



Background and Panels

A. General

1. Executive Summary of 2008 International Conference
2. The Atlanta Declaration and Plan of Action for the Advancement of the Right of Access to Information
3. Banisar, David, Map of Freedom of Information Around the World
4. Inter-American Court of Human Rights, *Claude v. Chile* Case Summary: www.corteidh.or.cr/docs/casos/articulos/seriec_151_ing.doc
5. Participant Resource Links
6. Bibliography of Recent Books on Transparency and Access to Information

B. Plenary Sessions

1. Roberts, Alasdair. "Future Challenges for the RTI Movement," Keynote speech to the Fifth International Conference of Information Commissioners, Wellington, New Zealand, November 27, 2007.
2. Suggested Background Reading
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EXECUTIVE SUMMARY

International Conference on the Right to Public Information, February 27-29, 2008

1. **OVERVIEW:** The Carter Center's International Conference on the Right to Public Information convened more than 125 participants representing 40 countries from February 27-29, 2008 to reflect on the successes and lessons learned over the past decade in the access to public information (ATI) arena and to consider the emerging issues. In convening representatives from all the key stakeholder groups – government, donors, media, civil society, private sector, and academia – the conference critically examined the progress and began to identify the necessary steps and measures to ensure the effective creation and implementation of universal access to public information. With an overall goal of the advancement of effective access to public information regimes globally, the conference addressed three primary objectives of:

- Reflecting on the worldwide status of the right of access to public information;
- Considering the impact of access to information on areas such as development and governance; and
- Creating a blueprint for future action.

2. **THE GLOBAL CHALLENGES:** During the past two decades, there have been enormous advances in the field of access to information; however, the global landscape also has endured great change and many challenges still remain. More than a hundred countries lack enabling legislation and numerous countries with once vibrant and robust access to information regimes are now in retreat. And even in those countries that have passed legislation, there is uneven and at times insufficient implementation of the law. Moreover, it remains unclear that all of the benefits of the right to information are in fact reaching the most disadvantaged people and creating the anticipated societal transformations. And collaboration among stakeholders has not always occurred or yielded the desired results. Often, critical voices – such as donors or access to information administrators – have not been engaged.

3. **CONFERENCE METHODOLOGY:** The conference, chaired by President Carter, utilized a mixed methodology of keynote speakers, panel presentations and small working groups to share experiences, consider the challenges facing the right of access to information, and develop an agreed upon action plan. Keynote speeches and plenary sessions bookended the three-day conference, with group work serving as the centerpiece. Conference attendees were purposefully chosen from a variety of

stakeholder groups and fields in order to highlight the broad reach of access to information. The stakeholders were divided into five working groups to consider separate topics. Through facilitated discussions and debate, the working groups delineated a set of concrete recommendations for the advancement of the field.

4. CONFERENCE PROCEEDINGS: Throughout the conference, participants grappled with the fundamentally political aspects of access to information, such as the motivations of public and private actors to contribute to or impede access to information. This was evident the evening before the conference officially opened, when many participants attended Conversations at the Carter Center, a quarterly event held at the Carter Center and open to the public. The theme for Conversations “Are we Safer with Secrecy?” focused on the intersection of security (national and public) and access to information. Although increasingly used as a reason to deny information, particularly post 9/11, the panelists argued that greater openness in fact serves to enhance national and personal security as it improves decision-making and allows for necessary accountability.

A. OPENING AND HUMAN RIGHTS: During the first day of the conference, participants reflected on their experiences relating to access to information over the past years and the situation to date. Diego Garcia-Sayan, Vice President of the Inter-American Court of Human Rights, served as the opening lunch speaker focusing his remarks on the seminal *Claude Reyes v. Chile* court case. His presentation framed the issue of access to information as a fundamental human right, and served as the starting point for our deliberations. President Carter opened the first plenary panel of the conference, along with Juan Ramón Quintana, Minister of the Presidency of Bolivia, Maharafa Traoré, Minister of Justice of Mali, and Laura Neuman, Carter Center Access to Information Project Manager. The remainder of the afternoon included panels on access to information as a tool for socio-economic rights and development, access to information and governance, and the state of access to information: case studies focused on successes and challenges. The format of the first day helped to lay the foundation of access to information as a fundamental human right and emphasized its value beyond just the fight against corruption.

B. GOOD GOVERNANCE: The first panel, “ATI as a Tool for Good Governance,” focused on the nexus between ATI and governance, considering questions such as: How does access to information make governments and governing bodies more effective and how can it increase the ability of governments to relate to their citizens? Panelists concluded that access to information advances government capacity to formulate and implement policy, make decisions, and ultimately, meet citizen demands.

C. SOCIO-ECONOMIC RIGHTS: Inquiry into the impact of ATI on development was the main focus of the second plenary panel entitled “ATI as a Tool for Socio-Economic Rights and Development.” Participants on this panel discussed the important link between ATI and pro-poor policies for effective development practices and recognized the issue as a priority agenda item for the advancement of ATI. Panelists emphasized that democracy alone cannot bring about economic, social and human

development, and it is essential to recognize that ATI can help democracies change people's lives by stimulating development.

D. CASE STUDIES: The last panel was conceived with the primary purpose of examining the state of ATI around the world. More than 70 countries in the world have ATI laws, and with each of these global triumphs come the corresponding possibility to share the experiences and learn from the countless lessons. Five case studies were presented in this panel – Jamaica, United States, Bulgaria, China, and Mexico – with each country presenting a unique ATI regime. Borne out of their distinct cultural, political, and social circumstances, the instruments are structurally diverse and implemented differently yet share many similar challenges. The panelists contributed to the idea that the future success will depend on the extent to which citizens embrace the right.

