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GOVERNMENT SECRECY IN THE INFORMATION AGE

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SOFT STATES

The countries that first adopted national disclosure laws – for convenience, let us focus on the fourteen that adopted laws up to 1990 – had much in common. They were among the richest countries in the world. Almost all were politically stable democracies with a long tradition of respecting citizen rights and the rule of law, a lively popular press, and healthy and independent nongovernmental organizations. Many had a political culture that included a skepticism about state authority – whether in the strong form (as in the United States), or in the moderate form peculiar to the older Commonwealth countries and the states of Northern Europe. (In 2000, one European Union official dismissed the call for tougher disclosure rules as a pathology of “protestant Puritanism.”1) All of these considerations eased the adoption of a disclosure law and made it more likely that the law would work in practice.

Indeed, it was common to think that some mix of these considerations was probably necessary as a prerequisite for the adoption of a disclosure law. One scholar suggested two conditions that were essential for a law to be adopted. One was a “fundamental commitment” to the institutions of liberal democracy, manifested in a long history of democratic rule. Such states, it was thought, would be more responsive to the case for protecting citizens’ rights against state authority and robust enough to tolerate the uncertainties that could be generated by a new disclosure law. A second prerequisite was a period of significant growth in the public sector, or at least a perception of growth, leading to concerns about the erosion of accountability.2 This seemed to capture the realities of the 1970s and 1980s: disgruntled
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Table 1 Perceptions of governance in nations adopting disclosure laws

The five "perceptions of governance" measures used in this table were developed by Kaufmann, Kraay, and Mastruzzi in research for the World Bank. A higher number reflects a more positive perception; each measure is calculated so that its "world average" is 0. Figures are averages for countries adopting in each period. Data on per capita gross national income is US$ for 2000, provided by World Bank.

<table>
<thead>
<tr>
<th></th>
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<tbody>
<tr>
<td>Per capita GNI</td>
<td>$21,082</td>
<td>$10,516</td>
<td>$3,626</td>
</tr>
<tr>
<td>Political Stability</td>
<td>0.81</td>
<td>0.45</td>
<td>−0.13</td>
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<td>Rule of Law</td>
<td>1.36</td>
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<td>−0.08</td>
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<tr>
<td>Control of Corruption</td>
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<td>Government Effectiveness</td>
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<td>Voice and Accountability</td>
<td>1.27</td>
<td>0.68</td>
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electorates in affluent welfare states, distrustful of their leaders and pressing for openness.

By the mid-1990s it was clear that this account was inadequate. The pace at which disclosure laws were being adopted was quickening: While it had taken more than a quarter-century for the first fourteen laws to be adopted, twenty-eight more were adopted in the nineties alone. The profile of this second wave of adopters was decidedly mixed. Some, such as the Netherlands or the United Kingdom – affluent, mature democracies – fit the pattern. But many did not, such as the countries of Central and Eastern Europe – new democracies determined to repudiate the secrecy of the Soviet era, and perhaps to emulate the policies of the remaining superpower. On the whole, countries that adopted disclosure in the nineties were much less wealthy than the first adopters, less politically stable, less able to enforce the rule of law, and more prone to corruption. Political rights, including the right to free expression, were not as deeply entrenched (see Table 1).

There were equally sharp disparities between this group and the nations that adopted disclosure laws in the first years of the twenty-first century. These countries had, on average, only one-sixth of the per capita income of the first wave of adopters; and by all of the measures of governance – including stability, rule of law, control of corruption, respect for civil liberties, and political rights – were in poorer
Soft States

condition than either of the preceding two groups of adopters. The conventional wisdom about the necessary conditions for adoption of a disclosure law had been turned on its head: The typical case was now far from being a mature democracy, populated by an enfranchised citizenry disturbed by sprawling bureaucracy. On the contrary, some new adopters were countries once described by Gunnar Myrdal as “soft states” – struggling with poverty, political disenfranchisement, and widespread corruption.5

One could imagine several explanations for this shift in the profile of adopting states over time. One simple explanation might be that all the affluent democracies have now adopted laws – meaning that any new adopters must, by definition, be poorer and rank lower on governance measures. The fact of pervasive adoption in the First World also helps to establish a disclosure law as a marker of democratic and economic advancement – thus encouraging other countries to adopt similar laws, if only to emulate the better-off states.

