Making the Case for Open Government

International Right to Know Week Event

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Toby Mendel
Executive Director
Centre for Law and Democracy

As Canadians, we are all obsessed by the weather. So let me preface my remarks on Open Government by suggesting that what we really need is a good mash-up of datasets on happiness, weather and health care. This should tell how many of us secretly want to live somewhere in the Southern United States, even though the health care system there leaves something to be desired.

My background is as a human rights activist, specifically as a right to information (RTI) campaigner, and so I am going to talk about what the Open Government Data (OGD) movement might learn from the RTI movement.

I would like first, however, to abuse my position as holder of the conch to talk about an important tool my organisation, the Centre for Law and Democracy, working with Access Info Europe, launched today. It is called the Right to Information Legislation Rating Methodology and it is a tool for rating the quality of access to information laws. Based on 61 Indicators, broken down into 7 themes, the Methodology assigns an overall numerical rating our of a maximum of 150 points to access to information laws, as well as sub-ratings in each of the seven thematic areas (such as scope, procedures, exceptions, appeals and so on). The two organisations are now going to use the Methodology to rate all national access to information laws globally, just over 80. So I hope to be able to present you with the 'score' for the Canadian law soon.

To return to the main theme, as I noted, my main focus is on human rights and what the OGD and RTI movements can learn from each other. Although these movements focus on very similar areas, namely openness in the public sector, they have until quite recently operated largely in isolation from each other. This is starting to change, and cooperation is growing, which is great. I will focus today on what the OGD movement might learn from shining a human rights light into their work.

Let me to start with some observations on the two movements. They have grown from a focus on different benefits from openness. The OGD movement is more focused on social

and pragmatic goals, and builds on its technical expertise to achieve its ends. The RTI movement is more focused on accountability, participation, anti-corruption and related goals, and bases its activities more on its human rights and legal expertise.

At the same time, we should not overrate the differences between the two groups. Thus, OGD projects such as fix-my-street and where-does-my-money-go are both pragmatic social tools and also means to hold governments to account.

The two groups also focus on slightly different vehicles for accessing information. The OGD movement tends to rely more on the proactive disclosure by public bodies of datasets, while the RTI movement has arguably focused more on the right to request and receive information, although it has also very much promoted proactive disclosure too. Interestingly, the Canadian Newspaper Association's National Freedom of Information Audit 2009-2010 shows that the performance of public bodies in providing datasets in response to requests is far worse than their overall performance on requests, suggesting there may be more work to do in this area.

I would now like to canvas five closely related but different policy issues where a human rights approach or analysis may have some relevance for the OGD movement.

Crown Copyright

Copyright over information produced by public authorities (such as crown copyright), a form of property or ownership right, is asserted as a matter of course in many countries, including Canada. In these countries, all information produced by the public sector is presumptively covered by some form of copyright. There are often categories of information for which this copyright has limited implications, in particular inasmuch as one is still allowed to copy and distribute the information. This is normally the case, for example, for legislation and a number of other official documents.

In some countries, the scope of public copyright is more limited, and it applies only to certain classes of government information (or does not apply to certain classes). Depending on how broadly these classes are defined, this may not be very different in practice than countries where there is a wider presumption in favour of copyright, subject to liberal use rules for some categories of documents.

There are other countries, however, where copyright is not routinely asserted by public bodies. At the federal level in the United States, for example, there is no assertion of copyright. This does not mean that federal bodies have no means at all to exercise control over the information they produce, but it does create a completely different legal environment for this.

The problem with copyright, from an OGD perspective, is that it places limitations not on access to information (so not on the core idea of a right to information), but on downstream use or re-use of that information. As a practical matter, re-use is normally governed by licence agreements, which can range from very liberal to far more

restrictive. They can also range from generic arrangements, which apply automatically to anyone wishing to use the data, to case-by-case negotiated arrangements.

There are, for those wishing to re-use data, a number of problems with this copyright-licensing approach. Even in the best-case scenarios, it may not be immediately and entirely clear to users what the precise conditions of re-use are. In many cases, licence agreements place some sort of restrictions on re-use, for example that the data may not be used for commercial purposes. This may create artificial distinctions between business and NGO users, and also lead to other complications.

