

MASTER THESIS ARCHIVAL STUDIES

The Right to Know

A Comparative Legal Survey of Access to Official Information in
Different Countries



Cynthia Warringa van Genderen
Philips van Nassastraat 17
4254 DE Sleeuwijk
Tel. 06-30621502
Email: cynthiavgenderen83@hotmail.com
Studentnumber: s0712779

Supervisor: Pr. Dr. K.J.P.F.M. Jeurgens
Institute for History
University of Leiden
June 24, 2013

Table of Contents

- List of abbreviations.....3**
- List of tables and figures.....4**

- Chapter one: Introduction and research methods.....5**
 - 1.1 General introduction and context of the research subject.....5
 - 1.2 Research question, goals and related studies no FOI.....8
 - 1.3 Sub questions and methodology.....10
 - 1.4 Terminology and central concepts.....13
 - 1.5. Explanatory note on the concepts of government bodies and public authorities.....13
- Chapter two: Legal Foundations of the Right to Know.....15**
 - 2.1. Introduction.....15
 - 2.2. Towards a new world-view.....16
 - 2.3. The autonomy of the written word.....17
 - 2.4. The concepts of publicness and freedom of the press18
 - 2.5. The evolution of the principle of public access.....19
 - 2.6. FOI around the world.....22
- Chapter three: the Netherlands.....25**
 - 3.1 The road to FOI legislation.....25
 - 3.2. Jurisprudence: legislation on FOI.....27
 - 3.2.1. The scope of the WOB of 1991 and the PRA of 1995.....27
 - 3.2.2. Rights and obligations of the public and the government.....29
 - 3.2.3. Procedures when making a request for information.....31
 - 3.2.4. Exemptions and exceptions.....32
 - 3.3. The Practice: access to information in reality.....33
 - 3.3.1. Access under the PRA of 1995.....34
 - 3.3.2. Access under the WOB of 1991.....34
- Chapter four: the United Kingdom.....37**
 - 4.1 The road to FOI legislation.....37
 - 4.2. Jurisprudence: legislation on FOI.....38
 - 4.2.1 The scope of the PRA of 1958/1967 and the Freedom of Information Act of 2000.....38
 - 4.2.2. Rights and obligations of the public and the government.....40
 - 4.2.3. Procedures when making a request for information.....40
 - 4.2.4. Exemptions and exceptions.....41
 - 4.3. The Practice: access to information in reality.....42
 - 4.3.1. Access under the FOIA of 2000.....42

Chapter five: India	45
5.1 The road to FOI legislation.....	45
5.2. Jurisprudence: legislation on FOI.....	47
5.2.1. The scope of the Right to Information Act of 2005 and the PRA of 1993.....	47
5.2.2. Rights and obligations of the public and the government.....	48
5.2.3. Procedures when making a request for information.....	49
5.2.4. Exemptions and exceptions.....	50
5.3. The Practice: access to information in reality.....	51
5.3.1. Access under the RTIA 2005.....	51
5.3.2. Access under the PRA of 1993.....	53
Chapter six: Indonesia	54
6.1 The road to FOI legislation.....	54
6.2. Jurisprudence: legislation on FOI.....	54
6.2.1. The scope of the UUKIP 2008 and the PRA of 2009.....	55
6.2.2. Rights and obligations of the public and the government.....	57
6.2.3. Procedures when making a request for information.....	59
6.2.4. Exemptions and exceptions.....	60
6.3. The Practice: access to information in reality.....	62
6.3.1. Access under the UUKIP 2008.....	62
Chapter seven: Comparing Different FOI Regimes	64
7.1 The road to FOI legislation.....	64
7.2. Jurisprudence: legislation on FOI.....	67
7.2.1. Comparing the scope of FOI legislation in general.....	67
7.2.2. Rights and obligations of the public and the government.....	69
7.2.3. Comparing procedures when making a request for information.....	71
7.2.4. Comparing exemption and exceptions.....	73
7.3. The Practice: access to information in reality.....	75
7.3.1. Comparing daily use of the right to access.....	75
Chapter eight: Conclusion	77
Bibliography	82

List of abbreviations

ANRI	Arsip Nasional Republik Indonesia
APIO	Assistant Public Information Officer
AU	African Union
ABW	Algemene Wet Bestuursrecht
BCI	British Council Indonesia
CIC	Central Information Commission
EU	European Union
FOI	Freedom of Information
FOIA	Freedom of Information Act
IC	Information Committee/Commission
IMDO	Information Management and Documentation Officer
IO	Information Officer
ICO	Information Commissioner's Office
MP	Member of Parliament
MKSS	<i>Mazdoor Kisan Shakti Sangathan</i>
NGO	Non-Governmental Organization
PIO	Public Information Officer
PRA	Public Records Act
PCO	Public Records Officer
PRR	Public Records Rule
RTIA	The Right to Information Act
SA	South Africa
SIC	State Information Commission
UK	United Kingdom
UN	United Nations
USA/US	United States of America
UUKIP	<i>Undang-Undang Keterbukaan Informasi Publik</i>
VNG	Vereniging van Nederlandse Gemeenten
WO I	First World War
WO II	Second World War
WOB	Wet Openbaarheid van Bestuur
WBP	Wet Bescherming Persoonsgegevens

List of tables and figures

Figure 1. Government bodies versus public authorities.....14

Table 7.1. Comparison of the development of FOI legislation.....64

Table 7.2.1. Comparing the scope of FOI legislation in general.....67

Table 7.2.3. Comparing rights and obligations of the public and the government.....69

Table 7.2.3. Comparing procedures when making a request for information.....71

Table 7.2.4. Comparing exemptions and exceptions.....73

Table 7.3. Comparing daily use of the right to access.....75

Figure 2. The World Value Survey Cultural Map 2005-2008 of Inglehart and Welzel.....78

Chapter one

Introduction and research methods

1.2. General introduction and context of the research subject

‘Civil servants and ministers are rightly cautious with disclosure. One wrong remark by the Finance minister can yield millions in damages nowadays’.¹ In a speech on the Day of the Freedom of the Press held on 3 May 2011, the Dutch Minister of Interior Piet Hein Donner took a shot at the journalists’ use of the *Wet Openbaarheid Bestuur* (WOB), the Dutch Open Government Act. He announced some measurements in order to prevent “misuse” of the WOB. The Dutch press interpreted this as a declaration of war.²

At the same time the UK was shocked by the scope of the phone hacking scandal of Rupert Murdoch’s *News of the World*. “Hackgate”, “Rupertgate” or “Murdochgate” involved intercepting voice-mail messages of politicians, celebrities, royalty and even Milly Dowler, a missing teenager who was later found dead. The controversy revealed by *The Guardian* led to public outrage against the excesses of the press. British prime minister David Cameron announced on 6 July 2011 a public enquiry to the culture and ethics of the wider British media under the lead of Lord Justice Leveson. The Leveson report recommended that the government should pass a law giving Ofcom, an institution that oversees British broadcasters, the power to approve a new regulatory system that will be independent of the newspaper industry.³

In June 2013, the world was shocked by the revealings of Edward Snowden (former CIA employee) in *The Guardian* on the existence of a secret surveillance program called PRISM, operated by the United States National Security Agency (NSA) since 2007. This program allows the NSA direct access to giant tech servers as Google and Facebook and grants access to emails and search history. It turned out that also the UK is involved in this

¹ Speech of minister P.H. Donner held on the Day of the Freedom of the Press, 3 May 2011.

² S. Dahllöf, ‘Netherlands: Misuse by journalists might lead to law changes’, 20-05-2011, in: <http://www.wobbing.eu/news/netherlands-misuse-journalists-might-lead-law-changes>

³ Lord Justice Leveson, *An Inquiry into the Culture, Practices and Ethics of the Press. Executive Summary*, (London November 2012), 9-11, 17-18, 30, 36, and 45.

scandal and the European Council urged explanation of the US and respect of European legislation on the protection of private data.⁴

So it seems, the battle for FOI is still going on. But, what is actually meant by FOI? David Banisar defines FOI as ‘an essential right for every person’.⁵ The *Constitution of the International Council on Archives* (ICA) states: ‘By guaranteeing citizens’ right of access to official information and to knowledge of their history, archives are fundamental to democracy, accountability and good governance.’⁶

FOI is all about openness, trust and transparency. It serves different purposes. Firstly, FOI is a vital element to democracy as democracy is based on the consent of citizens. That consent turns on the government informing citizens about their activities and recognizing their right to participate. It can also be beneficial to governments themselves: openness and transparency in the decision-making process can improve a citizen’s trust in government actions. It makes public authorities work better, because decisions which are made public are more likely to be based on objective and justifiable reasons.⁷

Secondly, FOI allows individuals and groups to protect their rights. It is an important guard against abuses, mismanagement and corruption. It can improve the enforcement of many other economic and political rights. E.g. Data Protection Acts allow individuals to access records held by public and private institutions, but also ensure that their private lives are protected. It also ensures that people can see what benefits or services they are entitled to and whether they are receiving their correct amounts. In this way, FOI also functions as a key tool in anti-corruption measures.⁸

Thirdly, in countries that have recently made the transition to democracy FOI allows the government to break with the past and allow society and its victims to learn what happened and better understand past harms. Almost all newly developed or modified constitutions include a right to access information from public authorities as a fundamental human and civic right.⁹ Whereas Europe, Australia and the United States have traditionally the oldest tradition of FOI, the *Indian Right to Information Act* (RTIA) was passed by the

⁴ D. Rushe and J. Ball, ‘PRISM scandal: tech giants flatly deny allowing NSA direct access to servers’, in: *The Guardian*, 07-06-2013: <http://www.guardian.co.uk/world/2013/jun/07/prism-tech-giants-shock-nsa-data-mining?INTCMP=SRCH>.

⁵ Banisar, D., *Freedom of Information around the World. A Global Survey of Access to Government Information Laws* (Privacy International 2006), 6.

⁶ *International Council on Archives Constitution as approved by the 2012 AGM in Brisbane* (24/08/2012).

⁷ Banisar, D., *Freedom of Information around the World. A Global Survey of Access to Government Information Laws* (Privacy International 2006), 6.

⁸ *Ibidem*, 7.

⁹ *Ibidem*, 8.

Indian Parliament on 15 June 2005 and came into effect on 12 October 2005. The Indonesian Transparency of Public Information Law (*Undang-Undang Keterbukaan Informasi Publik, UU KIP*) was passed on 30 April 2008 and came into effect on 30 April 2010. Even the People's Republic of China promulgated the *Regulations of the People's Republic of China on Open Government Information*, which came into effect on 1 May 2008.¹⁰

Although most countries have legislation on the protection of privacy and public access and maintain the democratic idea of open government, the practice is sometimes the reverse. For example, the European Parliament sharpens its resistance to new access rules proposed by the Commission: 'Politicians want to widen the scope of secrecy for citizens in order to get a better access to documents themselves'.¹¹ Therefore, the study *The Citizen's Right to Information: Law and Policy in the EU and its Member States* suggests more EU-legislation on information rights when fundamental freedoms and rights are threatened.¹²

Governments often try to conceal information from other governments and the public. These state secrets can include weapon designs, military plans, diplomatic negotiation tactics and intelligence (secrets obtained illicitly from others). Most countries have some form of Official Secrets Act and classify material according to the level of protection needed (classified information). What exemptions and exceptions apply are mostly recorded in a Freedom of Information Act (FOIA).

Although the importance of public access is increasingly recognized by many nations, there is still much work to be done to reach truly transparent government. David Banisar explains: 'The culture of secrecy remains strong in many countries. Many of the laws are not adequate and promote access in name only.'¹³

However, not everything is negative about secrecy. In some cases secrecy is much more favored than transparency. Erna Scholtes explains in her dissertation that the past fifteen years transparency has become a major issue in the debate on good governance, accountability of the government and active participation of civilians in society. Scholte states that the concept of transparency is an ambiguous one. There is no single definition to be found and the notion has a variety of meanings in different contexts. Furthermore, in administrative and political discourse transparency is seen as 'the norm'. Transparency seems to be society's

¹⁰ Wikipedia, 'Freedom of Information Laws by Country' (last modified on 20 November 2012): http://en.m.wikipedia.org/wiki/Freedom_of_information_laws_by_country#section_5.

¹¹ S. Dahllöf, 'EU: sharpened conflicts on new access rules', 01-12-2011, in: <http://www.wobbing.eu/news/eu-sharpened-conflicts-new-access-rules-updated>

¹² The Committee for Civil Liberties, Justice and Home Affairs (LIBE), *The Citizen's Right to Information: Law and Policy in the EU and its Member States* (June 2012), 105-108.

¹³ Banisar, D., *Freedom of Information around the World. A Global Survey of Access to Government Information Laws* (Privacy International 2006), 6.

‘multivitamin’. However, too much democratic control by society could temper creativity of policymakers to search for effective solutions for social and political matters. The unbalanced focus on integrity and accountability will not automatically lead to effect and efficiency. Therefore it is needed to be critical towards the limits of secrecy and transparency.¹⁴

The matter of public access to governmental information can be found on many political agendas these days, but each country deals with this issue differently. Although many countries in the world have FOI legislation, the specific aspects such as scope, coverage, exemptions and procedures differ per country due to different circumstances and cultures. Every country has its own FOI legislation with cultural bound instruments, ways of monitoring, fees and use. Moreover, FOI, meaning public access to information, are explained in different terms. E.g. the Dutch concept of *access* can be split up in *openbaarheid*, which refers to the possibility and the right to access, and *toegankelijkheid*, which means practical access to documents. However, in the English language *access* covers both meanings.¹⁵

In his dissertation, E.J. Daalder distinguishes four forms of disclosure. First and most important of all is *political disclosure* which obliges the government to inform representative bodies. Second, *proactive disclosure* forces the government to make their activities transparent to the public. This form of accessibility provides the right and possibility for the public to access governmental information and is recorded in legislation such as a FOIA and a Public Records Act (PRA). *Passive disclosure* enables the public to request the government for information. Passive disclosure is frequently used as an juridical instrument in the hands of the public to make use of their right to ask the State for information about their activities. Finally, *procedural disclosure* refers to providing information in the context of juridical cases.¹⁶

1.2. Research question, goals and related studies on FOI

Triggered by the probable existence of different public access regimes in the world, I have come to the following research question: *How is access to official information given shape in FOI legislation in different countries during the second half of the 20th and the beginning of the 21st century?*

¹⁴ Scholtes, E., *Transparantie, icoon van een dwalende overheid* (Den Haag 2012), 56-57.

¹⁵ Bergmans, M., *FOI Legislation Compared. Public Access Regimes in the Netherlands, Ireland and Canada* (Master Thesis Archival Science, University of Amsterdam, 2008), 11.

¹⁶ Daalder, E.J., *Toegang tot overheidsinformatie. Het grensvlak tussen openbaarheid en vertrouwelijkheid* (Amsterdam 2005), 3-6.

In this research, the differences and similarities between different public access systems in the world will be examined. Although I expect there will be clear differences between Western and non-Western countries due to the different traditions and cultures, I have chosen to formulate the research question in an open way to give space for unexpected conclusions by objective comparison of FOI legislation. The focus of this research will be on *proactive disclosure* and *passive disclosure* to see how FOI legislation is used by the public and public authorities. By access to official information I mean information that refers to both records and information in any form created, stored and managed by the State, represented by government bodies, especially public authorities. Another synonym for official information is government information or public information.

Much material has already been written about FOI, because the call for the right to know has grown ever since and is still evolving. Since 1995 transparency has become very popular in political and public discourse, and appears in many contexts. Over half of the FOIAs have been adopted in just the last ten years. The growth in transparency is in response to demands by civil society organizations, the media and international lobbyists.

Besides the impressive dissertations of Daalder en Scholte, many more have researched FOI, but few have compared FOI legislation. David Banisar has conducted a general global survey to access to government information laws commissioned by Privacy International. Toby Mendel of UNESCO conducted a similar research in 2006, but compared different FOIAs and its specific aspects for the development of further FOI legislation worldwide. Maaïke Bergmans has compared FOI legislation of Canada, the Netherlands and Ireland in her Master Thesis in which she makes some recommendations for revision of the Dutch WOB. S@p (*Stichting Archiefpublicaties*) dedicated its yearbook of 2006 completely to the theme of public access in historical and modern perspective. The significant difference between my research and other related studies is that I will not only focus on the significance of FOI legislation, but also on how it is operated in practice. Although Maaïke Bergmans does the same in her research, my intention is to let the facts speak for themselves instead of making some recommendations of what the best public access regime would be.

To see how public access is regulated in some parts of the world, some borders must be crossed. I have chosen four countries to compare with on several aspects of disclosure. First of all the Netherlands. To be able to notice clear differences or similarities in different countries, it is necessary to use my home country as a point of reference for this study. In addition, it is interesting to research Indonesia being a former colony of the Netherlands. The UK and India also share a common colonial history and are both member of the

Commonwealth. By the choice of these countries I will research the probable existence of different public access regimes in the world, how they function, how they deal with the issue of public access, how both differences and similarities can be explained, and if some underlying connections can be found.

Therefore, this paper begins with a general description of the objectives and basic principles behind the right of FOI in chapter two. Here the origins of the right to know will be traced back to the seventeenth - and eighteenth century, the ages of the Enlightenment. The legal foundations of the right to know will be explained as human and constitutional rights as defined by several international treaties.

1.3. Sub questions and methodology

The main issue of this research is to compare the four countries on their FOI legislation and how it is being used by the public and public authorities. The emphasis of my research will be on the right to information in the juridical sense of the word. Therefore, the starting point for my research is FOI legislation of each country, mostly represented by FOIAs and PRAs. Therefore, sources for my research will include the FOIAs and archival law of the different countries, governmental reports, newspapers, articles and studies of international organizations on FOI and transparency.

In order to be able to answer the research question I will analyze the four countries on several aspects of FOI legislation. To do so, it is essential to compare the countries on the same issues. Therefore, the main research question has been divided in several sub questions. These form the basis for assessing access to governmental information in the different countries and the composition of this paper. Therefore, the same issues will return in each chapter and will again form the basis for the comparison in chapter seven. The issues that will be addressed for each of the countries are:

- How did FOI legislation become the way it is now in each country?
 - How is FOI covered by law/Which Acts cover FOI?
 - Have there been political and public debates on FOI?
 - What are the specific political, cultural or social developments that empowered FOI?
 - What are the grounds to create FOI legislation?
- How does FOI legislation work?
 - What are the main purposes of FOI legislation?
 - What are the main principles and objectives?
 - What information is covered by legislation?
 - What institutions are covered by legislation?

- What are the rights and obligations of the public and the government?
 - What forms of disclosure are maintained in FOI legislation?
 - What are the rights and duties of the public?
 - What are the rights and duties of the government?
- How can the public make a request for information?
 - What system is maintained in FOI legislation: a system of records or a system of information?
 - Who can make a request?
 - What is the procedure to make a request?
 - How can the public make an appeal when the request is refused?
- When can a request for information be denied?
 - What information is covered by legislation?
 - What exemptions and exceptions are incorporated in FOI legislation?
 - Is a public interest override incorporated in FOI legislation?
- How does FOI legislation work in everyday practice?
 - What are the annual requests?
 - What are the annual appeals?
 - Is FOI being used by the public?
 - Is the government compliant with the law?

Chapters three till six will analyze FOI legislation in the Netherlands, UK, India and Indonesia in order to assess how access to official information is given shape. The approach will be “fourfold”: I will both look at the jurisdiction of proactive and passive disclosure, and how this is operated in practice. Within the jurisdiction and its daily use, I will also zoom in on the role of the government and the public in how accessibility is made possible or used. This approach is decisive for the choice of analysis factors.

The countries will be compared to each other according to the following factors, derived from the sub questions described above:

- I. The Road to FOI
- II. Jurisdiction
 - legislation on FOI
 - rights and obligations of the public and the government
 - exceptions and exemptions
 - procedures when making a request for information
- III. The Practice
 - access in reality under FOI legislation

These factors form a solid base for comparison between the four countries. It will show the different approaches to public access and the way how FOI is regulated in each country. Therefore, each chapter about a country is divided into three parts. First, for each country a

general description is given of how FOI legislation has developed under the name of “The Road to FOI”. This section provides a brief explanation of motives, principles and developments that led to the creation of FOI legislation and forms another important base for how differences and similarities concerning FOI legislation can be explained in the comparative part in chapter seven. For this part I will consult the studies of David Banisar and Toby Mendel, the Master Thesis of Maaïke Bergmans, websites of international organizations on FOI like UNESCO and newspaper articles on FOI issues.

The second part concerning the juridical approach is divided into four sections. Firstly, a brief and general oversight of FOI legislation is given and what main Acts cover FOI. These concern the FOIA and the PRA. Secondly, different aspects of the laws are discussed in the next three sections: rights and obligations of the public and the government, procedures when making a request for information and exemptions and exceptions. These sections deal with scope, coverage, costs and general procedures. Therefore I will research the sections in FOI legislation that relate to these aspects. Sources for this part will consist of the actual texts of the FOI laws, explanation on these sections and other publications relating to public access in the countries, such as the yearbook of S@p and other comparative studies on FOI legislation.

The third part, contains a practical approach to see if the public is actually receiving all the rights as described in the law and if the government is compliant. Sources for this part will concern publications about the use by the public and the government and implementation of FOI legislation.

After having discussed the FOI legislation of the four countries in the previous chapters, they will be compared to each other in chapter seven. In general, this chapter will follow the structure of the preceding chapters. This means that first the development of creating FOI legislation will be compared, before getting into scope, procedures and exemptions followed by the everyday use of this legislation in the four countries. The differences and similarities will be explained at the same time.

Having discussed the results of chapters two till six in chapter seven, in chapter eight some summarizing conclusions will be made on how access to official information in different cultures are given shape. My intention is to let the facts speak for themselves, so my conclusion will be foremost as objective as possible.

1.4. Terminology and central concepts

When speaking of terminology, all countries use different terms to the central concepts of this paper. Phrases frequently used for *FOIA* are ‘Right to Information Act’ (India), ‘The Open Government Act’ (the Netherlands), ‘Public Information Disclosure Act’ (Indonesia), and ‘Freedom of Information Act’ (the UK).