Many intergovernmental organizations have also prodded poorer and more fragile states to adopt disclosure laws. In 2002 the Council of Europe – a body distinct from the European Union, without comparable authority – recommended the adoption of disclosure legislation to its forty-six members, including over twenty countries in Central and Eastern Europe.6 In the same year, Commonwealth justice ministers approved a model freedom of information law for that organization’s fifty-three member countries7; in 2004, the thirty-five members of the Organization of American States adopted a resolution endorsing legislation to recognize a right to information.8

Countries have also been pressured by an increasingly sophisticated transnational network of nongovernmental organizations interested in transparency issues. ARTICLE 19, the London-based free expression group, has played a critical role in promoting the adoption of disclosure laws and in critiquing proposed laws.9 (In 2004, ARTICLE 19 also orchestrated a joint declaration by the free expression monitors of the United Nations, the Organization of American States, and the Organization for Security and Cooperation in Europe that the right to access information held by public authorities “is a fundamental human right.”10) So, too, has the Delhi-based Commonwealth Human Rights Initiative,11 as well as the International Helsinki Federation for Human Rights (particularly in Eastern Europe and the Caucasus)12 and the Atlanta-based Carter Center.
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(in Latin America and the Caribbean).13 The Open Society Institute, a philanthropy established in 1993 by investor George Soros, also provides substantial support to groups advocating for the adoption of disclosure laws. An arm of the OSI, the Open Society Justice Initiative, now has the adoption of disclosure laws as one of its main priorities.14

One of the most influential of these nongovernmental organizations has been Transparency International, established in 1993 by Peter Eigen, once a World Bank official frustrated by the Bank’s failure to address the problem of corruption in borrowing countries.15 TI publishes a Corruption Perceptions Index that annually ranks countries based on the international business community’s view about the pervasiveness of corruption within each. Arguing that there is “an obvious link between access to information and low levels of corruption,” TI has also recommended the adoption of a disclosure law as one of the central elements of a national anticorruption strategy. In 1998 it observed that almost all of the “clean countries” in its index had a Freedom of Information Act.16

The identification of disclosure law as a tool for dealing with the problem of corruption has become a principal reason for the widespread adoption of such laws among “soft states,” many of whom are attentive to their ranking in TI’s Corruption Perceptions Index because of its potential impact on foreign investment. Other intergovernmental organizations such as the OECD and the United Nations Development Programme have endorsed TI’s view; the UNDP has called freedom of information acts “an important precondition” for reduction of corruption.17 The Bretton Woods institutions – the World Bank and the International Monetary Fund – have encouraged adoption of national disclosure laws on similar grounds. Governments have also realized that disclosure laws might serve their own ends, by helping them to improve control over a vast and unresponsive bureaucracy. This was the case in China, where in 2003 senior party officials endorsed transparency as an important tool “for the control and supervision of administrative powers, so as to prevent and control corruption.”18 “External supervision” by citizens would be enlisted to serve the interests of the Party.

In other words, “soft states” were adopting disclosure laws precisely because of their softness, not in spite of it. Here was another case of “legal transplantation” (to continue with Otto Kahn-Freund’s
phrase) to new bodies politic – and this time the differences in context were perhaps even more substantial than those between one rich democracy (such as the United States) and another (such as the United Kingdom). The contrast between the early and late adopters was so stark that it raised a reasonable question of whether the transplant could thrive at all.

In some instances, an obvious issue was whether the new adopter-governments felt any “ownership” (to use a favored phrase of the International Monetary Fund) of their new disclosure law. There was always the possibility that legislation had been adopted purely for the sake of appearances. Pakistan may have illustrated the potential for backsliding. Routinely ranked by TI as one of the most corrupt countries in the world, Pakistan eventually agreed to adopt a Freedom of Information Ordinance in September 2002, as part of an anticorruption program promised in return for US$1.4 billion in aid from the IMF.19 Two years later, Pakistan’s Human Rights Commission complained that the government led by General Pervez Musharraf had done little to encourage bureaucratic compliance with the ordinance. “Nothing has turned around,” lamented the head of a Pakistani lawyers’ association. “Such legislation serves best in a civilized society. Our case is different. Either we make laws to violate or not to implement them at all; and this is our national tragedy.”20

**Governmental capacity**

Disclosure laws will also test the administrative capacities of developing countries. One mundane but nonetheless critical issue is the ability of governments to document their work and organize their records so that they can be retrieved later. The right to information is meaningless if files do not exist or cannot be found.21 Even in affluent countries, good record keeping is a challenge. Preparing a documentary record of official activities, sorting and filing documents – all of this takes time and staff. As the public services of the advanced democracies have been cut back over the last decade, record keeping – often regarded as one of the ancillary functions of government – has deteriorated in many of these countries. In 1997 the Australian Law Reform Commission concluded that prolonged efficiency drives in the Australian government had led to widespread problems of
“mediocre and fragmented recordkeeping”\textsuperscript{22}; the complaint was echoed in several other rich states.

