutional Revolutionary Party (PRI). Secrecy was seen as a contributing factor to some serious abuses by the previous government while, at the same time, the new government had no 'skeletons in the closet' to be exposed under a right to information regime.

Political will at the top levels of government, along with a strongly supportive network of local civil society organisations and a very strong oversight body, have been key success factors in the Mexican case. The importance of the right to information in Mexico was signalled by the adoption, in 2007, of very strong constitutional provisions on this key right, a process in which the oversight body played a key role. These constitutional amendments necessitate changes to the right to information legislation at the national and sub-national levels, a process which is currently underway.

South Africa, on the other hand, generated high initial expectations of openness, due in part to its very progressive law, but implementation has been weak by any measure. In South Africa, the right to information law flowed from the paradigmatic changes of the post-Apartheid era. This meant, however, that the right to information had to compete for public attention with a range of other far-reaching reforms. It has been noted that, due to the particular historical context, the South African public has tended to place a greater stress on equality rights, to the detriment of framework rights like the right to information. Political will has also been weak, with few senior official supporters. Finally, the structural mechanisms for implementation, as provided for in the law, were weak, in particular inasmuch as they failed to provide for an independent oversight body, instead placing only limited review powers in the hands of the existing Human Rights Commission.

The goal of this Study is to provide support and ideas to the Indian authorities, and in particular to the various information commissions – Central and State – as they struggle with implementation challenges. It does this both by outlining some of the key challenges faced in other countries and by providing a number of suggestions and 'action ideas' for consideration. These are intended to provide further food for thought rather than as specific recommendations for the Indian context, to which they would need to be carefully tailored. Although a key focus of the Study is to provide support to the information commissions in their work, the action ideas are not addressed to any particular actor. There is often scope for different stakeholders – such as NGOs, academics, the media, the legal profession and the private sector – to take ideas forward and who does what depends largely on how the underlying legislation is interpreted, where the resources lie and what institutional structures are in place.

The Study demonstrates that implementation of right to information legislation poses a number of challenges. There is a need to address the culture of secrecy, which embraces not only administrative culture but also the political considerations outlined above. Training for all public officials, and particularly for information officers, is needed. The promotion of a professional cadre of information officers, with clear responsibilities and the power to deliver on them, is important. Mainstreaming the right to information into existing civil service systems, and treating it in the same way as the delivery of other services – such as education, transportation or financial oversight – can also help address the culture of secrecy.

There is a need to put in place systems which facilitate provision of information while not placing unreasonable burdens on the civil service. Requests should be nurtured so as to ensure that the system is active and continually being honed and improved. Efficient and broad proactive disclosure systems should be put into place. Information needs to be managed properly so that it may be identified and assessed quickly and effectively, particularly in the context of a request. Exceptions need to be interpreted narrowly and yet appropriately.

There is a need to reach out to the public to ensure that they are aware of their rights and that they make active use of the system. Finally, there is a need to ensure that the new bodies established by the legislation – the various information commissions in the Indian context – are able to maintain their independence and professionalism, and to do their work efficiently. Adding to these challenges is the need to do all of this as quickly as possible since the early years are crucially important in setting the tone for longer-term practice.

1. *Addressing the Culture of Secrecy*

Calls to address the so-called culture of secrecy are a common refrain among right to information advocates. It is difficult to change pre-existing official and institutional cultures by law. Legislative directives are more likely to be adapted to fit the environment in which they are implemented than to change that environment. It is now widely accepted that bureaucrats can pose a significant informal obstacle to transparency. In countries like Canada, Australia and South Africa, the culture of secrecy represents one of the most enduring and difficult obstacles to achieving the openness goals which underlie right to information legislation.

The term ‘culture of secrecy’ is evocative of Dickensian officials scuttling around endless passages ferrying bundles of papers in confidential folders. A more modern image is the idea of a professional bureaucrat, used to operating under a cloak of secrecy and well versed in the official practices which support that cloak, who recognises accountability only to those who formally outrank him, and not to the public at large. Beyond these draconian images, however, lie a complex net of reasons for official failures to implement right to information legislation properly. These range from sophisticated strategies to deny access to sensitive information – whether for larger political reasons or because it exposes wrongdoing – to hostility to openness, to indifference, to a lack of capacity, whether human, financial or administrative.

Snell, building on work done by Roberts, has developed a model for rating bureaucratic responses to right to information legislation which describes five different levels of administrative compliance: malicious non-compliance (refusing to respond to requests, destroying records, deliberate non-recording of information); adversarialism (reliance on exceptions as a shopping list of reasons to deny access, delaying as long as the law permits, giving minimal reasons for refusing requests); administrative non-compliance (providing inadequate resources, poor information management, low priority given to requests); administrative compliance (timely decisions, narrow interpretation of exceptions); and administrative activism (requests given high priority, informal release of information, discretion exercised to waive exceptions where risk of harm remote or minimal).¹ Most of these apply simultaneously to a greater or lesser extent in all countries.

Even where the political culture has largely accepted the idea of openness, problems of bureaucratic resistance remain. In Mexico, for example, it is widely acknowledged that there has been a significant transformation and that political elites and senior officials have embraced transparency. At the same time, promoting a true culture of openness remains a very significant challenge. A good example of this was the refusal of the Mexican authorities to provide access to the ballots of the 2006 Mexican election, in which the vote was extremely close. Inspired by the famous 2000 Florida recount, major Mexican media requested access to the ballots to do their own recount. The election commission refused, originally arguing that the ballots were not covered by the law and that to disclose them would threaten national security. The oversight body, the Electoral Tribunal, rejected these arguments, but also rejected the request for the ballots on a highly technical legal analysis that failed to implement the right to information law, at least in spirit and intent.²

This section looks at a number of key ways to address the problem of a culture of secrecy. Specifically, it addresses the need for training and support to information officers, how to 'mainstream' the right to information, the role of Parliament and the courts, and the challenge of politically sensitive information.

a. Training

Training of public officials is routinely identified by experts as one of the key needs for proper implementation of the right to information or, to put it differently, lack of awareness and expertise among officials is a key obstacle to implementation. Although training is not a panacea, it is important. In addition to the more obvious benefits, it helps break down the culture of secrecy by inculcating in officials a sense

¹ Snell, Rick, 2005, "Using Comparative Studies to Improve Freedom of Information Analysis – Insights from Australia, Canada and New Zealand", Presented at 6th National and 2nd International Congress on the Right to Information, National University of Mexico, Mexico City, Mexico 8-11 November 2005.

² They held, first, that since the electoral law strictly protects the ballots and then provides for their destruction, this effectively constitutes an exception to the right of access and, second, that since the ballot boxes may be opened only by judicial order, there is no way in practice to grant access. Both arguments clearly run counter to the spirit and intent of the right to information law. At the time of the request, the ballots were simply waiting to be destroyed and no harm was identified that would have resulted from their release. Ackerman, John, 2007, *The Limits of Transparency: The Case of Mexico's Electoral Ballots*, 8 *Mexican Law Review*.

of their obligations and by giving them the confidence to disclose information which previously would have been kept secret.

Training raises a number of challenges. The first and foremost is the magnitude of the task, something that is of particular significance in India, given the vast numbers of people involved. This raises questions about who should receive training, what it should cover, and how to deliver it efficiently, including who should be responsible for this.

Different officials need different sorts of training. All officials should receive some general training on the right to information. This will help to foster a sense of openness as a core civil service value and to enhance the cooperation all officials should provide to information officers. It will also help to promote appropriate classification practices. Training should also be directed at senior civil servants to promote their understanding and support for the system. In South Africa, for example, the Human Rights Commission reported training provided to upper management staff at the South African Reserve Bank as one of its success stories.³

Designated information officials (public information officers or PIOs and assistant public information officers or APIOs under the Indian law) require more focused and more intense training and many experts recommend that such training be compulsory. Thematically, particularly important issues include training on information management and the interpretation of exceptions to the right of access. Interpreting exceptions poses a particular challenge for information officers, given the high stakes riding on 'getting it right' and the inherent complexity of this task. Where other officials have dedicated responsibilities for matters which are central to proper implementation of the right to information – for example in the area of classification of information, proactive publication of information and/or record (information) management – they should also receive targeted training.

The experience of other countries highlights the need for training to be tailored to address the particular needs of different public authorities, or perhaps categories of public authorities (for example working in the areas of health, poverty, financial issues and so on).⁴ Different types of authorities will need to consider different factors when applying exceptions, for example. Furthermore, it is important to ensure that training focuses on the real needs of information officers. All too often, training can become formalised and disconnected from day-to-day realities.

Although training needs are most intense during the initial implementation phases, this is in no way a one-off need. The Government of Canada noted in 2002, some twenty years after the Canadian right to information law was adopted, that the law was still poorly understood not only by the general public and requesters, but also by public officials.⁵ Similar problems pertain in most jurisdictions. A 2001 survey by the

³ South African Human Rights Commission, *11th Annual Report for the Year Ended March 2007* (Johannesburg: 2007), p. 101.

⁴ Sobel, David, Noll, Bethany, Bogado, Benjamin, TCC Group and Price, Monroe, *The Federal Institute for Access to Information in Mexico and a Culture of Transparency* (Annenberg School for Communications, University of Pennsylvania: 2006), pp. 37-39.

⁵ Government of Canada, *Access to Information: Making it Work for Canadians: Report of the Access to Information Review Task Force* (Ottawa: 2002), p. 3.

Open Democracy Advice Centre (ODAC) in South Africa found that 50% of officials in the three branches of government were not even aware of the existence of the right to information law, let alone of how it operated, despite its high-profile adoption just the year before.⁶

In addition to a constant need for more and better training, even for seasoned officials, there is a chronic problem of people moving to new posts or retiring, so that a continuous flow of newly trained officials is necessary. In Mexico, for example, the change of presidential administration in 2007 resulted in changes to the local equivalent of information officers, necessitating a new round of training and awareness raising activities.⁷

Under the Indian law, various governments have a responsibility, to the extent of their available financial and other resources, to provide training to information officers and public authorities. There are significant **advantages to promoting a central focal point of expertise on right to information training**. These include ensuring standardised training quality control and creating a central repository of training expertise. In South Africa, the Human Rights Commission has provided central training to public authorities.⁸

Given the magnitude of the challenge of training, it is important to involve as many different sectors as possible. Civil society groups, particularly academic institutions and NGOs, can make an important contribution in the area of training. In the United Kingdom, for example, civil society groups are responsible for providing much of the training given to civil servants.

The need to provide training to the staff of information commissions and to the judiciary has also been highlighted in some contexts. Given that judges sit at the apex of the right to information decision-making system, the rationale for this is clear. On the other hand, there are challenges in delivering specialised training of this sort to judges, and the nature of the administration of justice makes it difficult to target training efficiently since in most cases any judge on the relevant court could end up sitting on a right to information case.