E. WORKING GROUPS: The second day of the conference was dedicated to group work, with the participants strategically placed into five multi-stakeholder groups. With strong facilitation in each working group during the conference, the participants emerged with a number of specific recommendations and action items. Each group was assigned one specific topic to explore:

1. Politics and Economy: shifting the balance toward openness
2. Structural and Cultural Context: creating an environment for transparency
3. Non-State and Multi-lateral Actors: examining roles and responsibilities
4. International Norm-building: considering universal standards and a global community
5. Indicators and Measurement: demonstrating and improving impact

F. ACCOUNTABILITY: Featured on the second-day were keynote addresses from renowned persons. At the lunch, participants heard prepared comments from Huguette Labelle, Chair of the Board of Transparency International and Chancellor of the University of Ottawa, regarding the importance of access to information for holding officials accountable. She shared her global perspective of the value of access to information in the fight against corruption, as well as drawing from her own past experiences as President of CIDA and senior civil servant in Canada. At the special conference dinner, human rights defender and South African Constitutional Court Justice Albie Sachs spoke of the effects of secrecy under the apartheid regime and the extraordinary impact that transparency and the right to information has had on the country and its people.

G. REPORT-BACK AND PLENARY DISCUSSION: Under President Carter's leadership, on the third and final day, the facilitators reported back on the deliberations and findings of their working groups. A draft conference declaration was distributed, and participants were provided a short opportunity to comment on the working group considerations or the document. President Carter closed the conference with a request that all participants submit their comments and suggestions for strengthening the declaration. Additionally, he promised to review, make final edits, and personally ensure the wide distribution of the Atlanta Declaration to international organizations, regional bodies, and heads of state. With President Carter's chairmanship, disparate groups from

around the world were able to develop a shared agenda for the mutual advancement of the right of access to information, which is captured in the Atlanta Declaration and Plan of Action.

5. THE ATLANTA DECLARATION AND PLAN OF ACTION FOR THE ADVANCEMENT OF THE RIGHT OF ACCESS TO INFORMATION: The core findings of the conference are captured within the Atlanta Declaration and Plan of Action. The declaration reaffirms the Universal Declaration of Human Rights by stating, "access to information is a fundamental human right," and asserts that access to information "is essential for human dignity, equity and peace with justice," and that "a lack of access to information disproportionately affects the poor, women, and other vulnerable and marginalized people." The Atlanta Declaration further finds that transparency rather than secrecy is indispensable for promoting safety and security and that enacting legislation is necessary but insufficient to ensure a comprehensive right of access to information. In addition to the specific findings section of the declaration, the conference concluded with a number of overall findings including the need for:

- Greater coordination and collaboration among all stakeholders and others engaged in the promotion of transparency and access to information
- Additional scholarship, including quantitative and qualitative analysis of the impact of increased access to information
- Emphasis not only on the passage of a law, but also its implementation and enforcement; and
- The value of the right of access to information beyond just the fight against corruption, to other arenas such as development and governance

The Atlanta Declaration also establishes a series of key principles, for example that the right of access to information should apply to all branches of government at all levels, to all divisions of international bodies, and even to private corporations in certain circumstances and that all bodies should ensure a system for implementation. It calls upon all states to enact legislation to give effect to the right to information, and includes key tenets that should be respected. Importantly, the Atlanta Declaration reached consensus on a set of tenets that should be included in any access to information law or legal instrument. The final section of the Atlanta Declaration includes an plan of action, which provides a blue print of activities to encourage international and regional bodies, donors, states and corporate, professional, and civil society organizations to take concrete steps to establish, develop, and nurture the right of access to public information across the world. This set of activities will promote the advancement of the right of access to information, as well as serve as a useful tool for monitoring the impact of the conference and Atlanta Declaration and Plan of Action.

6. FOLLOW-UP: Following the conference, the Carter Center incorporated the substantive comments from more than 60 participants into the draft declaration. On March 26, 2008, the final version of the Atlanta Declaration and Plan of Action was released. It has been translated into the three official conference languages (English, Spanish and French) as well as Chinese, Portuguese, and Bulgarian and widely

distributed. President Carter sent a personal letter of encouragement for the advancement of access to information, attaching the Atlanta Declaration and Plan of Action, to more than 200 heads of state, development banks, and regional/international organizations. The Declaration has been the basis for numerous articles, speeches, blogs, and official government and multi-lateral organization documents.

7. IMPACT: There are a number of impacts as a result of the Declaration's dissemination and resonance, including personal commitments to its doctrine and several governmental bodies incorporating these principles and tenets into their own draft ATI recommendations, reports, and instruments and citing or annexing the Declaration. As part of the dissemination plan, the Atlanta Declaration and Plan of Action was sent to the Council of Europe in advance of its meeting on the proposed Convention on Access to Information to inform the deliberations. Furthermore, the principles and action items of the Atlanta Declaration served as a framework for the "Recommendations on Access to Information," a consensus document of the OAS that was presented to the OAS Committee on Political and Juridical Affairs, and presented to all Foreign Ministers at the full General Assembly in June. The declaration also was referenced in the working draft of the OAS Inter-American Juridical Committee's Right to Information Principles. Significantly, a number of Ministers that attended the conference returned to their countries energized to begin (or revisit) the legislative process, including Liberia, Sierra Leone and Bolivia. One of the action items called on the access to information community "to build solidarity with a full range of stakeholders who share a common transparency agenda." In response, the Carter Center began hosting the international calendar of access to information and transparency events on its website to enhance cooperation and coordination and allow organizations to better promote and share their work. The Carter Center continues to disseminate the declaration and monitor the times that it is distributed, posted, and referenced as well as focus on the action points to ascertain when and in what way they are being implemented.