The problems are substantially worse in developing countries. Anne Thurston, founder of the International Records Management Trust, says that the record-keeping systems of many developing countries are “in decline, and in some cases total collapse” for lack of proper policies, trained staff, or adequate facilities.\textsuperscript{23} An early Trust study of government personnel records in Uganda reported dire conditions: “No temperature, humidity or pest control exist, so paper is rotting, metal is rusting and there are layers of insects on or in files (termites have damaged shelving and wasps have nested among files).”\textsuperscript{24} In Tanzania, the Trust found that the ability to monitor financial and personnel systems was compromised because “the system is overwhelmed by huge volumes of unmanaged paper. For example, it is very difficult to audit the payroll because the relevant documents are scattered in different files in a variety of locations. . . . [Personnel] files are frequently incomplete, missing or misplaced.”\textsuperscript{25} Another study found that the Ecuadorian court system’s archives had accumulated 2.5 million files – 500,000 on shelves, and the other 2 million on the archive’s floors. File retrieval depended on the “knowledge and memory of the Director.”\textsuperscript{26}

In Kenya – which will have a constitutional right to information if a Bill of Rights drafted in 2004 is put into force – missing government files were found to be a major problem. A government archivist believed that a major reason for the loss of files was corruption; officials were simply destroying incriminating documents.\textsuperscript{27} This highlights one of the perversities of disclosure law as an anticorruption tool: It operates on the premise that the administrative system is, in large part, not corrupt. One of the remarkable features of disclosure systems in advanced democracies is the frequency with which they result in the release of documents that citizens did not know existed in the first place. That these documents are released, and not destroyed, is a testament to the professionalism of the civil service. Even in the cleanest civil services, however, cases of document destruction are occasionally uncovered. The problem is likely to be more severe in weakly professionalized civil services, particularly when missing documents can be blamed on notoriously poor record-keeping systems.

A decent system of record keeping and a reasonably professional civil service are likely to be two prerequisites for an effective
disclosure law. A third will be adequate resources for administering the law. Proponents of disclosure laws have sometimes been reluctant to discuss the potential burden of administering new laws, but they can be substantial if the law is to be applied properly. Staff need to be trained so that they know how to receive and respond to requests. In departments likely to receive a large number of requests, special offices may need to be established. The processing of requests will require some officials to retrieve records and review them to separate those that are sensitive from those that are not. Lawyers may be needed to give advice on the interpretation of exemptions in the law. Copies of documents containing sensitive material will have to be made, and the sensitive portions blacked out.

In short, a functioning disclosure law will spawn its own administrative routines and bureaucracy, and this will impose significant costs on government. In 2004, the Australian government estimated that the annual cost of administering its Freedom of Information Act was about $14 million, or about US$330 for each request.28 In 2000,
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the Canadian government estimated that the annual cost of administering its Access to Information Act was US$19.4 million, or about US$1,340 for each information request received that year. The difference in the two estimates is likely a result of the relative complexity of requests being handled in the Canadian system; the Canadian estimate also included the budget of the independent Information Commissioner, who investigates complaints about the handling of AIA requests.

In 2003, the cost of administering the U.S. Freedom of Information Act was estimated to be $323 million, or about $100 per request. This is significantly lower than either the Australian or Canadian estimates. Again, part of the difference is attributable to a variation in the kind of requests received by the three governments. Eighty percent of the 3.2 million FOIA requests received by the U.S. government in 2003 consisted of requests made by clients of the Veterans Health Administration or the Social Security Administration for personal information files; these requests are simple and highly standardized, and can be processed quickly and at low cost. The average processing cost for requests received elsewhere in the U.S. government in 2003 was $405. The U.S. estimate also excluded some costs – such as the time taken by bureaucrats outside FOI offices to gather files – that were counted in the Canadian estimate. Nor is there an information commissioner in the U.S. system, as there is in Canada. In the United States, much of the enforcement cost – consisting largely of the cost of FOI litigation – is shifted to the federal court system and individuals who litigate FOIA cases.