Action ideas:

- integrate right to information modules into other training programmes offered to officials
- develop online right to information courses to help promote delivery to large numbers of officials in an efficient manner
- develop specific training modules on key issues facing information officers, such as how to interpret and apply exceptions

⁶ Open Democracy Advice Centre, *Submission to the Review of State Institutions Supporting Constitutional Democracy: Right to Know Legislation* (Cape Town: 2007), p. 18.

⁷ Bogado, Benjamin, Martinez-Morales, Emilene, Noll, Bethany and Bell, Kyle, *The Federal Institute for Access to Information in Mexico and a Culture of Transparency: Follow Up Report* (Annenberg School for Communications, University of Pennsylvania: 2008), pp. 10-11.

⁸ South African Human Rights Commission, *10th Annual Report for the Year Ending March 2006* (Johannesburg: 2006), pp. 83-84 and South African Human Rights Commission, *11th Annual Report for the Year Ended March 2007* (Johannesburg: 2007), pp. 101-2.

- work with officials from different sectors/public authorities to ensure that training courses/modules are tailored to their specific needs
- supplement formal training activities by providing support on an ongoing basis to information officers through an information hotline or similar electronic or telephone-based system
- establish a central Internet portal providing access to training materials, as well as guidelines and other advice about how to implement the law
- have a central authority develop standardised core training modules in different areas which can then be adapted to local needs as required
- work with judicial training institutes to integrate right to information training into their more general training activities

b. Status and Role of Information Officers

Information officers play a hugely important role in any right to information system. They serve as the main public interface, and they make important decisions about the processing of requests and, in most cases, the release of information.

In Mexico, as is common in many new right to information systems, information officers have been appointed from among existing staff and public authorities have not been given any new resources for these posts. This is likely to lead to some sense of resentment towards the new system, which is asking for more from the same pool of officers. It is also unreasonable; the civil service cannot be expected to deliver more services without more resources and, in practice, this would not be expected from them in other service areas.

An analogous problem identified in the Canadian context has been the lack of a systematic approach to the placement of information officers, along with a lack of status associated with this position relative to other career options.⁹ Various initiatives have been put in place to address this, including internship programmes and the establishment of dedicated developmental positions, to attract staff from other parts of the civil service.

A more structural solution is to take the necessary steps to **promote various specialist positions for information officers** (such as information coordinator, analyst and so on) **as established or certified career posts** within the civil service with all that implies: standardised training and civil service grade requirements, clear responsibilities and authority, the possibility of upward mobility within the post and to other posts (perhaps by classifying the post within a wider professional grouping such as planning or communications), clear performance standards and so on.

Ideally, a **central certification process for information officers**, perhaps located at a university and overseen by a steering committee of experts from different sectors, could be developed. In Canada, the University of Alberta has worked with various official bodies to develop the Information Access and Protection of Privacy (IAPP)

⁹ Information Commissioner of Canada, *Annual Report, Information Commissioner: 2006-2007* (Ottawa: 2007), p. 14.

Certificate Program, which is gradually being introduced as a formal qualification for information specialists.¹⁰

Various measures may be put in place to promote the status, independence and visibility of information officers. One practical measure, depending on the structure of the civil service, is to locate information officer units in the same (ideally fairly visible) part of all public authorities, or at least the main government departments, whether this be communications, policy, the CEO's office or somewhere else.

A more far-reaching idea is for information officers to report to a central authority, rather than the individual public authority in which they are located. An analogous approach has been adopted in the Canadian civil service with respect to lawyers, all of whom report to the Department of Justice, even where they are assigned to work in other departments. Information officers could even be responsible to the relevant Information Commission, which would significantly bolster their independence, although it may create certain problems vis-à-vis their departmental colleagues.

Information officers should be given significant authority to make decisions on disclosure. While it is recognised that highly sensitive or difficult cases may require a reference to more senior officials, efficient and timely operation of the access system demands that most disclosure and related decisions (for example relating to fees, notification of third parties, form of access and transfer to other authorities) be taken by information officers. Indeed, delegation of authority to the least senior official it is reasonable should make a decision – for example to APIOs in the Indian system – should be the rule.

In many jurisdictions, information officers have a broad responsibility to ensure full implementation of the law in all of its aspects. This includes not only responsibility for processing requests but also a range of other obligations, such as putting in place the necessary systems for implementing the law, ensuring that proactive publication obligations are met, promoting and implementing appropriate information management and archiving systems, ensuring the provision of appropriate training to officials and so on. This ensures a central locus of expertise and responsibility for these functions, which may otherwise be neglected. The Indian law only gives PIOs and APIOs direct responsibility for the processing of requests for information but they could be given wider duties informally.

Support to information officers can also be provided in the form of liaison networks. In Canada, various associations exist to provide support and knowledge to information professionals.¹¹ The South African Human Rights Commission recently launched the Information Officers Forum, aimed at bringing together information officers to share experiences and best practices, and to promote capacity building.¹²

¹⁰ Investigators in the Information Commissioners Office, for example, are required to have or to obtain IAPP certification. Information Commissioner of Canada, *Annual Report, Information Commissioner: 2006-2007* (Ottawa: 2007), p. 16.

¹¹ These include the Canadian Access and Privacy Association (CAPA) and the Canadian Association of Professional Access and Privacy Administrators (CAPAPA).

¹² South African Human Rights Commission, *10th Annual Report for the Year Ending March 2006* (Johannesburg: 2006), p. 86.

Action Ideas:

- provide additional resources to hire information officers (PIOs and APIOs)
- establish specialist positions with clear responsibilities and status as career options for PIOs and APIOs, which provide for the possibility of upward career mobility
- put in place standardised training packages and requirements for PIOs and APIOs, perhaps along with official certification
- take steps to attract qualified staff to information officer positions
- locate information officers in the same part of all public authorities to promote visibility
- consider having information officers report to a central authority, perhaps the relevant information commissioner
- give information officers the power to make decisions on disclosure of information, as well as related decisions, for example on fees and form of access
- locate responsibility for a range of information functions – in addition to processing of requests – with information officers
- develop appropriate networks to provide support to information officers

c. Mainstreaming RTI as a Core Public Service Value

One of the challenges in implementing any new set of rules is to integrate them into existing public service systems and practices, not only formally but also in terms of the operational culture. This has been attempted, in many countries, for thematic issues like the environment and women. The challenge is to create an environment in which fulfilling the right to information is seen as part of the job, an aspect of the core service being provided, rather than as an external constraint on doing the job.

It is important to take steps to integrate the right to information into the civil service workplace environment in the early stages of implementation, since an ‘us and them’ mentality can easily develop and, once in place, is hard to get rid of. This has been a problem in Canada, for example, where the often latent hostility of officials to the law has seriously undermined openness in practice.

A number of steps can be taken to **integrate the right to information into formal systems**, depending on the particular structures in place. Overarching documents – for example the civil service guidelines or codes of conduct – should be revised as needed to reflect the new commitment to openness. Any focus on loyalty to the service needs to be adjusted to accommodate, and even prioritise, the obligation to be open, since this may well come into conflict with loyalty. In Canada, the Access to Information Review Task Force recommended that the Statement of Principles of the Public Service of Canada refer to openness and the obligations of civil servants, as custodians of public information, to provide access to that information.¹³ Openness should be incorporated into performance review systems at all levels: not only for information officers but also for managers and other staff, not only for individuals but also for sub-departmental units, such as sections, branches and so on.

¹³ Government of Canada, *Synopsis of Recommendations / Proposals / Comments From Written Submissions Sent to the Access to Information Review Task Force* (Ottawa: 2002).

Operationally, **implementation of right to information responsibilities should be handled in the same way as other programmes**, with resource planning and allocation, forward planning, systemic review and adjustment as needed, and so on. A careful balance needs to be struck in setting up systems between centralisation – which can concentrate expertise and promote uniformity but which can also lead to bottlenecks and provide opportunities for political control – and delegation – which allows for quick decision-making. As a rule of thumb, systems should be centralised but individual decisions decentralised.

Shifting the organisational culture is a difficult and long-term effort which goes beyond training and establishing systems. Ultimately, the sense needs to be fostered among civil servants that provision of information is a core part of what they do, similar to their role, for example, in delivering health or education, or undertaking financial planning.

The **impact of senior champions of the right to information within government** stressing the importance of openness as a core civil service value and value-added can be significant. A good example of this is the Memorandum issued by then United States Attorney General Janet Reno in 1993, which had a profound impact on official openness.¹⁴ The relative success of the right to information movement in Mexico has also been attributed, in part, to the strong commitment by former President Fox to openness. On the other hand, the paucity of senior support has been identified as a contributing factor to poor implementation in South Africa.¹⁵

It is also important to **get civil servants to see the benefits to themselves of openness**. It is significant that in the United Kingdom the civil service unions formally endorsed the campaign for right to information legislation. In the longer term openness, along with other associated democratic approaches such as participation, should promote a more harmonious relationship between officials and the public, a sense of working together to deliver shared goals rather than a sense of ‘us and them’. This will not only result in greater job satisfaction on the part of officials, but also help them to do their job better. Wider public input and oversight, which rely on the right to information, lead to better policies and strategies, to the benefit of everyone.

In South Africa, a Golden Key Award ceremony for different categories of best practice performers – among public authorities, information officers, right to information activists and the media – along with the exposure of poor performers has served a number of goals, including to mainstream the right to information and to raise public awareness.¹⁶

Action Ideas:

- prioritise actions to mainstream the right to information as a core public service before a negative attitude towards this new ‘duty’ takes root

¹⁴ The Memorandum essentially called on public officials to exercise their discretion to disclose information rather than to withhold it.

¹⁵ Open Democracy Advice Centre, *Submission to the Review of State Institutions Supporting Constitutional Democracy: Right to Know Legislation* (Cape Town: 2007), p. 10.

¹⁶ South African Human Rights Commission, *11th Annual Report for the Year Ended March 2007* (Johannesburg: 2007).

- revise organisational framework documents – such as civil service guidelines and codes of conduct – to reflect a commitment to openness
- incorporate rules on openness into job profiles and, where appropriate, contracts
- apply institutional systems of rewards and demerits to performance in implementing right to information rules
- treat delivery of openness in the same way as the delivery of any other service, incorporating it into central systems for allocating resources, planning and so on
- establish organisation-wide performance measurement indicators with a view to identifying and addressing systemic blockages or problems
- make efforts to get ministers and high-level bureaucrats to make statements supporting openness, for example by providing opportunities for this at conferences and other events
- popularise leading examples of the benefits of the right to information to civil servants
- work with civil service unions to promote a better understanding among their member of the benefits to them of the right to information
- use innovative techniques to promote and popularise the right to information, such as awards for best performers and naming and shaming poor performers

d. The Role of Parliament and the Courts

Under the Indian law, as with many right to information laws, the legislatures – national and state – have a specific oversight role inasmuch as the various information commissions report to them on an annual basis on implementation of the law, through the relevant government. In addition, legislatures have an inherent power and role to supervise implementation of laws.

