

Access to Information in Southeast Asia and Cambodia

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As Cambodia approaches nearly two decades as a post conflict society, establishing some semblance of transparency, both in the public sector and the burgeoning private sector, remains a daunting, if not overwhelming task. Governmental bodies and the judicial/legal sector are still rife with corruption, nepotism, and cronyism. Political control and patronage networks also dominate these institutions, and their decision making and policy making processes are often shrouded in secrecy. A recent study by the Berlin-based Transparency International rated Cambodia the 14th most corrupt country in the world, five positions worse than its 2007 rating. According to the TI ratings, Cambodia is now in the unenviable position of being the most corrupt country in Asia after Myanmar.ⁱ

An anti corruption law, which was first drafted in 1994, languishes in legislative limbo, going through various versions, the most recent one in 2006. Yet, despite recurrent promises by Government officials that they are committed to passing such a law, little real progress has been made.ⁱⁱ Mistrust, rumor, and flat out ignorance regarding public issues still permeates Cambodian society, particularly in the rural areas, where access to public information is often limited to ‘word of mouth’, gossip, rumor mongering, and pro forma proclamations from government officials. Often, these public rumors and gossip constitute nothing more than relatively harmless urban/rural legends, which lead to humorous results, as during the 2003 SARS crisis.ⁱⁱⁱ Sometimes, however, these public rumors can lead to destructive results and social unrest, as witnessed by the 2003 anti-Thai rioting in Phnom Penh.^{iv}

Experts in conflict resolution often cite inadequate or inaccurate information as potential sources of conflict.^v Assuming that this is true, one could therefore argue, as many human rights advocates currently do, that in post-conflict societies such as Cambodia, a free flow of information, particularly from public institutions, is vital to the building and

maintenance of a stable, functioning democracy and a vibrant, informed, and engaged citizenry. This information “free flow”, these advocates say, also creates a societal culture of tolerance, openness, honesty, and transparency, which provides a safeguard against corruption and oppressive governmental power. All of this leads to the creation and maintenance of a peaceful and stable society. As Toby Mendel, a noted human rights lawyer and advocate with the London-based NGO Article 19 recently wrote:

Information held by public authorities is not acquired for the benefit of officials or politicians but for the public as a whole. Unless there are good reasons for withholding such information, everyone should be able to access it. More importantly, freedom of information is a key component of transparent and accountable government. It plays a key role in enabling citizens to see what is going within government, and exposing corruption and mismanagement. Open government is also essential if voters are able to assess the performance of elected officials and if individuals are to exercise their democratic rights effectively, for example through timely protests against new policies.^{vi}

However, how much of this is realistic? Can effective Freedom of Information (FOI) legislation help create an environment of domestic stability and peace, as well as establish democratic values in a society? And in particular, can such laws work in Cambodia, where hierarchical rule, patronage, and secrecy have characterized governments and rulers from the ancient Angkor period to the present day?

Before we can answer these questions we must first refer to the current international legal instruments, opinions, and policies regarding Freedom of Information. Then we will briefly examine the current status of proposed FOI legislation in Cambodia, as well as existing and pending legislation in some of its Asian neighbors, including the post conflict societies of Indonesia and Sri Lanka. We will also examine some possible flaws and mistaken assumptions that underlie the ‘free flow of information’ model, particularly with regards to developing countries and post-conflict societies.

Access To Information: International Standards

The right to access information held by public bodies is often referred to as ‘freedom of information’ or ‘right to information’, and has been recognized in international law as a fundamental human right. There is no ‘right to information’ specifically listed in the earliest human right instruments. However, over the years, this right has gradually been recognized as part of the fundamental right of freedom of expression, which includes the right to seek,

receive, and disseminate information. Article 19 of the Universal Declaration of Human Rights (UDHR) states:

Everyone has the right to freedom of opinion and expression; this right includes the right to hold opinions without interference, and to *seek, receive and impart information and ideas* through any media and regardless of frontiers. (Emphasis in italics added)

