



WORLD PRACTICE

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Public Access to Information

For newly independent states emerging from an autocratic past, the concept of government operating in public view is a new one. Previously, as one commentator has said, the norm was that the government knew everything about the people but the people knew nothing about the government. Efforts to reverse this situation are in evidence in countries around the world, and are intended to establish new norms to ensure the maximum flow of information between citizens and the state.

The by now well-known phrase, "freedom of information," reflects the assumption that citizens in a democratic society have a right to be informed about the activities of government. Accordingly, it refers to fundamental conditions that are essential for the exercise of this right, namely the ability of citizens to obtain, publish and circulate information without interference by public authority. These conditions are necessary to produce an informed citizenry that can exercise other rights and obligations in a democracy, including identifying and discussing societal problems; participating in public decision making processes; forming opinions about the activities of government; and holding public officials to account.

All freedom of information laws provide exceptions to rights of public access. In conformity with European standards, it is generally accepted that governments have the right to withhold information with proven relevance to defense, national security, international relations, criminal investigations, judicial procedures and national financial interests.

Awareness of the relationship between freedom of information and the realization of a democratic society is not new. It has been a fixture in democratic theory from antiquity through the enlightenment, and was codified as a standard of international practice in Article 19 of the Universal Declaration of Human Rights in 1948. Recently, several countries have sought to expand concern for citizen access to information about the state to address the state's access to information about citizens. A law recently adopted in Hungary, for example, joins rights of freedom of information with protections on the security and privacy of personal data and records.

While freedom of information is not a sufficient condition for democracy, world practice has shown that it is necessary for developing a responsible citizenry, vital and responsive government institutions, and public confidence in the governance of the state. □

Access to Information in Azerbaijan

Access to information in Azerbaijan is regulated by the Azerbaijani Constitution, national laws on the mass media and state secrets, and international frameworks promulgated by the United Nations (UN) and the Organization for Security and Cooperation in Europe (OSCE), organizations both to which Azerbaijan belongs.

Together, the Constitution, the Law on Mass Media, and the Law on State Secrets provide considerable formal guarantees that entitle Azerbaijani citizens to receive true and current information from the mass media, and the mass media to obtain information from state bodies. However, citizens, civic organizations, and mass media outlets must be informed about these rights and willing to defend them if they are to have any meaning in practice.

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Secrecy and Access in Three Western Democracies

The general principle of public access to information is followed by established Western democracies. However, the methods and breadth of information disclosed vary considerably. Governments traditionally have withheld information that could affect national security or defense, but most have either statutory or constitutional guarantees that provide public access to unclassified information. Here we examine France, Great Britain, and Germany in the areas of public access, mechanisms for requesting information, and legislative openness.

Public Access

Public access to information in France is governed by a 1978 act that gave everyone the right to have access to public documents, with a few exceptions. The government may refuse to make certain documents public if doing so would impair: 1) the secrecy of the deliberations of the government and of executive authorities, 2) the secrecy of national defense and foreign policy, 3) the currency and public credit, 4) the security of the State and public safety, 5) court operations and pre-trial procedures, 6) the secrecy of personal and medical files, 7) the secrecy of commercial and industrial matters, and 8) investigations of tax and customs laws violations.

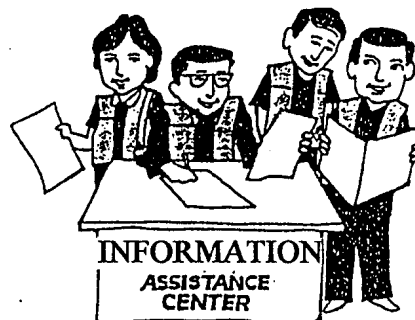
Of the three countries, Great Britain is unique in that it does not have general legislation on access to government information. Great Britain is also the only country where the presumption guiding legislation favors government secrecy.

Government decision-making processes are hidden from the public, with records released only after 30 years. In 1989, Great Britain enacted The Official Secrets Act, which enforces the trend against openness by using the criminal law to guard against the disclosure of state secrets.

In Germany, the right of public access to information is explicitly granted to the press, and not the individual. The right of press access to federal government information is grounded in Article 5(1) of the Constitution, and reflects the assumption that it is the duty of the press to inform citizens about public affairs. The Criminal Code defines state secrets as, "...facts, objects, or information which are accessible only to a limited number of persons and must be kept secret from foreign powers to avert serious damage for the external security of the Federal Republic." Section 93(2) emphasizes how narrow the domain of secrecy is. Even "Facts which are in contradiction to the free democratic order or which are kept secret from treaty partners in violation of arms limitation agreements are not state secrets."