Furthermore, once copyright is asserted, there is always a possibility of political abuse of this right, even in more democratic countries. Craig Murray, an erstwhile ambassador to Uzbekistan for the United Kingdom, blew the whistle on what he deemed were human rights abusive diplomatic practices there, including by the United Kingdom. He published a book detailing the situation and provided access through his website to publicly available documents disclosed by British authorities. In due course, he received a threatening letter from lawyers representing those authorities, alleging breach of crown copyright and asking him to take down the documents or risk being sued for the breach. The letter also helpfully noted that should he refuse to do so, and lose the case, he would have to pay the legal fees of the public authorities, which might amount to 100s of 1000s of pounds. Rather than risk such devastating financial loses, Murray took the documents down, even though providing them online not only did not deprive the authorities of any value, but was also very much in the public interest.

Looked at from a human rights perspective, there are serious problems with crown copyright. The right to information basically means that information held by public authorities may not be withheld without reference to an overriding confidentiality interest. It is not yet clear what the implications of the right to information are in terms of re-use of information. However, inasmuch as placing limitations on reuse represents a restriction on a right – either the right to information or the right to freedom of expression – it must also be justified by reference to an overriding interest. It is not clear what overriding interest, recognised under international law, limitations on re-use might serve.

Public bodies might potentially argue that re-use creates significant commercial value which they would wish to exploit themselves, and that providing the information free of any limitations on re-use would undermine this. There are various problems with this argument from a human rights perspective, inasmuch as this would not seem to be justified under the test for restrictions on the right to information. In any case, the claim would apply only be reserved for very limited categories of information with significant commercial value. There is no need, to protect this interest, to impose wide public copyright on all information created by public bodies. Rather, to protect this interest, it would make more sense to reverse the presumption, so that government information was presumptively free of copyright, but this could be overcome in certain cases to protect overriding public commercial interests.

Costs

The proactive publication of information does impose costs on the public sector and this is a perennial issue with this form of access. In many countries, these costs mean that public bodies struggle to meet their proactive publication obligations. In India, for example, the Right to Information Act imposes onerous proactive publication obligations on public bodies, but very few manage to meet them and many do not get anywhere near meeting them. Indeed, this is the area of most significant failure of the Indian law.

There are a few special cost features in relation to proactive publication for OGD. For OGD to fulfil its potential in terms of providing social benefits, a number of conditions must be fulfilled. The data that is released must be granular, in the sense of being broken down into the smallest data-units possible so that civil hackers can do more with it. The information must be provided in machine-readable formats, so that it may be extracted automatically. It must be provided through software that is non-proprietary, so that it may be manipulated freely. And, of course, exempt information must be removed (government datasets often contain private information, for example). All of these may impose certain costs, in either financial or human terms, on public bodies, depending on the form in which they hold the data at the time of a request.

Looked at from a rights perspective, it is clear from established sources that the right to information does impose certain proactive obligations on public bodies. However, the sources that currently exist are not very clear or detailed as to the exact scope of these proactive obligations. Some basic standards can be derived from the basic principles of the right to information. At a very minimum, public bodies are required to facilitate OGD and are prohibited from obstructing it. Thus, the Canadian Newspaper Association's National Freedom of Information Audit 2009-2010 found that charges for accessing information about cell phone costs varied very considerably from province to province, with British Colombia charging vastly more than any other province. Such variance is not justifiable since if other provinces can provide this information more cheaply, it is incumbent on British Colombia to do so as well.

Perhaps the most significant implication of the right to information for OGD is that public authorities should now start building in OGD compliance from the point at which they start to assemble (new) datasets. With proper front-end design, many of the costs associated with providing OGD useful data can be minimised. Exempt data, in particular private information, can be tagged in such as way as to be easily excluded or obfuscated in the dataset, non-proprietary software can be used or rights purchased, and so on.

