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AND DEMOCRACY

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Myanmar

Right to Information Guide

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Introduction: What is the Right to Information¹

The core concept behind the right to information is that public authorities do not hold information just for themselves. Instead, they hold it on behalf of the public which, at least in democracies, gives government its mandate and resources. As a result, the public, subject to limited exceptions, has a right to access this information.

The right to information is well established under international law. This right has its roots in the *Universal Declaration on Human Rights* (UDHR), which was adopted unanimously by all States represented at the UN General Assembly in 1948. Article 19 of the UDHR provides that the right to freedom of opinion and expression includes a right to “seek” and “receive” information and ideas, as well as to impart them. The rights to seek and receive information and ideas were subsequently included in Article 19 of the *International Covenant on Civil and Political Rights* (ICCPR), one of two legally binding international covenants elaborated on the basis of the UDHR which was adopted in 1966.

In 1999, the UN Special Rapporteur on Freedom of Opinion and Expression noted that Article 19 of the ICCPR imposes “a positive obligation on states to ensure access to information, particularly with regard to information held by government in all types of storage and retrieval systems”.² However, the earliest judicial recognition of the right to information as a general human right was in a 2006 case decided by the Inter-American Court of Human Rights, *Claude Reyes v. Chile*. In their judgment, the Court interpreted Article 13 of the American Convention on Human Rights, which is similar to Article 19 of the ICCPR, as follows:

In relation to the facts of the instant case, the Court finds that, by expressly stipulating the right to “seek” and “receive” “information,” Article 13 of the Convention protects the right of all individuals to request access to State-held information, with the exceptions permitted by the restrictions established in the Convention. Consequently, this article protects the right of the individual to receive such information and the positive obligation of the State to provide it, so that the individual may have access to such information or receive an answer that includes a justification when, for any reason permitted by the Convention, the State is allowed to restrict access to the information in a specific case. The information

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² Report of the UN Special Rapporteur on the protection and promotion of the right to freedom of opinion and expression, 29 January 1999, E/CN.4/1999/64, para. 12, <https://undocs.org/en/E/CN.4/1999/64>.

should be provided without the need to prove direct interest or personal involvement in order to obtain it, except in cases in which a legitimate restriction is applied.³

Both the European Court of Human Rights and the UN Human Rights Committee have subsequently recognised the right to information, with the latter stating in its 2011 General Comment that “Article 19, paragraph 2 embraces a right of access to information held by public bodies. Such information includes records held by a public body, regardless of the form in which the information is stored, its source and the date of production.”⁴

The international recognition of the right to information has been accompanied by a steady growth in the number of States with right to information laws. As of end 2021, nearly 140 States had adopted right to information legislation (see the RTI Rating at www.RTI-Rating.org).

1. The Importance of the Right to Information

Giving effect to the right to information brings with it a host of important benefits, some of which are outlined below.

1.1. Democracy and Accountability

A free flow of information about matters of public interest is essential to a healthy democracy. A core characteristic of democracy is that individuals have the ability to participate effectively in decision-making about issues that affect them. As noted in a judgment of the Supreme Court of India: “Where a society has chosen to accept democracy as its creedal faith, it is elementary that the citizens ought to know what their government is doing”.⁵ Democracies put in place a range of different participatory mechanisms, including direct elections for their leaders but also citizen oversight bodies for public services such as education and health, and mechanisms for commenting on proposed government programmes, activities, policies or laws. It is not possible to participate meaningfully in any of these mechanisms without access to timely, accurate and complete background information, including, crucially, information held by the government.

1.2. Sound Development

The participation promoted by right to information laws extends to development initiatives. Being open with beneficiaries fostering their involvement, leading to greater ownership over

³ *Claude Reyes and Others v. Chile*, 19 September 2006, Series C., No. 151, para. 77, http://www.corteidh.or.cr/docs/casos/articulos/seriec_151_ing.pdf.

⁴ UN Human Rights Committee, *General Comment No. 34: Article 19: Freedoms of opinion and expression*, 12 September 2011, CCPR/G/GC/34, para. 18, <https://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf>.

⁵ *S.P. Gupta v. President of India*, AIR 1982 SC 149, 1981 Supp (1) SCC 87, 1982 2 SCR 365, para 63, <https://indiankanoon.org/doc/1294854/>.

local development initiatives. This, in turn, helps improve decision-making processes and implementation of projects. For the same reason, greater transparency can also help ensure that development efforts reach their intended targets.

1.3. Relations with Citizens

When governments become more open and share information on a formal basis (i.e. under the right to information law rather than just informally through personal contacts), this can help limit rumours and build a more solid basis for the information that circulates in society. This, in turn, helps build better overall relations between citizens and the government based more on trust and information, rather than rumours.