These estimates are rough, but they suggest that the cost of processing an information request in these three countries is likely several hundred dollars, unless the process is highly routinized. In principle, it is possible to levy charges on citizens to recoup much of this cost. Indeed, a model right to information law drafted by ARTICLE 19 and the Commonwealth Human Rights Initiative in 2001 would allow fees up to “the actual cost of searching for, preparing and communicating” information, with waivers for personal information and public interest requests. In practice, however, the Australian, Canadian, and U.S. governments rarely charge actual costs; revenue from fees is equal to roughly 1 or 2 percent of each government’s expenses. There is evidence that a fee policy based on full cost recovery would cause the demand for information to collapse entirely.
A working disclosure system cannot sustain itself financially; it requires almost complete subsidy from government coffers. There are sound arguments for such a subsidy in affluent nations. For example, governments in these countries spend a vastly larger amount on advertising and other promotional activities aimed at conveying information in ways that favor official priorities. In these countries, however, the subsidy for disclosure is explicitly recognized in government budgets: To put it another way, an allowance is made for the burden that will be put on departments by new disclosure laws. It is not clear that countries now adopting disclosure laws have done this; on the contrary, the assumption appears to be that the cost of implementation will be absorbed within existing budgets.

The disparity between the approach to implementation in richer and poorer countries was clear in 2004. The British government was in its fourth year of planning for the roll-out of its new Freedom of Information Act; adopted in December 2000, the law was scheduled to go into effect in January 2005. There had been heavy investment by government agencies in training, promotional material, and computer systems to handle anticipated requests. Parliamentary committees had scrutinized the implementation effort, as had the National Audit Office. In 2004 alone, the new Office of the Information Commissioner was given US$7 million to prepare for the law; the office within the central government’s Department of Constitutional Affairs that had responsibility for providing guidance and overseeing implementation had, in that year, a budget of US$15 million.\textsuperscript{35} Consultants had been hired; advisory boards had been appointed; “project risks” associated with the roll-out had been carefully monitored. Constitutional Affairs’ public relations office announced that it would distribute complimentary coasters and pens bearing a new FOI logo\textsuperscript{36} (thus raising, for FOI requesters, the perverse possibility that their denial letter would be signed with a pen celebrating the government’s openness).

Jamaica, a poorer relation of the United Kingdom, put its Access to Information Act into force in January 2004, after only fifteen months of preparation.\textsuperscript{37} This was, admittedly, a smaller effort than in the United Kingdom, but scale alone could not account for the disproportion in resources available for implementation in Jamaica. The budget for central guidance of the British FOI implementation effort exceeded the budget of the Jamaican Access to Information Unit.
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(with its staff of four), the government’s Archives and Records Department, the other parts of the Prime Minister’s Office, and the Jamaican Houses of Parliament – combined.\textsuperscript{38}

In September 2004 the Open Society Justice Initiative issued a report on the results of a test in which requests for information were submitted to government agencies in three countries that had recently adopted disclosure laws – Bulgaria, Peru, and South Africa.\textsuperscript{39} The findings were discouraging. Officials frequently refused to accept requests for information, particularly if they were submitted by members of “vulnerable and excluded groups,” while over 40 percent of requests that were accepted by officials were simply ignored. In South Africa, 70 percent of requests were either rejected or ignored. The problem was not simply the “enduring reflex toward secrecy,” the report concluded; officials were often ignorant of the law, and agencies often lacked clear procedures for handling requests. The promise of the law had been defeated by failures in implementation.\textsuperscript{40}

A similar 2004 study of the Moldovan law found that one-quarter of state bodies ignored requests entirely, while another quarter violated deadlines for response.\textsuperscript{41}

In the affluent democracies, official recalcitrance is often remedied by an appeal to the courts. But this makes another assumption about governmental capacity: specifically, that the courts are able to make a timely and independent appraisal of bureaucratic compliance with the law. This may not always be the case. In some poorer countries, court systems are overburdened and incapable of handling cases promptly. (In a 2004 assessment, American human rights specialists observed that the Pakistani court system was plagued with backlogs due to “archaic and inefficient court procedures”; the Indian court system was subject to similar criticism.\textsuperscript{42}) Court systems may also be subject to political interference or governments may simply fail to comply with judgments – both of which are significant problems in the Ukraine, for example.