Where legislatures take their oversight role seriously, this can bolster the political commitment to implement the law in a progressive manner, send a clear signal that abuses will not be tolerated and promote best practice approaches. Members of opposition parties can play a central role in this oversight, given their function of monitoring government performance. They can also play a key role in promoting reform. Although they cannot bring about reform on their own, once they launch an initiative, members of the governing party often support it, since to refuse to do so would seem churlish and lose them popular support.

In Canada, the Standing Committee on Access to Information, Privacy and Ethics, which deals with right to information issues, has often played an active role, investigating alleged abuses, calling officials from public authorities whose implementation has been criticised to appear before them and imposing remedial measures on them, and promoting law reform efforts.¹⁷ The right to information has strong public appeal and MPs are often anxious to earn credit by pursuing it as a public interest issue. It is, for example, an issue which often gains significant media attention, something MPs normally relish.

¹⁷ Information Commissioner of Canada, *Annual Report, Information Commissioner: 2006-2007* (Ottawa: 2007), pp. 12-13.

The role of the courts in leveraging openness is also crucial. Courts stand at the pinnacle of right to information decision-making and they have the authority – in strictly legal terms but also in terms of the social respect they command and the power of their reasoning and process – to impose solutions in cases of disagreement, particularly about the boundaries of the right to information. Determining the proper scope of exceptions to the right of access can be a delicate balancing exercise between competing social interests. Information Commissioners should do their best to produce well thought-through and reasoned decisions on complaints, but sheer volume normally means that they cannot give the same depth and consideration to issues as can the courts. Furthermore, their constant interactions with public authorities on access to information matters, as well as the promotional role played by many Information Commissions, can sometimes lead the two sides to adopt entrenched positions; the courts can break these deadlocks by providing an authoritative ‘external’ resolution.

Action Ideas:

- take steps to encourage Parliament to take its oversight role seriously, for example through lobbying and encouraging media attention
- actively engage with parliamentary oversight committees, providing submissions and other information on implementation
- work with opposition members to monitor implementation and to promote reform efforts
- press parties to make commitments on the right to information in the context of elections, when such promises are much easier to elicit
- bring appeals to the courts to engage them in their oversight role; argue such cases well, presenting the court with best practices from other countries, as well as international standards

e. Politically Sensitive Information

In many countries, **serious openness problems have been observed in relation to politically sensitive information.** As noted in the introduction, modern governments seek increasingly to control information – a process neatly captured in the phrase ‘spin’ – for various reasons. In serious cases, for example where the information contains evidence of wrongdoing, governments or officials may wish to prevent disclosure altogether. In other cases, the aim may be simply to control the release of the information. This can, variously, delay release until the information is less politically ‘radioactive’, give governments time to develop a strategy to minimise the impact of disclosure and/or allow governments to accept responsibility on their own terms, seemingly voluntarily, rather than in response to damaging media exposure.

Right to information legislation, in fairly obvious ways, undermines the ability of public bodies to control the flow of information and a natural reaction, particularly in relation to politically sensitive information, is to try to counteract this. Roberts has analysed data on overall processing of requests in the Canadian context to demonstrate the differential treatment applied to requests from, on the one hand, ‘average’ requesters, and, on the other hand, the media and political parties. His research shows that, even when controlled for other factors, requests by the media and political parties take significantly longer to process and are more likely to result in a

deemed refusal (i.e. a failure to respond to a request, which is formally a breach of the rules regarding time limits for responding to requests).¹⁸

Special administrative routines have been put in place within the Canadian government to deal with politically sensitive requests, referred to variously as the 'amber light process' or 'red files'. Some public authorities undertake a preliminary risk assessment on incoming information requests and send those identified as potentially sensitive to the Minister's Office, which tags those it deems to be sensitive and then works with information officials to process them. These special processes affect a large number of requests. According to Roberts, 50-70% of all requests to the department of foreign affairs¹⁹ were amber lighted in 2002, with the figure being 40% for the Department of Defence.²⁰

There is also evidence of differential treatment being applied to 'troublemakers' and politically sensitive requests in South Africa. The difficulty of accessing the files from the South African Truth and Reconciliation Commission (TRC), for example, has been well-documented, even though the Commission itself strongly recommended that all of its files be preserved and made publicly available, absent compelling reasons for secrecy.²¹

From a principled right to information perspective, this is clearly problematical; refusals to disclose should be based only on overriding grounds for secrecy, assessed against a risk of actual harm, and not on political considerations. At the same time, this is a difficult problem not susceptible of easy solution. Bureaucratic buy-in to the system is essential for its proper functioning. **Government and the bureaucracy have enormous residual powers to control the flow of information, regardless of what the law or rules say.** It may be preferable to accept that some form of special treatment will be given to politically sensitive information and, rather than trying to combat this, focus instead on trying to ensure that the procedures are as formal and transparent as possible.

Action Ideas:

- undertake monitoring and research to better understand any special procedures that have been developed for processing politically sensitive requests
- expose instances of political interference in the processing of requests
- put in place rules prohibiting ministers or the Prime Minister's Office from getting involved in the processing of information requests
- as an alternative, put in place transparent internal procedures that ensure that the worst result of special procedures for politically sensitive requests is delay, rather than the outright denial of access

¹⁸ Roberts, Alasdair, 2002, "Administrative discretion and the Access to Information Act: An internal law on open government?" 45 *Canadian Public Administration* 175 and Roberts, Alasdair, 2005, "Spin control and freedom of information: Lessons for the United Kingdom from Canada" 83 *Public Administration* 1.

¹⁹ Formally the Department of Foreign Affairs and International Trade (DFAIT).

²⁰ Roberts, Alasdair, 2005, "Spin control and freedom of information: Lessons for the United Kingdom from Canada" 83 *Public Administration* 1, p. 8.

²¹ McKinley, Dale, *The State of Access to Information in South Africa*, Johannesburg, Centre for the Study of Violence and Reconciliation (2003).

2. Enhancing the Provision of Information

Changing underlying attitudes towards transparency within the civil service is necessary for long-term success. It is equally important to put in place good policies and mechanisms to foster the efficient application of the two main information disclosure systems, namely the requesting process and proactive disclosure. In other words, it is important to get the mechanics of providing information right. The experience from other countries demonstrates that a strong flow of information is key to building public support and a robust, progressive right to information system.

a. Nurturing requests

The requesting process is at the heart of the right to information system. If the volume of requests is low, there is a serious risk that the whole system will wither into irrelevance. It is important that many individuals, not only educated elites but all citizens,²² can and do in practice make requests for information. Making direct requests for information from government is not something that comes easily or naturally to everyone. Indeed, for most people, a number of barriers to this exist, including the obvious ones of cost and effort but also fear of interacting with government and scepticism about whether it will be worthwhile. Making it easy to lodge requests should be a key right to information implementation objective.

In the initial phases of implementing right to information legislation, there may be very basic problems that impact negatively on openness. In South Africa, for example, cases of requests getting lost due to staff changes or delayed because the relevant staff member was on holiday and left his or her office locked have been noted.²³ These problems will vary from context to context.

Standardised requesting procedures across public authorities, along with centralised systems for lodging requests, help foster an efficient and user-friendly approach. This is particularly likely where these are developed by authorities, like the information commissions, which have a mandate to promote openness and hence a vested interest in putting in place effective mechanisms.

In Mexico, a key decision has been to focus on electronic requests, although it is still possible to make requests in other ways, for example by mail or by presenting them directly to public authorities. This has some costs in terms of accessibility but it has paid dividends for those requesters who do have access to the Internet.

The Mexican information commission – the Instituto Federal de Acceso a la Información Pública (Federal Institute for Access to Public Information or IFAI) – has played a leading role in this area. It runs a sophisticated central electronic requesting system – the Sistema de Solicitudes de Información or SISI, as it is popularly known – through a central web portal which allows individuals to lodge requests and complaints with federal public authorities. SISI allows requesters to monitor the processing of their requests, and complaints (appeals) can even be lodged with IFAI

²² Ideally, everyone should benefit from the right of access but this is limited under the Indian law to citizens.

²³ Pietersen, Melvis and Dimba, Mukelani, *Digging out the Truth, Dogged ODAC Holds On* (Cape Town: Open Democracy Advice Centre, 2004), p. 6.

via SISI. It is widely acknowledged to be a very user-friendly system which has made an important contribution to the very high number of requests in Mexico – some 220,000 in the four years between June 2003 and June 2007²⁴ –and the overall success of the right to information system.

Efforts are currently underway to integrate SISI with the wider e-government initiative, known as e-Mexico. In particular, there are efforts to provide access to SISI via the more than 3000 kiosks providing public access points to the Internet, which should further facilitate the making of requests.

Standardised approaches can also be useful in the area of provision of assistance to requesters, with a view to promoting consistency and efficiency. Standard models can both provide guidance to public authorities as to what constitutes an appropriate level of assistance and relieve public authorities of the burden of developing their own systems.

In many cases, **an excessively formal approach to processing requests is neither efficient nor productive.** Instead, information officers should, as appropriate, engage in dialogue with requesters with a view to understanding what they are really looking for, so as to be able to respond in a more focused and efficient manner. Often, the information really being sought is hard to identify from poorly worded or excessively wide requests. Dialogue can help hone or narrow a request, saving time and effort for the public authority and increasing the likelihood of the request being satisfied in full and in time, to the benefit of the requester. At the same time, the right of requesters to refuse to provide reasons for their request should be respected where they do not wish to provide this information. More generally, requests should be treated on a client service model, and not in an adversarial or strictly formal manner.

Careful monitoring should be undertaken of abuses of the law that inhibit the lodging of requests, such as refusals to accept requests or placing illegitimate bureaucratic obstacles in the way of lodging requests. Targeted sanctions in high-profile cases can send a clear message to officials that such behaviour will not be tolerated.

Timely processing of requests is a significant challenge in most right to information systems. Delays are often closely linked to certain other features of the access regime, notably information management and exceptions. In Canada, the law allows public authorities to extend the time limit for a ‘reasonable period of time’ under certain conditions. Even though authorities often allocate themselves comparatively lengthy timelines to satisfy requests, they regularly breach even those limits.²⁵ The Canadian Information Commissioner is currently proposing triage rules whereby requests with a high public interest value will be processed more quickly. Although there are clear potential benefits to this, at the same time it has been criticised on the basis that it is inappropriate for the Information Commissioner to judge which requests are important.

²⁴ Bogado, Benjamin, Martinez-Morales, Emilene, Noll, Bethany and Bell, Kyle, *The Federal Institute for Access to Information in Mexico and a Culture of Transparency: Follow Up Report* (Annenberg School for Communications, University of Pennsylvania: 2008), p. 3.