1.4. Accountability

Accountability and good governance are core values for all democracies and essential to building public trust and signaling a transition to more open and inclusive approach to governance. The essence of accountability is that members of the public have a right to scrutinise and debate the actions of their leaders and to assess the performance of the government. This is possible only if they can access information about matters of important public concern, such as the economy, social systems, unemployment and environmental performance.

For Myanmar, in addition, the right to information has particular salience in terms of transitional justice as a means of both reckoning with past abuses and reasserting the rule of law. In 2005, independent expert Diane Orentlicher noted the following:

Every people has the inalienable right to know the truth about past events concerning the perpetration of heinous crimes and about the circumstances and reasons that led, through massive or systematic violations, to the perpetration of those crimes. Full and effective exercise of the right to the truth provides a vital safeguard against the recurrence of violations.⁶

More recently, the right to truth, which is closely linked to the right to information, has been affirmed in transitional justice contexts by both the Inter-American Court of Human Rights and the European Court of Human Rights.

1.5. Improving Administrative and Organisational Efficiency

Although implementing effective right to information systems requires some resources, there is evidence to suggest that these systems can also promote efficiencies, by fostering public oversight. Having a set of “fresh eyes” look over processes can lead to useful inputs for how

⁶ Report of the independent expert to update the Set of principles to combat impunity, Diane Orentlicher: Addendum, Updated Set of principles for the protection and promotion of human rights through action to combat impunity, 8 February 2005, E/CN.4/2005/102/Add.1, Principle 2, <https://undocs.org/E/CN.4/2005/102/Add.1>.

they may be improved. Although not always pleasant to receive, constructive criticism is, nonetheless, important to fostering positive changes. Moreover, the public accountability fostered by a functioning right to information system can impact staff attitudes towards efficiency and resource management. Just as an employee is likely to work harder if their supervisor is standing nearby, the knowledge that an official's actions are subject to public scrutiny will lead them to be more careful and judicious in their work and to take greater care over how public resources are expended.

1.6. Dignity and Personal Goals

The right to access information about oneself that is held by public authorities is part of one's basic human dignity. It can also be useful to help individuals make personal decisions. For example, individuals may not be able to make decisions about medical treatment, financial planning and so on if they cannot access their medical records. Right to information requests can also reveal information that directly impacts one's health or livelihood, such as environmental information related to a person's community.

1.7. Economic and Business Benefits

Public authorities collect and hold vast amounts of information on a wide range of issues, much of which is relevant to economic matters or social trends, which businesses can put to good use. This is an important benefit, which also helps respond to the concerns which are often voiced about the high cost of implementing right to information legislation. The economic value of the information released under right to information requests has been assessed at many billions of dollars.

Another economic benefit to openness comes in the form of more efficient and competitive contracting. Open contracting, whereby material about bids received in response to a call for tenders is published online, has become increasingly popular. This is due to its tendency to drive down costs over time, by ensuring that contracts are awarded fairly to the most competitive bid.

1.8. Combatting Corruption

One of the most high-profile benefits associated with the right to information is its power to combat corruption and other forms of wrongdoing in government. In the introduction to a 2003 annual report, the anti-corruption organisation Transparency International even described access to information as "perhaps the most important weapon against corruption,"⁷ and the organisation continues to view furthering the right to information as a priority for its work. Different social actors – including investigative journalists, watchdog

⁷ Transparency International, *Global Corruption Report 2003: Access to Information* (2003, Berlin), p. 6, https://images.transparencycdn.org/images/2003_GCR_AccessInfo_EN.pdf.

NGOs and opposition politicians – can use the right to information law to obtain information which would not otherwise be available to them and to use it to expose wrongdoing.

2. Implementing the right to information

To give effect to the right to information, States must have clear implementing legislation to describe how the right is to be exercised. Ideally, legislation should explicitly frame the issue as one of a “right” to access information, but it can also be expressed as a procedural right (i.e. “everyone can make a request for information”). Best practice is to enshrine the right as a constitutional guarantee to give it overriding status and to make it clear that it is a human right and not subject to legislative derogation.

The right to information is based upon the principle of maximum disclosure with limited exceptions. Maximum disclosure essentially means that States should endeavour to make as much information as possible publicly available and that provisions granting access should be interpreted as broadly as possible. There should be a general presumption that all types of information held by all public authorities should be accessible, and that the right should apply broadly, so that non-citizens and legal entities enjoy have the right to make requests for information.

As a matter of practice under most right to information laws there are two ways of exercising this right:

- Reactive or responsive provision of information: Anyone can make a request to a public authority for information that he or she wants and that authority should provide the information to the requester in accordance with set procedures.
- Proactive provision of information: Public authorities should publish key types of information even without a specific request for that information, so that everyone can access it.