Requesting Information

To ensure compliance with its disclosure laws and process complaints



about access, France has established a special *Commission d'accès aux documents administratifs* (CADA). Relevant government agencies are obligated to comply with CADA's decision either to release or withhold information. CADA also publishes various studies and papers, an annual report, and a useful guide on how citizens may gain access to public documents.

Great Britain has no *de jure* mechanism for requesting access to public information. In practice, British journalists have been known to use the U.S. Freedom of Information Act to obtain otherwise secret information about their own country.

In Germany, the press may appeal to the courts if denied information that it suspects is being improperly withheld. The courts will rule in favor of disclosure if the information was improperly classified, if it was released for the purpose of stopping some supposed illegal activity, or if the value in disclosure outweighs the interest in secrecy.

Legislative Openness

In France, all legislative proceedings and the meetings of most permanent and select committees of the National Assembly and Senate are public and may be freely reported. Parliamentary speeches, documents, reports, and "good faith" coverage of plenary sessions are immune from prosecution. However, Parliament can create special *commissions de controle* whose workings are secret and whose members are bound to secrecy.

Members of the British Parliament

are guaranteed immunity against court proceedings concerning statements made in Parliament or in its committees or reports. Such statements are also protected when reported by the press. In the past this immunity has been used to reveal information classified under the Official Secrets Act. Unlike in France, the British Parliament has the power to levy fines or even imprison members or outsiders for "contempt of Parliament," a poorly-defined offense expressed as directly or indirectly impeding Parliament in the performance of its functions, bringing it into odium or contempt, or ridiculing or lowering its authority. However, the offense has fallen into disuse and nobody has been imprisoned since 1880. Were any serious punishment to be imposed today, it is doubtful that it would withstand scrutiny by the European Court of Human Rights.

In Germany, legislative openness is mandated by the Constitution. Again, maintaining openness is treated as a duty and right of the press. Reporting on parliamentary proceedings, including public investigative committees, is part of the public function of the press. Article 42(3) of the Constitution provides that reports on the meetings of the *Bundestag* (Federal Parliament) and its committees can not be used to bring liability against either the *Bundestag* speaker or members of the press. □

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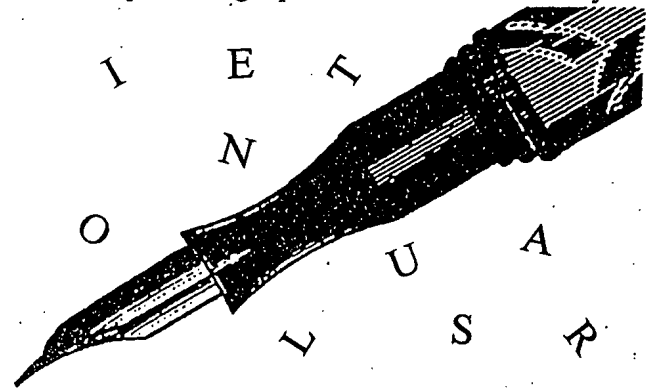
Information for this article was taken from Press Law and Practice: A Comparative Study of Press Freedom in European and Other Democracies. Article 19, International Centre Against Censorship, United Kingdom, 1993.

Around the Neighborhood

Nothing distinguishes totalitarianism from democracy more than the attitude of the rulers toward the freedom of the ruled to produce, obtain, and exchange information. Here are a few developments from around the neighborhood.

Turkey: Political leaders are talking about "combating tendencies to avoid telling the truth"... creating oversight mechanisms inside Parliament to ensure the compliance of deputies and staff with parliamentary rules and freedom of information laws... activating civil society to demand transparency in government... developing legislation that goes beyond freedom of information to require public figures to disclose financial information on earnings and income... the opening in Istanbul of a local office of Transparency International, an international NGO dedicated to promoting openness and accountability in government.

Georgia: The Parliament has begun producing a register of draft legislation that is available to the public and uses a color code to distinguish bills in their first (blue), second (green) and third (pink) readings... a draft law on Freedom of Information has been prepared by Georgian journalists at the request of the Speaker of Parliament... the Journalists' Union, the League for the Protection of the Constitution and the Young Lawyers Association have joined to create the non-governmental, non-partisan "Forum for Freedom of Information."



Latvia: MPs are talking about the need to open up information access to comply with international standards as a condition for membership in the European Union... the need to combat an "anti-service" attitude among civil servants and develop rules and sanctions that require them to respond to public complaints and information requests... publicizing draft laws among citizens and NGOs to build public support for legislative initiatives and gain public acceptance of difficult foreign policy decisions.