ATLANTA DECLARATION AND PLAN OF ACTION FOR THE ADVANCEMENT OF THE RIGHT OF ACCESS TO INFORMATION

We, over 125 members of the global access to information community from 40 countries, representing governments, civil society organizations, international bodies and financial institutions, donor agencies and foundations, private sector companies, media outlets and scholars, gathered in Atlanta, Georgia from February 27-29, 2008, under the auspices of the Carter Center and hereby adopt the following Declaration and Plan of Action to advance the passage, implementation, enforcement, and exercise of the right of access to information:

PREAMBLE:

Recognizing that Article 19 of the Universal Declaration of Human Rights, Article 19 of the International Covenant of Civil and Political Rights, Article 13 of the American Convention on Human Rights, and Article 9 of the African Charter on Human and People's Rights provide for a right to "seek, receive and impart information," and Article 10 of the European Convention on Human Rights establishes a similar right to "receive and impart information;"

Emphasizing that the Inter-American Court of Human Rights in the case of *Claude Reyes v. Chile* found that Article 13 of the American Convention on Human Rights recognizes a general right of access to information and that states must provide a system for exercising that right;

Considering that the Council of Europe, the Organization of American States, and the African Commission on Human and People's Rights have adopted clear statements and declarations on the right of access to information, that there are important right to information initiatives underway at the Organization for Economic Cooperation and Development, and that the recent United Nations Convention Against Corruption calls on all states to ensure that the public has effective access to information;

Acknowledging that the right of access to information is a foundation for citizen participation, good governance, public administration efficiency, accountability and efforts to combat corruption, media and investigative journalism, human development, social inclusion, and the realization of other socio-economic and civil-political rights;

Appreciating that the right of access to information promotes efficient markets, commercial investment, competition for government business, fair administration and compliance of laws and regulations;

Convinced that political commitment to the right of access to information is necessary for adoption and full implementation and enforcement of access to information legislation and instruments;

Stressing that although there have been great advances in the right of access to information over the past decade, there remain many challenges including the absence of national legislation, widely varying levels of implementation, and continued political resistance;

FINDINGS:

The assembled conference hereby finds that:

1. The fundamental right of access to information is inherent in all cultures and systems of government.
2. A lack of access to information disproportionately affects the poor, women and other vulnerable and marginalized people, and as such the right should be guaranteed to all sectors of society.
3. The right of access to information is fundamental to human dignity, equity and peace with justice.
4. Transparency is a necessary and powerful instrument for promoting human and state security.
5. New technology offers a great potential for facilitating access to information, yet factors that limit access and data management practices have prevented many from benefiting from its full potential.
6. Enacting a comprehensive law is essential, but insufficient, to establishing and sustaining the right of access to information.
7. Equally important is constructing an appropriate institutional framework and developing public administration capacity to manage and provide information.
8. It also is critical to raise public awareness of the right of access to information, ensure capacity to exercise the right including through public education, and foster support for transparency among all sectors of society.
9. A free and independent media is a fundamental component to the establishment and full enjoyment of the right of access to information.

PRINCIPLES:

Further to these findings, we set out the following key principles:

1. Access to information is a fundamental human right.
2. All states should enact legislation to give effect to the right of access to information.
3. The right of access to information applies to all intergovernmental organizations, including the United Nations, international financial institutions, regional development banks, and bilateral and multilateral bodies. These public institutions should lead by example and support others efforts to build a culture of transparency.

4. The right of access to information should be entrenched in international and regional instruments as well as national and sub-national laws and should respect the following tenets:
 - a. Access to information is the rule; secrecy is the exception;
 - b. The right of access to information should apply to all branches of government (including the executive, judicial and legislative bodies, as well as autonomous organs) at all levels (federal, central, regional and local) and to all divisions of the international bodies listed above;
 - c. The right of access to information should extend to non-state actors under the conditions enumerated in principle 5 below;
 - d. The right of access to information should include a right to request and receive information, and a positive obligation on public institutions to disseminate information related to their core function;
 - e. The right to request information is independent of a personal interest in that information, and there should never be a need to provide a justification or reason;
 - f. The instrument or law should include procedures designed to ensure the full implementation and ease of use, with no unnecessary obstacles (such as cost, language, form or manner of request) and with an affirmative obligation to assist the requester and to provide the requested information within a specified and reasonable period of time;
 - g. Exemptions to access to information should be narrowly drawn, specified in law, and limited only to those permitted by international law. All exemptions should be subject to a public interest override, which mandates release of otherwise exempt documents when the public benefit of release outweighs the potential public harm;
 - h. The burden of proof to justify a denial should always fall on the holder of information;
 - i. The instrument should mandate full disclosure, after a reasonable period of time, of any document that was classified as secret or confidential for exceptional reasons at the time of its creation;
 - j. The instrument should include clear penalties and sanctions for non-compliance by public officials; and
 - k. The requester should be guaranteed a right to appeal any decision, any failure to provide information, or any other infringement of the right of access to information to an independent authority with the power to make binding and enforceable decisions, preferably an intermediary body such as an Information Commission(er) or Specialist Ombudsman in the first instance with a further right of appeal to a court of law.