Civil society capacity

To say that the right to information is a citizen’s right is, in a certain sense, misleading. There are many circumstances in which the disclosure of information helps to protect a citizen’s important interests. However, it is unlikely – at least based on the experience
Soft States

of laws already in operation – that individual citizens will, on their own behalf, make requests for information under a disclosure law. Even if they seek personal information (about a health benefit, for example, or an adverse decision on school admission or immigration status), individuals may rely on an advocate to make a request for them. And individuals are even less likely to make requests for other kinds of documents – sometimes known as “general records” requests. Requests such as this might also protect important interests such as the right to be informed about government decision making, but it is more likely that a nongovernmental organization – an advocacy group, media outlet, union, or business – will ask for the information.

The reasons for this are straightforward. Even in countries with long-established disclosure laws, making a request for information requires knowledge about the bureaucratic routine by which information requests are processed and about the legal provisions that should govern decisions on the release of information. Often it is useful to have a good understanding of the organization of files within the bureaucracy – to know where the bodies are buried, so to speak. The act of requesting information also requires a strong sense of political efficacy and persistence, due to the long delays that may arise in the handling of requests. Finally, asking for information may require money, particularly if the request is novel or complex or if the law lacks a mechanism by which appeals can be lodged at little or no cost to the requester.

The practical impediments to the use of any disclosure law are evident in the stories that are told about the use of new disclosure laws. In Rajasthan, it was not the villagers of Kelwara who pursued the request for ration dealers’ registers; it was MKSS, an organization created by a former employee of the prestigious Indian Administrative Service (see Chapter 1). In Thailand, the case against the Kasetsart University Demonstration School was brought by a parent who also happened to be a public prosecutor. (In fact, most of the individuals who filed complaints about noncompliance with the Thai law in 2002 were government employees seeking information about disciplinary actions.43) It was also lawyers (a high-status occupation in Japan) who constituted the Zenkoku Shimin Ombudsmen, the organization that routed out evidence of corruption in Japanese government. Disclosure laws are wielded by knowledgeable, empowered...
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professionals, even if they are used to protect the interests of a larger population.

Expertise and a strong sense of political efficacy, while critical, may not be enough. The U.S. Freedom of Information Act works as it does because the federal government is surrounded by nongovernmental organizations and media outlets with the resources to use the right to information aggressively. Many of these nongovernmental organizations also take a special interest in the principle of openness. These include groups such as Public Citizen (“We fight for openness and democratic accountability in government”), the National Security Archive (“a counter-institution to the U.S. government’s secrecy system”), or OMB Watch (“Our objective is to improve access to government decision-makers and energize citizen participation”). Others, such as the Reporters’ Committee for Freedom of the Press, treat the right to information as one of several issues that are important to their core constituency. This “transparency lobby” depends in turn on contributions from a broad community of philanthropies, as well as favorable treatment under federal tax law.

The affluence of public interest groups within the United States, as well as the country’s major media outlets, is remarkable even when compared to other advanced democracies (see Table 2). And it is clear that the health of disclosure regimes in other rich democracies is tied to the health of the community of nongovernmental institutional users. Where the nongovernmental community has limited capacity, requests are either less likely to be made or are poorly drafted and pursued half-heartedly; or, if successful, requests may result in the release of information that is misconstrued or not used at all. All of this tends to discredit the law among policymakers, encouraging their efforts to reverse the law – efforts that, again, are unlikely to be strongly resisted. In Canada, for example, it is common for policymakers to complain that journalists misuse disclosure laws by dwelling on requests for travel and hospitality expenses – requests that are simple and unlikely to incur large charges for the journalists themselves but yield a sensational news report if the expenses are anything other than wholly prosaic. These complaints about the “trivialization” of access help to legitimize efforts to restrict the right to information.

The question in countries that are now adopting disclosure laws is not only whether government has the capacity to fulfill the law, but
Table 2 Washington’s Transparency Lobby

A partial list of nongovernmental organizations in the United States that promote governmental transparency and use FOIA actively. Budget data are drawn from IRS Form 990’s collected by guidestar.org. Several of these organizations also work on issues other than the right to information. ACLU data excludes state affiliates. Data is for most recent available year, either 2002 or 2003.