Hungary: MPs are talking about the recommendations of a small, multi-disciplinary team of independent experts charged with developing a legislative framework governing public access to information... efforts to educate lawyers, teachers and the public about the implementation of laws to protect personal data and public access to information... the danger that without laws guaranteeing public access to information, the country risks creating an environment where information that should be available is sold for profit or leaked for political advantage.

Access to Information in Azerbaijan

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The Constitution

The Constitution of Azerbaijan has three articles guaranteeing the right of citizens to receive and spread information:

Article 47. Freedom of Thought and Speech

Every person shall have the freedom of thought and speech.

Nobody shall be forced to identify or refuse his/her ideas and principles.

Propaganda inciting racial, ethnic, or religious animosity or hostility shall be banned.

This last line is the only constitutional limitation on the freedom of thought and speech.

Article 50 clarifies the rights of citizens to receive and spread information:

Article 50. Freedom of Information

Every person shall have the right to legally seek, get, pass, prepare, and spread information.

Freedom of mass media shall be ensured.

State censorship in mass media, including the print media, shall be forbidden.

According to Article 57, covering the right to petition, citizens have the right to address state bodies as an individual or as a group. Every petition should receive a written response according to procedures and times set by the law.

Law on Mass Media

The Law on Mass Media reinforces many of the ideas proclaimed in the constitution. Article 1 refers to the appropriate constitutional provisions and clarifies them:

"The freedom of speech and mass media, which is granted to the citizens by the Constitution of Azerbaijan, means the right to express one's thoughts and principles everywhere and in every form, and the right to seek, get, prepare, and spread information."

Article 3 confirms once again that, "Censorship over the

Azerbaijan's International Treaty Obligations

- ☐ Simultaneous with declaring independence in the fall of 1991, Azerbaijan joined the Universal Declaration on Human Rights, the Pact on Political and Social Rights, and the Pact on Cultural Rights.
- ☐ In 1992, Azerbaijan joined the Helsinki Final Act and became a member of the OSCE.
- ☐ In 1994 Azerbaijan joined the Paris Charter.

The rights and freedoms reflected in these international conventions are present in Azerbaijan's national laws.

mass media... is prohibited." Blank spaces continue to appear regularly on the pages of Azerbaijani newspapers and journalists instinctively edit their words, making calculations about what the censor will and will not permit.

The Law on Mass Media also guarantees the right of citizens and journalists to obtain information:

Article 29. Right to Obtain Information

Citizens have rights to obtain true and current information from the mass media about the activity of state bodies, public organizations, and state officials.

Mass media organs have the right to obtain information from state organizations, public unions, and even state officials.

Representatives of the mass media can complain about state officials at a higher level, and then to the court in case an official refuses to provide the information needed...

The same point about the right to get information is mentioned in Article 35, The Rights of Journalists. Article 34 states that only in cases concerning a preliminary criminal investigation or a juvenile delinquent can state officials refuse to provide information to a journalist.

Law on State Secrets

In order to define the limits of public access to information, Parliament recently adopted the Law on State Secrets. As defined in Article 4, state secrets include military, economic, and scientific information (arms production data, scientific research, etc.); foreign policy information (military cooperation agreements and official directives to high ranking officials of the Azerbaijani Foreign Ministry); and documents of the Azerbaijani intelligence and counter-intelligence services.

Article 6 defines the sphere of the information that cannot be classified as a state secret:

Article 6. Unclassified information

The following information is not classified:

- About emergency events endangering lives, natural disasters...;
- About the environment, health care, sanitation, demography, education, agriculture, and crime;
- About the privileges, compensation, and the powers given to citizens, organizations etc. by the government;
- About the facts of human rights violations;
- About the state of health of senior officials;
- About the illegal activities and abuses of authority committed by the high-ranking officials of Azerbaijan.

The law is less clear on the criteria that define "classified" information. It provides a legal procedure for reviewing cases where "unclassified" information is not freely disclosed.

According to Article 8, "State secrets are defined by the 'appropriate state body' that gives authority to the directors of public institutions to declare information to be a state secret or not." A presidential decree issued in January 1997 defined the term "appropriate state body" to mean the President. The article is as follows:

Article 8. The Procedure of Classifying Information as a State Secret

Information is classified as a state secret according to its status in certain spheres, organizations, or purpose of the programs.

Justification for the necessity of classifying information as state secret is to be made by the state body which prepared the information.

The procedure of classifying secret information is conducted by the heads of the state bodies, according to the list of the authorized persons to which the appropriate state body gave rights to classify the information as a state secret.

These persons carry personal responsibility for their decisions of classifying the information as a state secret.

In order to carry out a single state policy on the classification of information as a state secret, the appropriate state body makes a list of the classified information.