5. The right of access to information also applies to non-state actors that: receive public funds or benefits (directly or indirectly); carry out public functions, including the provision of public services; and exploit public resources, including natural resources. The right of access to information extends only to the use of those funds or benefits, activities or resources. In addition, everyone should have the right of access to information held by large profit-seeking corporations where this information is required for the exercise or protection of any human right, as recognized in the International Bill of Rights.

6. States and international organizations should ensure a system of implementation that provides for:
 - a. The equitable exercise of the right of access to information;
 - b. Training of all public officials on the practice and application of the right;
 - c. Public education and training to empower persons to make full use of the right;
 - d. Allocation of necessary resources to ensure efficient and timely administration;
 - e. Strengthening of information management to facilitate access to information;
 - f. Regular monitoring and reporting on operation of the law; and
 - g. Review of the operation and compliance with the law, by legislative and key oversight bodies.

7. Companion legislation that would further promote the right of access to information and provide a supportive legislative framework should be enacted, including: laws compelling disclosure of political party and campaign financing; lobbying disclosure; archiving legislation; whistleblowing protection; and professional public administration laws. Moreover, contradictory provisions, such as those contained within an Official Secrets Act, should be repealed.

PLAN OF ACTION

To give effect to the Findings and Principles, the following action plan should be undertaken:

For the International Community:

1. Intergovernmental organizations - including the United Nations and all of its bodies, Council of Europe, Organization of American States, African Union, the Organization for Economic Cooperation and Development and international financial institutes, regional development banks, and trade bodies - and international and domestic non-governmental organizations should give effect to the right of access to information in accordance with the findings and principles enumerated above.
2. As the first intergovernmental institution to formulate a specific convention on the right of access to information, the member states of the Council of Europe should ensure that the above findings and principles are respected in the future "European Convention on Access to Official Documents."
3. During the World Bank Group's forthcoming review of its Policy on Disclosure of Information, the Bank should engage in an open and consultative process to bring its policy into line with the findings and principles enumerated above. Other international governmental organizations also should take steps to adopt or bring their information policies into line with the findings and principles.
4. International and regional bodies should:
 - a. take measures to ensure that all states have effective mechanisms to promote and protect the right of access to information;
 - b. develop instruments on the right of access to information;
 - c. conduct ongoing monitoring of compliance with this right, through formal and informal follow-up mechanisms such as peer review.

5. International donors should support countries' efforts to establish, implement and enforce the right of access to information by providing technical assistance and sufficient long-term funding, including through new aid modalities such as program-based and sector-wide approaches.
6. Donor funding agreements should require that donors and recipients provide access to information regarding the amount and use of international funds.
7. Regional and international bodies considering the establishment of right of access to information instruments should ensure that they consult fully with civil society and with experts in the right of access to information. A panel of experts should be convened to support these efforts.
8. Passage and implementation of access to information laws should be prioritized as essential to reporting on progress toward and achievement of the Millennium Development Goals.
9. Donors should provide funding to support monitoring, analysis and assessment of the implementation and impact of the right of access to information, including through scholarly research, the development of appropriate indicators and practical evaluation tools.

For States:

10. Every state should provide for the right of access to information in keeping with the findings and principles enumerated above.
11. States should integrate promotion of the right of access to information into their own national development and growth strategies and sectoral policies.
12. States should seek multi-stakeholder partnerships to enhance their capacity to implement the right of access to information in practice.
13. States should establish independent enforcement mechanisms, such as Information Commissions, that provide for accessible, affordable, and timely appeal remedies. Where appropriate these bodies should have the power to make binding decisions and order disclosure of information.
14. States should put in place effective information management policies and systems, which facilitate their ability to properly create and maintain records and discharge their right to information obligations.
15. Effective training methods should be developed for officials charged with the responsibility of providing access to information along with structures for the sharing of best practice from around the world, and support from non-governmental organizations and donors should be sought.

16. To give effect to the right of access to information held by profit-seeking corporations, states should establish rules which ensure minimal administrative burdens, exemptions in accordance with general principles governing the right of access to information, and a threshold test for size to define which entities are subject to this duty.
17. Access to information regimes should incorporate some mechanisms for monitoring and evaluation, including quantitative and qualitative measurement, collection of statistics, and mandatory annual reporting.