²⁵ Roberts, Alasdair, 2002, “Administrative discretion and the Access to Information Act: An internal law on open government?” 45 *Canadian Public Administration* 175, pp. 186-187.

Delay is a chronic problem in the United States. Amendments to the United States law, adopted in late 2007, impose far more **stringent reporting obligations regarding the time taken to process requests**, in an attempt both to embarrass poor performers and to track the problem more scientifically. The amendments also prohibit certain fees from being charged where time limits are not met and require public liaison units to be established to assist applicants to resolve disputes involving delay. The United States law also provides for “multitrack” processing of requests based on the amount of work involved, as well as for expedited processing of requests in cases where the applicant demonstrates a “compelling need”.

In South Africa, delays are also chronic, and yet surveys suggest that public authorities rarely, if ever, formally resort to the extensions provided for in the law. Instead, they simply fail to respond to requests. A study by the Open Society Justice Initiative found that some 62% of requests in South Africa were met with so-called ‘mute refusals’, a failure to respond to the request within the established time limits.²⁶

On the other hand, public authorities in Mexico appear to be tackling the time limit issue with increasing success.²⁷ In Mexico, failure to respond in time limit is a deemed acceptance of the request (in most countries this leads to a deemed refusal of the request), and the information must be provided to the requester, unless IFAI agrees that it should remain confidential.

A related problem is the practice of indicating that information is ‘not held’, even when the authority does actually hold the information but either cannot or does not want to find it. There is evidence that the increasing rate of ‘not held’ responses in Mexico may be due in part to a desire on the part of public authorities to avoid their openness obligations.²⁸

Fees can pose a serious barrier to requesters and the idea of turning access to information into a commercial commodity is offensive to the underlying rationale for the right. At the same, time modest fees can serve to limit vexatious or abusive requests, which can waste civil servants’ time and undermine support for the system as a whole. Regulations in India at the central and state levels already provide for standard fee structures which appear to be reasonable.

Action Ideas:

- monitor request systems with a view to identifying basic problems and propose simple systemic solutions to avoid repetition
- develop clear and efficient model procedures for processing requests for information

²⁶ Open Society Justice Initiative, *Transparency and Silence: A Survey of Access to Information Laws and Practices in 14 Countries* (Hungary: Central European University Press, 2006), p. 43.

²⁷ Sobel, David, Noll, Bethany, Bogado, Benjamin, TCC Group and Price, Monroe, *The Federal Institute for Access to Information in Mexico and a Culture of Transparency* (Annenberg School for Communications, University of Pennsylvania: 2006), p. 36.

²⁸ Sobel, David, Noll, Bethany, Bogado, Benjamin, TCC Group and Price, Monroe, *The Federal Institute for Access to Information in Mexico and a Culture of Transparency* (Annenberg School for Communications, University of Pennsylvania: 2006), p. 21.

- make available a central electronic facility for receiving requests for information at each level of government (i.e. federally and in each state), perhaps along the lines of the Mexican SISI system
- integrate information requesting systems with wider e-government initiatives
- promulgate guidelines or guidance notes aimed at information officers and/or requesters, for example on what constitutes a reasonable level of assistance or on how to hone a request, or mapping the government departments which hold information which is most commonly sought by requesters
- develop specific training and central online resources for information officers to help them provide appropriate assistance to requesters
- promote a more interactive approach to the processing of requests which involves dialogue between requesters and information officers, where appropriate, with a view to focusing on the real information interests of requesters
- monitor request processing to identify and expose abusive practices
- apply sanctions in a few high-profile cases where officials have wilfully failed to apply required procedural rules with a view to sending a clear message that such practices will not be tolerated
- impose stringent reporting obligations on public authorities regarding the timeliness of responses to information requests
- promote a role for information commissions in agreeing (or refusing) proposed extensions to time limits
- promote the partial release of information as a first step in the processing of complex requests or requests where only part of the information potentially involves exceptions, and/or multi-track processing of requests depending on complexity and their public interest or personal need value
- encourage public authorities to provide for internal mediators or liaison units to resolve problems of delay
- impose sanctions on public authorities (or provide compensation to requesters) where they fail to meet predetermined standards of timeliness, for example by failing to process more than 10% of requests on time
- adopt regulations that make it possible for public authorities to skip the step of consulting with third parties where it is clear that the information requested is not covered by an exception (with due attention to the rights of third parties)
- zealously apply the rule whereby requesters may not be charged for requests which are not met within the prescribed time limits
- carefully monitor the imposition of fees for information requests and take measures to sanction public authorities which charge excessive fees
- ensure that the provision of information electronically, which is increasingly the dominant model, is free

b. Proactive Disclosure

Proactive disclosure, sometimes referred to as routine or *suo moto*²⁹ disclosure, has been recognised as central to an effective right to information system. It ensures that a minimum platform of information is publicly available, promotes access to information for the majority of individuals who will never make a request

²⁹ This term is commonly used in India, although it seems anomalous to use an obscure Latin phrase when referring to a transparency idea.

and limits pressure on the request process. Indeed, progressive modern governments are making increasingly large amounts of information that may be of public interest available on a proactive basis.

The longer-term goal should be for all information that is clearly not covered by an exception and which may be of public interest to be available over the Internet. This both fosters the right to know and also promotes efficiency since it should reduce the need for individuals to resort to requests to get this information. These benefits have been recognised in the Indian legislation which not only provides for extensive specific proactive disclosure obligations but also calls on public authorities to make a 'constant endeavour' to provide as much information available proactively as possible, so as to minimise the need for the public to have recourse to requests to obtain information.

It is one thing to recommend strong proactive publication regimes and another to put them in place. The early indications are that public authorities in India are struggling to satisfy their proactive disclosure obligations.³⁰ This is exacerbated by the fact that there does not appear to be any means of enforcing these rules. Various systems have been tried or recommended in different countries to prompt or facilitate more extensive proactive publication practices.

In Mexico, IFAI has a legislative mandate to set standards for proactive publication. Although, as in India, individuals do not have the right to lodge complaints regarding proactive publication failures, IFAI has taken a number of measures to promote better practice. It rates the websites of public authorities with a view both to helping to identify weaknesses and possible solutions, and to promoting healthy competition among authorities for good ratings. It also promotes uniform websites among different public authorities to make it easier for the public to navigate them, to promote best practice approaches and to relieve authorities, particularly smaller ones, of the burden of website design.

In the United Kingdom, public authorities are required to develop and implement publication schemes, setting out the classes of information which they will publish and the manner in which they will publish them. The schemes must take into account the public interest in access to the information it holds and in the "publication of reasons for decisions made by the authority". Importantly, the scheme must be approved by the Information Commissioner and the Commissioner may put a time limit on his or her approval. The law also provides for the development of model publication schemes by the Commissioner for different classes of public authority, which any public authority in the relevant class may simply apply, rather than developing its own. This system builds in a degree of flexibility, but with Commissioner oversight, so that public authorities may adapt their proactive publication commitments to their specific operations. Importantly, it allows for the levering up of proactive publication obligations over time, as public authorities gain capacity in this area.

³⁰ Participatory Research in Action, *Tracking Right to Information in Eight States – 2007* (New Delhi: 2008), p. 23.

Linking the right to information to ongoing e-government initiatives can also help foster better proactive disclosure practices. In Mexico, IFAI is working to integrate the right to information into the e-Mexico initiative, which involves a commitment to make far more information available on a proactive basis. IFAI has also set up a Portal of Transparency Obligations which provides information on public authorities subject to the right to information law, along with links to their websites (public authorities also link back to the Portal).³¹

Steps can also be taken to ensure better dissemination of formally published information. The Canadian government runs a Depository Service Programme to promote access to government publications. A network of academic and public libraries across the country and internationally – including 52 full deposit libraries – receive copies of government publications. A list of these libraries is provided online. There are proposals to strengthen the programme by requiring all public authorities to participate and by extending coverage to include all publications, regardless of format.

Requiring public authorities to include information about their proactive publication practices on an annual basis, to supplement the information they are required to provide about requests, can help to highlight the importance of this mode of disseminating information and to facilitate the identification of weak performers and problem areas.

In Sweden, public authorities are not only required to publish a list of the categories of information they hold (as is the case in India), but also a list of all significant documents held. The implications of this in terms of assisting requesters locate the documents they are looking for are obvious.

In Mexico, every request, the response to it and any information disclosed pursuant to the request are all automatically made publicly available, and the same applies to complaints. IFAI has implemented ZOOM, a searchable database of information requests, responses and the results of appeals, linked to the central electronic requesting system, SISI, to facilitate this.

In the United States, a weaker form of this applies whereby the responses to all requests which may be of wider public interest are made publicly available. In Canada, a record of all requests, but not the information provided in response to them, is available online. In a Kafkaesque twist, the system is not run by the government but by a private individual who obtains the information monthly by making an access to information request for it. The information comes from the Coordination of Access to Information Requests System (CAIRS), an internal database on requests which is maintained by the government.³²

Action Ideas:

³¹ Bogado, Benjamin, Martinez-Morales, Emilene, Noll, Bethany and Bell, Kyle, *The Federal Institute for Access to Information in Mexico and a Culture of Transparency: Follow Up Report* (Annenberg School for Communications, University of Pennsylvania: 2008), p. 11.

³² Just as this Study was going to print, the Canadian government had decided to do away with the database in a move that has attracted widespread condemnation.

- provide assistance to help public authorities discharge their proactive publication obligations, such as providing off-the-shelf website designs
- work to develop more interactive websites with a view to better targeting of proactive disclosure to meet the needs of requesters
- require public authorities to report in detail on their activities to implement their proactive publication obligations, as part of their annual reporting requirements
- rate public authorities according to their performance in the area of proactive publication, perhaps awarding a symbolic prize to best performers
- set minimum standards for proactive disclosure, including through developing model publication schemes as in the United Kingdom
- link proactive disclosure regimes to ongoing e-government initiatives
- promote better and more standardised distribution of formally published information, including through 'deposit' libraries where individuals can be assured of finding all government publications
- help rationalise access to publications which are available electronically, for example by providing access via a central web portal, so that members of the public do not need to search through the individual websites of different public authorities to find them
- encourage public authorities to make available not only a list of categories of information held, but also a full list of requests and responses to them
- facilitate the above by requiring public authorities to track all information requests, as part of their annual reporting requirements
- publish on a central website all information available electronically which has been made public pursuant to a complaint (link this, where possible, to a central electronic requesting system, along the lines of SISI)

c. Information Management

Effective systems for information management, including the destruction and archiving of older records, are central not only to the right to information but to modern, efficient governance more generally. Poor information management systems lead to delays in the processing of requests and, in more serious cases, to the inability of public authorities to respond to requests (for example where they cannot locate requested information). At the same time, this is a huge challenge for most governments and the advent of electronic information technologies has, while vastly enhancing information storage capacities and reducing their costs, made information management far more complicated.