As mentioned earlier, in the English language *access* or *openness* covers both the possibility or idea of proactive and passive disclosure. *Transparency* is used in this paper in the context of proactive disclosure; the duty of the government to disclose information on own initiative. *Access* or *accessibility* refers to the possibility and practical access to information. This could be translated by the Dutch word ‘toegankelijkheid’. Although *disclosure* is semantically closely related to *accessibility*, *disclosure* in the context of my research is more interpreted as the idea or principle of openness of government information, translated in Dutch as ‘openbaarheid’.

Public access is used as a synonym for disclosure. *Accessibility* and *disclosure* apply both to governmental information. Related concepts as *classified*, *secrecy* or *restriction* refer to the exemptions and exceptions of disclosure. The use of *records* and *documents* refer to governmental *information* in any form, except for the difference between a *system of records* or a *system of information* (see chapter three, subsection 3.2.3.). In this case, records refer to physical and electronical documents created by administrators. *Archives* can both refer to archival depositories and to archival collections of records creating agencies.

1.5. Explanatory note on the concepts of government bodies and public authorities

Concerning the juridical terms of *government bodies*, *administrative bodies/authorities/agencies* or *public bodies/authorities/agencies*: there is a difference.

Government body (*overheidsorgaan*) means:

1. the government of any country or of any political subdivision of any country
2. any instrumentality of any such government
3. any other person or organization authorized by law to perform any executive, legislative, judicial, regulatory, administrative, military, or police functions of any such government,

4. any intergovernmental organization.¹⁷

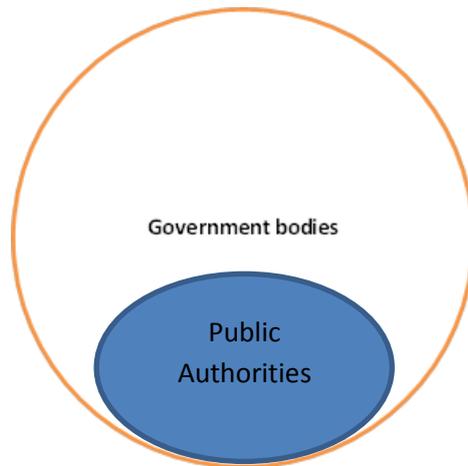


Figure 1. Government bodies versus public authorities

Administrative authorities/bodies/agencies or public authorities/bodies/agencies (*bestuursorganen*), are part of the whole of government bodies. Although the difference is sometimes very difficult to see, public authorities are created by statute and only the legislature has the authority to provide for their creation. The statutory provisions that create the administrative agencies and confer functions on them determine the character of the agencies. In general, public authorities represent the people and act as guardians of the public interest, not the interests of private persons. As an incident to the performance of their public functions, however, public authorities can decide issues between private parties or private rights.¹⁸

¹⁷ K. Adams, 'Defining "Government Body"', consulted on 21-08-2009:

<http://www.adamsdrafting.com/defining-government-body/>

¹⁸ The Free Dictionary by Farlex, searched on 'Public Administrative Bodies', consulted on 17-06-2013:

<http://legal-dictionary.thefreedictionary.com/Public+Administrative+Bodies>

Chapter two

Legal Foundations of the Right to Know

2.1. Introduction

The Freedom of Information (FOI), the right of access to official information, lies at the heart of the notion of democracy and is crucial to the existence of human rights. Section 19 of both the *Universal Declaration on Human Rights* and the *International Covenant on Civil and Political Rights* guarantees that every person shall have the right to search for and to publish information. Central to the guarantee in practice of a free flow of information and ideas is the principle that government bodies hold information not for themselves but on behalf of the public.¹⁹ FOI is gaining more recognition and over the last forty years there has been an enormous increase in the number of countries that have adopted FOI laws.²⁰

Although FOI is developing at a growing pace, the concept is not new. The origins of the citizen's right to know derive from the seventeenth- and eighteenth century, the ages of the Enlightenment. The concepts of publicness, freedom of the press and the principle of public access were born in this period. Therefore, this chapter will examine the roots of the concepts of FOI for a better understanding of their backgrounds and developments. An oversight of their creation and changing definitions over time under different circumstances are indispensable for a good comprehension of how the concepts of FOI function in the 21st century and how they can be placed in their historical context.

2.2. Towards a new world-view

The Enlightenment and the Scientific Revolution of the sixteenth- and the seventeenth century caused a change in world-view and laid the foundations for modern Europe. Precise knowledge of the physical world based on experimental observations crystallized into independent science that became primary for many educated people in the eighteenth century. Men like Galileo Galilei, Johannes Kepler and Isaac Newton paved the way for modern scientific thinking. Gradually, the traditional religious and theological world-view, which

¹⁹ Mendel, T., *Freedom of Information: A Comparative Legal Survey* (UNESCO, Paris, 2008), 1.

²⁰ G. Björkstrand and J. Mustronen, 'Introduction': Anders Chydenius' Legacy Today', in: J. Mustronen (ed.) *The World's First Freedom of Information Act* (Kokkola 2006) 4-7, 4.

rested on determining and accepting the proper established authority, was beginning to give way to critical new methods of learning and investigating.²¹

This new way of thinking started to affect Western politics and society in the eighteenth century. The role of religion in society, traditions, established sources and ancient authorities were questioned by a new rising and expanding international educated community of writers and philosophers. Members of this community were linked together by shared values and interests. Their common goal was to reform society using reason, challenge ideas grounded in tradition and faith, and advance knowledge through the scientific method.²² The Enlightenment promoted science, skepticism and intellectual exchange, challenged superstition, intolerance and some abuses by Church and State.²³

2.3. The autonomy of the written word

By the end of the eighteenth century it became clear that the Enlightenment ideas had permeated politics and society as well. The Glorious -, American – and French Revolutions had posed new questions about traditional powers, religion and social issues. After 1770 the harmonious unity of the *philosophes* like Voltaire, John Locke and Montesquieu began to break down. Other thinkers and writers began to attack the ideas of reason, progress and moderation. Jean-Jaques Rousseau (1712-1778) attacked rationalism and favored passionate individualism. He argued that the general will of the individual is sacred and absolute. However, the general will is not necessarily the will of the majority according to Immanuel Kant (1724-1804). He stimulated foremost independent thinking of the individual.²⁴

So, having started in France, diverse Enlightenment ideas spread throughout Europe and the colonies by the written word. The new intellectual forces travelled to urban centers across Europe, then jumped the Atlantic into the European colonies and back again, where it influenced Benjamin Franklin and Thomas Jefferson and many others to play an important role in the American and French Revolutions. Thus, the political ideals of the Enlightenment influenced the *American Declaration of Independence* (1776), the *United States Bill of Rights* (1787) and the *French Declaration of the Rights of Man and of the Citizen* (1789).²⁵

²¹ McKay, J.P., B.D. Hill and J. Buckler, *A History of Western Society since 1300* (Boston-New York 2006), 595-596, and 598-602.

²² Ibidem, 604-605.

²³ Wilson, E. and P. Reill, *Encyclopedia of the Enlightenment* (New York 2004), 577.

²⁴ McKay, J.P., B.D. Hill and J. Buckler, *A History of Western Society since 1300* (Boston-New York 2006), 611-613.

²⁵ Ibidem, 692 and 695-697.

The call for liberty was foremost a call for individual human and civic rights, but even the most enlightened monarchs still saw it as their duty to regulate what people wrote and believed. Liberals protested against such control and demanded freedom to worship according to their consciences, an end to censorship, freedom from arbitrary laws and from shortsighted judges. However, the call for liberty also included a call for a new kind of government: representative government, first outlined by Edmund Burke. The radical idea was that the people alone have the authority to make laws. This system of government would mean choosing legislators who represent the sovereign people and are accountable to them.²⁶

According to Francois Guizot representative government enables citizens to permanently ‘seek after reason, justice and truth and delegitimizes absolute power by *discussion* which compels existing powers to seek after the truth in common; by *publicity*, which places these powers when occupied in this search, under the eyes of the citizens; and by *the liberty of the press*, which stimulates citizens to seek after truth, and to tell it to power.’²⁷

2.4. The concepts of publicness and freedom of the press

Immanuel Kant strongly influenced the concept of “publicness” (*Öffentlichkeit*). He conceptualized freedom of speech and freedom of thought as a transcendental formula of public justice and the principle of “the public use of reason”. He emphasized the personal right of publishing opinions. However, the understanding of publicity as the basis for a “system of distrust” in Jeremy Bentham’s view (1748–1832), would prevail in the next centuries as the “fourth estate of power”, first used by Thomas Carlyle who attributed the term to Edmund Burke who would have been making reference to the traditional three estates of Parliament: The Lords Spiritual, the Lords Temporal and the Commons.²⁸

The fourth estate contains ‘the idea of newspapers independent of governmental and party-political control, representing public opinion and having the power to control the other “estates”’.²⁹ The notion of the fourth estate was reduced to the concepts of ‘freedom of the press’ and the ‘right to publish the truth about the government’. The concept of freedom of the press was in the US first to be codified in *Virginia’s Bill of Rights* (1776) and in France in the

²⁶ Ibidem, 691-692.

²⁷ Francois Guizot cited in S. Splichal, *Principles of Publicity and Press Freedom* (Oxford 2002), 2.

²⁸ Carlyle, Thomas (19 May 1840). "Lecture V: The Hero as Man of Letters. Johnson, Rousseau, Burns", in: *On Heroes, Hero-Worship, & the Heroic in History. Six Lectures. Reported with emendations and additions* (London-New York 1908), 392.

²⁹ Splichal, S., *Principles of Publicity and Press Freedom* (Oxford 2002), 1.

Declaration of the Rights of Man and of the Citizen (1789).³⁰ However, Sweden had the scoop in the *Ordinance on Freedom of Writing of the Press* (1766).³¹

Slavko Splichal states that the eighteenth-century concept of freedom of the press does not mean the same as freedom of the press nowadays. Early debates on the freedom of press regarded the idea of “publicness” as a moral principle and an extension of personal freedom. Newspapers emerged from a new class: the bourgeoisie. Thus, the press had an different source of legitimacy than the three classic estates of power (the legislative, the executive and the judicial) and developed into an critical anti-force to the traditional ruling groups in society. In this context, the call for the right to publish was seen as the right of the individual’s right of free expression.³²

However, in the nineteenth century Bentham’s idea of the press as the fourth power gained popularity over Kant’s notion of the “public use of reason”. The press lost its repressive character and transformed from an mediator between democratic conversations and their readers into an autonomous power that started to control the public discourse. At first, the newspaper functioned as a platform for public letters and public conversation for a small public, but by the end of the nineteenth century it had become a global intellectual power with an independent industry of commerce. Therefore, the original significance of the freedom of the press as an individual’s right was annexed by the press itself, who as an autonomous power monopolized the pursuit of freedom and permitted itself the role of the watchdog of democracy.³³

The mass media as the fourth estate or watchdog was congruent with the concept of representative government where “with the consent of the people” newspapers represented public opinion. One argued that the press only serves collective interests and that the freedom of the press was justified by its function of representing the people or the public and their individual rights, such as the right to know. Bentham’s idea conflicted with the still existing original Enlightenment idea of the freedom of the press as an individual privilege. This was also reflected in the definition of freedom of the press as a ‘great bulwark of liberty’ in *Virginia’s Bill of Rights* versus ‘free communication of thoughts and opinions’, which includes ‘free printing’ in the revolutionary *French Declaration of Rights and Men and Citizen*.³⁴

³⁰ Ibidem, 1-2.

³¹ P. Hogg, ‘The First Freedom of Information Act’, in: J. Mustronen (ed.): *The World’s First Freedom of Information Act* (Kokkola 2006) 8-17.

³² Splichal, S., *Principles of Publicity and Press Freedom* (Oxford 2002), 32.

³³ Ibidem , 2 and 15.

³⁴ Ibidem, 2-3.

The concepts of freedom of the press and publicness are interrelated by power struggles between the traditional authoritarian and emancipatory forces in society. When set into historical perspective, specific interests are implicated. Therefore, different meanings and derivations cannot be molded into one singular definition of publicness or freedom of the press. The genealogy of the concepts reveal more diversity than uniformity. Concepts and meanings change over time. Each age and space creates its own specific circumstances which determines the temporal significance that is given to a certain concept.³⁵

Therefore, the press in the eighteenth century was characterized by transmitting the news, having an earnest debate of political issues and being a prop and complement for parliamentary regime. However, in the nineteenth and twentieth century political rulers began to discover the value of popular support for their actions and tried to influence public opinion. Censorship gave way to propaganda, public relations and massive information subsidies in mass media. Newspapers retained new functions for all kinds of newspaper customers and reading situations. Freedom of speech and publication were legitimized as civic liberties under the growing influence of liberalism.³⁶

In the end, two ideas evolved around the same central idea from publicness where the concepts of freedom of the press, the right to know and freedom of information originate from. Publicness obtained in the course of history two meanings. The first refers to the personal right or freedom to form, express and to publish opinions. The principle of publicness is functional as long as it stimulates individuals' participation in a rational discourse (Immanuel Kant). The other denotes the social need to prevent or hinder abuses of power. In this view, it is the social responsibility of the press to expose actions of the State in order to achieve a more responsible democratic government (Jeremy Bentham). In this way, the press grew out to the people's agent for the people's right to know.³⁷

2.5. The evolution of the principle of public access

Closely related to the concepts of publicness and freedom of the press is the right of access to information to make governments accountable for their actions. This democratic principle was born in the second half of the eighteenth century when complicated bureaucracy and resistance against it were developing. Sweden is a fine example of the battle for freedom that characterized the age of Enlightenment. From 1718 to 1772 Sweden experienced its 'period of

³⁵ Splichal, S., *Principles of Publicity and Press Freedom* (Oxford 2002), 5 and 9.

³⁶ *Ibidem*, 8.

³⁷ *Ibidem*, 22-32.

freedom'. The power came into the hands of the Parliament who was represented by people of all social classes and who were entitled to choose the King. Openness of governmental decisions seemed to be a good method to prevent abuse of power. Therefore, the Swedish Freedom of Press Act, adopted in 1766, set the principle that government records were by default to be open to the public and granted citizens the right to demand documents from government bodies.³⁸ Civil servants who resisted this decree were threatened with dismissal.³⁹

In 1790, at the foundation of the French National Archive and the creation of the first Archives Law in the world, it was determined that the archive would be open to the public for three days a week. The *law of 7 Messidor Year II* (25 June 1794) section 37, expanded this civic right by granting full access to public archives in other parts of the Republic. Civilians were enabled to request for governmental information on set times and to ask for a copy of documents preserved in the depository.⁴⁰

Until then, archives had been closed to the public or only open to privileged researchers whose use was mostly official purposes. The notion that research in archives was a civic right was increasingly recognized. Furthermore, the French Revolution and the Napoleonic conquests had turned traditional administrative and legal structures upside down, so the whole field of archival theory and practice in Europe was being completely renovated.⁴¹

Judith Panitch states that 'the Revolution definitively established the principle that archival records should be accessible to the public.'⁴² Panitch bases this on Posner's famous article *Some Aspects of Archival Development Since the French Revolution* where he explains how the creation of archives legislation contributed to 'the principle of the accessibility of archives to the public'.⁴³ Posner states further: 'It was not so much the desire to create opportunities for scholarly research that caused this regulation as the wish to provide for the needs of persons who had acquired part of the national property. But still for the first time archives were legally opened and held subject to public use.'⁴⁴

³⁸ *His Majesty's Gracious Ordinance Relating to Freedom of Writing and of the Press* (1766), sections 10 and 11.

³⁹ A.E.M. Ribberink, 'De overheid opent haar archieven', in: *Nederlandsch Archievenblad* 84 (01-09-1980) 440-451, 440.

⁴⁰ A.E.M. Ribberink, 'De overheid opent haar archieven', in: *Nederlandsch Archievenblad* 84 (01-09-1980) 440-451, 447.

⁴¹ M. Duchein, 'The History of European Archives and the Development of the Archival Profession in Europe', in: *American Archivist* 55 (1992) 14-25, 17 and 21.

⁴² J.M. Panitch, 'Liberty, Equality, Posterity? Some Archival Lessons from the Case of the French Revolution', in *American Archivist* 55 (1992) 30-47, 31.

⁴³ E. Posner, 'Some Aspects of Archival Development Since the French Revolution', in: *The American Archivist* 3 (July 1940) 159-172, 162.

⁴⁴ *Idem*.

However, K.L. Cox argues that the principle of accessibility was born out of necessity. Preceding the codification of public access in the Archives Law of 1794, revolutionaries recognized the importance of finding documents they wished to consult within a reasonable amount of time. In this way, archivists from 1789 to 1791 instituted a system of arranging and processing papers to provide legislators with quick access to information.⁴⁵

Soon other European countries adopted the new ideas on archival management that originated from the French Revolution. Because many countries stayed for long time under French control and experienced the influence of French institutions, the idea of a specialized public archives service was gradually taken over in almost all of Europe. The Dutch *Algemeen Rijksarchief* in The Hague and the Belgian *Archives Generales du Royaume* are examples of who imitated the idea of a central archives depository for noncurrent records of the State.⁴⁶

The American and British origins of the right to know derive from seventeenth- and eighteenth century, where an ambitious press struggled to evade censorship of the State and the official prohibition on reporting the actions of the House of Commons and the House of Lords that can be traced back to *de Scandalis Magnatum* of 1275, the earliest English law on seditious speech. Throughout the centuries, many were fined, imprisoned or even executed who violated this ban.⁴⁷

The American and British campaigns for the people's right to know paralleled each other and were a natural corollary of the Enlightenment demand for freedom of the press and freedom of expression. However, the British associated an informed citizenry with an elite class and the American colonists developed a more expansive notion of a simple freeholder of taxpayer citizenship and a more broadly based political participation, although their common struggle for the common citizen's right to know encountered the same hostility from the classic authorities.⁴⁸

Throughout the nineteenth century, the American and British press struggled on for more press freedom. In 1803 the Republican administration prosecuted a Federalist newspaper editor for seditious libel against President Thomas Jefferson and in 1812 another

⁴⁵ Cox, K.L., *Ideology, Practicality, and Fiscal Necessity: The Creation of the Archives Nationales and the Triage of Feudal Titles by the Agence Temporaire des Titres, 1789-1801* (Florida State University), 11.

⁴⁶ E. Posner, 'Some Aspects of Archival Development Since the French Revolution', in: *The American Archivist* 3 (July 1940) 159-172, 162-163. The situation of the Netherlands and Belgium are described in A.E.M. Ribberink, 'De overheid opent haar archieven', in: *Nederlandsch Archievenblad* 84 (01-09-1980) 440-451, 448-449.

⁴⁷ Foerstel, H.N., *Freedom of Information and the Right to Know. The Origins and Applications on the Freedom of Information Act* (London 1999), 4.

⁴⁸ *Ibidem*, 1.

libel against the President took place.⁴⁹ In the UK, the idea of a liberal press was spread across the empire, as press laws were gradually weakened or eliminated. Liberal papers called for a free economy and a free marketplace of ideas, including a maximally free press. This liberal creed was forcefully stated by John S. Mill in *On Liberty* (1859).⁵⁰

Removal of forms of control took place in the second half of the nineteenth century. In England, taxes on papers to control the spread of ‘mass’ or popular newspapers were finally removed by the mid-1800s. Government regulations across Europe, such as onerous press regulations were eliminated by the 1880s. Concerning libel, legal decisions were taken to reduce libel from criminal to common law, truth was recognized as a defense and courts recognized the right of the press to criticize government and its ministers.⁵¹

The need to open up archives to more groups of society was gradually recognized in Europe and the USA. After WO I the duration for access restrictions was fixed, but varied with lengths to fifty years or more. After WO II the restrictions or periods of closure were lessened, so that in nearly all European countries the duration of access restriction is now twenty to thirty years.⁵²

2.6. FOI around the world

After WO II the fundamental notion of the right to know and access to information has been clearly established as a human and civic right in various international treaties, instruments and jurisprudence. Section IV of the *American Declaration of the Rights and Duties of Man* (1948) recognizes that every person has the right to freedom of investigation, of opinion, and of the expression and dissemination of ideas by any medium whatsoever. The famous section 19 of the *International Covenant on Civil and Political Rights* (1966) establishes that the right to freedom of opinion and expression includes the right to seek, receive, and impart information through any media and regardless of frontiers. Section 13 of the *American Convention on Human Rights* (1969) also protects the right and freedom to seek, receive, and impart information and ideas of all kinds.

⁴⁹ Foerstel, H.N., *Freedom of Information and the Right to Know. The Origins and Applications on the Freedom of Information Act* (London 1999), 8.

⁵⁰ ‘History of Free Press’, consulted on 23-06-2013:

http://www.journalismethics.info/media_law/history_of_free_press.htm

⁵¹ Idem.

⁵² M. Duchein, ‘The History of European Archives and the Development of the Archival Profession in Europe’, in: *American Archivist* 55 (1992) 14-25, 22.

Although, it is interesting to describe the development of FOI in Africa, the Middle-East and Latin-America, it falls outside the scope of this paper. Therefore, only the USA, Europe and South-East Asia will be described.⁵³

After the world's first FOIA in 1766, the next major FOIA was passed in 1966 in the US, although there is a long history of public access in the USA according to David Banisar.⁵⁴ However, the call for more transparency in the USA by non-partisan movements increased after WO II⁵⁵ and the 5 U.S.C. § 552 was signed into law by President Lyndon B. Johnson on July 4, 1966, stating: 'I signed this measure with a deep sense of pride that the United States is an open society in which the people's right to know is cherished and guarded.'⁵⁶ The significance of this FOIA lies in its influence to stimulate many other countries around the world to adopt legislation on FOI. Despite some inadequacies, it established for the first time the statutory right of *any* person to access government information. The American right to know was further expanded with the Sunshine Act in 1976 and in 2009 when President Barack Obama stated in his memorandum that the government should be transparent.⁵⁷

Although most Western European countries adopted FOI laws starting in the 1970s, the call for transparency as the basic principle for democracy was not frequently heard until the 1990s. Like many other international organizations the European Union (EU) acted in a sphere of secrecy that was dominated by a culture of diplomats and bureaucracy. Access to official information was foremost passive accessibility, but after opening up the Internet to the public the fear for full public access was decreased.⁵⁸ On 3 December 2001 the *EuroWob* was passed and Section 1 states that 'This treaty marks a new stage in the process of creating an ever closing union among the peoples of Europe, in which decisions are taken openly as possible and as closely as possible to the citizen.'⁵⁹ This treaty 'grants a right of access to European Parliament, Council and Commission documents to any Union citizen and to any natural or legal person residing, or having its registered office, in a Member State'.⁶⁰ Since

⁵³ For more reading on those parts of the world: Banisar, D., *Freedom of Information around the World. A Global Survey of Access to Government Information Laws* (Privacy International 2006), 13-20.