Proactive publication is a critical aspect of the right to information. In the digital age, there is an increasing emphasis on open government and on providing as much information as possible on a proactive basis, mainly via the Internet. In addition to facilitating greater public access to information, proactive publication is an efficient use of public resources, particularly for information which is likely to be the subject of an access request. It is far easier to publish a document online than to respond to even one request for it.

The scope of the law on the right to information should be broad and encompass all recorded information, regardless of its medium of storage. The law should apply to all records held by government entities and government officials acting in an official capacity. Best practice is to make it clear that the law applies not only to documents but also to information, which may be contained in a document. In terms of bodies, it should apply to the executive, legislative and judicial branches of government, all levels of government (central but also governorates or provinces, districts and so on), all bodies which are owned or controlled by public authorities, including State-owned enterprises, bodies which are created by law or by the

constitution, such as information commissions, and any other bodies, including companies and other private entities, which are funded by the State or which undertake public functions.

The law should set out clear procedures for how requests for information may be made and processed. This is fundamental to the successful functioning of the system. As part of this, the law should make it easy to make a request for information. The other part is that strict rules should be established for responding to requests.

The following are the key procedural rules that should be included in a right to information law:

- Requesters should *not* be required to provide reasons for their requests.
- It should be simple to make a request, which should be not be restricted to a single means of communication (including electronically). A request should only be required to contain a clear description of the information sought and some form of address to deliver the information to the requester.
- Public officials should be required to provide assistance to help requesters where they need it either to formulate their requests or to submit a request in writing due to special needs, for example because they are illiterate or disabled.
- Requesters should be provided with a receipt or acknowledgement upon lodging a request within a reasonable timeframe, which should not exceed five working days.
- There should be clear rules for cases where a public authority does not have the requested information, including a requirement to inform the requester that the information is not held and to transfer the request to another public authority where the first public authority knows of another one which has the information.
- Public authorities should be required to comply with requesters' preferences regarding how they access information (for example obtaining a paper or electronic copy, inspecting documents, etc.), subject only to clear and limited overrides (for example to protect a record).
- Public authorities should be required to respond to requests as soon as possible and in any case within clear and reasonable maximum timelines, ideally 10 days. There should also be clear limits on timeline extensions (also 10-15 days or a maximum of 20 days).
- It should be free to file requests and there should be clear and centrally set rules relating to fees, with these being limited to the cost of reproducing and sending the information (i.e. costs should be limited to photocopying/printing and mailing fees). As such, inspection of documents and electronic copies should be free. Fee waivers should be established for impecunious requesters.
- There should be no limitations on or charges for reuse of information received from public authorities, except where a third party (which is not a public authority) holds a legally-protected copyright over the information.

3. Exceptions to the right to information

It is universally recognised that the right to information is not absolute and that certain types of information should not just be disclosed to anyone who asks for it. The core idea behind the right to information is that access is the default or presumed position and that any refusal to provide information is exceptional in nature. One of the important consequences of the creation of a presumption in favour of access is that public authorities must justify any refusal to make information public.

The right to information is part of the general right to freedom of expression under international law which, as noted above, protects the rights to seek and receive, as well as to impart, information and ideas. As such, exceptions to the right to information are subject to the three-part test for restrictions on freedom of expression, which requires restrictions to:

- be provided by law;
- protect one of the interests listed under international law; and
- be necessary to protect this interest.

The second part of the test means that restrictions on freedom of expression must have the purpose of protecting one of the aims listed in Article 19(3) of the ICCPR. This list, which is exhaustive so governments may not add to it, includes only the following interests:

1. the rights or reputations of others;
2. national security;
3. public order; and
4. public health and morals.

In the context of the right to information, this is generally understood as requiring exceptions to meet a three-part test:

- a. The restriction must aim to protect one of a limited number of interests set out in the law which conform to the list of protected interests noted above.
- b. Information may be withheld only where its disclosure would cause harm to one of the protected interests (as opposed to information which merely relates to an interest).
- c. Information must be disclosed unless the harm to the protected interest outweighs the overall benefits of disclosure (the public interest override).