This is a challenge for wealthy developed countries, as it is for poorer, less developed nations. The 2002 Report of the Access to Information Review Task Force, for example, noted, in respect of Canada: "Everyone is in agreement, however, that there is a crisis in information management in the federal government, as well as in every jurisdiction we have studied." In the Mexican context, it has been reported that while electronic records created since the right to information law came into effect in 2002

are reasonably well-organised, “historic documents remain unorganized and completely impenetrable”.³³

There is no simple solution for this problem. **Resources have to be invested in developing and implementing good information management systems**, which also ensure the necessary level of information security. Such resource allocation can easily be justified given the importance of good information management for overall public service efficiency.

At a minimum, **central responsibility should be allocated for setting and enforcing information management standards**. Ideally, this should be overseen by a body which is independent of or operates at arms-length to government. The right to information law of the United Kingdom provides one example of how this can be done. It requires the Lord Chancellor to issue a Code of Practice providing guidance to public authorities regarding the keeping, management and destruction of their records, as well as transfer of records to the Public Record Office (the archives) and the destruction of those records which are not to be transferred. The Code is not technically binding, although to some extent it might be considered to elaborate on binding obligations in the primary legislation. However, the Information Commission has a mandate to promote compliance with the Code, specifically through the issuing of practice recommendations on the extent to which public authorities are complying with its provisions. The system thus combines standard setting with a soft monitoring and enforcement model.

The question of transferring records to the archives and disposing of (destroying) those records that are not of historical value is important. As with information management, this should ideally be overseen by a body which is independent of government. It is important that decisions about destruction of records not be based on a narrow appreciation of their potential further use to the civil service, but on wider social and cultural considerations.

Both information management and the archiving/destruction of records within the civil service are massive tasks and they require dedicated, qualified staff. One option is for this to be incorporated into the role of the information officers. If responsibility for information management and archiving is allocated to other officers, the suggestions above regarding the professionalization of information officer positions also apply to those officials.

Action Ideas:

- allocate adequate resources, including dedicated staff, to the task of information management and archiving
- adopt clear central standards on information management and archiving which are consistent with right to information rules and priorities (for example, ensuring that information of potential wider public interest is not destroyed)
- ensure that clear rules apply to the storage and destruction of electronic records, which can often be deleted at the press of a button

³³ Bogado, Benjamin, Martinez-Morales, Emilene, Noll, Bethany and Bell, Kyle, *The Federal Institute for Access to Information in Mexico and a Culture of Transparency: Follow Up Report* (Annenberg School for Communications, University of Pennsylvania: 2008), p. 11.

- vest overall responsibility for implementation of information management and archiving rules in a central body or bodies which are independent of government, such as the Central Information Commission
- promote cooperation between those responsible for information management and archiving, including the various archival institutions and information commissions, with a view to setting and overseeing proper implementation of standards and procedures
- provide dedicated training on information management and archiving to officials responsible for these tasks
- issue clear guidelines on how to implement information management systems to provide assistance to those responsible for this task

d. Exceptions

Drawing an appropriate line between information which should be disclosed and information which should be kept secret is one of the most difficult challenges in implementing right to information legislation. The matter is made more complicated by public interest override rules, which require a consideration of all of the circumstances at the time of the request. A further complication is the fact that most right to information laws, including the Indian law, grant a measure of discretion to public officials regarding the release of information since they provide simply that there is no obligation to disclose information covered by an exception (and not that such information may not be disclosed).

Like the issue of information management, there is no magic solution to this problem. **Ultimately, what is needed is well-trained and, to the extent possible, experienced officers with the capacity and confidence to release information in accordance with the law and the overall public interest.**

The Canadian Information Commissioner has made available to all information officers the manual used to train his own officers on the proper scope of exceptions, even though he recognises that it is not binding and is not always fully up-to-date.³⁴ The South African Human Rights Commission monitors decisions by the Constitutional Court and Supreme Court that are relevant to the right to information and posts summaries of these online.³⁵

Much of the above should be applied to the matter of classification of information as well. **Although in India classification is technically irrelevant in light of a request for information, it can significantly influence the manner in which officials interpret exceptions.** As a result, it is very important that, to the extent possible, the scope of classification corresponds to the exceptions in the right to information law.

The Mexican system operates rather differently and (proper) classification is grounds for refusing access. IFAI is responsible for establishing criteria for the classification and declassification of information, and classification is strictly limited in time to 12 years, although this may exceptionally be extended by IFAI. Each public authority is

³⁴ Information Commissioner of Canada, *Annual Report, Information Commissioner: 2006-2007* (Ottawa: 2007), pp. 17-18.

³⁵ South African Human Rights Commission, *11th Annual Report for the Year Ended March 2007* (Johannesburg: 2007), p. 102.

required to establish an Information Committee, responsible for overseeing classification, which must be notified when the classification of a document is proposed. In practice, implementation of this varies considerably among different public authorities.

Action Ideas:

- discourage public authorities from being excessively zealous in their consideration of potentially applicable exceptions
- provide specialised training for officials, particularly PIOs and APIOs, on interpreting and applying exceptions, with a particular focus on the more difficult, and most abused, exceptions and on the public interest override
- supplement training with written guidance, for example in the form of targeted briefing notes interpreting key exceptions, including simple ‘rule of thumb’ advice which information officers should find easy to follow; for example, it might be useful to clarify that protected commercial interests apply only where disclosure would be likely to lead to **monetary** loss, as opposed to loss of face
- do the same for the public interest override and the exercise of discretion in applying exceptions; guidance on applying the public interest override might specify a number of potentially overriding interests – such as protection of human rights or the environment, or the exposure of wrongdoing or incompetence – as well as other considerations, such as that the sensitivity of information declines over time and that specific interests should dominate over vague threats
- establish a system for the central provision of specific advice on the application of exceptions, for example via a dedicated phone or email hotline
- publish synopses of court rulings elaborating on exceptions in a simplified format and disseminate to PIOs and APIOs and other relevant decision-makers
- promote the adoption of detailed legislation on data protection, which includes a clear and detailed definition of what constitutes personal data³⁶
- review existing classification labels and systems, which are likely to be fundamentally at odds with the right to information rules
- establish clear rules for classification which incorporate time limits on classification, as well as regular review of classification, with information regularly declassified as the need for classification disappears

e. Complaints

Complaints – both internal, and to the information commission and courts – are an important part of the request process. **Internal complaints give public authorities a chance to reconsider refusals to disclose and to have the matter dealt with at a more senior level.** In many instances, particularly during the initial stages of applying a new right to information regime, lower-ranking officials do not feel they have the authority to release information that, previously, would have been kept secret. An internal complaint to more senior officials can help address that problem and also build confidence to release information in the first instance. On the other hand, if senior officials consistently support refusals to disclose, an internal complaint can become simply a further barrier and delay to accessing information.

³⁶ The development of a data protection law is reportedly already underway in India.

External complaints or appeals, in particular to information commissions, can be a sort of circuit breaker when relations between requesters and public authorities become adversarial. Such external complaints set the standards and tone for the application of the law. They are particularly important for purposes of authoritative elaboration of the scope of exceptions, but they also set standards in other areas, such as timely processing of requests, appropriate request processing procedures, fees and so on. Complaints also provide useful input into how the system overall is working. Where similar issues keep recurring on appeal, this may be a sign that systemic reform is needed. For all of these reasons, the overall success of the system depends on there being a satisfactory rate of complaints from requesters.

Complaints potentially create tension between information commissions and public authorities and so need to be dealt with carefully. It is important for information commissions to maintain good relations with public authorities, due among other things to the ability of the latter to obstruct openness. At the same time, the manner in which commissions deal with complaints (and in the Indian context also appeals) will have a significant impact on their credibility among the public, particularly as they seek to establish themselves in the initial implementation period.

Two factors can seriously undermine the credibility of information commissions in the context of complaints. The first is inconsistency of decision-making, a particular risk where different commissioners have to process a large number of complaints within a short time, as is the case in many Indian jurisdictions.

Second, credibility can be undermined where decisions are poorly reasoned or not fully explained to the parties while, on the other hand, well-reasoned decisions will be more acceptable (or less unacceptable) to those whom they go against. Well-reasoned decisions also serve as a learning tool and help provide guidelines to public authorities to amend their decision-making, where applicable (i.e. where the decision goes against them).

Complaints often give rise to investigations. In Canada, investigations of public authorities by the Information Commissioner – whether *suo moto* or pursuant to a complaint – have proven to be a source of considerable tension and have even created a backlash. When the Commissioner announced a policy of zero tolerance on late responses to requests in the late 1990s, and sought to use his full investigative and subpoena powers to enforce this, the backlash was significant. There were reports of threats to the future careers of his staff and, as the Commissioner put it, when his searches, subpoenas and questions were too insistent or too close to the top, “the mandarins circle the wagons”.³⁷ Partly as a result of this, considerable attention has been given, in Canada, to the question of investigations. Many commentators have called for the Commissioner to be given binding decision-making powers (at present his powers are simply recommendatory in nature).

Closely related to complaints is the question of remedies, including sanctions. The Indian law provides for a wide range of possible remedies to be imposed by information commissions, including structural measures – such as requiring a public

³⁷ Information Commissioner of Canada, *Annual Report, Information Commissioner: 1999-2000* (Ottawa: 2000), p. 9.

authority to publish categories of information or to enhance its training programmes – and individual fines for obstructive behaviour. While formally binding, the law does not specifically indicate how these decisions are to be enforced. This has been a problem in the Mexican context, where enforcement of IFAI’s decisions has been left to the Ministry of Public Administration.³⁸

Regardless of the formal mechanism, imposing sanctions ‘by force’, as it were, should be a last resort. It takes time and there will always be avenues for resistance from determined public authorities. It is far preferable for an information commission to command sufficient moral authority and respect that public authorities implement its decisions ‘voluntarily’.