⁵⁴ Banisar, D., *Freedom of Information around the World. A Global Survey of Access to Government Information Laws* (Privacy International 2006), 158.

⁵⁵ *Ibidem*, 158-159.

⁵⁶ Cited in Banisar, D., *Freedom of Information around the World. A Global Survey of Access to Government Information Laws* (Privacy International 2006), 5.

⁵⁷ Scholtes, E., *Transparantie, icoon van een dwalende overheid* (Den Haag 2012), 31-32.

⁵⁸ Scholtes, E., *Transparantie, icoon van een dwalende overheid* (Den Haag 2012), 32-33.

⁵⁹ *Regulation (EC) No 1049/2001 of the European Parliament and of the council of 30 May 2001 regarding public access to European Parliament, Council and Commission document.*

⁶⁰ *Idem*.

then, many other acts, regulations and codes have exalted the status of access to information in Europe.⁶¹

In the Asia-Pacific region has been a modest adoption of laws. The Commonwealth, an association of fifty-three countries who were previously part of the British Empire, adopted a resolution in 1980 to encourage its members to enhance citizens' right to access information. In 1999, the Commonwealth Law Ministers recommended that member states adopt FOI laws and in 2003 the Commonwealth Secretariat issued a model bill on freedom of information. Australia and New Zealand were original adopters, South Korea and Thailand both adopted laws in the 1990s. Japan adopted a national law in 2000, India in 2002 and Indonesia in 2008.⁶²

The last decades there has been a significant increase by nations in the recognition of the importance of access to information as a human and civic right, a basic principle for good governance and an important right to fight corruption. At least eighty countries have adopted the right to know and the right to access as a constitutional right. Nearly seventy countries around the world have adopted national laws on FOI and in another fifty FOI legislation are in preparation. In this way, the right to know has become a common feature in nations all around the world.⁶³

⁶¹ Banisar, D., *Freedom of Information around the World. A Global Survey of Access to Government Information Laws* (Privacy International 2006), 11-12. Think also of the *Recommendation Rec(2002) 2* of the Committee of Ministers to member states on access to official documents, *The European Convention for the Protection of Human Rights and Fundamental Freedoms* (ETS-005) Section 10, and Section 225 of the *Treaty Establishing the European Community, Official Journal C 325*, 24 December 2002.

⁶² *Ibidem*, 16.

⁶³ *Ibidem*, 16-17.

Chapter Three

The Netherlands

3.1 The road to FOI legislation

Transparency is an important and longstanding principle in the Netherlands. The right to know is codified in section 110 of the Constitution: ‘In the exercise of their duties government bodies shall observe the principle of transparency in accordance with rules to be prescribed by Act of Parliament’.⁶⁴ The Netherlands subscribes the right to access to official information as the Carter Center defines access as ‘a free flow of information that can be an important tool for building trust between a government and its citizens’.⁶⁵

In the 1960s, when democracy and openness were highly propagated, the debate on public access made a real turn from the topic of the informative government in the 1940s and 1950s to the issue of the public’s right to know. The question was raised if the government could be forced to proactive disclosure by means of jurisdiction.⁶⁶ At that time, only press officers made information public.⁶⁷ The PRA of 1962 was not enough in fulfilling this need which only concerned retained records at public archives.⁶⁸

Political motives made things speed up. The State’s Information Service (*Rijksvoorlichtingsdienst*) posed the question if there should be a special State Secretary of Government Information. Other matters concerned what information should be made accessible.⁶⁹

Especially the case of journalist Faas and public relation officer Korsten led to a furious debate between press and politics about free acquisition of news and to what extent information about the formation of cabinets should be made accessible to the public. The cases led to the installation of the Committee Biesheuvel by the cabinet De Jong in 1970. The Committee was assigned with the task to advise the government on the societal function of the

⁶⁴ Unofficial translation. Official translation of the revised Constitution of the Netherlands 1983: http://wetten.overheid.nl/BWBR0001840/geldigheidsdatum_01-11-2011

⁶⁵ Cited in Banisar, D., *Freedom of Information around the World. A Global Survey of Access to Government Information Laws* (Privacy International 2006), 111.

⁶⁶ *Idem*.

⁶⁷ Rijksvoorlichtingsdienst, *De overheidscommunicatie in vogelvlucht. Ontwikkelingen sinds de Commissie Biesheuvel* (Den Haag 2000), 3.

⁶⁸ This is stated in section 7 of the *Archiefwet 1962*, *Stb.* 313, 19 July 1962.

⁶⁹ Daalder, E.J., *Toegang tot overheidsinformatie. Het grensvlak tussen openbaarheid en vertrouwelijkheid* (Amsterdam 2005), 77-78.

State to inform society, about open government and to prepare a disposition of the government on the possibility to record the right to information in legislation. The research of the Committee resulted into a publication in 1970 that recommended the creation of a law on open government.⁷⁰

The report of the Committee Biesheuvel included a template for a FOI law and emphasized ‘good and democratic governance’ as motivation for creating a FOIA. Those terms were frequently mentioned in the *Wet Openbaarheid van Bestuur* (WOB) of 1978⁷¹ and 1991⁷². However, the reaction of the government was foremost reserved. In her opinion, the Dutch government thought that the right to know can only exist if this would be in the interest of the understanding of the public of the practice of policy. Accessibility should be weighed against other to be respected and to be protected interests, like unity of policy, ministerial responsibility, efficiency of governance and protection of private life. Public access should be regarded as an effective instrument to improve better communication between State and society, and not as a goal in itself. Also the *Raad van State* (the Council of the State) was negative about the report and even denied a general right to information.⁷³

It took five more years before cabinet Den Uijl could present a proposal for a FOIA. The proposal adopted some recommendations of the report of Biesheuvel, but went not that far as Van Biesheuvel had wished for. Eventually the WOB was accepted by the Second Chamber (*Tweede Kamer*) in 1978, but came into effect on 1 May 1980 due to internal discussions. By an evaluation of the law in 1983, the WOB was revised and passed on 30 October 1991 and came into effect on 1 May 1992. Although the current WOB knows twice as more sections than the old one, changes remained limited.⁷⁴ In sum, not the public, but politics and the political system have shaped FOI.

Other important legislation that regulate public access are the current PRA of 1995⁷⁵ and the Law on the Protection of Personal Data⁷⁶, which will not be further discussed in this

⁷⁰ Cited in E.J. Daalder, *Toegang tot overheidsinformatie. Het grensvlak tussen openbaarheid en vertrouwelijkheid* (Amsterdam 2005), 78-79.

⁷¹ *Wet Openbaarheid van Bestuur* 1978, *Stb.* 9 November 1978, 581.

⁷² *Wet Openbaarheid van Bestuur* 1991, *Stb.* 1991, 703.

⁷³ Daalder, E.J., *Toegang tot overheidsinformatie. Het grensvlak tussen openbaarheid en vertrouwelijkheid* (Amsterdam 2005), 80.

⁷⁴ Daalder, E.J., *Toegang tot overheidsinformatie. Het grensvlak tussen openbaarheid en vertrouwelijkheid* (Amsterdam 2005), 80-81.

⁷⁵ *Archiefwet* 1995, *Stb.* 1995, 276.

⁷⁶ *Wet Bescherming Persoonsgegevens* 2000, 6 July 2000, *Stb.* 2000. 3. Besides this act there are many more laws that regulate public access in the Netherlands such as: the Act on Police Data (*Wet politiegegevens*), several regulations concerning the protection of information (*Besluit informatievoorziening in de rijksdienst 1990* (*Besluit IVR*), *Besluit Voorschrift informatiebeveiliging Rijksdienst 1994*, *Besluit voorschrift informatiebeveiliging rijksdienst - bijzondere informatie (Vir-bi)*, *Besluit archiefoverdrachten rijksadministratie (BARA)*), the General Law of Governance (*Algemene wet bestuursrecht*), the Act on Governmental Electronic

research for it concerns personal information and no official information. In the next section, the juridical frame of public access will be explained in which the relationship of the WOB of 1991 and the PRA of 1995 will become clear.

3.2. Jurisprudence: legislation on FOI

3.2.1. The scope of the WOB of 1991 and the PRA of 1995

The constitutional right of FOI is codified in section 110 of the Dutch Constitution. ‘In accordance with rules to be prescribed by Act of Parliament’ are meant the WOB of 1991 and the PRA of 1995 that make sure that ‘in the exercise of their duties government bodies shall observe the principle of transparency in legislation’.

As described in the previous section, the most important law in the Netherlands that regulates FOI is the WOB. Generally spoken, the WOB enables the public to request for information at any moment to know what is being done in their name for their benefit and their money, and obliges the government to proactive and passive disclosure. The principle the WOB maintains, is that governmental information is always open unless there is a good reason for secrecy.⁷⁷ This means that before the moment of transfer to a public archive, governmental information is in fact open to the public with the exception of the exemptions described in sections 10.⁷⁸ However, public access to official information means here that the public is only entitled to information ‘contained in documents’, which means that the public cannot consult the document itself.⁷⁹

The WOB is limited to administrative records in the possession of public authorities (*bestuursorganen*) or companies carrying out work for a public authority. This means that citizens can only ask for information about administrative matters that are in the possession of the public authority.⁸⁰ Section 1a specifies what public authorities are covered by the WOB: ministers, the administrative bodies of provinces, municipalities, water boards and businesses under public law. The Act applies also to other administrative bodies that work under the mentioned before or so far as they are not exempt by any other administrative regulation.

Transactions (*Wet elektronisch bestuurlijk verkeer*), the Act on Digital Signatures (*Wet elektronische handtekeningen*) and the EuroWob (*Openbaarheid van documenten van de Europese Unie*).

⁷⁷ WOB 1991, section 2, subsection 2.

⁷⁸ J.G. Van der Beek-Scholten, ‘Openbaarheid van Archieven’, in: J. J. Kompagnie (ed.): *Jaarboek S@p 2006. Openbaarheid in historisch en hedendaags perspectief* (Den Haag 2008) 26-33, 27.

⁷⁹ WOB 1991, section 3, subsection 1.

⁸⁰ WOB 1991, section 3, subsection 1 and section 4.

Very confusingly, the WOB speaks of a ‘government body’ in section 1, subsection i, where the law defines a *government body* as an ‘(a) organ of a legal person which is established by public law and (b) any other person or board that is authorized by law.’ This definition is copied from the General Law of Governance (*Algemene wet bestuursrecht*) section 1:1, subsection 2 that defines a *public authority* in exactly the same way. The General Law of Governance distinguishes two forms of public authorities: *A bodies* and *B bodies*. *A bodies* refer to institutions that are authorized legal persons by public law, such as the municipal council, the major, a minister or the Queen. *B bodies* refer to legal persons which are authorized to some extent by private law, such as companies, NGOs or a society.⁸¹ It becomes rather confusing for as the WOB never mentions ‘government body’ anymore, but continues to speak of ‘public authority’.

In this case it remains unclear what the exact difference between ‘government body’ and ‘public authority’ is or if the WOB sees government bodies and public authorities as the same thing. It seems as if the government is not consequent in the use of juridical terms or tends to adjust the narrow definition of *public authority* to the broader concept of *government body*. Archival records that have been transferred to public archives are not within the scope of the WOB, but are under the charge of the PRA of 1995.⁸²

The PRA deals with all records that have been transferred to State archival depositories. Public access under the PRA means the right to the free consultation of records.⁸³ Within a maximum of twenty years after the archives have been formed, the archival material is physically or digitally transferred to a public archive and at the moment of transfer open to the public.⁸⁴ It concerns both private archives as government archives. The PRA regulates the care and management of governmental archives that have been transferred, so that everyone has the possibility to understand how the government acted in the past, but also regulates the care of semi-static archives still held at public authorities.⁸⁵

The PRA covers all government bodies as described in section 1, subsection c. The term applies to the whole government, so the PRA is also applied to the exemptions to public authorities described in the General Law of Governance section 1:1, subsection 2. This means that the PRA also covers bodies like the Houses of Parliament, the Judiciary, the Council of

⁸¹ *AWB 1991*, section 1:1.

⁸² ‘Juridisch kader van openbaarheid’, consulted on 23-06-2013:

<http://www.nationaalarchief.nl/onderwerpen/openbaarheid-toegankelijkheid/juridisch-kader-openbaarheid>

⁸³ J.G. Van der Beek-Scholtens, ‘Openbaarheid van Archieven’, in: J. J. Kompagnie (ed.): *Jaarboek S@p 2006. Openbaarheid in historisch en hedendaags perspectief* (Den Haag 2008) 26-33, 26.

⁸⁴ *Idem*.

⁸⁵ *Idem*.

State, Office of the Ombudsman and General Audit Office (*Rekenkamer*).⁸⁶ In this way, the coverage of institutions under the PRA is larger than the WOB. Confusingly again, the PRA clearly speaks of *government body* just like the WOB and maintains the same definition derived from the General Law of Governance section 1:1, subsection 1 where is only spoken of *public authorities*. The Archives Regulations of 1995⁸⁷ further specifies the conditions in which the care of archives must take place.

In sum, the PRA and the WOB have different forms of disclosure, so this has consequences for the extent of how much and what information is disclosed. The WOB entitles the public to passive and proactive disclosure, but its scope is limited to public authorities and administrative records on policymaking and how it is operated. The PRA maintains passive disclosure, but covers all government bodies, so that the public is entitled to consult all government records at public archives. This is the main difference between the two Acts.

3.2.2. Rights and obligations of the public and the government

The WOB 1991

The main purpose of the WOB is to regulate the provision of information for control of good democracy and governance. The principles of democracy and the democratic state form the basis for transparency and accessibility. Therefore, the public has the right to access government information in order to be able to control the activities of the government in a good way and to expose abuse of power. Besides this, the government has also the duty to provide enough information to the public without being asked for it.⁸⁸

These forms of public access are called proactive and passive disclosure. The Memorandum of Explanation defines proactive disclosure as the duty of the government to inform society about her activities for good governance and democracy.⁸⁹ This is regulated in sections 2 and 8 of the WOB.

⁸⁶ Bergmans, M., *FOI Legislation Compared. Public Access Regimes in the Netherlands, Ireland and Canada* (Master Thesis Archival Science, University of Amsterdam, 2008), 15.

⁸⁷ *Archiefbesluit 1995*.

⁸⁸ *Wijziging van de Wet openbaarheid van bestuur in verband met aanvullingen inzake onredelijke en omvangrijke verzoeken, inzake bijzondere verstrekkingen alsmede inzake hergebruik en in rekening te brengen vergoedingen (Wet aanpassing Wob), Memorie van Toelichting 20 juni 2012, 2.*

⁸⁹ *Regelen betreffende de openbaarheid van bestuur (Wet openbaarheid van bestuur), Memorie van Toelichting, Tweede Kamer, vergaderjaar 1986-1987, 19859, nummer 3, 29.*

Passive disclosure functions as an juridical instrument for the public to participate in the maintenance of governance and to control the activities of the government. The WOB obliges public authorities to provide information to the public when requested. When the request is formulated in a vague or broad way, the public authority is obliged to help the requester to specify what administrative information he needs. This is regulated in section 3.

Any person, Dutch or otherwise, can submit for a request for information. In theory, governmental information is always open, unless the WOB decides that the requested information is not eligible to make public.⁹⁰ The Act was amended in 2005 and implemented the EU requirements for the re-using and commercial exploitation of public sector information.⁹¹

The PRA of 1995

The PRA of 1995 is based on the main principle that all government records in public archives are freely accessible and available for consultation. This is regulated in section 14, except for some restrictions set out in sections 15, 16 and 17. To facilitate this, the PRA explicitly states in section 3 that archival records must be transferred and preserved not only in a proper and orderly state, but that they must also be easily accessible. The requirements that the government places to the 'orderly and accessible state' are laid out in section 20 of the Ministerial Regulation on Public Records: 'The caretaker makes sure that the archival system guarantees the accessible state of records, so that records can be found within a reasonable period of time by linking metadata and methods of disclosure'.⁹² The juridical term 'caretaker' used in the PRA is defined as the person that is authorized by public law to take care of archival records.⁹³ At municipalities this is the board of the major and aldermen (*college van Burgermeesters en Wethouders*).

⁹⁰ *Regelen betreffende de openbaarheid van bestuur (Wet openbaarheid van bestuur), Memorie van Toelichting, Tweede Kamer, vergaderjaar 1986-1987, 19859, nummer 3, 29.*

⁹¹ Bergmans, M., *FOI Legislation Compared. Public Access Regimes in the Netherlands, Ireland and Canada* (Master Thesis Archival Science, University of Amsterdam, 2008), 15.

⁹² Section 20 of the *Regeling van de Minister van Onderwijs, Cultuur en Wetenschap van 15 december 2009, nr. WJZ/178205 (8189), met betrekking tot de duurzaamheid en de geordende en toegankelijke staat van archiefbescheiden en de bouw en inrichting van archiefruimten en archiefbewaarplaatsen (Archiefregeling)*.

⁹³ PRA of 1995, section 1, subsection d and sections 23, 27, 30, 35, 40 en 41.

3.2.3. Procedures when making a request for information

There is a difference in requesting access to *information* or to *records*. Daalder explains that a *system of records* means that governmental institutions need to register all documents with the exception of sensitive information.⁹⁴ Simply this means that the public is entitled to make a request for or to consult records that are registered at public authorities. In contrast to the Eurovob and the UK who maintain a system of records, the Netherlands has a *system of information*. This means that the public cannot request or consult a specific document themselves, but only ‘information contained in documents’.⁹⁵

Where the requester under the WOB can only make a request for information, the PRA entitles the public to freely consult or request all government records of all government bodies stored at public archives after transfer themselves. Procedures in requesting information or archival records vary per archival institution, but usually the user can ask for information or consult archival records in any form. Access to some parts of archival collections can be restricted. In this case, special procedures are applied as can be found on the website of the National Archives for example.⁹⁶

The WOB is restricted to information about administrative matters and the public can only submit a request for information contained in documents that are in the possession of public authorities. Anyone can issue a request for any information held by administrative bodies. The reason for making a request is unimportant and cannot influence the decision to disclose or deny access. It is sufficient for the requester to mention the (administrative) topic he wants information about without knowing what specific documents to ask for.⁹⁷

Requests can be submitted in any form: orally, digitally or by the written word. The requester specifies the administrative matter or the document relevant to it about which he wishes information. When a request is too broadly or too vaguely expressed, the administrative body will ask to specify the request. A request for information shall be granted in accordance with the provisions of sections 10 and 11. If the request concerns documents held by an administrative authority other than that to which the application has been submitted, the requester will, if necessary, be referred to that authority. If the request was made in writing, it will be forwarded and the requester will be informed about this by the

⁹⁴ Daalder, E.J., *Toegang tot overheidsinformatie. Het grensvlak tussen openbaarheid en vertrouwelijkheid* (Amsterdam 2005), 336-337.

⁹⁵ WOB 1991, section 3.

⁹⁶ Website of the *Nationaal Archief*, consulted on 23-06-2013:

<http://www.nationaalarchief.nl/onderwerpen/openbaarheid-toegankelijkheid/inzage-beperkt-openbaar-archief>

⁹⁷ Bergmans, M., *FOI Legislation Compared. Public Access Regimes in the Netherlands, Ireland and Canada* (Master Thesis Archival Science, University of Amsterdam, 2008), 15 and 17.

administrative body. The decision on a request for information will be given verbally or in writing. Making a request under the WOB is free of charge, but some fees can be charged for the costs of photocopies.⁹⁸

The administrative body to which the request was sent is obliged to reply within four weeks whether his request is denied or granted. This deadline can be extended for a maximum of another four weeks, but the administrative body will inform the requester on this extension before the first deadline has expired.⁹⁹

Appeals are not regulated by the WOB, but there is a possibility of an internal interview with the head of the administrative body on base of the provisions of the General Law of Governance or to issue an complaint at the Ombudsman. When an internal interview is not satisfactory, the requester can bring the matter to court in a simple way. The court decision can be appealed before the Council of State (*Raad van State*).¹⁰⁰

3.2.4. Exemptions and exceptions

On what grounds disclosure can be denied, will be explained in this section. Like the WOB, the PRA maintains the principle ‘public, unless...’, except for the interests laid out in sections 15, 16 and 17. These interests outweigh the public interest and concern the protection of privacy, the security of the State and its allies, information about the environment and prevention of disproportionate advantage or disadvantage of private bodies, legal bodies or third parties.¹⁰¹

The exemptions listed above are shown as being more or less mandatory, but in reality they very often are not. In most public archives information that is not available due to one of the exemptions are nevertheless accessible under certain conditions. The user has to sign a form where he promises not to publish any of the information, or not at least before the archival institution has read the publication in advance. Private archives fall not under the PRA, so disclosure can be restricted in consultation with the archival institution for an unlimited period of time.¹⁰²

⁹⁸ WOB 1991, sections 3-5.

⁹⁹ WOB 1991, section 6.

¹⁰⁰ Bergmans, M., *FOI Legislation Compared. Public Access Regimes in the Netherlands, Ireland and Canada* (Master Thesis Archival Science, University of Amsterdam, 2008), 17. Bergmans notes that the Ombudsman does not have any legal power, but is considered an authority and mediates between government and citizens. Issuing a complaint to the Ombudsman does not force the public authority to reconsider its decision.

¹⁰¹ PRA 1995, sections 15-17.