The names of the state bodies authorized to classify information as a state secret are indicated in the list. The list is approved by the appropriate state body.

Some MPs have expressed concern about the law fearing that, for example, "The fact that state secrets would

be classified by different state organizations can bring up a situation where information would be classified not from the standpoint of national interests, but from the standpoint of special, organizational interests, which could affect democracy."

Complaints about prohibitions on spreading information, difficulties in obtaining information from the state, shortcomings with respect to compliance and implementation of these laws, and censorship are frequent in Azerbaijan. To date, however, not a single TV station, radio station, or newspaper has sued any state bodies. □

From Paper to Practice

The passage of laws declaring freedom of information is not sufficient to ensure that access is meaningful and real. Concrete, manageable and efficient mechanisms must also be created to ensure that legal guarantees are observed in practice. A sampling of mechanisms instituted in countries throughout the world follows.

- publication of daily records of parliamentary debates and votes (Turkey, Western Europe, USA).
- publication of parliamentary reports, special documents and draft bills (Georgia, Poland, Western Europe, USA).
- publication of annual registers compiling new laws, regulations and executive and presidential orders indexed by subject matter (Western Europe, USA).
- routine public access to parliamentary sessions and committee hearings and meetings (Turkey, Hungary, Poland, Western Europe, USA).
- independent committees charged with publicizing the freedom of information law, and overseeing its implementation (Czech Republic, Europe, USA).
- creation of a Data Protection Commission to publicize the freedom of information law and oversee its implementation (Hungary, Czech Republic).
- creation of an independent ombudsman's office responsible for issuing an annual report on human rights violations, including government compliance with the freedom of information law (Portugal, Sweden, South Africa, pending in Latvia).

Excerpts from International Instruments and Laws

Universal Declaration of Human Rights (1948). Article 19

“Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”

□ □ □

European Convention on Human Rights (1953). Article 10

2. “The exercise of these freedoms [to hold opinions and to receive and impart information and ideas without interference by public authority] since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

□ □ □

International Covenant on Civil and Political Rights (1966). Article 19

2. “Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.”

□ □ □

American Convention on Human Rights (1978). Article 13: Freedom of Thought and Expression

2. The exercise of the right [to freedom of thought and

expression] shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary in order to ensure:

- a) respect for the rights or reputations of others; or
- b) the protection of national security, public order, or public health or morals.

□ □ □

The United States Bill of Rights (1791)

Congress shall make no law... abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of their grievances...

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated...

No person... shall be deprived of life, liberty, or property, without due process of law...

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial... and to be informed of the nature and cause of the accusation... and to have the assistance of counsel for his defence...

The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people...

Council of Europe Recommendation No.R(81)19 of the Committee of Ministers to Member States on the Access to Information Held by Public Authorities (1981).

“...Considering the importance for the public in a democratic society of adequate information on public issues;

“Considering that access to information by the public is likely to strengthen confidence of the public in the administration;

"Considering therefore that the utmost endeavor should be made to ensure the fullest possible availability to the public of information held by public authorities.

"Recommends the governments of member states to be guided in their law and practice by the principles appended to this recommendation."

Materials Available at NDI

This newsletter and other materials related to public access to information are available at NDI's Baku office.

- * U.S. Privacy Act and Government in the Sunshine Act
- * Freedom of Information Acts from the United States, Portugal, Latvia, Sweden, and Hungary
- * "The Ombudsman - Means to Ensure Accountability in Government and Other Public Activities," Sweden
- * The Article 19 Freedom of Expression Manual: International and Comparative Law Standards and Procedures. Article 19, International Centre Against Censorship. United Kingdom, 1993.
- * Press Law and Practice: A Comparative Study of Press Freedom in European and Other Democracies. Article 19, International Centre Against Censorship. United Kingdom, 1993.
- * "Charter for a Free Press," World Press Freedom Committee
- * provisions of international treaties and instruments on public access to information
- * listings of international organizations involved in the promotion and protection of freedom of information

Appendix to Recommendation No.R(81)19.

I. Everyone within the jurisdiction of a member state shall have the right to obtain, on request, information held by the public authorities other than legislative bodies and judicial authorities.

II. Effective and appropriate means shall be provided to ensure access to information.

III. Access to information shall not be refused on the ground that the requesting person has not a specific interest in the matter.

IV. Access to information shall be provided on the basis of equality.

VI. Any request for information shall be decided upon within a reasonable time.

VII. A public authority refusing access to information shall give the reasons on which the refusal is based, according to law or practice.

VIII. Any refusal of information shall be subject to review on request.

Contact us!

We welcome letters to the editor and special submissions for the next issue of *World Practice*.

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