Action Ideas:

- provide dedicated training to those responsible for deciding internal complaints
- monitor and report on the performance of public authorities regarding internal complaints
- adopt procedures that make it easy to lodge a complaint/appeal with the commissions and undertake public outreach to encourage requesters to lodge such complaints/appeals
- put in place expedited procedures for complaints/appeals relating to matters such as fees, delays and form of access, given that these should be relatively simple to resolve
- analyse complaint/appeal decisions by the commissions with a view to identifying systemic failures at the level of public authorities and to proposing remedial measures
- put in place systems such as peer or central review to help promote consistency of complaint/appeal decisions by commissions
- issue well-reasoned decisions on complaints/appeals at the commission level, so that they may serve as authoritative and clear interpretations of the law
- adopt clear procedures for investigations and allocate dedicated staff members to particular public authorities for purposes of investigations, so as to build relations and trust, and to enhance their understanding of those authorities
- clarify the issues being investigated at the outset, so that public authorities know ‘the charges against them’
- use persuasive measures, where possible, to promote compliance with complaint/appeal decisions by commissions, such as giving due publicity to such decisions, resorting to sanctions only occasionally and for more egregious breaches of the rules
- clarify the rules regarding enforcement of commission decisions, preferably through court order rather than a more political route

3. Engaging the Public

The success of any right to information system depends in a number of ways on positive engagement with the public. First and foremost, fulfilment of the objectives

³⁸ Bogado, Benjamin, Martinez-Morales, Emilene, Noll, Bethany and Bell, Kyle, *The Federal Institute for Access to Information in Mexico and a Culture of Transparency: Follow Up Report* (Annenberg School for Communications, University of Pennsylvania: 2008), pp. 12-13.

of the law – in the Indian context the goals set out in the preamble to the law, namely promoting democracy, controlling corruption and ensuring public accountability – depends in fairly obvious ways on active use of the system. In other words, if the volume of requests for information is low, these benefits will simply not be delivered. Second, political support for the law, central to its success, depends on broad-based public support, which in turn is possible only if it is actively used. Third, operation of the mechanisms for disclosing information, described in the previous section, can develop into a well-oiled system only where they are actively used; it is primarily through use that disclosure processes are honed and developed.

a. Public Awareness-Raising

Wide-spread public education and awareness-raising campaigns are central to engaging the public. It has been widely observed that the early years of implementing a right to information regime are particularly important as they set the trend and form lasting initial impressions of the value and impact of the system. At the same time, there is a need to maintain efforts over time. The 2002 Information Review Task Force noted that, in Canada, after 20 years, the right to access information is still not well understood. Indeed, there is some evidence to suggest that there has been a decline in awareness in comparison to the years following the adoption of the law.³⁹

Outreach campaigns face a barrier in the culture of secrecy that affects not only the civil service but also the public, which is accustomed to longstanding secrecy practices and a history of less than satisfactory interactions with government. The attitudes and value structures of members of the public around engagement with the public sector, including in relation access to information, need to be changed.

Careful consideration needs to be given to the content of public outreach. In the Mexican context it has been noted that, although IFAI naturally wishes to publicise its mandate and role, a better focus of public awareness-raising initiatives is the overall right to information system and the benefits it can bring.⁴⁰ At the same time, it is important for information commissions to build a strong constituency of support for their offices so that they receive appropriate levels of support and their independence is respected.

Public misperceptions, based on superficial awareness of the system, can also cause problems. In Mexico, the high profile of the right to information rules has led to a significant number of requests which do not involve access to information. On the other hand, in India there is an emerging picture of ‘collateral’ right to information successes, whereby information claims lead to the resolution of other administrative failures.⁴¹

³⁹ Government of Canada, *Access to Information: Making it Work for Canadians: Report of the Access to Information Review Task Force* (Ottawa: 2002), p. 3.

⁴⁰ Sobel, David, Noll, Bethany, Bogado, Benjamin, TCC Group and Price, Monroe, *The Federal Institute for Access to Information in Mexico and a Culture of Transparency* (Annenberg School for Communications, University of Pennsylvania: 2006), p. 44.

⁴¹ Participatory Research in Action, *Tracking Right to Information in Eight States – 2007* (New Delhi: 2008), pp. 12 and 19.

Commentators regularly call for greater attention and resources to be devoted to direct outreach efforts. In Mexico, IFAI has engaged in a broad public relations campaign involving pamphlets, posters, radio and television spots, academic publications and a massive and successful Internet drive, spearheaded by an extensive and user-friendly website. Although there is a wealth of anecdotal information and a strong track record of requests being lodged, overall levels of awareness have not been systematically measured and the causal impact of IFAI's public relations campaign has not been assessed.

At the same time, resource limitations mean that public campaigns need to be strategic. **Two types of information are particularly important to building public support: information about politically or socially important events which attract media coverage and which are widely viewed as access 'successes'; and information about the regular and widespread ongoing release of personal or other information which improves peoples' everyday lives.** Real successes – which lead, for example, to the exposure of corruption, the reversal of policy or development proposals, or an increase in participation – should be distinguished from scandals, which may attract short-term media attention but which will ultimately fail to build real support for the system.

There is a real sense in Mexico that the law works because every week stories are published in the media about releases which actually affect people. For example, the right to information law is widely credited with the almost complete disappearance of the 'aviadores', government employees who would get paid but never actually turn up for work. Highlighting the role of the right to information in these stories can generate significant public awareness dividends.

On the other hand, where the role of the right to information is not highlighted, this benefit is lost. In Canada, the exposure of abuses relating to the so-called 'sponsorship programme',⁴² initially discovered through right to information requests, eventually led to the downfall of the long-standing Liberal Government. However, the public generally failed to avert to the right to information link, and so relatively little support for the system was generated notwithstanding the enormous significance of the result.

Efforts can be directed towards increasing the supply of access success stories, strengthening the right to information angle in them and enhancing media coverage of them. Networking among NGOs and journalists can be useful; NGOs frequently have stories of interest to journalists and can provide support to enhance the ability of journalists to take advantage of the law in developing their stories.

There is some debate about whether outreach should be directed towards those more likely to use the system or to the grassroots, in an effort to promote truly widespread use of the system. Evidence from longer-standing systems, such as that of Canada and Australia, suggests that only a small percentage of the overall public will ever actually make a request for information, and that users tend to be heavily concentrated in the middle classes. At the same time, the rationale behind right to information legislation suggests that the whole population should be targeted. It would be ironic if a tool

⁴² A Federal Government programme to sponsor activities aimed at wooing Quebecers with a view to decreasing support for separatism in the province.

designed to make government accountable and responsive served instead to further privilege elites.

At a practical level, it can be very difficult to reach out to the truly disempowered; indeed, isolation is a defining characteristic of disempowerment which applies to the right to information just as it does to other aspects of social life. Discrimination against the disempowered in the context of the right to information has been documented in some cases. Surveys indicate that requesters are sometimes unable to submit oral requests, even though the law specifically provides for this, while the same problem has not been experienced by those submitting written requests.⁴³

On the other hand, in Mexico the oversight body has initiated a project called 'IFAI Comunidades', aimed at bringing together people within communities to identify and then request information that they need. The project has been successful in delivering information about health studies, the environment, corporate donations to public bodies and so on to local communities.⁴⁴

A dual strategy is appropriate, with a focus both on individuals and groups who are more likely to use the system, and on the wider public. Outreach to the youth can be especially important to longer-term support. The youth are more likely to embrace modern governance ideas and, in particular, the equality and participation which access to information can fuel. They are also more likely to be comfortable using the Internet, and the public education system provides a potentially powerful and yet very cost-effective outreach system. Other natural targets for outreach include NGOs, academics, frequent requesters (who can bring special benefits due to their expertise and knowledge of the system) and businesses.

Public authorities, including information commissions, should develop strategic partnerships with NGOs and others to supplement and strengthen their own efforts at public outreach. In Mexico, businesses have proven to be important supporters based on the fact that they oppose corruption and bureaucratic red tape. Reliance on civil society groups may be important when attempting to reach out to the disempowered. The MKSS experience in India, where the focus was on minimum wages, is an excellent example of this.

Action Ideas:

- place particular emphasis on public outreach during the initial stages of implementation but continue outreach efforts over time to maintain a strong base of public awareness
- target messages on the overall benefits of the system, while also ensuring that appropriate attention is given to the role of information commissions, so as to build public support for these key bodies
- focus on (real) success stories and ongoing releases which directly affect people

⁴³ Open Society Justice Initiative, *Transparency and Silence: A Survey of Access to Information Laws and Practices in 14 Countries* (Hungary: Central European University Press, 2006), pp. 96-102.

⁴⁴ Bogado, Benjamin, Martinez-Morales, Emilene, Noll, Bethany and Bell, Kyle, *The Federal Institute for Access to Information in Mexico and a Culture of Transparency: Follow Up Report* (Annenberg School for Communications, University of Pennsylvania: 2008), p. 5.

- track ‘success stories’ over time to ensure that they really are successes in terms of delivering benefits
- undertake direct dissemination of success stories
- build contacts with the media to get them both to carry more right to information success stories and to attribute those stories to the right to information
- enhance the ability of investigative reporters to use the right to information law through activities like training and internships
- forge links with associations of investigative reporters as a conduit for training initiatives and to highlight the potential of the right to information to their work, including through exposure to international experiences
- connect investigative reporters with NGOs, perhaps even through some formal mechanism
- target outreach efforts at both more likely requesters and the general public, although the latter may require more basic messaging and innovative strategies, like IFAI Comunidades
- build strategic partnerships with NGOs and others to promote cooperation on public outreach, for example with targeted dissemination of pamphlets and reaching out to disempowered communities
- highlight the importance of access to information to the particular issues different civil society groups focus on

b. The Role of Civil Society

Civil society – NGOs but also the media and academics – plays a key role in promoting access to information. It often constitutes a very important requester group, particularly in the area of wider public interest requests. In many countries it is a key, often the key, source of political support for the right to information. It can be an important ally in outreach to the wider public, as well as in training public officials. And it can undertake a range of activities that help develop a strong right to information system, including legal challenges, research, including on best practices from abroad, strategic requesting to test the limits of openness, protesting bad practices, advocating for progressive implementation and so on. Private businesses can also be key political allies on the right to information. In the United States and Canada, for example, this sector is among the more important requester groups and it provides key political support from a powerful constituency.

Public authorities, including information commissions, can help maximise the impact of civil society initiatives in two key (and closely related) ways: by forming strategic partnerships with different groups to deliver common goals, and by working to build the capacity of civil society to achieve those goals.

Training is an area where extensive cooperation between officials and civil society, primarily NGOs and academic institutions, has taken place. As noted above, in Canada, the University of Alberta has worked to develop the IAPP Certificate Program. In the United Kingdom, private bodies, in many instances NGOs, undertake a substantial part of all right to information training for officials.

In Mexico, IFAI has taken cooperation with civil society to a high level. It has entered into formal cooperation agreements with a number of organisations, although these

lack specificity as to the nature of the cooperation and appear to be developed on an *ad hoc* basis rather than pursuant to a coordinated strategy.⁴⁵ It also played a key role in nurturing a new NGO, the Centro Internacional de Estudios de Transparencia y Acceso a la Información (CETA), which has a mandate to promote the right to information nationally and internationally.

A number of steps can be taken to enhance the impact of civil society organisations (CSOs) in this area. It has been noted in both the South African and Mexican contexts that **CSOs would benefit from greater coordination and cooperation among themselves**, so as to move away from their ‘silo’ approach of focusing on their core issues and to recognise the mutual benefits of more strategic work both with and targeting public authorities to deliver the right to information.⁴⁶

Many CSOs would also benefit from enhanced skills, both to make effective use of the right to information (‘legal’ skills) and to make effective use of the information they obtain (‘advocacy’ skills). In Mexico, training has been provided to NGOs in both of these areas (using the law and advocacy).