¹⁰² Bergmans, M., *FOI Legislation Compared. Public Access Regimes in the Netherlands, Ireland and Canada* (Master Thesis Archival Science, University of Amsterdam, 2008), 20 and the website of the National Archives: <http://www.nationaalarchief.nl/onderwerpen/openbaarheid-toegankelijkheid/beperkingen-openbaarheid>.

If an administrative body decides that one of the interests mentioned in sections 15-17 can be applied to its archive, accessibility on the concerned documents will be restricted after transfer to the public archive. In a degree on restricting public access, which the administrative body has to make up itself, it has to be specified on what grounds and conditions access is denied and to what extent disclosure is permitted and for how long, because section 15 states that restriction on accessibility cannot be applied to records older than 75 years.¹⁰³ In case of restriction of access to information in order to protect the interests of the State and its allies, the 75-year rule can be extended by the cabinet.¹⁰⁴

In contrast to the PRA, the WOB mentions eleven exemptions. Also the WOB is based on the core principle ‘public, unless...’, which means that all information in the possession of administrative bodies are basically accessible, unless it falls under one of the categories in section 10. The exemptions listed in the WOB define both mandatory as discretionary exemptions. Information falling under mandatory exemptions are not accessible at all in contrast to discretionary exemptions. In this case the administrative body can decide that the general public interest is better served when the information is disclosed.¹⁰⁵

Information under the following mandatory exemptions are not to be disclosed at all when:¹⁰⁶

- a. this might endanger the unity of the Crown;
- b. this might damage the security of the State;
- c. the data concerned relate to companies and manufacturing processes and were furnished to the government in confidence by natural or legal persons.
- d. It concerns personal data as described in section 2 of the Privacy Act of 2000 (*Wet Bescherming Persoonsgegevens*).¹⁰⁷

Disclosure of information takes place insofar as its importance does not outweigh another seven discretionary exemptions listed in section 10, subsection 2.

¹⁰³ Website of the *Nationaal Archief*, consulted on 23-06-2013:

<http://www.nationaalarchief.nl/onderwerpen/openbaarheid-toegankelijkheid/beperkingen-openbaarheid>

¹⁰⁴ *PRA of 1995*, section 15.

¹⁰⁵ *Ibidem*, 18.

¹⁰⁶ *WOB 1991*, section 10, subsection 1.

¹⁰⁷ *Wet Bescherming Persoonsgegevens 2000*, 6 July 2000, *Stb.* 2000. 3.

3.3. The Practice: access to information in reality

3.3.1. Access under the PRA of 1995

The late J.H. Kompagnie, former head of Research at the National Archives in The Hague, stated that in daily practice dealing with public access legislation is respected, but pragmatism is applied when practical objections occur. Besides the PRA, he mentions that the archivist is also obliged to comply with the Privacy Act of 2000. Although this Act falls outside the scope of this research, it is worth mentioning, because most cases concerning accessibility in public archives deal with the protection of privacy. Under some conditions, restricted access to archives that contain personal information is granted.¹⁰⁸

Dealing with partly restricted open archives is a responsible job, but responsibility lies not at the archival institution alone. Also the user participates in this. Usually, the user has to fill in a sign in where he promises to keep the conditions and terms for access to restricted open archives. Every day, archivists try to keep the law and daily practice in balance, so that the law will be respected and practical problems can be solved in an efficient way in favor of writing history.¹⁰⁹

3.3.2. Access under the WOB of 1991

Access under the WOB has frequently led to debate in politics, press and society. An illustrative example is the speech of Minister Donner at the Day of the Freedom of the Press on 3 May 2011 as described in the main introduction. The *Open Oester Report* of political party *Groen Links* in 2005 stated that the public is not informed about their right to request for information or how to make a request. Even when a request is made, only 15-35 % is granted, mostly after appeal. Moreover, the exemptions are expressed in a vague manner and leave room for much interpretation. Decisions about requests for information sometimes lasted a few months up to a year. Therefore, the time for response on requests was restricted to the four weeks' period. Annually, only around 1,000 requests are made, mostly by journalists and attorneys.¹¹⁰

¹⁰⁸ J.H. Kompanie, 'Openbaarheid in de praktijk van alles dag', in: J. J. Kompagnie (ed.): *Jaarboek S@p 2006. Openbaarheid in historisch en hedendaags perspectief* (Den Haag 2008) 94-102, 97-99 and 102.

¹⁰⁹ Ibidem, 102.

¹¹⁰ R. Vleugels and W. Duyvendak, *Open de Oester*, 2005, consulted on 23-06-2013: http://www.wobverzoek.nl/archief/2005/07/open_de_oester.shtml

According to experts, the WOB is lightly used as described above. Mostly attorneys and journalists make use of their right to request for information. The majority of the public is unaware of their right to access official information. Furthermore, the lack of interest stem from media and NGOs' belief that filing requests could be considered to be disruptive to good relations with government bodies, no tradition of political research, a lack of sanctions, broad exemptions and poor archives.¹¹¹

In 2011 Donner announced some measures due to problems with the operation of the law. Donner said that improper and broad requests meant a lot of work for civil servants to search for the requested information. Mostly, they experience it more as an administrative burden than as a service to the public. Moreover, it frequently happens that one person sends the same FOI-request to several public authorities and demands the legal compensation when the administrative bodies fail to response on the request within four weeks. In this way, civil servants are unwilling to serve the public in their right to know. Therefore, increasing abuse and improper use of the WOB led to a proposal of *Groen Links* for revision of the law in 2012, in which a change in mentality at public authorities, a clear right of public access and measures against misuse of the WOB are advocated.¹¹²

Just recently, a documentary on EenVandaag, *De WOB als Tandeloze Tijger*¹¹³, once again mentioned the problems with the WOB. Experts like Roger Vleugels, Brenno de Winter and Pieter Klein of *RTL Nieuws* stated that requesters are frequently frustrated by a reluctant government to provide information. Deadlines are often exceeded, unjustified exemptions are used and if information is provided, this is mostly marked black so that little essential information for further research remains. In Vleugel's opinion, the WOB is the most slowest FOIA in the world due to ignorant civil servants and bad records management.

Brenno de Winter says that the Dutch government rather prefers secrecy than openness. When information is finally provided, the most parts are marked black. Ironically, the government still claims to have acted in a "transparent" way. Pieter Klein thinks the WOB is a fine law in itself, but it is in practice where things go wrong. Minister Ronald Plasterk, current Minister of Culture, Science and Education, was also asked for a reaction. He promised recovery and emphasized that the government is still willing to maintain the principle of "disclosure, unless...". He also referred to the proposal of *Groen Links* to revise

¹¹¹ Banisar, D., *Freedom of Information around the World. A Global Survey of Access to Government Information Laws* (Privacy International 2006), 111.

¹¹² Letter of Minister J.P.H. Donner to the Second Chamber concerning revision of the Open Government Act, 31 May 2011.

¹¹³ A documentary by Sander van 't Sas (reporter) and Jan Born (ed.) of EenVandaag, *De WOB als Tandeloze Tijger*, broadcasted on 16 May 2013: http://www.eenvandaag.nl/politiek/45853/de_wob_als_tandeloze_tijger

the Act, but it is still uncertain when the proposal will be actively discussed in Parliament.¹¹⁴ Even the national Ombudsman Alex Brenninkmeijer advocated an abolishment of the WOB.¹¹⁵

In this way, it can be concluded that the Dutch government is not compliant with the WOB in practice due to a lack of law enforcement, resistance by civil servants to facilitate passive disclosure and a low usage of Act by the public.

¹¹⁴ Mariko Peters of *Groen Links* who wrote the proposal pleads for a clear right to access to official information instead of merely receiving a 'favour' of the government when a request for information is granted.

¹¹⁵ *NRC*, 'Ombudsman wil Wob afschaffen – 'alle informatie openbaar maken', 30-05-2013: <http://www.nrc.nl/nieuws/2013/05/30/ombudsman-wil-wet-openbaarheid-bestuur-afschaffen/>.

Chapter four

The United Kingdom

4.1. The road to FOI legislation

Although the freedom of the press and freedom of expression in the UK have a strong and long tradition as described in chapter two, the UK does not have a constitutional bill of rights, so the right to information does not find constitutional expression.¹¹⁶ So, until 2000 no FOIA did exist. Britain's political culture was permeated by secrecy and scandal. Excessive secrecy had subverted democratic processes. Plans for a FOIA had been discussed since the seventies, but the Act of Parliament followed some twenty years of debate. It took so long for the FOIA to be passed, because MP's in opposition were eager to champion the cause of FOI, but once in power their eagerness faded dramatically. Moreover, the government which had been traditionally extremely secretive refused to adopt a FOIA, despite a long campaign by local civil society groups. Finally, after a string of exceptionally embarrassing scandals, the Conservative government bowed to public pressure and introduced the Code of Practice on Access to Government Information on 4 April 1994. This was the precursor to the FOIA of 2000.¹¹⁷

When the Labour Party came to power in 1997 it turned British political and legislative infrastructure upside down. One of the election promises was to adopt the right to information, so Labour published a very liberal White Paper.¹¹⁸ One of the most important points was the creation of the function of an Information Commissioner (IO) who would be responsible for FOI and data protection. However, the bill was not introduced for three more years. The new government began to dislike open government, because it experienced after a series of incidents that FOI benefits the people, but it does not always benefit politicians. Soon the government had abandoned its 1997 promises and ministers were allowed to veto the rulings of the IO. The numbers of exemptions increased and legislation swelled in size and complexity.¹¹⁹

Lobbyists worked hard to save what they could from the bill and some important concessions were made. Debates in the House of Lords and Commons committed the

¹¹⁶ Mendel, T., *Freedom of Information: a Comparative Legal Survey* (UNESCO, Paris 2008), 119.

¹¹⁷ Brooke, H., *Your Right to Know. A Citizen's Guide to the Freedom of Information Act* (London 2007), 32.

¹¹⁸ A White Paper can be compared with a proposal for a new law.

¹¹⁹ *Idem*.

government to more liberal interpretations of the exemptions, but the government refused to budge on most of the bill, threatening to withdraw it if substantial changes were made. FOI supporters agreed that a weak FOIA was better than nothing, so the Freedom of Information Act was passed on 30 November 2000, but came into force on January 2005, because agencies needed the time to 'prepare'. In January 2004 the law was amended and the Independent Review of Government Communications recommended on how to rebuild between the government, the media and the public. It recommended the government to abolish the ministerial veto, to replace blanket exemptions with qualified ones. Also, one of the recommendations was to commit more to proactive disclosure. Therefore, compulsory Publication Schemes were to be created by every public authority. However, Tony Blair declined to change the law, preferring instead to see 'how the act bedded down'.¹²⁰ Hazell, Worthy and Glover conclude that the FOIA has not shaped politics and the political system, but that equally politics and the political system have shaped FOI.¹²¹

Besides the FOIA of 2000 there is also the PRA of 1967 that replaced the part of the PRA of 1958 concerning the period of disclosure after transfer.¹²² The current PRA regulates that public records have to be transferred thirty years after creation and are open to public inspection. This is also called the Thirty-Year rule. In January 2005, the FOIA of 2000 replaced those parts of the PRA that related to access to records.¹²³

4.2. Jurisdiction: legislation on FOI

4.2.1. The scope of the PRA of 1958/1967 and the Freedom of Information Act of 2000

The PRA of 1958/1967 was created 'to make provision with respect to public records and the Public Record Office'.¹²⁴ The PRA covers records in private and public archival collections of The Public Record Office, Her Majesty's Government, government department offices, commissions or other bodies under HMG in the UK, courts and tribunals, and other bodies if

¹²⁰ Brooke, H., *Your Right to Know. A Citizen's Guide to the Freedom of Information Act* (London 2007), 33.

¹²¹ Hazell, R., B. Worthy and M. Glover, *The Impact of the Freedom of Information Act on Central Government in the UK. Does FOI Work?* (London 2010), 251.

¹²² For the PRA of 1958 is not entirely replaced by the PRA of 1967, the Act will be referred to as the PRA of 1958/1967.

¹²³ Website of the National Archives, consulted on 07-06-2013: <http://www.nationalarchives.gov.uk/information-management/legislation/history-of-pra.htm>. Other legislation that deals with access, but will not be further discussed, because it falls outside the scope of this paper are: *the Official Secrets Act of 1989, the Environmental Information Regulations of 2004, Access to Medical Records Act 1990, The Data Protection Act 1998 and the Privacy and Electronic Regulations 2003*. Scotland and Northern-Ireland have their own FOIA's, since they have their 'own' parliament since 1998.

¹²⁴ PRA 1958/1967, preamble.

their own legislation brings them within the PRA or they have been brought within its scope in some other way, e.g. the British Council.¹²⁵

The main difference between the FOIA of 2000 and the PRA of 1958/1967 is that the FOIA replaced those parts of the PRA that related to access to records in January 2005. This means that all exemptions described in the PRA have been fully replaced by the FOIA of 2000. Also the old regime, under which records were closed for thirty years unless the Lord Chancellor set a longer or a shorter period, has effectively been replaced by the FOI access regime.¹²⁶ So, public records long before they have become historical (thirty years after creation) whether they have been transferred or remain with the public authority fall under the FOIA.¹²⁷

The FOIA regulates the FOI of the UK on a national level and maintains the principle of disclosure of all documents unless there is a good reason for secrecy. The ‘right to access’ is recorded in section 1 of the law. The fundamental feature is that any person, any individual, any company, in fact in the world can make a request to any public authority. A public authority could be defined as any organization providing a necessary public service or funded primarily by public money.¹²⁸ Section 4 of the FOIA defines what is meant by a public authority.¹²⁹

The UK has over 100,000 public authorities and includes government departments, local authorities, police forces, the public education service and every part of the National Health Service. The vast majority of organizations must be listed in Schedule 1 at the end of the FOIA for the Act to apply as described in section 4 of the Act.¹³⁰

The IO is created by the law entirely outside the government, and has a combined role of promoting public access to official information and to protect personal information. The IO is required to supervise and enforce FOI legislation. The Information Commissioner’s Office

¹²⁵ Website of the National Archives of the UK, consulted at 07-06-2013:

<http://www.nationalarchives.gov.uk/information-management/legislation/pr-faqs.htm#what-is-act-for>.

¹²⁶ ‘History of the Public Records Act’, consulted on 23-06-2013:

<http://www.nationalarchives.gov.uk/information-management/legislation/history-of-pra.htm>

¹²⁷ Brooke, H., *Your Right to Know. A Citizen’s Guide to the Freedom of Information Act* (London 2007), 38.

¹²⁸ *Ibidem*, 34.

¹²⁹ (a) body or an office is established by virtue of Her Majesty’s prerogative or by an enactment or by subordinate legislation, or

(b) body or an office is established in any other way by a Minister of the Crown in his capacity as Minister, by a government department or by the National Assembly for Wales.’

¹³⁰ Thomas, R., *Freedom of Information. The UK Experience*, the eighth Ketelaarlezing held on 1 October 2008, 7.

(ICO) has an independent status and is directly accountable to Parliament and has a quasi-judicial tenure. The IO has the same sort of tenure as a judge of the High Court.¹³¹

4.2.2. Rights and obligations of the public and the government

The main right of the public is access to information from all public authorities as stated in section 1 of the FOIA. The Act provides the public with three main formal ways for access to official information. The first is proactive disclosure of specified information under a FOI Publication Scheme. In section 19 the Act says that every public body must have a Publication Scheme approved by the ICO which sets out what they will disclose on a voluntary basis without being asked for it.¹³²

Secondly, the Act obliges the government to passive disclosure. Information must be disclosed if a request is made for it, unless it is withheld under one of the exemptions under the Act. The public is entitled to all information held at public authorities created at any time, not since the FOIA was passed.¹³³

Thirdly, public authorities have the legal duty to provide advice and assistance to those making the request and there is a code of practice (known as the 45 section Code) setting out in some detail how public authorities are encouraged to handle requests which they receive. Finally, the National Archives and other archival depositories have the duty to disclose records which have been retained by the government after thirty years. As noted above, the PRA only provides the facilities to the public for the consultation of (historical) public records, but access to them falls under the FOIA.¹³⁴

As described above, the appointment of an IO can also be seen as a duty of the government to supervise and enforce FOI legislation.¹³⁵

4.2.3. Procedures when making a request for information

The UK maintains both a system of information and records, for the requester can apply to consult a document and may decide in what form he wishes to receive the requested information. Section 1 of the FOIA says that any person can make a request for information to

¹³¹ Ibidem, 2-3.

¹³² Thomas, R., *Freedom of Information. The UK Experience*, the eighth Ketelaarlezing held on 1 October 2008, 7 and 9.

¹³³ Idem.

¹³⁴ Idem.

¹³⁵ *FOIA 2000*, sections 46 , 49, 50-56.

a public authority created at any time. No formal motivations or reasons for making a request is needed. There is no formal application process, set requirement or set procedure. Any request in writing (including email and fax) can be classed as a request under the FOIA even without mentioning the law specifically. The only requirement is that the information must be currently held by the authority. The public can simply make a request specifying what information they would like to see. Within twenty working days following the date of receipt the public authority has time to respond. The public authority must either provide the information or give reasons for not supplying the information inside twenty working days, but this period can be extended if there are public interest considerations. Then a reasonable time is provided for reflection as to whether the request should be granted. When the authority cannot release the information because it concerns a third party or it does not have the information, the authority is obliged to inform the requester about this or to refer him to the right organization. No fees are payable for the vast majority of the cases. When a request is denied, there are several possibilities to make an appeal, e.g. to the IO, the Information Tribunal or the High Court.¹³⁶

4.2.4. Exemptions and exceptions

The definition of information outlined in section 84 of the FOIA is ‘information recorded in any form’. This means that the public can request for written material, photographs, plans, videos and sound recordings, data on computer, etc. There is no requirement to disclose unrecorded information, so it is possible for public authorities to leave controversial items unrecorded.¹³⁷

As noted before, the FOIA maintains the principle disclosure of all information, unless other interests outweigh the public interest. The Act knows many descriptive categories of exemptions outlined in *Part II Exempt Information*, section 21-44 of the law. In fact, there are over twenty-four exemptions. The exemptions are discretionary, which means that public authorities do not have to use them. They could release all information if they want.¹³⁸

Ambiguously and very confusing, a distinction is made between *qualified* and *absolute* exemptions laid out in sections 21 to 44. Eight of the main exemptions are absolute and sixteen are qualified. Qualified means that there is a ‘public interest override’. This means

¹³⁶ FOIA 2000, section 1 and 8-11 and R. Thomas, *Freedom of Information. The UK Experience*, the eighth Ketelaarlezing held on 1 October 2008, 9 and 12-13.

¹³⁷ Brooke, H., *Your Right to Know. A Citizen's Guide to the Freedom of Information Act* (London 2007), 35.

¹³⁸ Ibidem, 44.

that there must still be disclosure -even though the qualified exemption applies- unless the public interest in the exemption outweighs the public interest in disclosure. There is a requirement for public bodies to outweigh the competing public interests in a public interest test. For example, tests are required for information like ‘national security’, ‘prejudicial to law enforcement’, ‘relates to the formulation of government policy’ or ‘prejudicial to the effective conduct of public affairs’. Public authorities can follow the guidelines provided by the IO, and decisions of the Information Tribunal and the courts.¹³⁹ Absolute exemptions are mandatory and no public interest test is required for withholding information. This makes it difficult to counter and open abuse them.

Although the FOIA replaced all parts of the PRA concerning access, the public can still consult documents or information at public archives. Records that were closed for extended periods for reasons before the FOI Act came into force in January 2005, remain closed only where an exemption in the FOIA applies. Most of the records transferred after January 2005 are open; those which are closed have only been closed under an exemption in the FOIA. If a user wants to see information in a closed record, he can submit a FOI request asking for the record to be reviewed. The archivist then will re-examine the record in the light of FOI, and if no exemptions apply, the record will be opened.¹⁴⁰

4.3. The Practice: access to information in reality

4.3.1. Access under the FOIA of 2000

In this section the PRA of 1958/1967 will not be discussed, for the parts that related to access have been completely replaced by the FOIA. Toby Mendel states that the ‘very broad regime of exceptions, referred to in the Law as exemptions, reflecting an ongoing preoccupation with secrecy in government’ turns out to be ‘the real Achilles heel of the Law.’¹⁴¹

The public interest test is good *an sich* in favor of disclosure, but is undermined in two ways according to Mendel. First, most exemptions are absolute meaning that the public interest does not apply to them. Second, the public interest override can be weakened by section 53. Here the ‘accountable person’, of any of the public bodies covered by this section (normally a minister), is allowed to sign a certificate within twenty days of a decision by the

¹³⁹ Thomas, R., *Freedom of Information. The UK Experience*, the eighth Ketelaarlezing held on 1 October 2008, 10-11. Qualified exemptions are set out in sections 22, 24, 26-31, 33, 35-39, 42 and 43 of the FOIA.

¹⁴⁰ Website of the National Archives of the UK, consulted at 07-06-2013:

<http://www.nationalarchives.gov.uk/information-management/legislation/public-records-system.htm>.

¹⁴¹ Mendel, T. *Freedom of Information: A Comparative Legal Survey* (UNESCO, Paris, 2008), 122.

IO that information should be disclosed in the public interest. By this certificate the enforcement powers of the IO are undermined, because the accountable person voids the IO's decision: 'he has on reasonable grounds formed the opinion that, in respect of the request or requests concerned, there was no failure to comply with the law'.¹⁴² This had led to a great public interest debate in which how to interpret the exemptions described in the law.¹⁴³

However, Richard Thomas, the former IO,¹⁴⁴ thinks that the British government has come far in granting FOI to civilians: 'There has been some recalcitrance, some reluctance in some areas, but for the most part, I pay tribute to the way that the British public administration has responded to this challenge. There has been a very, very strong public appetite with very high volumes. We do not know exactly how many requests have been made, but at least 300,000 requests have been made in the first three years, and somewhere between 60 and 80% of those are granted without any problem whatsoever.'¹⁴⁵

Thomas continues on to explain that the ICO receives quite a small number of complaints compared to the number of requests. In 2008 8,900 complaints were received, 7,900 cases of those have resulted in 1,000 Decision Notes and 100,000 requests were received at an annual basis. Furthermore, a study from 2004 to 2007 shows that the FOIA has impact on the general public. Knowledge of what public authorities do, increased, as well as confidence and trust. The promotion of accountability and transparency has increased as well. Moreover, the FOIA has also a positive impact on records management.¹⁴⁶

Still, there are problems and challenges. Sometimes the public and media are disappointed when information is not given where confidentiality is preferred for the ICO does not promote openness at any price. Furthermore, the ICO has to become temporary experts very quickly due to a variety of issues, the wide range of subjects and all the different levels of public administration. This leads to delays at the ICO and public authorities that can be very disappointing and frustrating for people. The bureaucracy and the burdens of compliance with the law sometimes make that most cases have to wait six months before the ICO can start on them.¹⁴⁷

This practice shows that also the British government fails to comply with the law. The FOIA 2000 has achieved greater transparency and stronger accountability, but not better

¹⁴² Ibidem, 123.