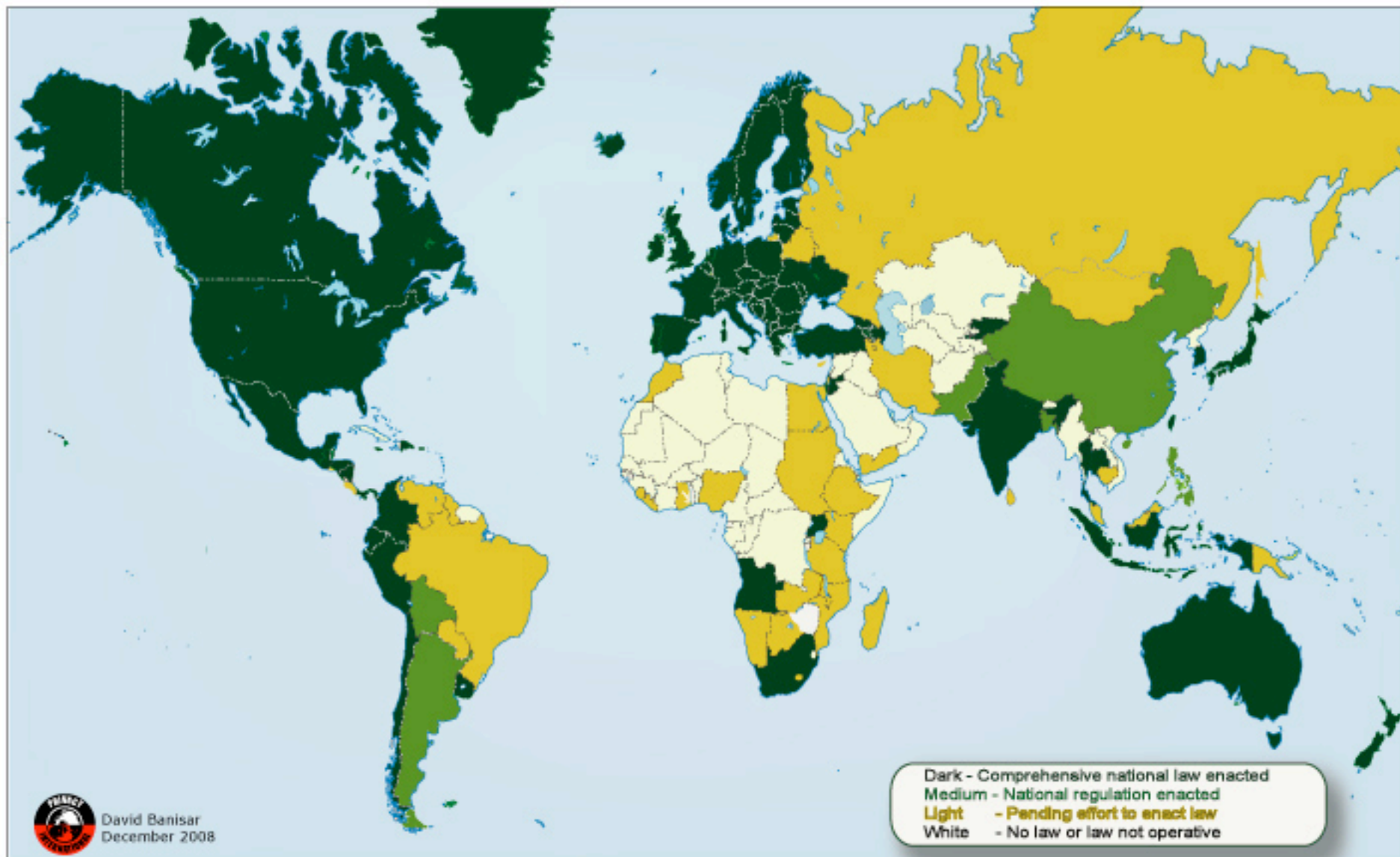
For Corporate, Professional and Civil Society Organizations:

18. Multi-national corporations and large domestic businesses should establish voluntary commitments to proactively disclose information in the public interest, and such efforts should be encouraged and supported.
19. Technology innovators should develop and share new methods for the promotion of the right of access to information.
20. Additional scholarship and study on the right of access to information, implementation of relevant laws, socio-economic impact, politics of compliance, exercise of the right, its enforcement, and how it changes peoples' lives should be undertaken.
21. Right of access to information advocates should focus further efforts to develop and update guidelines on the drafting of right to information instruments and national laws, as well as on their implementation. These guidelines should be widely disseminated with a view to promoting right to information regimes that conform to the above principles.
22. All stakeholders should engage in the monitoring and assessment of the implementation and impact of the right of access to information, including through the development of appropriate indicators and practical evaluation tools.
23. Civil society should ensure full enjoyment of the right of access to information by demanding and using public information, and promoting and defending the right.
24. A free and independent media should be developed and promoted, and journalists should be trained in use of the right to information.
25. The access to information community should strive to build solidarity with a full range of stakeholders who share a common transparency agenda.
26. The Carter Center will work with others to disseminate the Atlanta Declaration, through high level communications, publications, conferences and meetings.

We call upon all states, international and regional bodies, and the global access to information community to establish, develop and nurture the right of access to information across the world, in accordance with the findings and principles enunciated in this Declaration and to commit to the plan of action in furtherance of our common objective.

Atlanta Georgia
February 29, 2008

National Freedom of Information Laws, Regulations and Bills 2008



*Not all national laws have been implemented or are effective. See www.privacyinternational.org/foisurvey for reviews of the laws and practices

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Participant Resource Links / Materiales Suplementarias de los Participantes

Due Process of Law Foundation / Fundación para el Debido Proceso Legal

- “Evaluation of Judicial Corruption in Central America and Panama and the Mechanisms to Combat It” (English executive summary and case study)
http://www.dplf.org/index.php?c_ID=260
- “Controles y descontroles de la corrupción judicial: Evaluación de la corrupción judicial y de los mecanismos para combatirla en Centroamérica y Panamá (Versión en Español)
http://www.dplf.org/index.php?c_ID=260
- “Disclosing Justice” (English) <http://www.dplf.org/uploads/1196288246.pdf>
- “Comparando transparencia” (Español) http://www.dplf.org/index.php?c_ID=129
- “Acceso a la información judicial en México: una vision comparada” (Español) http://www.dplf.org/index.php?c_ID=128
- AportesDLPF No. 3 – “Transparentar la justicia”: (Español) <http://www.dplf.org/uploads/1191333619.pdf>
- AportesDLPF No. 6- “La era de transparencia y el acceso a la información” (Español) <http://www.dplf.org/uploads/1217951188.pdf>