Action Ideas:

- reach out to CSOs with an interest – active or potential – in working on right to information to explore possible areas for cooperation
- conduct a national audit of key CSOs working on the right to information or related issues, with a view to mapping possible coordination/cooperation options both with and among them
- conclude agreements with leading CSO groups to formalise cooperation with commissions
- match smaller CSOs with larger groups and provide links to international expertise
- provide training to civil society groups to build both legal and advocacy capacity

c. Annual Reports and Public Guides

Many laws, including the Indian law, provide for the production of user-friendly guides for the public on how to take advantage of the right to information. These **guides are important resources for the public and it is worth devoting sufficient attention and resources to ensure that they are accessible and informative.**

The annual report which the information commissions are required to produce under the Indian law, as with many right to information laws, is a central tool for tracking progress in implementing the law, identifying problem areas and generally understanding the use to which the law is being put. In Thailand, data on requests is

⁴⁵ Sobel, David, Noll, Bethany, Bogado, Benjamin, TCC Group and Price, Monroe, *The Federal Institute for Access to Information in Mexico and a Culture of Transparency* (Annenberg School for Communications, University of Pennsylvania: 2006), pp. 77-8 and 83-4.

⁴⁶ McKinley, Dale, *The State of Access to Information in South Africa*, Johannesburg, Centre for the Study of Violence and Reconciliation (2003) and Sobel, David, Noll, Bethany, Bogado, Benjamin, TCC Group and Price, Monroe, *The Federal Institute for Access to Information in Mexico and a Culture of Transparency* (Annenberg School for Communications, University of Pennsylvania: 2006), p. 4.

not tracked at the level of public authorities but only in relation to complaints to the Information Commission, and this has proven to be a serious shortcoming in terms of understanding the operation of the system.

The quality of the report produced by the information commissions depends importantly on the information being provided to them by public authorities. There have been serious problems in South Africa with public authorities failing to provide the oversight body, the Human Rights Commission, with the information it needs to compile its report. Indeed, in 2006 the Commission noted that the number of such reports being submitted to it was actually decreasing⁴⁷ while in 2007 it reported that there had been an improvement in the submission of reports by national authorities, and a decrease in reporting at the provincial level. It attributed this in part to the Golden Key Award ceremony which both rewarded good performers and exposed bad performers.⁴⁸

The 2006 Annual Report provided by the South African Human Rights Commission presents tables of raw data on requests, which is not very informative for the public. Instead, **information commissions should analyse the information provided to them and provide comments based on this in their annual reports.**

Experience in Canada and Mexico suggests that it is useful to track a wide range of different variables relating to requests. For example, it is useful to track the age and occupation of requester (by broad category), the type of information requested (for example, personal data, business information and so on), fee information including not only actual fees levied but also initial fee estimates where these are provided, timelines for provision of information, the form in which access was provided, requests which have been ‘abandoned’ by requesters and so on.

Action Ideas:

- produce a central ‘model’ guide which state governments could adapt to their particular circumstances as appropriate
- monitor and analyse annual reports produced by the various information commissions, with a view to identifying and then profiling successes and problem areas
- encourage commissions not only to present information but also to analyse it in their annual reports
- require public authorities to provide high-quality annual reports to the commissions, which contain a range of relevant data, including detailed information on performance (such as the extent to which they are meeting their proactive publication obligations, the appointment of information officers and so on)
- promulgate a model annual report which public authorities can use as guidance for their own reporting
- adapt central electronic tracking systems for requests to facilitate the collection of a wide range of relevant data

⁴⁷ South African Human Rights Commission, *10th Annual Report for the Year Ending March 2006* (Johannesburg: 2006), pp. 85-6.

⁴⁸ South African Human Rights Commission, *11th Annual Report for the Year Ended March 2007* (Johannesburg: 2007), p. 107.

- assist smaller public authorities with putting electronic tracking systems into place and training to use them

4. Promoting Effective Information Commissions

Oversight bodies – the information commissions in the case of India – can play a very important role in promoting the right to information. One of the key problems identified in relation to the South African system is its failure to establish a dedicated oversight body or to vest any other administrative body with the power to hear complaints.⁴⁹ Oversight bodies can, at their best, serve as independent, dedicated focal points for promoting progressive implementation of the right to information system, high-profile champions of the right.

The ability of oversight bodies to play a positive role in implementation depends on a number of factors, including their mandate, both formally and in terms of the funding available to them, their independence and their relations with other key players, such as the public (information users), civil society and the public authorities they oversee.

a. Role

There are two main types of roles played by different oversight bodies: resolving complaints and undertaking promotional measures. The role of the body in terms of resolving complaints is normally fairly clearly circumscribed by the legislation and this is the case in India. Indeed, this is the primary role envisaged for the information commissions under the Indian legislation.

There are a number of informal approaches, in addition to the formal complaints system, that can help to resolve problems quickly and relatively amicably. The benefits of promoting dialogue between requesters and information officers with a view to honing requests has been noted. Less adversarial approaches to resolving complaints, like mediation and conciliation, have been proposed, for example in Canada and South Africa,⁵⁰ and the South African Human Rights Commission has provided some informal mediation services.⁵¹ The complaints system provided for in India could provide a vehicle for mediation, although formal mediation would need to be backed up by regulations giving the Commissions the power to approve mediated agreements.

Oversight bodies can potentially undertake a wide range of promotional activities, including monitoring, training, advocacy, public outreach and awareness-raising, providing assistance to requesters, making recommendations for reform and even requiring public authorities to undertake structural reforms to better implement the law. In the Indian system, the government is seen as the primary promotional body,

⁴⁹ Open Democracy Advice Centre, *Submission to the Review of State Institutions Supporting Constitutional Democracy: Right to Know Legislation* (Cape Town: 2007), pp. 11-27.

⁵⁰ Government of Canada, *Synopsis of Recommendations / Proposals / Comments From Written Submissions Sent to the Access to Information Review Task Force* (Ottawa: 2002) and Open Democracy Advice Centre, *Submission to the Review of State Institutions Supporting Constitutional Democracy: Right to Know Legislation* (Cape Town: 2007), p. 22, 24.

⁵¹ South African Human Rights Commission, *11th Annual Report for the Year Ended March 2007* (Johannesburg: 2007), pp. 102-3.

although the commissions are given fairly extensive powers to make remedial orders in the context of appeals and they also have the power to make general recommendations for reform. In practice in most countries, these roles are shared between oversight bodies and government, and, indeed, civil society. The ability to mobilise sufficient resources for these tasks is likely to be the key determining factor regarding scope of activities, rather than formal mandates as such.

There is a potential, or sometimes apparent, conflict between the complaints and the promotional role of oversight bodies, although most undertake both. For example, where an information commission has provided assistance to a requester, it might seem like a conflict of interest for the commission also to consider a complaint from the same requester. In practice this is not as significant a problem as it might at first appear. Oversight bodies are not courts, and they do not need to follow the same strict impartiality rules. Separating out the two functions can help minimise this problem and makes sense since they require different skill sets.

Action Ideas:

- explore the possibility of undertaking mediation and/or conciliation with a view to resolving complaints
- interpret the formal mandates of the Commissions broadly, with a view to enabling them to undertake a wide range of promotional measures
- assign different staff to promotional functions and complaints/appeals
- establish different divisions to deal with these two roles
- seek to ensure adequate and independent funding to allow commissions to engage in broad promotional activities

b. Independence and Accountability

Oversight bodies can only discharge their functions properly if they are independent in the sense of being protected against political and other forms of interference. This is, to a great extent, a function of their formal structures, particularly regarding appointments and funding, as well as the presence of political will to respect independence and not to interfere.

A number of external factors may affect independence. **It is essential that the oversight body build political credibility among key constituencies which can support it in the face of threats to its independence.** In the Mexican context, the idea has been mooted of establishing a special support group – a Committee for the Protection of IFAI’s Autonomy – consisting of distinguished citizens who are above politics to safeguard IFAI’s independence.⁵²

An important factor is who is actually appointed to the post of commissioner. The present Canadian Information Commissioner was a long-time Clerk of the House of Commons, whose main role is to advise the Speaker and MPs on House procedure and to manage the Commons’ departments and services. The previous commissioner was a leading political figure, and one-time Cabinet Minister, but appointed under a

⁵² Sobel, David, Noll, Bethany, Bogado, Benjamin, TCC Group and Price, Monroe, *The Federal Institute for Access to Information in Mexico and a Culture of Transparency* (Annenberg School for Communications, University of Pennsylvania: 2006), pp. 3 and 78-9.

government not run by his party. There are five Mexican commissioners from a range of different backgrounds, with a heavy focus on academics. The institutions in both countries are widely perceived to be independent.

Resources are clearly central to the notion of independence. A potentially serious constraint on the independence and effectiveness of the various information commissions in the Indian context is the fact that the government sets the salaries and terms of service of the employees, and that the budget is also provided by government. Inasmuch as the rules on salaries are set out directly in the legislation, they may be difficult to change but the budget rules could perhaps be amended so that funding comes directly from Parliament. Funding by Parliament can be justified on the basis that, for accountability purposes, the body reports to Parliament.

In Canada, a pilot project has been established with a view to ensuring independent and yet appropriate funding for ‘Officers of Parliament’, like the Auditor General, the Information Commissioner, the Chief Electoral Officer and so on. Under the pilot project, an *ad hoc* advisory panel of MPs from all parties, chaired by the Speaker of the House of Commons, considers funding requests from these bodies and makes recommendations on funding to the Treasury Board. The idea is to address the problem of bodies which oversee and investigate government behaviour having to apply to government for funding. In turn, the Officers of Parliament have agreed to respect the spirit and intent of government policies on financial management and fiscal accountability, as well as to operate transparently.⁵³

IFIA’s statute guarantees its “operational, budgetary, and decisional autonomy”. In practice, it presents its budget to the President, although it is understood that it is the Congress that supervises the budget and that the President may not object to it. This understanding is probably cemented with the 2007 constitutional amendment, which basically raises the guarantee of autonomy to a constitutional level. In practice, IFAI receives generous funding.

The overall costs of administering right to information systems, although often a matter of heated discussion, are modest as the experience of the longer-standing right to information regimes demonstrates. In Canada, for example, a 2002 estimate put the cost of the system at \$30 million, or about \$1 per citizen – very similar to *per capita* cost estimates in the United States – compared to total federal government expenditure (in 2001-2) of over \$450 billion.⁵⁴

The flip side of independence is accountability. In addition to the (generally quite limited) formal accountability mechanisms, including budget oversight, **a number of informal systems can significantly enhance the accountability of oversight bodies.** Direct forms of consultation with stakeholders are one means of promoting accountability. A comprehensive review of the whole right to information system every five to ten years has been recommended in the Canadian context, along with

⁵³ Information Commissioner of Canada, *Annual Report, Information Commissioner: 2006-2007* (Ottawa: 2007), pp. 19-22.