¹⁴³ Thomas, R., *Freedom of Information. The UK Experience*, the eighth Ketelaarlezing held on 1 October 2008, 26.

¹⁴⁴ Christopher Graham is now the current IO since June 2009.

¹⁴⁵ Thomas, R., *Freedom of Information. The UK Experience*, the eight Ketelaarlezing held on 1 October 2008, 15.

¹⁴⁶ Ibidem, 20-23.

¹⁴⁷ Ibidem, 24-27.

decision-making, a better public understanding or greater public participation. As for public trust, because of the way the media report FOI stories, it has served to reduce trust in the government.¹⁴⁸

¹⁴⁸ Hazell, R., B. Worthy and M. Glover, *The Impact of the Freedom of Information Act on Central Government in the UK. Does FOI Work?* (London 2010), 266.

Chapter five

India

5 .1. The road to FOI legislation

The road to FOI legislation in India took quite another path compared to that of most countries. Where FOI is imposed by Act of Parliament, in India the people themselves fought for their right to know, but this took several decades.¹⁴⁹ Due to acceptance of the Universal Declaration of the Rights of Men by the UN in 1948, the Indian government added in 1950 a section to the Constitution that the people of India was given the right of ‘freedom of speech and expression’.¹⁵⁰ This led to a juridical breakthrough when the Supreme Court of India stated in 1975 that: “The people of this country have a right to know every public act, everything that is done in a public way, by their public functionaries. (...) They are entitled to know how the particulars of every public transaction in all its bearing. The right to know which is derived from the concept of freedom of speech, though not absolute, is a factor which should make one wary when secrecy is claimed for transactions which can, at any rate, have no repercussions on public security.”¹⁵¹ Later civil society organizations based themselves frequently on this statement in their battle for FOI.

In the 1980s a small *grassroot* organization developed in the desert of Rajahstan under the lead of Aruna Roj. This movement fought for the welfare of the local people. In 1990 this movement was recalled *Mazdoor Kisan Shakti Sangathan* (MKSS) and fought for an increase of the minimum wages of poor workmen in the country side. In 1994 the MKSS started to organize *jan sunwais* (public hearings) and soon the call for FOI was translated in their demand that ‘copies for all documents related to public works are made available to the people, for a people’s audit’. When one gained those documents it turned out that civil

¹⁴⁹ M. Bergmans, E. Florijn, M. Heijmans-van Bruggen, J. Romijn-Wixley, A. de Vries, ‘Voorbij het Gemeenebest. Een onderzoek naar de openbaarheidsregimes in Groot-Brittannië, India en Zuid-Afrika’, in: J. J. Kompagnie (ed.): *Jaarboek S@p 2006. Openbaarheid in historisch en hedendaags perspectief* (Den Haag 2008) 137-164, 146.

¹⁵⁰ The Constitution of India, section 20.

¹⁵¹ Cited in M. Bergmans, E. Florijn, M. Heijmans-van Bruggen, J. Romijn-Wixley, A. de Vries, ‘Voorbij het Gemeenebest. Een onderzoek naar de openbaarheidsregimes in Groot-Brittannië, India en Zuid-Afrika’, in: J. J. Kompagnie (ed.): *Jaarboek S@p 2006. Openbaarheid in historisch en hedendaags perspectief* (Den Haag 2008) 137-164, 147.

servants kept money for themselves that was meant for the workmen and food to the poorest.¹⁵²

The MKSS was supported by many groups in Rajasthan and received national attention by the media. In 1997 the *National Campaign for People's Right to Information* (NCPRI) was founded which represented the MKSS and other groups. They urged fiercely to national legislation on FOI. First, legislation was passed in the Federal States. Many cases of corruption were revealed and the grassroot organizations helped the poor in the slums with FOI-requests about their conditions at the public authorities of Delhi.¹⁵³

So, at the end of the 1990s social motives inspired Indian politics to prepare a national FOIA. A Committee under the lead of Hari Dev Shourie designed a concept proposal for a FOIA and was the precursor to the *Freedom of Information Bill* in 2000. The FOIA was passed in 2002, but never came into force. The law received many negative reactions by critics. The most frequently heard complaint was that there were too many exemptions and there was no enforcement rule included for authorities that do not comply with the law. Organizations made clear that the law should be revised, so at the end of 2004 the new *Right to Information Act* was sent to Parliament. This led to fierce debates and more than 100 amendments, but the Bill was signed by the President on 15 June 2005. The RTIA came into effect on 13 October 2005 and replaced the FOIA of 2002.¹⁵⁴

The scope of the RTIA is limited to citizens (section 3) and also includes a geographic limitation (section 1). The Act applies to whole of India, apart from the States of Jammu and Kashmir which have their own FOIA's for they have a special constitutional status.¹⁵⁵ The *Public Records Act of 1993* that was enacted on 22 December 1993 'to regulate the management, administration and preservation of public records'.¹⁵⁶

¹⁵² H. Mander and A. S. Joshi, *The movement for right to information in India: People's power for the control of corruption*.

¹⁵³ M. Bergmans, E. Florijn, M. Heijmans-van Bruggen, J. Romijn-Wixley, A. de Vries, 'Voorbij het Gemenebest. Een onderzoek naar de openbaarheidsregimes in Groot-Brittannië, India en Zuid-Afrika', in: J. J. Kompagnie (ed.): *Jaarboek S@p 2006. Openbaarheid in historisch en hedendaags perspectief* (Den Haag 2008) 137-164, 147.

¹⁵⁴ Ibidem, 147-148.

¹⁵⁵ Mendel, T. *Freedom of Information: A Comparative Legal Survey* (UNESCO, Paris, 2008), 56. Other legislation besides the RTIA is the *Official Secrets Act 1923* (which will not be further discussed) and *The Public Records Rules 1997* (PRR), part of the PRA, regulates access of public and private records at the Indian National Archives, other archival depositories or still under the custody of public authorities.

¹⁵⁶ PRA of 1993, preamble.

5.2. Jurisdiction: FOI legislation

5.2.1. The scope of the Right to Information Act of 2005 and the PRA of 1993

Both the Right to Information Act 2005 and the PRA of 1993 (including the PRR) regulate access to official information. The RTIA regulates access to official information ‘which is held by or under the control of any public authority’.¹⁵⁷ The right to information is recorded in section 3. Indian citizens have the right to ask for information not only from Central Government public authorities, but also from public authorities under the jurisdiction of the Federal States. This includes local level bodies (*panchayats*).¹⁵⁸ The Act covers all public authorities of the legislative, the juridical and the executive powers, and organizations that are founded by an Act of Parliament or the State Legislature. Furthermore, the Central Government or the State Government can decide which other organizations fall under the Act. In some cases also private bodies.¹⁵⁹ Therefore the coverage of government bodies under the RTIA is quite large.

One of the major objectives of the RTIA is to promote transparency and accountability in the working of every public authority by enabling citizens to access information held by or under the control of public authorities as is described in the preamble of the law. The focus is entirely on the people’s right to information in the context of the fight against corruption. The Act states that ‘democracy requires an informed citizenry of information which are vital to its functioning and also contain corruption and to hold Governments and their instrumentalities accountable to the governed’.¹⁶⁰

According to section 22 the law overrides *the Official Secrets Act 1923* and other legislation concerning accessibility. On some grounds explained in section 8 some information is not accessible for civilians. Some government bodies do not fall under the Act such as intelligence services and national security, and are listed in section 24 and ‘the second schedule’.

The PRA of 1993 sets a thirty-year rule for access to archives. The PRR explains how to implement the PRA in practice. The PRA and the PRR regulate both the access to

¹⁵⁷ RTIA 2005, section 2, subsection j.

¹⁵⁸ Banisar, D., *Freedom of Information around the World. A Global Survey of Access to Government Information Laws* (Privacy International 2006), 85.

¹⁵⁹ M. Bergmans, E. Florijn, M. Heijmans-van Bruggen, J. Romijn-Wixley, A. de Vries, ‘Voorbij het Gemenebest. Een onderzoek naar de openbaarheidsregimes in Groot-Brittannië, India en Zuid-Afrika’, in: J. J. Kompagnie (ed.): *Jaarboek S@p 2006. Openbaarheid in historisch en hedendaags perspectief* (Den Haag 2008) 137-164, 148.

¹⁶⁰ RTIA 2005, preamble.

(transferred) public and private records at the National Archives and other archival depositories.¹⁶¹

5.2.2. Rights and obligations of the public and the government

The RTIA 2005

The RTIA regulates access to official information for all Indian people as recorded in section 3 of the law. Detailed obligations of public authorities are outlined in section 4. First, proactive and passive disclosure are both stimulated by obliging the authorities to ‘maintain all its records duly catalogued and indexed in a manner and form which facilitates the right to information under this Act’. All records have to be digitalized, so that they are connected through a national network all over the country on different systems and access is facilitated.¹⁶² Information about their organization and records management have to be made public in a way which is easily accessible to the public.¹⁶³

Second, public authorities have the duty to facilitate passive disclosure by designating Public Information Officers (PIOs). PIOs deal with requests for information, examine if the requested information may be disclosed and are responsible for providing the requested information. The Central Government employs also an Assistant Public Information Officer (APIO) who is not tied to a specific public body. Both the PIOs and APIOs deal with requests for information and provide assistance to the applicant.¹⁶⁴

Thirdly, the Central Government and State Governments have the duty to proactively communicate to the public that it is their right to make a request for information. In this way, educational programmes and *User Guides* are to be published and developed, so that the public know their right. Moreover, the law obliges the government to train POIs and APOIs for this purpose.¹⁶⁵

Furthermore, a Central Information Commission (CIC) or the State Information Commission (SIC) are installed by the government in the Act and are obliged for receiving the complaints of requesters and to examine them. The IC and the CIC are independent institutions on a national and regional level.¹⁶⁶

¹⁶¹ *PRA 1993*, section 3, subsection m and p, and sections 11-12. *PRR 1997*, sections 10 and 11.

¹⁶² *RTIA 2005*, section 4, subsection a.

¹⁶³ *RTIA 2005*, section 4, subsection b-d.

¹⁶⁴ *RTIA 2005*, section 5.

¹⁶⁵ *RTIA 2005*, section 26.

¹⁶⁶ *RTIA 2005*, sections 18-20.

The PRA of 1993

In order to make public records accessible to the public also the PRA of 1993 obliges 'records creating agencies' to nominate one of its officers as records officers to discharge the functions under the Act. The records officer is responsible for proper arrangement, maintenance and preservation of public records under his charge.¹⁶⁷ One of his duties is to 'grant to any person access to any public record in its custody in such manner and subject to such conditions as may be described', which means 'prescribed by rules made under this Act'¹⁶⁸. However, it becomes not really clear what is precisely meant by this section. Does the PRA overrides the RTIA on this matter, for access here is 'prescribed by rules made under this Act'? It seems unlikely, because the RTIA clearly deals with public records held at public authorities. Anyhow, it is unclear how to interpret this section. Also the website of the National Archives, the PRA or other publications do not give any explanation about this topic.

The records officer acts under the direction of the Director General, the head of the National Archives and who is appointed by the Central Government. The Director General is responsible for a variety of functions outlined in section 3, such as 'regulating access to public records' and 'providing authenticated copies, or extracts from, public records'.

Section 11, subsection 2 says that 'any record referred to in sub-section (1)' can be made 'available to any bona fide research scholar.' The PRA maintains the principle that any person can consult public records at records creating agencies and archival depositories on basis of good trust. Section 12 adds that 'all unclassified public records as more than thirty years old and are transferred to the National Archives of India or the Archives of the Union Territory may be, subject to such exceptions and restrictions as may be prescribed made available to any bona fide research scholar.'

5.2.3. Procedures of how to make a request for information

Procedures for making a request for information are recorded in sections 6 to 11 of the RTIA, from which sections 8-11 deal with exemptions and procedures in case a request is denied.. India maintains both a system of records and information system, because the public can

¹⁶⁷ PRA 1993, section 5 and 6.

¹⁶⁸ PRA 1993, section 2, subsection d and section 12.

apply to consult a document and may decide in what form they wish to receive the requested information.¹⁶⁹

As noted earlier, requests must be made at the PIO. The requester has to make a request in writing or Hindi or in the official language of the area in which the application is being made. The PIO examines if the request can be granted and is responsible for providing the information. When the requested information is not in the possession of the public authority, the PIO must communicate this to the requester and forward the request to the right organization. The deadline for the PIO to reply on the request is thirty working days. When the request is forwarded to another authority the deadline is thirty-five working days. When information is requested in case of emergency, the information must be provided within two days.¹⁷⁰ Requests are not free of charge.¹⁷¹

When a request is denied, civilians can turn with their complaints to the Central Information Commission (CIC) or the State Information Commission (SIC). The Information Commissions are responsible for receiving the complaints of requesters and to examine them. Requesters can make an appeal to the Information Commissions when their request for information is denied by the PIO. The Information Commissions have the same status as the civic court. The Information Commissions are also authorized to fine PIOs and AIOs with 250 up to a maximum of 25,000 rupees a day when the deadlines are not maintained.¹⁷²

When the public wishes to consult public records at the National Archives they have to make a request to the Director General. The National Archives of India and other archival depositories are available for use of `bona fide` research. Access to the records in the National Archives of India is governed by the provisions of the PRR of 1997.¹⁷³

5.2.4. Exemptions and exceptions

India maintains the principle that information in the possession of the government is accessible, unless other interests of the State or of third parties outweigh the public interest. In

¹⁶⁹ RTIA 2005, section 7, subsection b, clause 9.

¹⁷⁰ M. Bergmans, E. Florijn, M. Heijmans-van Bruggen, J. Romijn-Wixley, A. de Vries, 'Voorbij het Gemeenebest. Een onderzoek naar de openbaarheidsregimes in Groot-Brittannië, India en Zuid-Afrika', in: J. J. Kompagnie (ed.): *Jaarboek S@p 2006. Openbaarheid in historisch en hedendaags perspectief* (Den Haag 2008) 137-164, 149 and sections 5, 7 and 24 of the RTIA.

¹⁷¹ M. Bergmans, E. Florijn, M. Heijmans-van Bruggen, J. Romijn-Wixley, A. de Vries, 'Voorbij het Gemeenebest. Een onderzoek naar de openbaarheidsregimes in Groot-Brittannië, India en Zuid-Afrika', in: J. J. Kompagnie (ed.): *Jaarboek S@p 2006. Openbaarheid in historisch en hedendaags perspectief* (Den Haag 2008) 137-164, 149.

¹⁷² Ibidem, 150 and RTIA 2005, sections 12-14 and 26.

¹⁷³ Idem and sections 10-11 of the PRR 1997.

section 8 of the RTIA ten exemptions are outlined. These concern matters like the security of the State, commercial confidence or personal data. Disclosure of information can also be denied on grounds of copyright on information that is under the custody of the government, but is not created by the government itself. In case of information of third parties, the public authorities need to consult them before disclosure. Information that has been sent to Parliament or legislative powers are always open to the public. At each request, public authorities still have to consider if the public interest outweighs the exemptions. However, it is not specified in what way. Thus, the exemptions are not absolute and can therefore be regarded as discretionary.¹⁷⁴

The PRR of 1997 and the PRA of 1993 explain in sections 10 and 11 under which conditions access to public and private records is regulated. Section 10 of the PRA prevents public records ‘bearing security classification’ to be transferred to the National Archives or the Archives of the Union Territory. The PRR therefore obliges the records officer to ‘evaluate and downgrade classified records’. This is done every fifth year and a report of this is sent to the Director General. If classified records have been downgraded and are appraised for permanent value, they can be transferred to the National Archives and be disclosed. In section 11 the PRR explains on what grounds the Director General may refuse access to public records for ‘bona fide’ consultation.

5.3. The Practice: access to information in reality

5.3.1. Access under the RTIA 2005

Siddharth Srivastava wrote in the Jakarta Post: “In the few months of existence, the Right to Information (RTI) Act has already engendered mass movements in the country that is bringing the lethargic, often corrupt bureaucracy to its knees and changing power equations completely”.¹⁷⁵ The initial indications are that the implementation of the law has been a success, although there were reports of bureaucratic resistance.¹⁷⁶

In July 2006, around 700 organizations campaigned to make the Indian people conscious of their right to know and to assist them with making a request for information.

¹⁷⁴ M. Bergmans, E. Florijn, M. Heijmans-van Bruggen, J. Romijn-Wixley, A. de Vries, ‘Voorbij het Gemenebest. Een onderzoek naar de openbaarheidsregimes in Groot-Brittannië, India en Zuid-Afrika’, in: J. J. Kompagnie (ed.): *Jaarboek S@p 2006. Openbaarheid in historisch en hedendaags perspectief* (Den Haag 2008) 137-164, 151 and sections 9 and 11 of the RTIA.

¹⁷⁵ S. Srivastava, ‘Right to Information Act. India’s magic wand and against corruption’, in: *The Jakarta Post*, 31 August 2006: www.asiamedia.ucla.eu/article.asp?parentid=52046.

¹⁷⁶ Mendel, T. *Freedom of Information: A Comparative Legal Survey* (UNESCO, Paris, 2008), 56.

Information centers were founded at important government bodies in 47 cities. This led to 14,000 requests for information. Also the government acted proactively in informing the people about their rights and managed to resolve information requests within the thirty-day period.¹⁷⁷ Nowadays a range of actors, varying from villagers to urban elites, and for a wide range of purposes, have found their way to the public authorities to make a request for information. A number of studies, completed in 2007-2009, showed that two millions requests have been made in the first two and a half years and 86,000 appeals, from which 50,000 were disposed.¹⁷⁸

However, the same surveys indicated three main problems with implementation of the law: low levels of awareness about the law, a poor administrative will to implement the law and a lack of support from the government for Information Commissions. Requirements for proactive disclosure of information are often ignored and mechanisms for enforcing the new law are hindered by a growing number of complaints and appeals of the public.¹⁷⁹ Moreover, civil servants claim that requests are made to blackmail them. In other cases civilians asked for too much information to be able to handle within thirty working days. Furthermore, the government found out that records concerning internal statements ('file notings') are excluded from FOIAs in other countries, so that the government has announced to make an amendment. According to the government, politics would otherwise not feel free to exchange ideas on policy.¹⁸⁰

In this way, access to official information in India remains a game of forces between the government, the bureaucracy and mass movements. The RTIA has many gaping holes in practice due that 40 % of the population is illiterate and many belong to oppressed social groups. Mismanagement and systematic corruption still prevail high in public authorities and Indian bureaucracy, whose fundamental features were established during the era of British colonial rule, are very powerful, and share the British bureaucracy's penchant for

¹⁷⁷ M. Bergmans, E. Florijn, M. Heijmans-van Bruggen, J. Romijn-Wixley, A. de Vries, 'Voorbij het Gemenebest. Een onderzoek naar de openbaarheidsregimes in Groot-Brittannië, India en Zuid-Afrika', in: J. J. Kompagnie (ed.): *Jaarboek S@p 2006. Openbaarheid in historisch en hedendaags perspectief* (Den Haag 2008) 137-164, 152.

¹⁷⁸ Mendel, T. *Freedom of Information: A Comparative Legal Survey* (UNESCO, Paris, 2008), 56 and A. Roberts, 'A Great and Revolutionary Law? The First Four Years of India's Right to Information Act', in: *Public Administrative Review* (revised on 12 March 2010) 1. Electronic copy available at: <http://ssrn.com/abstract=1527858>.

¹⁷⁹ Idem.

¹⁸⁰ M. Bergmans, E. Florijn, M. Heijmans-van Bruggen, J. Romijn-Wixley, A. de Vries, 'Voorbij het Gemenebest. Een onderzoek naar de openbaarheidsregimes in Groot-Brittannië, India en Zuid-Afrika', in: J. J. Kompagnie (ed.): *Jaarboek S@p 2006. Openbaarheid in historisch en hedendaags perspectief* (Den Haag 2008) 137-164, 153.

secretiveness.¹⁸¹ Still, public authorities and civil society organizations continue to develop innovations in practice that may be useful for other developing countries adopting similar FOI legislation.¹⁸²

5.3.2. Access under the Public Records Act of 1993

In 2009 a meeting of a Review Panel to review the workings of the PRA and the PRR took place. It turned out that records creating agencies did not take the PRA that seriously and records management had not been given the due importance for efficient management of public records. Good records management holds the key to access to records. If records management is neglected, transparency, accountability, effective and responsive government are impossible. Because records creating agencies do not respond proactively to the endeavor of the National Archives to evolve a sound records management program, the Central Government decided to review and amend the PRA and the PRR to make them more effective in order to facilitate better accessibility to official information for citizens and civil servants.¹⁸³

¹⁸¹ A. Roberts, 'A Great and Revolutionary Law? The First Four Years of India's Right to information Act' (revised 12 March 2010), 2. Electronic copy available at: <http://ssrn.com/abstract=1527858>.

¹⁸² Ibidem, 1 and M. Bergmans, E. Florijn, M. Heijmans-van Bruggen, J. Romijn-Wixley, A. de Vries, 'Voorbij het Gemenebest. Een onderzoek naar de openbaarheidsregimes in Groot-Brittannië, India en Zuid-Afrika', in: J. J. Kompagnie (ed.): *Jaarboek S@p 2006. Openbaarheid in historisch en hedendaags perspectief* (Den Haag 2008) 137-164, 153.