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Civil Society Information Society Advisory Council

- CSISAC website: (English) <http://www.csisac.org>

Electronic Privacy Information Center (EPIC)

- EPIC website: (English) <http://www.epic.org>
- Litigation Under the Federal Open Government Laws (FOIA) 2008: (English) <http://epic.org/bookstore/foia2008/default.html>

Fundación Pro Acceso

- “Hacia una nueva institucionalidad de acceso a la información pública en Chile” (Español) http://www.proacceso.cl/contenido_general/libro_hacia_una_nueva_institucionalidad_de_acceso_la_informacion_en_chile_1
- Jurisprudencia Judicial (Español) http://www.proacceso.cl/documentos/jurisprudencia_judicial
- “Entra en vigor Ley sobre Acceso a la Información Pública” (Español) http://www.proacceso.cl/noticia/entra_en_vigor_ley_sobre_acceso_la_informacion_publica

Instituto de Investigaciones Sociales, UNAM Laboratorio de Documentación y Análisis de la Corrupción y la Transparencia

- Transparencia en el Rescate Bancario: Problemas de Agencia, Corrupción Imperfecciones de Mercado o Captura Regulatoria (Español) <http://www.corrupcion.unam.mx/documentos/ponencias/GzlzArechiga.pdf>

Organization of American States / Organizacion de los Estados Americanos

- Office of the Special Rapporteur for Freedom of Expression of the OAS: <http://www.cidh.org/relatoria>
- Annual Reports of the Office of the Special Rapporteur for Freedom of Expression of the OAS: <http://www.cidh.org/relatoria/showarticle.asp?artID=45&II=2>
- Recommendations on Access to Information (English) http://www.oas.org/dil/access_to_information_recommendations.htm
- Recomendaciones sobre Acceso a la Información (Español) http://www.oas.org/dil/esp/acceso_a_la_informacion_recomendaciones.htm

Manuel Mora MacBeath

- Blog (Español) <http://mejoroficio.blogspot.com/>

SunshineWeek.org

- Proyecto Tano: “Piquetes” Contra la Opacidad: (Español)
http://www.sunshineweek.org/sunshineweek/manuel_mora_macbeath_09

The Public Voice

- The Public Voice Website: (English) <http://www.thepublicvoice.org>

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Future Challenges For The RTI Movement

The Right-To-Information (RTI) movement has had a good ten years. Little more than a decade ago, transparency was not in vogue. The World Bank had not yet released its influential 1997 report on the importance of good governance. Transparency International had only just begun the publication of its annual corruption perceptions index. There were scarcely two dozen countries that had national RTI laws, most of them in the developed world.

Today, of course, we confront different circumstances. The concept of transparency is now so familiar that it has become, as Professor Christopher Hood recently observed, a "banal" idea, "taken as unexceptional in discussions of governance and public management." Almost seventy countries have national RTI laws. We have witnessed the emergence of an unprecedented global community of advocates, government officials, and academics interested in the promotion and study of RTI. And every day we hear stories about the ways in which RTI have helped to improve governmental accountability.

This is a considerable achievement. Nonetheless there are still several ways in which the RTI movement could be confounded. It is important -- and certainly consistent with our own insistence on the virtues of transparency -- to be candid about the challenges that the movement still confronts. I propose to outline five of these challenges.

1. The Workability of RTI Law

The first and most immediate urgent task is to deal directly with the reality that RTI law is a complicated policy instrument, easily prone to failure. We can view the problem of workability from three perspectives: those of users, administrators, and independent arbitrators.

First, the user's perspective. While lobbying for RTI laws, advocates have often understated the difficulties encountered when citizens actually exercise their statutory rights.

Users require three resources that are generally in scarce supply. The first is knowledge about bureaucracy and the law. Individuals who are effective in using RTI laws know what documents are held by government agencies, and where they are likely to be held. They also know how to file a request; understand when they are being put off, and when excuses are being improperly invoked; and know how to complain about bureaucratic recalcitrance.

A second requirement is gumption -- by which I mean the courage to exercise the right to information. This is a quality that is in surprisingly short supply, even among citizens who are well-educated and not dependent on governmental largesse. Even in jurisdictions that have long-established RTI laws, citizens worry that they will disrupt relations with government officials, or simply cause offense, by filing a request for information.

The third resource is persistence. Individuals must be prepared to pursue cases for months, and sometimes for years.

The difficulties encountered by users are aggravated by administrative shortfalls. But here we must deal candidly with the reality that RTI laws are not easily administered. They require special procedures and staff training. In every country that has established a passable RTI system, this has meant a significant investment of money. Today, however, many countries have taken the symbolical step of adopting an RTI laws without taking the substantive step of investing in administrative capabilities. Moreover it is not clear, given their poverty, that many countries are capable of developing capabilities like those in the rich democracies. One warning sign is the substantial

proportion of "test requests" that result in mute refusals in countries outside the first world.

Bureaucratic compliance might be better if enforcement bodies (that is, Information Commissioners) were effective in responding to problems of bureaucratic misbehavior. But commissioners have their own difficulties, which arise from a combination of resource shortfalls and problems of institutional design. As to the latter: commissioners are principally designed to resolve *cases* of alleged misconduct, not *patterns* of non-compliance that may involve hundreds or thousands of cases. This is an approach that is congenial to lawyers, who like to apply their forensic skills to particular disputes. But is also an approach that is easily confounded by errant bureaucracies. More cases of non-compliance increase a commissioner's workload, which results in delayed resolution of complaints, which further corrodes bureaucratic incentives for compliance.