<table>
<thead>
<tr>
<th>Organization</th>
<th>Annual expenses</th>
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<td>American Civil Liberties Union Foundation</td>
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<tr>
<td>Center for American Progress</td>
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<td>Center for Democracy and Technology</td>
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<td>Center for Public Integrity</td>
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<td>Electronic Frontier Foundation</td>
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<td>Electronic Privacy Information Center</td>
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<td>Federation of American Scientists Fund</td>
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<td>Freedom Forum, Inc.</td>
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<td>Judicial Watch</td>
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<td>National Security Archive Fund</td>
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<td>OMB Watch</td>
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<td>Public Citizen Foundation</td>
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<td>Reporters’ Committee for Freedom of the Press</td>
<td>$808,151</td>
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<tr>
<td>Total</td>
<td>$80,133,475</td>
</tr>
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</table>

whether the nongovernmental sector will have the capacity to use the law effectively. In several countries, cumbersome registration laws – such as Turkey’s Law of Associations – discourage the establishment of nongovernmental organizations and sometimes allow government leaders to block the establishment of unfriendly associations.45 Governments also harass already-established nongovernmental organizations. Ukrainian nongovernmental organizations complained in 2003 that their mail had been opened and their activities monitored by the security service; in Georgia in 2002, a pro-government gang attacked the offices of the Liberty Institute, a nongovernmental group that played a key role in the adoption of Georgia’s disclosure law. (“You hit the Liberty Institute, you hit all the NGOs,” another association leader said. “The message is the same for everyone.”46)

Funding is also a critical issue for media outlets and nongovernmental organizations. The condition of the independent press in Georgia – constrained by “high printing costs, a lack of advertising, and general poverty” – is typical of many other nations.47
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Nongovernmental organizations in these countries frequently rely on foreign assistance. The Soros-funded Open Society Justice Initiative said in 2004 that it provided support for freedom of information and expression projects to nongovernmental organizations in about twenty-five countries, and to international organizations such as the International Media Lawyers Association and the new Freedom of Information Advocates Network. Conventional development agencies also provide aid for transparency-oriented nongovernmental organizations. South Africa’s Open Democracy Advice Center has received support from Swedish, Finnish, and British development agencies; in the Philippines, the Center for Investigative Journalism has received support for transparency projects from the United Nations Development Programme. However, reliance on foreign assistance carries a price: In the Georgian state of Adzharia, President Aslan Abashidze used the fact of Justice Initiative funding to tar the Liberty Institute as a tool in an alleged Soros-driven plot to overthrow him.

Civil and political rights

For disclosure laws to work well, nongovernmental organizations must also have the capacity to act on the information they receive from government agencies. In individual cases of misconduct, we presume that individuals will have remedies against arbitrary or corrupt decisions; but there may be no legal basis for challenging the decision – no equivalent of the Administrative Procedures Act, for example – and it may be impossible, for reasons noted earlier, to obtain a remedy in court. More broadly, information might be used to ensure that political rights can be exercised intelligently, but this assumes that political rights can be exercised at all. Recent elections in several of the countries that have recently adopted disclosure laws – Armenia, Georgia, Ukraine – have been marred (in the antiseptic language of American officials) by “serious irregularities.”

The capacity of media outlets to act on information obtained through the law may also face sharp constraints. Many countries still maintain defamation or desacato laws that threaten imprisonment for news reports that insult the honor or dignity of public officials. There are, in addition, other methods of suppressing or intimidating independent media. Ironically, one common tactic is deployed in
Zimbabwe’s Access to Information Act, adopted in 2002. The law provides a right to government documents, albeit a right that is hedged by broadly drawn exemptions. The law also created a new Media and Information Commission to hear complaints about denial of information. However, a 2004 report found only one instance in which the right to information had been exercised. This was hardly surprising, because the 2002 law also included severe restrictions on press freedom, including fines or imprisonment for media outlets and journalists who were not registered with the Commission. (The penalties were strengthened in 2004.) The principal use of the law was to harass journalists and suppress independent newspapers prior to the country’s 2005 election.51

There have been comparable restrictions on the media in other countries that have recently adopted disclosure laws. Uzbekistan, which adopted a law in 1997 and overhauled it in 2003, also maintains a registration system that has effectively crushed an independent media, and independent journalists have been harassed in an effort to discourage the distribution of stories critical of the government. Major media outlets are state-owned, and therefore subject to direct political control. Human rights observers reported a comparable situation in Azerbaijan, whose parliament was considering adoption of a disclosure law in 2005.52 The editor of a prominent Azerbaijani opposition magazine, Monitor, was murdered in early 2005.