¹⁸³ Letter of the Director General S.M.R. Baqar to Prof. Shahid Amin of the University of Delhi concerning the panel review of the PRA 1993 and the PRR 1997, 25 May 2009.

Chapter six

Indonesia

6.1. The road to FOI legislation

In 1998, the New Order Regime of President Soeharto fell and Indonesia set the fundamental changes in constitution and law to support the process of democracy. However, to some extent Indonesian laws recognized the public right to information. Although the Indonesian Constitution does not include a direct guarantee of the right to information section 28 f, states that ‘Every person shall have the right to communicate and to obtain information for the purpose of the development of his/her self and social environment, and shall have the right to seek, obtain, possess, store, process and convey information by employing all available types of channels.’¹⁸⁴

Unfortunately, Soeharto suppressed freedom of speech, press and access to information which contributed greatly to the failure of the implementation of further legislation on FOI. In 1998, when Soeharto stepped out of office after 32 years, a new era in the country started. The reformation was marked by some significant changes, among them the growth of Non-Governmental Organizations (NGOs). The country gradually moved to a transition period, embracing democracy and transparency.¹⁸⁵

The process of democracy was marked by the growth of NGOs at the end of the 1990s. In the mid-1990s, 7,000 NGOs were registered with the Ministry of Home Affairs and by 2002 the number had reached 13,500.¹⁸⁶

The NGOs played an important role in empowering FOI in Indonesia for stipulating transparency and accountability as the pillars of democracy in the fight against corruption and dictatorship. Empowering society and the government for a better understanding of public rights and obligations of the State resulted in 1999 in the enactment of the *Human Rights Act* and the *Press Act*.¹⁸⁷

In 2000, the Indonesian Parliament took the initiative to amend the Indonesian Constitution and thirty NGOs joined the Coalition for Freedom Of Public Information

¹⁸⁴ H. Kamil, ‘The Role and Initiatives of NGOs in Indonesia in Empowering Freedom of Information’ (2005). Electronic copy available on: <http://eprints.rclis.org/9296/1/Paper-Yati-kamil.pdf>.

¹⁸⁵ Idem.

¹⁸⁶ Idem.

¹⁸⁷ Idem.

(KMIP), drafted the FOIA in 2001 and proposed it to the Parliament. Toby Mendel of Article 19 and others helped to set up the draft. The draft was presented to Commission I of the House of Representatives (period 1999 to 2000) for a review in March 2002. Long and painful debates and amendments followed in 2001, but at the end of 2002 the Commission completed draft legislation. The proposal was sent to President Megawati Sukarnoputri, but a general election of the House of Representatives intervened and the draft failed to meet the time frame as an Indonesian law does not recognize a carry-over process. Until 2005 neither Megawati nor her successor, Susilo Bambang Yudhoyono, commented on the legislation until late 2005, finally enabling Parliament to begin discussing the draft legislation. So, the Coalition had to start introducing the newly MPs to the concept and thinking behind FOI as part of crucial components for the establishment of a democratic and transparent society.¹⁸⁸

In the period of 2005-2007, MPs debated the draft of the FOIA, with input from numerous FOI and human rights NGOs, some of which received funding from the US Agency for International Development (USAID), the World Bank and other institutions.¹⁸⁹

In the end, the combined forces of the KMIP, the British Council Indonesia and NGOs eventually resulted in the *Public Information Disclosure Act 2008* (UUKIP 2008), signed on 30 April 2008 and came into effect on 30 April 2010.¹⁹⁰ Other legislation that regulates access to information is the *Public Records Act of 2009* (PRA of 2009) and its numerous regulations.¹⁹¹

6.2. Jurisdiction: legislation on FOI

6.2.1. The scope of the UUKIP 2008 and the Public Records Act of 2009

The UUKIP 2008 is very descriptive in its aims, underlying grounds to initiate the law and the rights and duties of both the public and the government. The Act starts off with a brief description of sections 20, 32, and 28 F and J of the Constitution where the law derives its legitimacy from. The right to information is primarily considered as a basic (human) right in the context of the fall of the repressive regime of Soeharto and this is reflected in almost every

¹⁸⁸ H. Kamil, 'The Role and Initiatives of NGOs in Indonesia in Empowering Freedom of Information' (2005). Electronic copy available at: <http://eprints.rclis.org/9296/1/Paper-Yati-kamil.pdf> and B. Simpson, 'Indonesia's Freedom of Information Law' (July 2010). Online article: <http://www.freedominfo.org/regions/east-asia/indonesia/>.

¹⁸⁹ B. Simpson, 'Indonesia's Freedom of Information Law' (July 2010). Online article: <http://www.freedominfo.org/regions/east-asia/indonesia/>.

¹⁹⁰ *Undang-Undang Keterbukaan Informasi Publik, Nomor 14 2008 (UUKIP)*.

¹⁹¹ *Undang Undang Tentang Kearsipan, Nomor 43 2009*.

section of the Act. Section 3 of the law, where the objectives of the law are explained, emphasizes the importance of encouraging public participation in the process of democracy.

In section 2 the right of Indonesians of access to 'public information' held by 'Public Agencies' is granted. A public agency is broadly defined in section 1, subsection 3.¹⁹² In practice this means that the Act applies to almost all government bodies. Gatot Dewa Broto, of the Communications and Information Ministry, stated on April 29, 2010 that the law applies to all public authorities (as outlined in section 1, subsection 3), including both central and regional bodies, together with political parties and non-governmental organizations if they take public funding: "We've issued today on our website a press statement on the enactment of the law to remind all public institutions that they must comply with the law."¹⁹³ Under the provisions of the Act, public authorities are obliged to respond to information requests from members of the public.

The websites of the ANRI (the National Archives of Indonesia) and the Ministry of Foreign Affairs both refer to Law No. 7 of 1971 on the *Basic Provisions on Archives*.¹⁹⁴ This law forms the basis for good records management and 'ensuring the safety of materials of national accountability planning, implementation and management of national life and to provide accountability for such materials for government activities'.¹⁹⁵ Here again the significance of accountability and transparency of government activities are recognised and explained as the remedy against corruption and violating human rights. Access to information is considered as a condition for 'good governance, development, research and science' and is in the interest of 'the welfare of the people'.¹⁹⁶

In 2009 another law on Archives came into force. The *Undang Undang Tentang Kearsipan, Nomor 43 2009* states in its preamble that the Law. No. 7 of 1971 needed to be adjusted to modern times. The law did not provide for sufficient regulations and provisions concerning good archival management. Furthermore, rules concerning archival management were scattered among different laws and regulations, so the need arose to combine all

¹⁹² 'Public Agency means an executive, legislative, judicative and other agencies whose function and main duties are related to the organizing of the state, where part or all of its funds originate from the state budget and/or the regional budget, or a non-governmental organizations that part or all of its fund originate from the state budget and/or the regional budget, the contribution from the people and/or from overseas sources.'

¹⁹³ Cited on http://www.loc.gov/lawweb/servlet/lloc_news?disp2_l205401951_text, consulted on 15 May 2013.

¹⁹⁴ *Undang- Undang Nomor 7 Tahun 1971 Tentang Ketentuan-Ketentuan Pokok Kearsipan*.

¹⁹⁵ Consulted on 15 May 2013: <http://www.indonesia.go.id/en/lpnk/arsip-nasional-republik-indonesia/2481-profile/361-arsip-nasional-republik-indonesia.html> and <http://www.microsofttranslator.com/bv.aspx?from=&to=nl&a=http%3A%2F%2Fwww.anri.go.id%2Fprofil%2Fvisi-dan-misi.html>

¹⁹⁶ Consulted on 15 May 2013: <http://www.microsofttranslator.com/bv.aspx?from=&to=nl&a=http%3A%2F%2Fwww.anri.go.id%2Fprofil%2Fvisi-dan-misi.html>

regulations on Archives into one Act.¹⁹⁷ The Act was also created to provide the ANRI with juridical security to impose good records- and archival management to all public authorities and other institutions as outlined in section 13. Like the UUKIP, the PRA covers all public authorities on national and regional level, political parties and NGOs who receive public funding.¹⁹⁸

The PRA regulates access to archives at the ANRI, other public archives and public information in the possession of public authorities.¹⁹⁹ Access to archives is defined in section 3 as an legal instrument to obtain juridical evidence. Once again, the objectives of the law are set in the context of empowering the democratic process, creating awareness of public rights and encouraging public participation. In this way, records - or archival management serve the interests of human rights and accountable, responsible government.²⁰⁰

6.2.2. Rights and obligations of the public and the government

Duties and rights of the government

Public authorities in Indonesia are under stringent obligations in the UUKIP and the PRA of 2009. Information Management and Documentation Officers (IMDOs) play a key role in ensuring that the obligations are met. The government has the duty to facilitate proactive and passive disclosure. Under the provisions of the law, public authorities have a variety of key obligations as described by Toby Mendel and sections 7-16 of the UUKIP. The obligations concern tasks relating to facilitating proactive and passive disclosure, including the appointment of an IMDO and a functional officer and/or information officer at each public authority to assist the IMDO in carrying out his roles, responsibilities and authorities.²⁰¹

To make public information available in accordance with the law, IMDOs are responsible to build and develop an information and documentation system so that public information is well and efficiently managed for easy access. They also provide and/or delivering services relating to public information, such as the collection of information from all unit/task forces of the public authority for purposes of proactive publication and announcing public information through various media. The IMDO is also authorized to

¹⁹⁷ *PRA 2009*, preamble subsections d, f and g. The PRA is not available in English yet, so I translated the parts relevant for my research with the help of <http://www.microsofttranslator.com>.

¹⁹⁸ *PRA 2009*, section 1, subsections 12-16. Unofficial translation.

¹⁹⁹ *Idem*.

²⁰⁰ *PRA 2009*, section 3. Unofficial translation.

²⁰¹ T. Mendel and Sunudyantoro, 'Participant Manual Indonesia: How Requesters Can Use the Right to Information', published by *The Alliance of Independent Journalists Indonesia (AJI)*, 44-45.

perform a consequential harm test in to determine whether or not to release information to the public, to refuse requests for exempted information and provide notice of such refusals and to appoint a functional officer and/or information officer within his scope of authority, including to produce, maintain and/or update the list of public information at least once a month.²⁰²

An Information Committee (IC) and a Central Information Committee (CIC) are installed by the government and provide the standard technical directives of public information services and settle disputes by mediation or non-litigation adjudication. The IC and the CIC are independent institutions on a national and regional level that have the obligation to settle disputes and complaints about FOI-requests by requesters, to determine general policy of the public information service and to determine the implementation of the FOIA.²⁰³

Public authorities are also obliged to publish and supply information on a frequent basis at any time as outlined in sections 9-12. Taken together, the rules require public authorities to disclose a significant amount of information to the public.²⁰⁴

Besides those obligations, the Act also allows some rights to public agencies as outlined in section 6. Public authorities have the right to refuse to provide classified information pursuant to the provisions and regulations of the laws, but should give a notice to the requester in writing and with reasons.

The PRA resembles the UUKIP much in the duties and rights of both the government and the public. Concerning the duty of the government to facilitate proactive and passive disclosure, the focus is more on historical archives, semi-static and static archives at the ANRI and other State archival depositories. Disclosure is regarded in the context of encouraging the democratic process, unifying the Nation and respecting human rights. Sections 3, 40, 42, 59, 64-66 focus on the duty of public agencies to maintain good records- and archival management to make information easily accessible to the public and civil servants, like the IMDOs.

Duties and rights of the public

The PRA states in section 3 that the public has the right to have access to public information as a legal instrument to obtain juridical information about their rights at the ANRI and other

²⁰² Ibidem, 45-46.

²⁰³ UUKIP 2008, section 26.

²⁰⁴ T. Mendel and Sunudyantoro, 'Participant Manual Indonesia: How Requesters Can Use the Right to Information', published by *The Alliance of Independent Journalists Indonesia (AJI)*, 53.

archival depositories. Section 4 of the UUKIP grants passive disclosure by stating that ‘Every individual has the right to obtain Public Information pursuant to the provisions of this Law’. Furthermore, the public has also the right to see and to know about public information, to attend public meetings that are open to the public in order to obtain public information. The Act also contains obligations of the public.²⁰⁵

Sections 71-72 and 74 of the PRA describe the role of the community in maintaining good archival management of public information. The local community can participate in the management and organization of private archives, cultural-historical archives, legal archives and political archives. The community can perform tasks in providing means to good archival management, the protection of archives and the organization of archival education. Archival activities can be implemented in local policies on community activities like creating rescue plans in case of emergency, archival inspection and the dissemination archives as historical sources.

6.2.3. Procedures for how to make a request for information

The UUKIP 2008 requires all information held by public authorities to be made accessible to the public, apart from exempt information. Any Indonesian citizen and/or Indonesian legal entity can make a request and obtain information fast, promptly at low costs and in a simple manner.²⁰⁶

Requests may be made in writing or orally and are required to include only limited information about the requester and the information requested. Requests should be registered and the requester should be provided with a registration number. The IMDO should respond to requests within ten days indicating either how access to the information will be provided or giving reasons for any refusal to provide access. Requesters may stipulate different ways of accessing information, such as inspecting documents or getting copies of them. Fees should be limited mainly to the cost of copying and sending the information to the requester.²⁰⁷

²⁰⁵ *UUKIP 2008*, section 5: ‘(1) The Public Information User is obliged to use Public Information in accordance with the provisions and regulations of the laws. (2) The Public Information User is obliged to state the source of his Public Information that is used in his/her own interest as well as for publication purposes, pursuant to the provision and regulations of the laws.’

²⁰⁶ *UUKIP 2008*, sections 2 and 4. This includes the right to have access to public information and attend meetings which are open to the public, to obtain a copy of public information or have access to it in other ways, according to the established procedures and to disseminate public information, as long as this does not breach another law

²⁰⁷ *UUKIP 2008*, section 22.

There are three different levels of appeals in Indonesia: an internal one to a superior officer of the IMDO within the public authority, one to the relevant Information Commission (IC) and one to the courts. There are clear deadlines and procedural fairness rules for the processing of appeals at all levels. The IC can resolve disputes both through mediation and through a non-judicial adjudication procedure. The UUKIP establishes a number of criminal offences for both misuse of information and for obstruction of access to information. In this way, the public right to information is strictly maintained by the government and IMDOs are little freedom allowed in interpreting the law in favor of themselves.²⁰⁸

In sections 64-66 of the PRA access to archives is regulated. Archival institutions are obliged to facilitate easy access to public records by good archival management. Access to users is granted for consultation, research and based on the principles of the UUKIP. According to the website of the ANRI access to archives are also in the interest of democratic government, development, the welfare of the State and society. Individuals who wish to consult archives need to fill in an application form, students need to bring a letter of recommendation of their educational institution with them, government bodies and NGOs have to show signed declarations of their superiors.²⁰⁹

6.2.4. Exemptions and exceptions

Indonesia maintains both a records and an information system, for citizens can consult a document and receive information in any form they wish. All public information is open and accessible to the public. Exceptions are restricted and limited and the UUKIP maintains public interest override. The UUKIP makes a difference between information and public information.²¹⁰ Information is defined as ‘the information, statement, ideas and signs having a value, meaning and message, both the data, fact and clarification that can be seen, heard and read, and are presented in various packages and formats, in accordance with the development of the information and communication technology, both electronically and non-electronically’.²¹¹ Public information is seen as ‘information that is produced, stored, managed, sent and/or received by a Public Agency relating to the organizer and the organizing

²⁰⁸ UUKIP 2008, sections 35-55.

²⁰⁹ Website of the ANRI, consulted on 17 May 2013:

<http://www.microsofttranslator.com/bv.aspx?from=&to=nl&a=http%3A%2F%2Fwww.anri.go.id%2Flayan%2Fpublik%2Fmekanisme-akses-arsip-statis.html>.

²¹⁰ UUKIP 2008, section 2, subsections 1 and 2.

²¹¹ UUKIP 2008, section 1, subsection 1.

of the state and/or the organizer and the organizing of other Public Agencies pursuant to this law and other information pertaining to the interest of the public'.²¹²

Exemptions must be clearly and narrowly defined based on information which is categorized as secretive by law to protect a limited list of interests. Exemptions depend on the application of a 'consequential harm test' to assess whether substantial harm will result if the information is made accessible to the public. In addition to the consequential harm test, careful consideration must be given to whether the benefit of disclosing the information outweighs the harm (in which case it should be disclosed) or vice versa (in which case it should not be disclosed).²¹³ Public authorities may refuse to provide access to information where it is classified in accordance with the law (exemption by procedure). They also have the right to refuse access to information as provided for in a law, including the exemptions set out in the Act (exemption by substance).²¹⁴ General grounds for refusing to provide access to information are listed in section 6 of the Act.²¹⁵

When considering the applicability of exemptions, rational reasons must be used before access to information is refused. The key consideration is whether making the information public poses a risk of substantial harm to an interest which is protected in accordance with section 17 where a detailed list of classified information is given. These exemptions can be defined as mandatory, with the exceptions listed in subsections a-e. Only the exemptions listed in section 17 may be withheld to public access. The IMDO of the public authority is obliged to perform a strict consequential harm test before refusing to provide access to information.²¹⁶ The IMDO must also conduct a public interest test to see whether the larger public interest warrants disclosure or withholding of the information.²¹⁷

There are also exemptions that are not permanent and could be categorized as being discretionary. These exemptions are temporary and the overall time limit for nondisclosure is to be regulated by a Government Regulation.²¹⁸ There are also 'exceptions to exceptions': types of information which may not be withheld, outlined in section 18.²¹⁹

²¹² Ibidem, subsection 2.

²¹³ *UUKIP 2008*, section 2, subsection 4.

²¹⁴ *UUKIP 2008*, section 6, subsections 1 and 2.

²¹⁵ *UUKIP 2008*, section 6, subsection e: a. 'information that may jeopardize the state; b. information relating to protection of the business from unhealthy business competition; c. information relating to personal rights; d. information relating to office secrets; and Jor; e. the required Public Information is not within its authority or not yet documented.'

²¹⁶ *UUKIP 2008*, section 19.

²¹⁷ T. Mendel and Sunudyantoro, 'Participant Manual Indonesia: How Requesters Can Use the Right to Information', published by *The Alliance of Independent Journalists Indonesia (AJI)*, 66.

²¹⁸ *UUKIP 2008*, section 20.

²¹⁹ *UUKIP 2008*, section 18, subsections 1 and 2.

Public records in ‘static archives’ are open to the public twenty-five years after their creation. The PRA maintains the principle that all ‘static archives’ are open, unless some exemptions set out in sections 44, 65 and 66.

6.3. The Practice: : access to information in reality

6.3.1. Access under the UUKIP 2008

For little information is found about experiences with access under the PRA, only the UUKIP will be discussed. According to Toby Mendel the Act is a relatively good one, which grants Indonesians the right to access information held by public authorities. However, ‘despite the two year timeframe given for preparing the implementation of the law- which includes setting up the system of information commissions and having public authorities put in place internal implementation systems- relatively little had been done in this regard by May 2010. Since that time, however, more priority has been given to putting in place implementation measures’.²²⁰

Due to the ascribed above and to other factors, the volume of requests for information from the media and civil society groups remains relatively low in Indonesia. FOI NGOs have raised a number of concerns regarding the Act. Brad Simpson: ‘often poorly funded agencies at local, provincial and national level currently lack the procedures and personnel to effectively implement the law, raising questions of how promptly and effectively officials will respond to application requests. Second, the law contains broad exemptions, especially in the area of national security and foreign relations, that could be used to justify withholding information regarding a wide range of government functions and operations. Journalists in particular have raised concerns that the law does not define with enough precision exactly what information ought properly to be classified as secret, though violations of these provisions can carry heavy penalties. Given the frequency with which the government has launched defamation lawsuits against journalists and even ordinary citizens, and the current consideration by Parliament of very broadly worded state secrets legislation, these are not idle fears (...) the impact and reach of the new law is as yet unknown, and will likely be determined by the efforts of civil society activists and ordinary Indonesians in testing its limits’.²²¹

²²⁰ T. Mendel and Sunudyantoro, ‘Participant Manual Indonesia: How Requesters Can Use the Right to Information’, published by *The Alliance of Independent Journalists Indonesia (AJI)*, 8.

²²¹ B. Simpson, ‘Indonesia’s Freedom of Information Law’ (July 2010). Online article: <http://www.freedominfo.org/regions/east-asia/indonesia/>.

However, the UUKIP represents substantial progress over a New Order-era legal regime and political culture that previously emphasized state secrecy and harsh penalties for those accused of libel, slander, or insulting the state and its officials. Therefore, Indonesian information advocates are rightfully celebrating passage and implementation of the country's first FOIA, but still much needs to be done to make the government compliant with the Act.

Chapter seven

Comparing Different FOI Regimes

After having discussed the FOI legislation of the Netherlands, the UK, India and Indonesia in the previous chapters, they will be compared to each other in this chapter. As will be clear, all four countries have a different approach to FOI. In general, this chapter will follow the structure of the preceding chapters. This means that first the development of creating FOI legislation will be compared, before getting into procedures and exemptions followed by the everyday use of this legislation in the four countries. The differences and similarities will be explained at the same time.

7.1. The Road to FOI legislation

Table 7.1. Comparison of the development of FOI legislation

	Codification of Right to Know	Political debate	Public debate	Developments (political, social, cultural)	Grounds for the creation of FOI	What Acts cover FOI
The Netherlands	Section 110 of the Constitution.	Yes: started by MPs in the 1960s	Not much: some skeptics in the press and lawyers started debates in the 1960s.	Political matters, see also section 3.1.	Political motives, see appendix ..., table 3.1.	WOB 1991, PRA of 1995. For other laws: see also section 3.1.
Indonesia	Section 28f of the Constitution.	Not much, but from 2005-2007 fierce debates on the concept FOIA.	Yes: started by NGOs in the 1990s.	Political and social matters, see also section 6.1.	Political and social motives, see appendix ..., table 6.1.	UUKIP 2008, PRA of 2009. For other laws: see also section 6.1.
The UK	Section 1 of the FOIA 2000.	Long and painful debates by MPs from 1970-2000.	Started by civil society groups and the press in the 1970s.	Political matters, see also section 4.1.	Political motives, see appendix ..., table 4.1.	FOIA 2000, PRA of 1958/1967. For other laws: see also section 4.1.
India	Section 20 of the Constitution.	Not much. Government copied the ideas of the grassroots organisations in the 1990s.	Yes: started by grassroots organizations in the 1980s.	Social matters, see also section 5.1.	Social motives, see appendix ..., table 5.1.	RTIA 2000, PRA of 1993. For other laws: see also section 5.1.