There is also the issue of whether or not it is appropriate for public bodies to charge for releasing datasets. There are obvious problems from an access perspective to charging for this information. Imposing charges is likely to exert a serious chilling effect on the creative energies that the OGD movement currently mobilises. Charging may also tend to privilege commercially viable uses of information over more public interest ones. On the other hand, this is a question of the allocation of public resources, which needs to be done in an efficient and fairly prioritised manner. So, it is arguably a question of where greatest benefits to the public lie.

In this regard, I believe that the economics of OGD are not fully understood. I have seen many rather interesting, even exotic, claims in this line. Just this morning, an email crossed my desk claiming that $3.2 billion had been generated in Canada through the use of OGD. I tend to be sceptical of such expansive claims. On the other hand, the UK government now makes ordinance surveys and other maps available for free, and there is some good research pointing to the economic benefits of this, which seems intuitively reasonable.

Use Restrictions

The issue of whether or not use restrictions may be imposed on OGD is another contested issue. Sometimes, use restrictions are related to the cost issues noted above: datasets are provided for free, but only on the basis that they are not used for commercial purposes. From a human rights perspective, such a restriction would only be legitimate if it could be justified as necessary to protect an overriding public or private interest. Under this test, I think it will be very difficult indeed to justify use restrictions.

However, there may be cases where a use restriction in the only way to justify release of information in the first place, since this is the only way of complying with the necessity test. For example, it is normal to place use restrictions on the release of information held by public bodies which is covered by copyright held by a third party. Without such restrictions, the information could not be released in the first place.

There may also be situations where use restrictions enable a public interest override to apply to what would otherwise be exempt information (i.e. so that information which is subject to an exception to disclosure should nevertheless be released in the public interest). For example, there may be cases where restricted use of information for research purposes might outweigh the sensitivity to national security of the information, but this would not be the case if the information as a whole were released generally. For example, the information could be used to inform the research, but sensitive national security details would not have to be widely disclosed. Indeed, in Sweden, this idea is built directly into the right to information law. But it remains a rather unique and controversial approach.

Removal of Sensitive Data

Often, datasets contain a lot of publicly useful information, but alongside other data which is sensitive, often because it contains private information. It can sometimes be difficult to remove this data, but often that is because the dataset was not originally designed with the idea of public release in mind. As noted above, where such considerations are built into the original design, it should normally be pretty simple to strip sensitive data before releasing the dataset.

But there it is also important to keep the idea of what constitutes sensitive data in its proper place. For example, following on from a scandal relating to MLAs expenses in Nova Scotia, the government made the right decision to post the relevant expense reports online. However, they have indicated that they will not post the name of the vendor where the expense was incurred, on the basis that this is private information relating to

that vendor. This reflects a fundamental misunderstanding at various levels. First of all, businesses as such do not have personal information, although they may have commercially sensitive information. Second, there is no reason not to release this information for the fact that an MLA had bought goods or services from a certain vendor would hardly harm them. Third, even if some harm might result, the public interest in knowing this information clearly outweighs that.

How Far Does This Go?

The right to information defines public bodies very broadly. It includes crown corporations (or State owned enterprises), statutory bodies like the Canadian Broadcasting Corporation (CBC), and even private bodies that receive public funding or undertake public functions. It may be problematical for various reasons to impose too onerous OGD obligations on all of these bodies, including that this may undermine their business models or impose excessive costs on them. Indeed, it is generally recognised that proactive publication rules need to be adapted to private bodies (for example, where these bodies only conduct a part of their work with public funding, it may be unreasonable to impose a full set of proactive publication obligations on them. So it may be necessary to think of imposing different sets of proactive obligations on different types of public bodies.

To conclude, I would like to reiterate that an analysis of OGD from a human rights perspective is extremely complicated and that right to information activists are just starting to think more seriously about it. At the same time, this is an issue area which is moving rapidly in terms of attracting public attention and energy, and producing public results. For example, I am on an advisory group for a research project looking at the possibility of rolling out OGD initiatives more globally.

A human rights analysis, based on the right to information, clearly has very important implications for OGD. At the moment, it is probably fair to say, however, that this issue raises more questions than answers. I hope to be able to give another presentation on this next year during Right to Know Week and provide some of those answers.