Initiatives to improve transparency in China will also be hampered by controls on press freedom. Chinese leaders may wish to curb corruption, but their tolerance for “external supervision” of state institutions clearly has firm limits. China’s state secrets law, which prohibits “spreading rumors or libel or in other ways instigating subversion of the state regime,” is a useful tool for constraining dissent. In 2002 the Chinese government jailed the journalist Jiang Weiping for eight years for violating the state secrets law: Jiang had written a series of articles in a Hong Kong magazine about an alleged cover-up of corruption in Liaoning province in northeast China. (Jiang’s sentence was later reduced, and he is now scheduled for release in 2007.53) In 2004 Chinese authorities also detained Zhao Yan, a researcher for the New York Times, on allegations that he had “divulged state secrets” by providing the Times with details about the imminent retirement of President Jiang Zemin; Zhao was


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already suspect because of his earlier work against corruption in rural areas.\textsuperscript{54} Local officials in Guangzhou (which adopted its Provisions on Open Government Information in 2002) jailed editors and journalists from the \textit{Southern Metropolitan Daily}, which had embarrassed the local government with its coverage of corruption and police abuses.\textsuperscript{55} Central government officials who had cited their eventual openness on SARS as evidence of a new commitment to transparency later detained Jiang Yanyong, the government physician who first exposed official deception about the extent of the crisis.\textsuperscript{56}

A Brave New World?

The editors of the Lagos \textit{Vanguard} were exultant when the Nigerian House of Representatives passed a Freedom of Information bill in September 2004. The government of President Olusegun Obasanjo agreed in 2003 that it would support a disclosure law as condition for a US$17 million aid package negotiated with the UNDP in 2003.\textsuperscript{57} Nigeria was in terrible condition, still wrestling with the legacy of sixteen years of military rule and plagued by corruption. The FOI bill, said the \textit{Vanguard}, would allow Nigeria to “join the league of open democratic societies”:

The bill…has removed the shackles from the media for conducting investigative journalism…and would allow the Nigerian media to beam its searchlight on public officials. Henceforth, public service will cease to be attractive to those who in the past have considered public office as a method of self-enrichment…. It is a brave new world for the Nigerian media and its people.\textsuperscript{58}

That the editors took this view was not surprising. To a small degree the overstatement may have reflected their desperation to find \textit{any} remedy for the overwhelming problems confronting the nation. To a larger degree, the editors had merely accepted what they had been told by many advocacy groups and international organizations: Disclosure laws were powerful instruments for eradicating corruption.

In truth, the actual effectiveness of disclosure laws as corruption-fighting tools in developing countries is largely unknown. Yes, many of the world’s cleanest countries have similar laws, but this confuses correlation with causation. Many of these nations had been among the cleanest in the world \textit{before} they acknowledged the right to
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information. Disclosure laws have been used to uncover abuses subsequently, but it could be argued that disclosure laws did this precisely because the system of governance was, on the whole, already functioning well: officials were usually honest; records were well maintained; courts were efficient and independent; nongovernmental organizations were free to express their opinion about official misconduct; and governments were compelled to pay attention to public outrage.

Now the same instrument is being deployed in a much more hostile environment. It is certainly possible that the right to information could prove useful as a corruption-fighting tool in poorer countries, as the Indian experience seems to show. Right-to-information campaigns in several Indian states have succeeded in giving attention to abuses and prompting promises of reform; furthermore, there is a vibrant national community of professionals, activists, and academics who are committed to the use of disclosure law. On the other hand, India has several advantages over other countries in the group of recent adopters. Within this group, India is perceived to be more committed to the rule of law, and more respectful of civil and political rights. It also has the advantage of an independent high court that has spoken forcefully about the importance of the right to information, and a senior public service that is generally regarded as professional and free of corruption.

Perhaps the Indian case suggests that there must be a certain minimum set of conditions in order to make a disclosure law useful in anticorruption campaigns. But even this may be saying too much: It is still unclear whether Indian government has the budget or administrative capacity to maintain an active disclosure system – that is, one that is capable of responding to thousands or millions of information requests every year. In India, as in most other countries in the cohort of recent adopters, statutory recognition of the right to information is an experiment in governmental reform, and the odds are slim that it will quickly corrode old habits of secrecy.