Principle IV of the Council of Europe's (COE) Recommendation of the Committee of Ministers to Member States on access to official documents, titled "Possible limitations to access to official documents", reflects the test outlined above and also provides an indication of what sorts of interests might need to be protected by secrecy. It reads as follows:

1. Member states may limit the right of access to official documents. Limitations should be set down precisely in law, be necessary in a democratic society and be proportionate to the aim of protecting:
 - i. national security, defence and international relations;
 - ii. public safety;
 - iii. the prevention, investigation and prosecution of criminal activities;

- iv. privacy and other legitimate private interests;
- v. commercial and other economic interests, be they private or public;
- vi. the equality of parties concerning court proceedings;
- vii. nature;
- viii. inspection, control and supervision by public authorities;
- ix. the economic, monetary and exchange rate policies of the state;
- x. the confidentiality of deliberations within or between public authorities during the internal preparation of a matter.⁸

The law should include a severability clause so that where only part of a document is confidential, that part should be removed and the rest of the document disclosed. There should also be presumptive overall time limits on confidentiality, for example of 20 or 30 years, after which documents become public absent a special and overriding need for continued secrecy (which should be decided through a special procedure). Finally, right to information laws should provide for consultation with third parties where information is requested which was provided by them. In this case, they may either consent to the disclosure of the information or put forward reasons why it should not be disclosed, which should be taken into account by the information officer.

4. Appeals

It is clear under international law that one must have access to a decision-maker outside of the public authority when access to information is refused or other breaches of the law may have occurred. Better practice is to provide for three levels of appeal: internally, to an independent administrative body empowered with adequate powers to investigate and issue binding orders, and to the courts.

The law should provide for broad grounds for appeals, basically for any violation of the rules in the law relating to the processing of requests. This should clearly include refusals or failures to provide information but also the provision of wrong or incomplete information and procedural breaches, such as a failure to respond to a request within the established time limits.

In many countries, the law provides for an internal appeal to the same public authority which originally refused the request. This can be useful in terms of helping public authorities to resolve matters internally and quickly. It can also be useful because more junior officials are often nervous to disclose information, whereas senior officers are sometimes less so.

In most countries, one can ultimately appeal to the courts. This is an important level of appeal because, in the end, one does need the courts to decide on more complicated and difficult questions of law, especially relating to exceptions. The more involved and probing

⁸ Recommendation Rec (2002)2 of the Committee of Ministers to the Member States on Access to Official Documents, para. IV, <https://rm.coe.int/16804c6fcc>.

examination of issues that takes place before the courts is necessary to resolve these issues in ways that are broadly acceptable within society.

Experience has shown that an independent administrative level of appeal, before an administrative body (i.e. an information commission) is essential to providing requesters with an accessible, rapid and low-cost appeal. The courts are simply too expensive and complicated, and take too long, to be accessible to or useful for most requesters. The role of this body is particularly important in terms of interpreting exceptions to the right of access, given the complexity and sensitivity of this aspect of the system. But it is also important to resolve the often far too common procedural failures to apply the law properly (such as delays or refusing to provide information in the format requested).

5. Sanctions and Protections

It is critical that sanctions may be imposed on those who act wilfully to undermine the right to information, including through the unauthorised destruction of information. Experience suggests that administrative sanctions (i.e. fines or disciplinary measures) are far more likely to be used (and hence to be effective) than criminal sanctions, which are very hard to apply. Sanctions should also be available at the institutional level, i.e. to be imposed on public authorities which systematically fail to respect the right to information.

In addition to sanctions, there need to be protections for officials who disclose information in good faith pursuant to the law. Otherwise, officials will always be worried about making mistakes and attracting the sanctions in secrecy laws, leading to access being undermined in practice. It is also good practice to provide protection to those who, again in good faith, release information to expose wrongdoing (i.e. “whistleblowers”).

6. Promotional Measures

For implementation of a right to information law to be a success, it needs a little bit of support, in the form of promotional measures. Some key such measures are as follows:

- a. Public authorities should be required to appoint officials (information officers) or units with dedicated responsibilities for ensuring that they comply with their information disclosure obligations.
- b. A central body, such as an information commission(er) or government department, should be given overall responsibility for promoting the right to information.
- c. Public awareness-raising efforts (for example producing a guide for the public or introducing right to information awareness into schools) should be required to be undertaken.
- d. A system should be put in place whereby minimum standards regarding records management (how public authorities manage their documents and other records) are set and enforced (this is important both so that officials are able to respond to requests but also so that they can do their jobs in general).

- e. Public authorities should be required to create and update lists or registers of the documents in their possession, and to make these public, to facilitate the making of requests.
- f. Officials should be required to be provided with appropriate training on the right to information.
- g. Public authorities should be required to put in place tracking systems for requests for information and to report annually on the actions they have taken to implement the law. This should include statistics on requests received and how they were dealt with.
- h. A central body, such as an information commission(er) or government department, should be under an obligation to present a consolidated annual report on implementation of the law to the legislature.

Conclusion

The right to access information can and should play a key role in Myanmar's transition to democracy. The relevant authorities should ensure that the right to information is enshrined in law and that adequate institutional measures are implemented to ensure the realisation of this key right, which carries numerous benefits, including facilitating government accountability and participatory democracy.