As can be seen in table 7.1. all countries took quite another path in creating FOI legislation to grant public access to official information. Dutch legislation was passed very early (1978), whereas the UK (2000), India (2004) and Indonesia (2008) followed later. This shows that the

idea of public access entered the political agenda in the three last mentioned countries later than in the Netherlands. Already in the 19th century, the Dutch Constitution defined the right to know as ‘the principle of transparency’. However, this does not mean that all issues on FOI are figured out. On the contrary, the WOB of 1978 was replaced in 1980 and amended in 1991. The debate for reviewing the WOB continued and in 2006 and in 2012 *Groen Links* proposed a total revision of the WOB. Just recently the national Ombudsman plead for an abolishment of the law. The matter is not solved yet and is still on the table.

The call for FOI increased like the Netherlands, in the UK in the 1970s. The public grew tired of the obsession of the government with secrecy. A long tradition of excessive secrecy had subverted democratic processes and political culture was permeated by secrecy. The press revealed a series of political scandals that shocked society, so public pressure for FOI legislation increased. Due to a complex political and legal system where national and local politics are divided, the central government was able to maintain a policy of strict secrecy on government information, whereas the local authorities granted access to documents on base of the *Local Government Act of 1972*. After 1997, when Labour came to power and the UK had to adjust its political and legal system to the rules of the EU, the right of information was for the first time codified in legislation: the FOIA of 2000.²²²

The debate in the Netherlands on FOI legislation resembled that of the UK, but Dutch politics was not that obsessed with secrecy or famous for scandals. The fact that Dutch FOI legislation dates back to 1978 is not particularly due to a large political involvement of the public. The Dutch attitude towards their government in the 1980s and the 1990s is not cynical like in the UK, but more skeptical. Discrepancy between the government and the public is decreasing since the end of 1990s, although this does not mean that people have much confidence in politicians. Compared to other European countries, Dutch people seem to be actually very confident in how their democracy is functioning. This might explain why there was no loud cry for FOI legislation in the Netherlands and the WOB is lightly used by the public. Moreover, the call for a new WOB came from members of Parliament and not from the public.²²³

Whereas political motives initiated FOI legislation in the Netherlands and the UK, social motives played an important role in Indonesia and India. Being both former colonies,

²²² M. Bergmans, E. Florijn, M. Heijmans-van Bruggen, J. Romijn-Wixley, A. de Vries, ‘Voorbij het Gemenebest. Een onderzoek naar de openbaarheidsregimes in Groot-Brittannië, India en Zuid-Afrika’, in: J. J. Kompagnie (ed.): *Jaarboek S@p 2006. Openbaarheid in historisch en hedendaags perspectief* (Den Haag 2008) 137-164, 145.

²²³ Bergmans, M., *FOI Legislation Compared. Public Access Regimes in the Netherlands, Ireland and Canada* (Master Thesis Archival Science, University of Amsterdam, 2008), 23-24.

the nations are young and still in the middle of the process of establishing democracy and finding a status quo. Both countries gained independence from the UK and the Netherlands around 1950 and therefore focused the next decades on forming an independent (democratic) government. This implied struggles for the State and society in what political system worked best and how the relationship between the government and the individual must be defined. Therefore, debates about FOI were marked by the fight for human rights, the fight against corruption and abuse of power.

In India, entirely social motives initiated FOI legislation. The fact that the FOIA is called the *Right to Information Act* and not *Freedom to Information Act* like in the UK, says much. Especially the grassroot organizations stipulated FOI as a human right and a vital element in the fight against corruption and empowering the process of democracy. The Indian government copied the idea of the grassroot organizations to see public access as a public right and maintains the principle that an informed citizenry must be able to control the activities of the government. Therefore, India distinguishes itself for the fact that now one billion Indian people are the controlling power of the government.²²⁴

Also in Indonesia human rights and empowering public participation in the democratic process are the most important grounds for creating FOI legislation. Here NGOs took the initiative to stipulate transparency and accountability as the pillars of democracy in the fight against corruption and dictatorship. Soon after the fall of Soeharto's regime, members of Parliament and international organizations like UNESCO (Toby Mendel) and the Indonesian British Council joined the debate and combined forces. Influenced by input from numerous international FOI and human rights NGOs, some of which received funding from the US Agency for International Development (USAID), the World Bank and other institutions, the Coalition for Freedom Of Public Information drafted a strong FOIA and proposed it to Parliament. This resulted in a very descriptive and detailed FOIA that resembles the British FOIA much.

²²⁴ M. Bergmans, E. Florijn, M. Heijmans-van Bruggen, J. Romijn-Wixley, A. de Vries, 'Voorbij het Gemeenebest. Een onderzoek naar de openbaarheidsregimes in Groot-Brittannië, India en Zuid-Afrika', in: J. J. Kompagnie (ed.): *Jaarboek S@p 2006. Openbaarheid in historisch en hedendaags perspectief* (Den Haag 2008) 137-164, 153.

7.2. Jurisdiction: legislation on FOI

7.2.1. Comparing the scope of FOI legislation in general

Table 7.2.1. Comparing the scope of FOI legislation in general

	Main purpose	Main principles and objectives	Coverage of information	Coverage of institutions
The Netherlands WOB 1991	To regulate the provision of information for control of good democracy and governance.	The principle of democracy and transparency. See also section 3.2.1.	Administrative information.	Public authorities listed in the Act. See also section 3.2.1.
PRA of 1995	To regulate the care and management of governmental archives that have been transferred, so that everyone has the possibility to understand how the government acted in the past.	All records in public archives are freely accessible and available for consultation.	Records of private and government archives.	All government bodies.
Indonesia UUKIP 2008	To regulate the right of Indonesians of access to 'public information' held by 'Public Agencies'.	To secure the right of the citizens and to encourage public participation of society in the process of democracy. See also section 6.2.1.	Public information.	Public authorities listed in the Act. See also section 6.2.1.
PRA of 2009	Ensuring the safety of materials of national accountability, planning, implementation and management of national life and to provide accountability for such materials for government activities.	- All 'static archives' are open to the public, unless there is a good reason for secrecy. - Access to information is a vital condition for good governance, development, research and science and is in the interest of the welfare of the people.	Public and private records. See also section 6.2.1.	Idem.
The UK FOIA of 2000	Preamble of the Act: 'To make provision for the Disclosure of information held by public authorities or by persons providing services for them and to amend the Data Protection Act 1998 and the Public Records Act 1958; and for connected purposes'.	- Disclosure of all documents unless there is a good reason for secrecy -Right to access to information in public records before transfer to a public archive. -Accountable and open government.	Public information. See also section 4.2.1.	Public authorities listed in the Act. See also section 4.2.1.
PRA of 1958/1967	Preamble of the Act: 'To make provision with respect to public records and the Public Record Office'.	-To keep public records safe. - Right of access to information in public records after transfer.	Private and public records. See also section 4.2.1.	Idem.
India RTIA 2005	To promote transparency and accountability in the working of every public authority by enabling citizens to access information.	'Public, unless...'. See also section 5.2.1.	Public information. See also section 5.2.1.	Public authorities listed in the Act. See also section 5.2.1.
PRA of 1993	To regulate the management, administration and preservation of public records.	'Public, unless...'. See also section 5.2.1.	Public and private records. See also section 5.2.1.	Public authorities listed in the Act (Records creating agencies')

All four countries have FOI legislation which compel their government bodies and public authorities to actively disclose and provide information, although the definition and coverage of institutions and information vary. The scope of the WOB is most restricted in public body coverage, whereas the UK, India and Indonesia cover a larger variety of public authorities. That means that the WOB does not include the Judiciary, the Houses of Parliament, Council of State, Ombudsman and the General Audit Office.

In the Netherlands, the WOB covers only administrative information in all public records still with the public authorities. Once the records are transferred to a public archive, access is covered by the PRA of 1995. Because the PRA states that public records need to be transferred after twenty years, the WOB basically covers all public records up to that age. For the UK it does not matter where public records are located, whether that be a public body or at the National Archives, because the FOIA 2000 covers all public authorities listed in its Schedule I. India and Indonesia follow the example of the UK, for their PRAs apply both to public records held at State archival depositories and public authorities.

The UK and the Netherlands differ in their main purpose, principles and objectives from India and Indonesia. The Netherlands considers FOI foremost as an effective instrument to improve better communication between State and society, but not as a goal in itself. Also the UK has the tendency to approach FOI as an important tool for building trust between a government and its citizens that benefits both the government and the public. In contrast, the right to access official information is explicitly described in the FOIAs of India and Indonesia. Both Acts are very descriptive in its purposes and objectives. The right to know is presented as a clear human and civic right to fight against corruption and abuse of power, to stimulate public participation in the democratic process and to promote transparency in the working of every public authority. The focus is totally on the public. This difference explains the different points of perspective of FOI legislation in the four countries.

7.2.2. Comparing rights and obligations of the public and the government

Table 7.2.2. Comparing rights and obligations of the public and the government

	Forms of disclosure	Rights and duties of the public	Rights and duties of the government
The Netherlands WOB 1991	Proactive disclosure and passive disclosure	The right to access government information in order to be able to control the activities of the government in a good way and to expose abuse of power.	- The duty of the government to inform society about her activities for good governance and democracy without being asked for it. - To provide information to the public when requested. See also section 3.2.2.
PRA of 1995	Passive disclosure.	The right to consult all records in public archives at free costs.	Archival records must be transferred after 20 years and preserved not only in a proper and orderly state, but that they must also be easily accessible.
Indonesia UUKIP 2008	Proactive disclosure and passive disclosure.	Every individual has the right to obtain public information held by public authorities, to see and to know about public information, to attend public meetings that are open to the public in order to obtain public information. For duties: see section 6.2.2.	Numerous rights and duties. See also section 6.2.2.
PRA of 2009	Passive disclosure.	-The public has the right to have access to public information as a legal instrument to obtain juridical information about their rights. -The local community is entitled to participate in the management and organization of archives. See also section 6.2.2.	- Public agencies have the duty to maintain good records- and archival management to make information easily accessible to the public and civil servants, like the Public and Documentation Officers. - Records must be transferred after 20 years.
The UK FOIA of 2000	Proactive disclosure and passive disclosure.	The right to be told whether the information is held by the public authority and the right to be provided with the information.	The duty of the government to inform society about her activities for good governance and democracy without being asked for it. See also section 4.2.2.
PRA of 1958/1967	Regulated by the FOIA of 2000 since 2005.	Regulated by the FOIA of 2000 since 2005.	To disclose records which have been retained by the government after thirty years.
India RTIA 2005	Proactive disclosure and passive disclosure.	Access to official information for all Indian people.	- To maintain all records duly catalogued and indexed in a manner and form which facilitates the right to information See also section 5.2.2.
PRA of 1993	Passive disclosure.	Any person can consult public records at records creating agencies and archival depositories on basis of good trust.	-To disclose unclassified records which have been retained by the government after 30 years. See also section 5.2.2.

Table 7.2.3. shows that all four countries are obliged to proactively provide information voluntarily and when requested. All PRAs maintain passive disclosure by means of granting the public the right to consult public records at public archives or other State archival depositories. In the Netherlands the PRA of 1995 obliges the government to preserve public records in a proper

and orderly state, so that they must be easily accessible for civil servants and the public. Good archival and information management are indispensable in making public access possible. So, in India the PRA even states explicitly that public authorities have to nominate special records officers who are responsible for proper arrangement, maintenance and preservation of public records to make them accessible to the public.

Also the FOIA of India recognizes the importance of good archival - and information management to facilitate the right to information. Therefore, the RTIA obliges public authorities to appoint PIOs and APIOs who deal with requests for information and provide assistance to the applicant. Also Indonesia appoints special (IMDOs) at every public authority. The Netherlands and the UK set themselves apart on this aspect, but like India and Indonesia the UK also appoints an Information Commissioner on a national level who is responsible to supervise and enforce FOI legislation. Information Commissions in India and Indonesia perform tasks in settling disputes and complaints on FOI-requests. In the Netherlands there are no special records officers appointed at a national or regional level who deal with FOI requests, disputes or complaints. This can be explained for the reason that there is no loud cry from the Dutch people for a clear right to know as was the case in the other three countries. Most Dutch people are content on how democracy functions, are unaware of their rights and therefore the WOB is lightly used. In this way, the government does not feel the need to appoint special FOI officers, although the VNG recommended in a recent publication to do so.²²⁵

²²⁵ *De transparante gemeente. Lokaal bestuur dat wordt vertrouwd; een discussiestuk over openbaarheid in lokaal bestuur*, a publication of the VNG (November 2012), 28.

7.2.3. Comparing procedures when making a request for information

Table 7.2.3. Comparing procedures when making a request for information

	System of records or information	Who can make a request	Procedure	To whom is the request sent to	Right to appeal
The Netherlands WOB 1991	System of information	Anyone	See also section 3.2.3.	Public authority	Not regulated by the WOB. Possibilities: Ombudsman, the court or the Council of State.
PRA of 1995	Both	Anyone	See also section 3.2.3.	The archivist or archival employee	Not specified
Indonesia UUKIP 2008	Both	Any Indonesian citizen and/or Indonesian legal entity.	See also section 6.2.3.	The IMDO at a public authority.	the IMDO, the Information Commissions or the court.
PRA of 2009	Idem.	Idem.	See also section 6.2.3.	The archivist or archival employee.	Not specified.
The UK FOIA of 2000	Both.	Anyone.	See also section 4.2.3.	Public authority.	the IO, the Information Tribunal or the High Court.
PRA of 1958/1967	Idem.	Idem.	See also section 4.2.3.	The archivist or archival employee.	The IO.
India RTIA 2005	Both.	All Indian people.	See also section 5.2.3.	The PIO or APIO at a public authority.	CIC, SIC or IC's.
PRA of 1993	Idem.	Idem.	See also section 5.2.3.	The Director General of the National Archives or the archivist of the archival depository.	The National Archives or the IO.

The procedures for making a request for information are more or less the same in the way that they are all described in the FOIAs and must be sent to public authorities. In the Netherlands, the UK and Indonesia the public can make a request for information in any form, only India requires to receive a request in writing of Hindi or in the official language that is spoken in

the area. This is due to the fact that in India around 850 languages and dialects are spoken, which some of them have their own writing.

In the Netherlands and the UK anyone in the world can make a request for information in contrast to India and Indonesia who limit the right to public access to their own citizens. In this way, the right to know is only reserved for the people as a human and civic right. Foreigners who want to make a request for information need to follow special procedures.

The most important difference in the four countries lies in the possibilities of appeal. Whereas the Dutch WOB has no separate agency to monitor the use of the WOB, the UK, India and Indonesia have independent Information Commissioners or Commissions to monitor the use of the FOIA. The UK does have the Information Officer on a national level who has roles of auditing, enforcing and prosecuting.²²⁶ The Indian government designates Central and State Information Commissions who have more or less the same functions as the British IO. In Indonesia requests are received and examined by the IMDO. Appeals can also be made at the IMDO, but when this is not satisfactory requesters can turn with their complaints to Provincial and Central Information Commissions or the court.

The Information Commissioner or Information Commissions in the UK, Indonesia and India are all designed to play a role of intermediary and controller, but this does not mean that they share the same powers and authorities.²²⁷ These agencies provide for a possibility of appeal without having to go to court straight. This tradition is absent in the Netherlands, where the lines of appeals are very short. This might explain why the Dutch do not have a special office to monitor FOI. This difference is possibly due to different legal traditions and law systems. As already noted, the UK maintains a complex system of bills and acts, India and Indonesia resembles the UK in quite the same way. In contrast, when a requester in the Netherlands is not satisfied with the decision, he can appeal before the courts and therefore immediately enters the legal system. So, the way to courthouse is much shorter.²²⁸

²²⁶ Thomas, R., *Freedom of Information. The UK Experience*, the eighth Ketelaarlezing held on 1 October 2008, 4-5.

²²⁷ For the powers and authorities of the British IC: see sections 18, 47 and 50-56 of the FOIA 2000. For the Central and State Information Commissions of India: sections 12-20 of the RTIA 2005. For the Indonesian Central and Provincial Information Committees: sections 23-44 of the UUKIP 2008.

²²⁸ Bergmans, M., *FOI Legislation Compared. Public Access Regimes in the Netherlands, Ireland and Canada* (Master Thesis Archival Science, University of Amsterdam, 2008), 54-55.

7.2.4. Comparing exemptions and exceptions

Table 7.2.4. Comparing exemptions and exceptions.

	The Netherlands	Indonesia	The UK	India
Number of exemptions in the FOIA	11	15	24	10
Number of exemptions in the PRA	3	9	-	3
Distinction mandatory-discretionary	Yes	Yes	Yes	No
Other distinctions	No	No	Yes	No
Important exemptions	-Privacy - Interests of the State (security and international relations) -Disproportionate (dis)advantage	-Privacy - Interests of the State (security and international relations) -Commercial confidence - Law enforcement - Court records	- Privacy - Interests of the State (security and international relations) - Law enforcement - Commercial interests - Communications with the Queen and Ministers - Court records - Formulation of government policy - Parliamentary privilege	- Privacy -Interests of the State (security and international relations) -Commercial confidence

The most important of FOI legislation is the exemption scheme. When providing for the right to access official information, it is the exemptions that determine how far this right stretches. The basic idea for this table can be found in Bergmans.²²⁹

As can be seen from table 7.2.4. the FOIAs of all four countries have between ten and fifteen exemptions, with the exception of the UK who has twenty-four. The PRAs maintain three to nine exemptions per country. The way these exemptions are specified in FOI legislation differs.

The Dutch WOB merely sums up the exemptions. On the contrary, the UK, India and Indonesia extensively describe the exemptions and make a number of subsections per exemption to clarify what exactly falls under and falls not under the Act. The exemptions are used in different ways. In the Netherlands the WOB distinguishes mandatory and discretionary exemptions in sections 10. Although the public authority must consider if the public interest outweighs the interest of the exemption, no formal public interest test is conducted in contrast to the UK and Indonesia.

²²⁹ Bergmans, M., *FOI Legislation Compared. Public Access Regimes in the Netherlands, Ireland and Canada* (Master Thesis Archival Science, University of Amsterdam, 2008), 56.

Due to long tradition of obsessive secrecy culture in the UK, there are twenty-four very descriptive exemptions set out in detail and many subparagraphs in sections 21-44. The UK distinguishes absolute and qualified exemptions. Absolute exemptions are never to be disclosed, whereas a public interest test is required for qualified exemptions. Indonesia and India also make a distinction between mandatory and discretionary exemptions. India lists ten discretionary grounds in section 8 to deny access to information to citizens, because for each exemption the public authority needs to consider if the public interest is better served. In Indonesia 15 mandatory and discretionary exemptions are described in detail in sections 6 and 17. The IMDO of the public authority is obliged to perform a strict consequential harm test before refusing to provide access to information. The IMDO must also conduct a public interest test to see whether the larger public interest warrants disclosure or withholding of the information.

It can be said that a number of exemptions are very much the same. There is a large emphasis in all four countries on the protection of privacy, the interests of the State concerning security and the economy. The fact that the WOB merely sums up its exemptions in contrast to the other countries, is because of the secrecy culture that is still strong in the UK, India and Indonesia. In the UK, because there is a long tradition of secrecy in politics that is difficult to oust. The British Acts and Bills gave legal sanction to a culture in which information was held tight by the elite, who were separated from the masses of population. This culture is still maintained in India, being a former colony under British Rule. In many important ways, information in India today still flows as it has for generations rooted in a long culture of secrecy.²³⁰ The situation is the same in Indonesia that is still in the middle of the transition from suppression to democracy what is reflected by the extensive detailed descriptions of exemptions and categories of classified information.

²³⁰ R.N. Winfield and S. Evans, 'Not Good Enough: India's Freedom of Information Bill Has Great Potential to Overhaul the Ills of Secrecy and Inaccessibility but There Are Inadequacies That Need to be Addressed', in: *Combat Law: The Human Rights Magazine*, 28-31, 28.

7.3. The Practice: access to information in reality

Table 7.3. Comparing daily use of the right to access

	The Netherlands	Indonesia	The UK	India
Attention in the media	Some attention	Little attention	Some attention	Some attention
Are public authorities compliant	No	No	No	No
Annual requests	1,000	Unkown	100,000	800,000
Annual appeals	Unkown	Unkown	8,900	34,400

The basic idea for this table can be found in Bergmans.²³¹ Although the use of the PRAs are also examined, they are not included in this table, because the FOIAs give the best picture of how FOI legislation is used in practice by the public and the government.

What is most striking is that none of the four countries really succeed to comply with FOI legislation. All countries face practical problems that makes it difficult to operate FOI in practice. In the Netherlands the WOB is frequently in the news and is attacked for a reluctant government to provide information. Deadlines are often exceeded, unjustified exemptions are used and if information is provided, this is mostly marked black so that little essential information for further research remains. This causes that requesters are frequently frustrated with the government and reduce trust in the State. Furthermore, the WOB is increasingly abused by the public, what leads to many appeals and delays.

The situation in the UK is more or less the same, apart from the fact that the British government receives more requests from the public than in the Netherlands. The still remaining culture of secrecy is reflected in too many exemptions that are expressed in a vague manner and leave room for much interpretation. Moreover, the public interest test is undermined in several ways. Also recalcitrance and some reluctance at government bodies are experienced by requesters. Delays at the ICO and public authorities are caused by strong bureaucracy and complicated procedures due to the complex legal system.