These observations about the weaknesses of RTI law are informed by personal experience. I recently received a response to an RTI request that I filed with the U.S. Federal Bureau of Investigation five years ago; sadly I cannot say that this was the oldest of my U.S. requests. The delay was partly attributable to my own unwillingness to commit time and money in making an application for compliance to the federal court. I have also one complaint with the Canadian Office of the Information Commissioner that is now over two years old. I have seven complaints with the U.K. Information Commissioner that range in age from 21 to 30 months, without prospect of immediate resolution. (As a consequence I have stopped filing requests in the U.K, because -- at least in my case -- there is no effective remedy against bureaucratic non-compliance.) I recently spent more than two years fruitlessly pursuing a request for information under the United Nations Development Programme's Information Disclosure Policy.

Delay is so widespread, and so extensive, that I now find it possible to gauge roughly how many requests I could file in the rest of my working life. Assuming that I can handle two or three files at once, and assuming that each takes two or three years to reach a conclusion, I have perhaps two dozen requests left in me. In my own case, the grand promise of RTI has been reduced to a game of Twenty Questions. This should be regarded as a damning comment on the efficacy of RTI systems, even in wealthy democracies, for I am fortunate to have advantages -- in terms of education and position -- that are not shared by the vast majority of the world's population.

Moreover the evidence tends to support this skeptical view of RTI law. Who do we often find using RTI? Exactly those constituencies who have the advantage of the three resources that I described earlier: Businesses; current and former government employees; law firms; and well-funded interest groups. A case can be made, of course, that disclosure serves the public interest even in these circumstances. But it is a different and more complicated case than would be made if the *typical* requester were the citizen-hero who champions the dispossessed, as we often suggest.

I say this as a friend of RTI, wishing to see RTI laws work for the advantage of the vast majority of the world's citizens. However, attaining this goal will not be easy. Unless we grapple with the implementation challenges I have just described, we are at risk of achieving, on a global scale, the result that Antonin Scalia once said had befallen the U.S. Freedom of Information Act. The US FOIA, Scalia said in 1982, had become "the Taj Mahal of the Doctrine of Unanticipated Consequences . . . [The provisions of the law] were promoted as a boon to the press, the public interest group, the little guy; [but] they have been used most frequently by corporate lawyers."

2. The Changing Infostructure

A second RTI challenge may be peculiar to the developed countries. It arises because of changes in the governmental "infostructure" -- that is, the systems that are used by government organizations to contain and share information. (Professor Luciano Floridi defines the infostructure as "an organization's information assets that comprise the information base of the organization, including hardware, software, networks, infrastructure, information, and applications."). RTI laws were developed in a different and simpler era, so far as infostructure is concerned -- an era in which information was typically recorded on paper, contained in physical files and cabinets, and reproduced through relatively expensive photo-mechanical processes. This era has now faded away. Information is now typically digitized, and aggregated into vast electronic databases. The cost of storing and reproducing information has dropped dramatically, and consequently the volume of information held by government organizations has skyrocketed.

This technological transformation has profound implications for the operation of RTI systems. Increasingly, a request for information will pertain not to physical records, but

to digitized information held within government databases. In one sense this might seem to simplify the process of responding to RTI requests. After all, RTI officers might be able to use new document management systems to locate records that are responsive to a request more quickly.

On the other hand, new complications might be added. The volume of responsive records will probably increase substantially. Moreover, requesters might not want a specific record, but rather bulk data. This sort of request is much more complicated. Deciding precisely what to ask for, and whether it can be retrieved, requires a high degree of technical literacy on the part of requesters, RTI officials, and investigators within Commissioners' offices. Requesters may also lack the technical capacity to interpret bulk data after it is released.

Digitization also creates the threat of new impediments to access. Increasingly the databases that are used to warehouse government data are designed and maintained by private contractors.

Consider the following predicament, taken from personal experience. A request is made for information contained in a departmental database. The department replies that the database does not have the capability to download the requested information, because the department did not specify that capability when it procured the software. It is too expensive to hire the contractor to amend the software, says the department, which consequently refuses the request.

What has happened here? The department has effectively locked away a mass of information by the simple expedient of failing to insist that the contractor provide a capacity for retrieval. It should be added that this functionality can usually be added at little additional cost. But the department has no incentive to insist on it, and can justify its indifference by saying that the functionality is not essential to its "business needs." Nor does there appear to be a remedy for this predicament under major RTI laws. It is as though government departments have locked their filing cabinets and dropped the keys in the Thames (or the Potomac, or the Ottawa River).

3. Private and Quasi-Public Governance

A third challenge is the shift of functions to private or quasi-public organizations. It used to be said in the United States that certain activities -- known as "inherently governmental functions" -- could never be transferred out of the hands of government departments. We have now learned that this boundary line cannot be maintained in practice. There is nothing in the governmental sphere that could not be given to a contractor or autonomous agency. This creates significant difficulties for RTI systems, which are not well suited to these so-called "alternate service delivery mechanisms."

The problem is often framed as one of access to contract documents. While this is an important subject it is actually only one aspect of the larger issue. For example, should there be a right of access to *internal* documents of the contractor, if they pertain to the performance of some critical activity such as prison management or education? And if we acknowledge a right of access to such documents, how should it be exercised -- against the contractor directly, or through the contracting government?