⁵⁴ Government of Canada, *Access to Information: Making it Work for Canadians: Report of the Access to Information Review Task Force* (Ottawa: 2002), p. 5.

the appointment of a retired judge to investigate complaints against the Information Commissioner.⁵⁵

Action Ideas:

- establish an NGO whose role is to support the independence of the Commissions, as well as to monitor their performance and make recommendations for reform as appropriate
- foster links with a range of potential supporters who may defend the independence of the Commissions should this be threatened
- look into the idea of an agreement on the involvement of parliament in funding Commissions
- adopt a transparency policy for the Commissions so that they operate openly themselves
- put in place a system for resolving complaints against the Commissions
- engage in consultation, including on the performance of the Commissions, on a regular basis with both public authorities and users/civil society
- undertake a formal institutional review on a regular basis, perhaps every two years, with a view to garnering input from different stakeholders
- monitor the performance of the Commissions and report on this
- put in place internal systems to assess the performance of the Commissions

c. Relations with Public Bodies

It is important that oversight bodies maintain good relations with the public authorities they oversee, although this can sometimes be difficult. In any right to information system, regardless of the formal rules, public authorities retain considerable capacity to obstruct the flow of information and the work of the oversight body. **The longer-term goal should be to inculcate in these authorities a sense of ownership over, and pride regarding, the right to information** rather than to try to force them to comply with their legal obligations. Good relations between the oversight body and public authorities can help with this.

The constant challenges the oversight body is forced to make to these authorities, particularly if it serves as a complaints body, as is the case in India, makes it more difficult to maintain good relations. Consistent and well-reasoned decisions on complaints can at least ensure that public authorities understand the basis for those decisions. Negative perceptions by public authorities vis-à-vis oversight bodies can contribute to poor relations. In Mexico, for example, IFAI is sometimes seen as superior, top-down or lacking in understanding of the civil service. **Regular consultation between public authorities and the oversight body, in particular with information officials, can help to address unhelpful perceptions.**

The oversight body needs to be firm in upholding right to information principles, but it should generally seek to avoid imposing solutions which are seen as overly harsh by public authorities. The problems arising from a firm policy on timelines in Canada have been noted. A more successful example from Mexico involved efforts by IFAI to get public authorities to fulfil their proactive publication obligations. An initial survey

⁵⁵ Government of Canada, *Synopsis of Recommendations / Proposals / Comments From Written Submissions Sent to the Access to Information Review Task Force* (Ottawa: 2002).

indicated that only a minority of public authorities were fulfilling these obligations. IFAI wrote to the poor performers privately, but indicating that next time the report on performance would be widely publicised. The response was impressive and the rate of compliance jumped to over 90%.⁵⁶

The oversight body should reach out to potential official allies. It has been noted in the Mexican context that state and local governments are often more responsive to implementing the right to information.⁵⁷ This can have a number of positive benefits, including fostering allies, promoting openness pilots and strong performers, and demonstrating the benefits of transparency. IFAI has established a special unit that reaches out to states and municipalities, and has dedicated part of its website to information on these levels of government, including a mechanism for channelling information requests to them, called Infomex.

The different oversight bodies – the Central and State Information Commissions in the Indian context – should also seek to learn from and provide mutual support to each other, and to share best practices. In Mexico, IFAI provides some support and guidance to the state-level commissions. An informal international network of information commissioners hosts a conference about every 18 months, although far more could be done to promote institutional cooperation at the international level. As noted, in Canada, the various Officers of Parliament, the independent oversight bodies, have come together on an informal basis to discuss common concerns regarding funding and to look for collective solutions.

Action Ideas:

- use opportunities for cooperation between the Commissions and public authorities, such as training, to promote trust and to forge personal relationships
- put in place a formal programme of consultations with public authorities, perhaps by sector – health, finance, etc. – with meetings being held on a regular basis, perhaps annually or semi-annually, with a view to addressing areas of disagreement head on, so that they do not fester
- explore ways to promote compliance by public authorities with their openness obligations which do not cause tension
- seek out potential allies among official bodies, perhaps by establishing a special unit to do this, and use those allies to pilot progressive ideas
- establish a regular process of consultation among the Commissions with a view to sharing best practices and promoting cooperation

Conclusion

It has often been noted that getting a good right to information law adopted is just the start of the process and the easier part of it. Implementation is long-term, complex and a constant struggle against the inevitable marshalling of forces that oppose openness.

⁵⁶ Sobel, David, Noll, Bethany, Bogado, Benjamin, TCC Group and Price, Monroe, *The Federal Institute for Access to Information in Mexico and a Culture of Transparency* (Annenberg School for Communications, University of Pennsylvania: 2006), p. 74.

⁵⁷ Sobel, David, Noll, Bethany, Bogado, Benjamin, TCC Group and Price, Monroe, *The Federal Institute for Access to Information in Mexico and a Culture of Transparency* (Annenberg School for Communications, University of Pennsylvania: 2006), p. 76.

It requires political will, a broad alliance between individuals and groups that support openness, imaginative solutions and commitment.

This Study looks at a wide range of implementation challenges, painting a picture of some of the key hurdles and opportunities, and providing a brainstorming list of possible implementation strategies and action ideas. It is not intended to be prescriptive or even to prioritise key strategies but, rather, to identify a wide range of possible options to choose from. Some may not be appropriate for the Indian context; others will. The latter still need to be adapted to fit the particular circumstances. The goal is simply to widen the range of options being considered.

The table below sets out the key recommendations of this Study, along with hurdles to implementing those recommendations and some possible solutions. Some of these – like training officials, undertaking proactive disclosure, managing information, raising public awareness and promoting strong and independent oversight bodies – are fairly obvious, although some of the solutions suggested may be less readily apparent. Others – like promoting a professional cadre of information officers, mainstreaming the right to information, nurturing requests and ensuring that exceptions are understood and narrowly applied – have become clear from the experience of countries like Canada, Mexico and South Africa which have struggled with the challenges of implementing right to information systems.

In practice, choices will need to be made in the Indian context about which particular strategies to adopt. While many of the action ideas in the Study can help foster greater openness in India, it is not realistic to try to implement them all. At the same time, some effort should be made to address the primary recommendations outlined in the table below, since these are essential to achieving at least minimum standards of openness in practice.

Implementation of the right to information is a long-term process which requires serious commitment and effort from a range of different actors. Right to information proponents need to be creative and to adapt their strategies depending on the particular circumstances and through observing what is working and what is not. The purpose of this Study is to assist those working on the right to information in India by providing them with ideas, based on the experience of other countries, to help fuel their creativity and adaptability.

Key Recommendations	Hurdles	Solutions
1. Provide some right to information training to all civil servants and more specialised training to information officers	<ul style="list-style-type: none"> ▪ cost ▪ lack of interest ▪ other priorities ▪ human resources 	<ul style="list-style-type: none"> ▪ integrate right to information training into other training programmes ▪ develop standardised training and core modules that can be adapted to different contexts ▪ develop specialised training modules for information officers ▪ provide ongoing support to information officers, for example through a telephone hotline ▪ provide online training courses
2. Promote the status and role of information officers	<ul style="list-style-type: none"> ▪ lack of interest/opposition ▪ lack of systems ▪ rapid movement of officials between posts 	<ul style="list-style-type: none"> ▪ establish specialist career positions for information officers with clear responsibilities and the possibility of upward mobility ▪ put in place standard training options and requirements for information officers ▪ give information officers the power to make decisions on requests, as well as a wider promotional role ▪ develop support networks for information officers
3. Mainstream the right to information as a core public service	<ul style="list-style-type: none"> ▪ opposition from officials ▪ inertia ▪ lack of resources ▪ lack of political will 	<ul style="list-style-type: none"> ▪ treat the right to information in the same way as the provision of any other service, including by integrating it into central planning and resource allocation systems ▪ incorporate the right to information into central systems, such as civil service guidelines and performance review systems ▪ provide opportunities for senior officials to make statements supporting the right to information ▪ popularise examples of the right to information benefiting civil servants
4. Nurture right to information requests	<ul style="list-style-type: none"> ▪ systems that are not user friendly ▪ undue delays in 	<ul style="list-style-type: none"> ▪ establish a central electronic requesting facility, along the lines of SISI in Mexico, and integrate this with wider e-government initiatives

	<ul style="list-style-type: none"> responding to requests ▪ internal opposition 	<ul style="list-style-type: none"> ▪ promote a more interactive, service delivery approach to processing of requests ▪ impose detailed reporting obligations regarding responding to requests, including on timeliness ▪ monitor the processing of requests and take measures to address structural blockages ▪ apply sanctions in a few, targeted high-profile cases of official obstruction
5. Promote proactive disclosure of information	<ul style="list-style-type: none"> ▪ Capacity/cost ▪ systems ▪ opposition 	<ul style="list-style-type: none"> ▪ develop central tools to assist public bodies, such as off-the-shelf website designs, model publication schemes and minimum standards ▪ require public bodies to report in detail on proactive disclosure ▪ help rationalise access to documents through deposit libraries and a central web portal
6. Develop strong information management systems	<ul style="list-style-type: none"> ▪ capacity ▪ systems ▪ resources 	<ul style="list-style-type: none"> ▪ allocate adequate resources to information management (systems and implementation) ▪ adopt clear central standards on information management and vest overall responsibility for implementation in a central body ▪ promote cooperation between various relevant institutions, such as archival institutions and information commissions ▪ provide training and guidance notes on how to implement information management standards
7. Ensure that exceptions are understood and applied appropriately	<ul style="list-style-type: none"> ▪ lack of understanding and absence of clear standard ▪ existing secrecy systems 	<ul style="list-style-type: none"> ▪ provide specialised training on exceptions, along with supplementary materials, such as guidance or briefing notes on difficult exceptions and synopses of relevant court decisions ▪ provide on-demand advice on the application of exceptions, for example through a dedicated phone or email hotline ▪ review existing classification systems and establish clear rules for classification that are consistent with the right to

		information
8. Raise awareness among the general public	<ul style="list-style-type: none"> ▪ lack of awareness/interest ▪ resources 	<ul style="list-style-type: none"> ▪ disseminate information about genuine success stories, particularly those which directly affect people ▪ develop relations between the media, and particularly investigative reporters, and other key actors (information commissions, civil society groups) to facilitate media coverage of right to information successes ▪ target different messages at different groups: the general public, civil society, media, frequent requesters ▪ build strategic partnerships between information commissions and civil society to foster cooperation in this area
9. Promote strong and independent oversight bodies	<ul style="list-style-type: none"> ▪ Resources ▪ respect for independence 	<ul style="list-style-type: none"> ▪ promote independent funding systems overseen by parliament for Information Commissions ▪ allocate a wide promotional role (in addition to complaints/appeals) to Commissions ▪ foster good relations with civil society with a view to ensuring support for independence ▪ ensure that Commissions operate openly and undertake regular consultations with the public and with public authorities

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