India and Indonesia are both in the middle of the process of discovering FOI is one of the most fundamental of human rights and key to building a stable, efficient democracy. Both FOIAs are just recently enacted, so that it is difficult to make a statement about the real impact of FOI. Both countries are still in the process of implementing the law and although

²³¹ Bergmans, M., *FOI Legislation Compared. Public Access Regimes in the Netherlands, Ireland and Canada* (Master Thesis Archival Science, University of Amsterdam, 2008), 58.

the FOIAs have made much progress on securing the right to know, but there are still many challenges to deal with. Use of FOI legislation has been constrained by uneven public awareness, poor planning by public authorities and bureaucratic indifference or hostility due to mismanagement and corruption. Requirements for proactive disclosure of information are often ignored and mechanisms for enforcing the law are strained by a growing number of complaints and appeals.

Chapter Eight

Conclusion

The preceding chapters have shown similarities and differences between the four countries when it comes to how FOI is regulated, monitored and used by both the public and the government. In this chapter some summarizing conclusions will be made on how the most striking similarities and differences can be explained that shaped different FOI regimes in the world.

In all factors that have been researched and compared in this paper there are striking differences between the Netherlands and the UK on the one hand, and India and Indonesia on the other hand. The way how FOI legislation developed and how it is used in public show that this can be explained at first by the political situation. It is a fact that Indonesia and India are still in the transition from suppression to democracy and from secrecy to openness. FOI legislation was created to promote transparency and accountability to make the public aware of their rights. The FOIAs of India and Indonesia make strong and balanced statements of the importance of the right of information. They recognize that transparency and an informed citizenry are vital to democracy, to controlling corruption and to ensuring public accountability. Compared to the UK and the Netherlands it was the public that called for a clear right to know.

However, the practice shows that both countries still have a long way to go to implement the law successfully and making the public aware of their rights. Indonesia and India are still in the middle of the process of discovering FOI as one of the most fundamental of human rights and key to building a stable and efficient democracy. This means that old habits and traditions from former regimes still hold sway. A strong culture of secrecy, mismanagement on toplevel and corruption cause that local documentation and information officers on low positions are indifferent towards compliance or even ignorant of the law. Also illiteracy and poverty among the public result into an uneven public awareness of their right to know.

The problems described above are reflected in the Corruption Perceptions Index 2012 of Transparency International. 176 countries were researched by Ernst & Young. A score of 0 percent means highly corruptive, a score of 100 percent is very clean. No countries score a perfect 100 percent. Two-third of the 176 countries ranked in 2012 scored below 50 percent which means that public authorities need to be more transparent, and powerful officials more

accountable.²³² Both India and Indonesia score below the 50 percent. India has a score of 36 percent and Indonesia was granted a percentage of 32 percent This means that both countries take the ranks of 94 and 114 out of the total of 176 on the Index.²³³

Another model that explains cultural differences is the World Values Survey of Inglehart and Welzel. Their surveys were designed to provide a comprehensive measurement of all major areas of human concern, from religion to politics to economic and social life. Inglehart and Welzel divide the countries in two dimensions. One dimension sets out traditional and secular-rational values. The second dimension deals with survival and self-expression values. (See figure 2).

Figure 2. The World Value Survey Cultural Map 2005-2008 of Inglehart and Welzel²³⁴

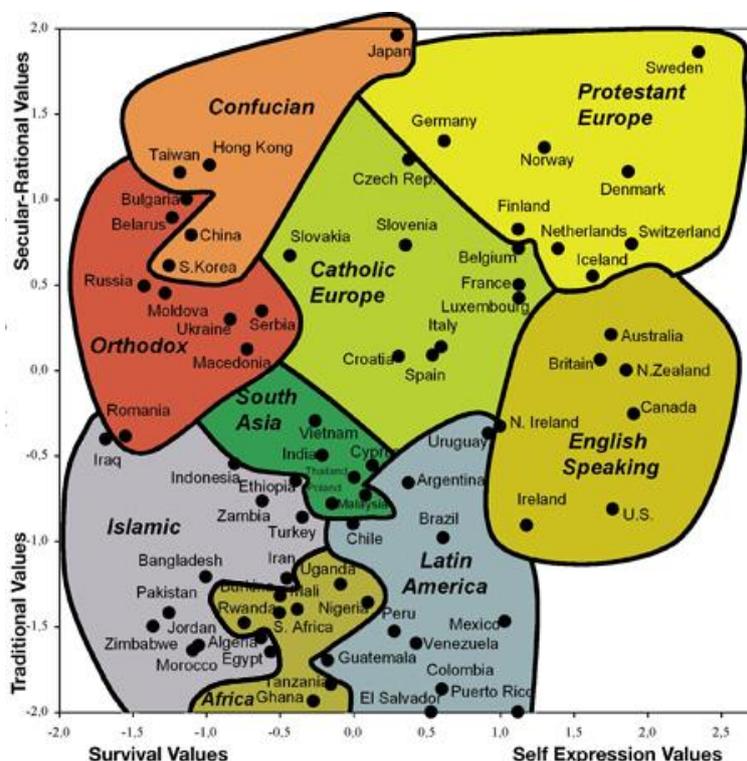


Figure 2 shows that Indonesia and India are positioned in the dimensions of traditional values and survival values. This means that factors like religion, parent-child ties and deference to authority are emphasized, along with absolute standards and traditional family values. Therefore topics such as divorce, abortion, euthanasia and suicide are rejected and regarded as

²³² Transparency International and Ernst & Young, *Transparency International Perceptions Index 2012*, 2.

²³³ *Ibidem*, 5.

²³⁴ R. Inglehart, 'Inglehart-Welzel Cultural Map of the World', see:

http://www.worldvaluessurvey.org/wvs/articles/folder_published/article_base_54 or Ronald Inglehart and Christian Welzel, "Changing Mass Priorities: The Link Between Modernization and Democracy", in: *Perspectives on Politics June 2010* (vol 8, No. 2) 554.

immoral. These societies have high levels of national pride, and a nationalistic outlook as the Indian and Indonesian FOI legislation reflect. Often, people in these cultures are busy with surviving every day and wealth is not taken for granted.²³⁵

Societies with secular-rational values have the opposite preferences on all of these topics. Unprecedented wealth that has accumulated in advanced societies during the past generation means that an increasing share of the population has grown up taking survival for granted. Thus, priorities have shifted from an overwhelming emphasis on economic and physical security toward an increasing emphasis on well-being, self-expression and quality of life. When a secular-rational society starts becoming a knowledge society, it moves in a new direction, from survival values toward increasing emphasis on self-expression values. This implies that self-expression values give high priority to environmental protection, tolerance of diversity and rising demands for participation in decision making in economic and political life. This produces a culture of trust and tolerance, in which people emphasize individual freedom, self-expression and active public participation in politics. These are precisely the attributes that the political culture literature defines as crucial to democracy.²³⁶

The UK and the Netherlands perfectly fit in this image of secular-rational societies and therefore it is no surprise that both countries are positioned in the dimensions of secular-rational values and self-expression values. In the Netherlands, active participation of the public lacked in the debate on FOI, because there was a lot of faith in the workings of democracy. Therefore, the Corruption Perceptions Index shows that the Netherlands scores high on the Index with 90 percent.²³⁷ This means that the Netherlands takes the 9th rank of the 176 ranks on the Index. This explains that for mere political reasons the WOB was created and received fierce criticism from politicians, but not from the public.

The UK scores with 74 percent and takes the 17th rank.²³⁸ This can be explained by the fact that the FOIA of 2000 was also shaped by politics and the political system, but more public pressure was involved. The public was fed up with the obsessive culture of secrecy in British politics that subverted democratic processes. Long campaigns from local civil society movements advocated greater transparency and stronger accountability by designing the FOIA.

However, the UK and the Netherlands resemble Indonesia and India to some extent in the operation of FOI legislation. This is mainly due to the legal system and culture of politics.

²³⁵ Website on World Values Surveys, consulted on 21-06-2013:
http://www.worldvaluessurvey.org/wvs/articles/folder_published/article_base_54

²³⁶ Idem.

²³⁷ Transparency International and Ernst & Young, *Transparency International Perceptions Index 2012*, 5.

²³⁸ Idem.

Delays at the British ICO are caused by strong bureaucracy and complicated procedures due to a complex legal system. This causes a heavy burden for public authorities to comply with the law, so that requesters often meet recalcitrance and some reluctance at government bodies. This is also the situation in the Netherlands. The absence of an independent institution such as an IO to monitor the use of FOI legislation causes public authorities to often exceed deadlines and to deny requests based on unjustified exemptions. Moreover, too broad requests, improper use and abuse of the WOB frustrate public authorities and reduces trust in the State.

Another similarity between the four countries can be possibly explained by common colonial history. The way the FOIAs of India and the UK are described are very much the same. Both Acts are very descriptive in its provisions and use many subsections. Also both countries appoint information officers and install Information Commissions to monitor the use of FOI legislation. Furthermore, India maintains strongly the British tradition of secrecy in political culture. E.g., the British Official Secrets Act of 1923 is still used as an excuse not to disclose official information to the public. The culture of holding information tight to the elite who are separated from the masses of population, remains.

Remarkably, the Netherlands and Indonesia have few similarities in FOI legislation, except for the archival system in the PRAs that resemble each other to some extent. The scope of the UUKIP is larger than the WOB concerning the definition of public authorities, procedures and the coverage of information. In this way, Indonesia follows more the example of India and the UK. The UUKIP maintains more descriptive sections on definitions, aims, objectives, purposes, rights, duties and exemptions. Moreover, Indonesia also appoints IMDOs to deal with requests and complaints. Information Commissions are installed to monitor the use and implementation of FOI legislation. This can be explained from the fact that international NGOs like the British Indonesian Council and UNESO helped to set up the FOIA.

From the described topics above it can be concluded that mostly political and legal systems, and some cultural factors shaped the different FOI regimes. All four countries took quite another path in developing FOI legislation and deal differently with issues like scope, procedures and usage. Thus, it strongly depends in which state the country is. In stable democracies where wealth is taken for granted and public rights have been recorded since long, FOI legislation focuses more on improving better communication with the public and building trust. In developing cultures that have not reached complete democracy yet, traditional values still prevail over secular-rational values. This means that these societies still struggle with establishing human and civic rights and are very busy by overcoming traditional

and survival values. Western countries cannot expect that these countries function and think in the same way as established democracies do in the West. Every country has its unique situation and has to take in account the characteristic features of its culture in implementing FOI legislation.

Therefore, when assessing different FOI regimes, the political and cultural context must be taken into account before judging a public access system. Western methods or strategies cannot always be applied to societies where other norms and values are dominant. It implies tact, respect and showing understanding of the political system, the legal system and culture. When this is clear, different FOI regimes could combine forces to improve or adjust FOI legislation. The focus must be on the shared aim of securing the citizen's right to know. So, it does not actually matter what path each country takes or how long. In the end, it is the purpose of each FOIA to make the public aware of their rights, to grant them their rights and to secure their rights for the greater purpose of reaching a stable and healthy democracy. As M. Cullen said at the opening of the FOI Conference at the University College of York, 16 October 1998: "Freedom Of Information is pure change. It requires change in understanding, in procedures and practices. Most fundamentally, it requires change in beliefs."

Bibliography

Legislation

The Netherlands:

Grondwet voor het Koninkrijk der Nederlanden van 24 augustus 1815.

Archiefwet 1962, Stb. 313, 19 July 1962.

Archiefwet 1995, Stb. 1995, 276.

Archiefbesluit 1995.

Wet Openbaarheid van Bestuur 1991, Stb. 1991, 703.

Wet Bescherming Persoonsgegevens 2000, 6 July 2000, Stb. 2000. 3.

Regelen betreffende de openbaarheid van bestuur (Wet openbaarheid van bestuur), Memorie van Toelichting, Tweede Kamer, vergaderjaar 1986-1987, 19859, nummer 3.

Wijziging van de Wet openbaarheid van bestuur in verband met aanvullingen inzake onredelijke en omvangrijke verzoeken, inzake bijzondere verstrekkingen alsmede inzake hergebruik en in rekening te brengen vergoedingen (Wet aanpassing Wob), Memorie van Toelichting 20 juni 2012.

Regeling van de Minister van Onderwijs, Cultuur en Wetenschap van 15 december 2009, nr. WJZ/178205 (8189), met betrekking tot de duurzaamheid en de geordende en toegankelijke staat van archiefbescheiden en de bouw en inrichting van archiefruimten en archiefbewaarplaatsen (Archiefregeling).

The United Kingdom:

English Bill of Rights (1689).

Freedom of Information Act 2000 ELIZ. II CH. 36.

Public Records Act, 1958 6 & 7 ELIZ. II CH. 51.

Public Records Act 1967 ELIZ. II. CH. 44.

India:

The Constitution of India 1949.

Right to Information Act, 2005 (Act No. 22 of 2005).

The Public Records Act, 1993 (Act No.69 of 1993).

Annexure III, The Public Records Rules, 1997, Department of Culture, New Delhi, the 9th January of 1997.

Indonesia:

The 1945 Constitution of the Republic of Indonesia.

Undang-Undang Nomor 7 Tahun 1971 Tentang Ketentuan-Ketentuan Pokok Kearsipan.

Undang-Undang Keterbukaan Informasi Publik, Nomor 14 2008.

Undang Undang Tentang Kearsipan, Nomor 43 2009.

Other legislation:

His Majesty's Gracious Ordinance Relating to Freedom of Writing and of the Press (1766).
French Declaration of the Rights of Man and of the Citizen (1789).
Virginia's Bill of Rights (1776).
The law of 7 Messidor Year II (25 June 1794).

International treaties

American Declaration of the Rights and Duties of Man (1948).
International Covenant on Civil and Political Rights (1966).
American Convention on Human Rights (1969).

International Council on Archives Constitution as approved by the 2012 AGM in Brisbane (24-08-2012).

Regulation (EC) No 1049/2001 of the European Parliament and of the council of 30 May 2001 regarding public access to European Parliament, Council and Commission document.

Literature

Banisar, D., *Freedom of Information around the World. A Global Survey of Access to Government Information Laws* (Privacy International July 2006).

J.G. Van der Beek-Scholtens, 'Openbaarheid van Archieven', in: J. J. Kompagnie (ed.): *Jaarboek S@p 2006. Openbaarheid in historisch en hedendaags perspectief* (Den Haag 2008) 26-33.

Bergmans, M., *FOI Legislation Compared. Public Access Regimes in the Netherlands, Ireland and Canada* (Master Thesis Archival Science, University of Amsterdam 2008).

M. Bergmans, E. Florijn, M. Heijmans-van Bruggen, J. Romijn-Wixley, A. de Vries, 'Voorbij het Gemenebest. Een onderzoek naar de openbaarheidsregimes in Groot-Brittannië, India en Zuid-Afrika', in: J. J. Kompagnie (ed.): *Jaarboek S@p 2006. Openbaarheid in historisch en hedendaags perspectief* (Den Haag 2008) 137-164.

G. Björkstrand and J. Mustronen, 'Introduction': Anders Chydenius' Legacy Today', in: J. Mustronen (ed.) *The World's First Freedom of Information Act* (Kokkola 2006).

Brooke, H., *Your Right to Know. A Citizen's Guide to the Freedom of Information Act* (London 2007).

Carlyle, Thomas (19 May 1840). "Lecture V: The Hero as Man of Letters. Johnson, Rousseau, Burns", in: *On Heroes, Hero-Worship, & the Heroic in History. Six Lectures. Reported with emendations and additions* (London-New York 1908).

Cox, K.L., *Ideology, Practicality, and Fiscal Necessity: The Creation of the Archives Nationales and the Triage of Feudal Titles by the Agence Temporaire des Titres, 1789-1801* (2007 Florida State University).

- Daalder, E.J., *Toegang tot overheidsinformatie. Het grensvlak tussen openbaarheid en vertrouwelijkheid* (Amsterdam 2005).
- S. Dahllöf, 'Netherlands: Misuse by journalists might lead to law changes', 20-05-2011.
- S. Dahllöf, 'EU: sharpened conflicts on new access rules', 01-12-2011.
- M. Duchein, 'The History of European Archives and the Development of the Archival Profession in Europe', in: *American Archivist* 55 (1992) 14-25.
- Foerstel, H.N., *Freedom of Information and the Right to Know. The Origins and Applications on the Freedom of Information Act* (London 1999).
- Hazell, R., B. Worthy and M. Glover, *The Impact of the Freedom of Information Act on Central Government in the UK. Does FOI Work?* (London 2010).
- P. Hogg, 'The First Freedom of Information Act', in: J. Mustronen (ed.): *The World's First Freedom of Information Act* (Kokkola 2006) 8-17.
- H. Kamil, 'The Role and Initiatives of NGOs in Indonesia in Empowering Freedom of Information' (2005).
- H. Kompanie, 'Openbaarheid in de praktijk van alle dag', in: J. J. Kompagnie (ed.): *Jaarboek S@p 2006. Openbaarheid in historisch en hedendaags perspectief* (Den Haag 2008) 94-102.
- Lord Justice Leveson, *An Inquiry into the Culture, Practices and Ethics of the Press. Executive Summary*, (London November 2012).
- H. Mander and A. S. Joshi, *The movement for Right to Information in India: People's Power for the Control of Corruption*.
- McKay, J.P., B.D. Hill and J. Buckler, *A History of Western Society since 1300* (Boston-New York 2006).
- Mendel, T., *Freedom of Information: A Comparative Legal Survey* (UNESCO, Paris, 2008).
- T. Mendel and Sunudyantoro, 'Participant Manual Indonesia: How Requesters Can Use the Right to Information', published by *The Alliance of Independent Journalists Indonesia (AJI)*.
- J.M. Panitch, 'Liberty, Equality, Posterity? Some Archival Lessons from the Case of the French Revolution', in *American Archivist* 55 (1992) 30-47.
- E. Posner, 'Some Aspects of Archival Development Since the French Revolution', in: *The American Archivist* 3 (July 1940) 159-172.
- A.E.M. Ribberink, 'De overheid opent haar archieven', in: *Nederlandsch Archievenblad* 84 (01-09-1980) 440-451.
- Rijksvoorlichtingsdienst, *De overheidscommunicatie in vogelvlucht. Ontwikkelingen sinds de Commissie Biesheuvel* (Den Haag 2000).

A. Roberts, 'A Great and Revolutionary Law? The First Four years of India's Right to Information Act', in: *Public Administrative Review* (revised on 12 March 2010).

Scholtes, E., *Transparantie, icoon van een dwalende overheid* (Den Haag 2012).

B. Simpson, 'Indonesia's Freedom of Information Law' (July 2010).

Splichal, S., *Principles of Publicity and Press Freedom* (Oxford 2002).

The Committee for Civil Liberties, Justice and Home Affairs (LIBE), *The Citizen's Right to Information: Law and Policy in the EU and its Member States* (June 2012).

Transparency International and Ernst & Young, *Transparency International Perceptions Index 2012* (2012).

Vereniging van Nederlandse Gemeenten, *De transparante gemeente. Lokaal bestuur dat wordt vertrouwd; een discussiestuk over openbaarheid in lokaal bestuur* (Den Haag November 2012).

R. Vleugels and W. Duyvendak, *Open de Oester* (2005).

Wilson, E. and P. Reill, *Encyclopedia of the Enlightenment* (New York 2004).

R.N. Winfield and S. Evans, 'Not Good Enough: India's Freedom of Information Bill Has Great Potential to Overhaul the Ills of Secrecy and Inaccessibility but There Are Inadequacies That Need to be Addressed', in: *Combat Law: The Human Rights Magazine*, 28-31.

Websites

Adam's Drafting

<http://www.adamsdrafting.com>

Anders Chydenius Organisation

<http://www.chydenius.net>

British legislation

<http://www.nationalarchives.gov.uk/>

<http://www.ico.org.uk/>

Dutch legislation

<http://www.wetten.nl>

<http://www.juristenweblog.nl>

<http://www.rijksoverheid.nl>

<http://www.gahetna.nl>

<http://www.nationaalarchief.nl>

Europe Wobbing

<http://www.Wobbing.eu>

European Union

<http://www.europarl.europa.eu>

Freedominfo.org

<http://www.freedominfo.org>

Indian legislation

<http://www.righttoinformation.org>

<http://www.righttoinformation.gov.in/>

<http://www.legalserviceindia.com>

Indonesian legislation

<http://www.loc.gov>

<http://www.indonesia.go.id>

International Council on Archives

<http://www.ica.org>

Nederlands Handelsblad

<http://www.nrc.nl>

Nederlandsch Archievenblad:

<http://www.kvan.nl>

Privacy International

<http://www.privacyinternational.org>

Right2info

<http://www.right2info.org>

The Guardian

<http://www.guardian.co.uk/>

The Jakarta Post

<http://www.thejakartapost.com/>

Transparency International, Corruption Perceptions Index

<http://transparency.org>

Trouw

<http://www.trouw.nl>

UNESCO

<http://www.unesco.org>

Vereniging van Nederlandse Gemeenten

<http://www.vng.nl>

Wikipedia

<http://en.m.wikipedia.org>

World Values Surveys Ingelhart & Welzel
<http://www.worldvaluessurvey.org>

Newspaper articles

D. Rushe and J. Ball, 'PRISM scandal: tech giants flatly deny allowing NSA direct access to servers', in: *The Guardian*, 07-06-2013.

S. Srivastava, 'Right to Information Act. India's magic wand and against corruption', in: *The Jakarta Post*, 31 August 2006.

NRC, 'Ombudsman wil Wob afschaffen – 'alle informatie openbaar maken'', 30-05-2013.

Other sources

De WOB als Tandeloze Tijger, broadcasted at 16 May 2013 on channel Nederland 1. A documentary by Sander van 't Sas (reporter) and Jan Born (ed.) of *EenVandaag*, a programme of AVRO and TROS.

Letter of Minister J.P.H. Donner to the Second Chamber concerning revision of the Open Government Act, 31 May 2011.

Letter of the Director General S.M.R. Baqar to Prof. Shahid Amin of the University of Delhi concerning the panel review of the PRA 1993 and the PRR 1997, 25 May 2009.

Speech of minister P.H. Donner held on the Day of the Freedom of the Press, 3 May 2011.

Thomas, R., *Freedom of Information. The UK Experience*, the eighth Ketelaarlezing held on 1 October 2008.