Even more difficult are the cases in which critical services are delivered by organizations that are not tethered to a government department by contract. Air traffic control in Canada is a good example. We might add the National Electricity Reliability Council in the United States, which oversees the country's power grid; or the regulatory components of many of the world's major stock exchanges; or national organizations that run components of the World Wide Web. We lack generally accepted criteria for deciding when such organizations should be covered by RTI. And there is also little political support for the extension of RTI law to such organizations, even if the criteria should be decided upon.

The problem of assuring transparency when responsibilities are given to contractors and other non-governmental actors is not only, or even primarily, a rich-country problem. In the next thirty years, the developing world will undergo an unprecedented build-up of infrastructure, as a consequence of rapid urbanization and trade liberalization. Fiscal constraints, and pressure from eager investors, means that much of this build-up will be accomplished through private action. The ground rules for governance of such infrastructure are being negotiated now, and it is not likely that RTI will be properly accommodated in those negotiations.

4. Growing Complexity in the Security Sector

There are also mounting challenges in the sphere of national security. Of course, there is renewed sensitivity to security considerations in the post-9/11 era. In some countries -- notably the United States -- there are also serious problems in the operation of the security classification system, an invention of the early Cold War years that has become massive and unwieldy.

In addition, there have been important changes to the very structure of the security sector that threaten to undermine the right to information. In Iraq, for example, we have witnessed the substantial role of the private sector in functions that were once the exclusive preserve of governmental actors. Even combat roles are now fulfilled by contractors. This is only one instance of the threat to RTI posed by privatization.

A less obvious and even less tractable problem is the growth of intergovernmental security networks. By this I mean the interlinking of defense, intelligence and police organizations in different countries, and the corresponding growth of agreements on the sharing of information within these networks. One consequence is that the proportion of information held by one agency that has been received from other governments, often under strict assurances of confidentiality, continues to grow. This results in a quiet corrosion of national RTI requirements.

It is difficult to preserve openness in the security sector because of the deference that courts, legislatures and ombudsmen have traditionally shown to executives on national security issues. This is compounded by a massive mismatch in resources between security agencies and non-governmental watchdogs. The secrecy systems of most countries are highly complex. Few non-governmental groups have the resources to understand these systems, or to monitor changes such as the growth of transnational security networks.

5. Building Reliable Knowledge About RTI Systems

There is a final difficulty: the limits of our knowledge about the operations of RTI systems. As I noted earlier, there are now almost seventy national RTI laws, and many dozen sub-national laws. Some of these laws have been in force for decades. Still, consider how little we know about these basic questions:

- Who actually uses RTI laws?
- What sort of information do different kinds of requesters usually seek?
- What do requesters actually do with the information they obtain under RTI?
- Can we undertake a benefit/cost analysis of different types of requests, and distinguish those that yield great benefits at low cost, from those that yield little benefit despite substantial processing costs?
- To what extent do RTI laws simply reroute requests for information that were once handled by other means?
- How do RTI laws affect the internal operations of government agencies?
- How do fees and other administrative barriers -- such as requirements relating to the form of a request -- affect the demand for information?

These are important questions, some of which go to the core of the argument for RTI. Suppose, for example, that we found that many requesters did nothing at all with the information they received; how would we adjust our views about the value of RTI? Or suppose that the most costly requests came from affluent individuals or businesses: how would we adjust our views about fee policies?

Not only are these important questions; they are also questions that are frequently asked by government officials in poorer countries who are being encouraged to adopt new RTI laws. It is possible, of course, for any practiced advocate of RTI to hobble together a plausible answer to some (but not all) of these questions. Too often, however, these answers rely on anecdotes, selected because they bolster the case for adoption of an RTI law. Careful, reliable research is in short supply.

Why don't we do better in producing reliable knowledge about RTI? One reason, regrettably, is the impatience of funders and activists, who are reluctant to invest scarce resources in research that does not have a clear short-term payoff. Another reason is the defensiveness of government agencies, which are reluctant to support research whose conclusions cannot be controlled. (Hence the common resort to consultants, whose work can be more tightly controlled, but who often lack good knowledge of the RTI field.) Yet another reason is (again) the professional bias of lawyers -- whether situated in ombudsmen's offices, government departments, or advocacy organizations. Lawyers are good at interpreting law, and good at analysis of cases. They are less adept in studying complex bureaucratic and social systems.

We could know more about the operation of RTI systems than we do. And knowing more would be useful, in the long run. It would put us in a better position to make the case for RTI, or to adjust RTI systems so that benefits and costs are better balanced. There is an emergent community of new scholars who could be encouraged to undertake this research. However, good scholarship requires three things: a serious commitment of resources; tolerance of a long-time frame for production of results; and a willingness to cede complete control over the production of research to the scholarly community.

Only in the Foothills

A few months ago I had the good fortune to visit the Indian government's training facility for senior civil servants, the Lal Bahadur Shastri National Academy of Administration, which is located a few hours northeast of Delhi, on the edge of the Himalaya range. During a tea break I mentioned to an Indian colleague that the view of the mountains was breathtaking. My colleague corrected me. I was not looking at the mountains, he said; I was looking at the foothills. The mountains were hidden in the distance.

The RTI movement stands in a similar position. In the last decade the idea of transparency has seized public attention, and there have been great strides in persuading governments to acknowledge the right to information as a matter of principle. Compared to where we were only a few years ago, the prospect is spectacular. Nonetheless we are only in the foothills. Full realization of the RTI idea will require many more years of steady marching.