Although the UDHR is not directly binding on States, portions of it, including Article 19 are now generally regarded as part of customary international law.^{vii} Article 19 of the International Covenant on Civil and Political Rights (ICCPR), which unlike the UDHR is a formally binding legal treaty endorsed by over 160 countries, including Cambodia, guarantees the freedom of expression and information, using language similar to the UDHR.^{viii}

As a result, the current consensus of much of the international community is that States have an obligation to enact FOI laws. Since the mid-1990's the United Nations Special Rapporteur on Freedom of Opinion and Expression has called on nations to adopt and implement FOI legislation. In 1997, the U.N. Rapporteur stated:

The Special Rapporteur, therefore, underscores once again that the tendency of many Governments to withhold information from the people at large. . . is to be strongly checked.^{ix}

The UN Commissioner on Human Rights then invited the Special Rapporteur to “develop further his commentary on the right to seek and receive information on his observations and recommendations arising from communications”.^x In a 1998 report to the UN, the Special Rapporteur amplified his position on the issue, arguing that the right to information includes the right to access State information:

(T)he right to seek, receive, and impart information imposes a positive obligation on States to ensure access to information, particularly with regard to information held by Government in all types of storage and retrieval systems[.]^{xi}

A year later, the Special Rapporteur was joined by his two regional counterparts – the Representative on Freedom of the Media of the Organization for Security and Cooperation in Europe, and the Special Rapporteur on Freedom of Expression of the Organization of American States – in a Joint Declaration calling for legal recognition of the right to information access. Their call was most recently reiterated in a 2004 Joint Declaration:

The right to access information held by public authorities is a fundamental human right which should be given effect at the national level through comprehensive legislation (for example Freedom of Information Acts) based on the principle of maximum disclosure, establishing a presumption that all information is accessible subject only to a narrow system of exceptions.^{xii}

The right of freedom of information has been recognized as an essential human right by regional bodies throughout the world. The Inter-American Commission on Human Rights, which approved the 'Inter-American Declaration of Principles on Freedom of Expression' in October 2000, recognized a right to access information held by the State as constituting not only an aspect of freedom of expression but also as a fundamental right of its own.^{xiii} In October 2002, the African Commission on Human and People's Right adopted a 'Declaration of Principles on Freedom of Expression in Africa.' Principle IV of the Declaration states in part:

1. Public bodies hold information not for themselves but as custodians of the public good and everyone has a right to access this information, subject only to clearly defined rules established by law.
2. The right to information shall be guaranteed by law in accordance with the following principles:
 - a. Everyone has the right to access information held by public bodies.
 - b. Everyone has the right to access information held by private bodies which is necessary for the exercise or protection of any right.
 - c. Any refusal to disclose information shall be subject to appeal to an independent board and/or the courts.
 - d. Public bodies shall be required, even in the absence of a request, actively to publish important information of significant public interest.
 - e. No one shall be subject to any sanction for releasing in good faith information on wrongdoing or that which would disclose a serious threat to health, safety or the environment save where the imposition of sanction serves a legitimate interest and is necessary in a democratic society.
 - f. Secrecy laws shall be amended as necessary to comply with freedom of information principles.^{xiv}

Within the European Community, the Committee of Ministers of the Council of Europe adopted Recommendation No R (2002)2 on Access to Official Documents in 2002.

Principle III provides that: "Member states should guarantee the right of everyone to have access, on request, to official document held by public authorities. This principle should apply without discrimination on any ground, including that of national origin".^{xv} Effective implementation of FOI laws is regarded as a key requirement on State parties to the 2005 UN Convention on Corruption, (acceded to by Cambodia in September, 2007). Article 13 of the Convention requires that States should "(ensure) that the public has effective access to information".^{xvi}

The past twelve years have seen the adoption of a record number of FOI laws worldwide. Since the mid-1990's FOI legislation has been passed in Azerbaijan, Belize, Chile,

China, Germany, India, Jamaica, Japan, Pakistan, Peru, South Africa, Thailand, Trinidad and Tobago, the United Kingdom, as well as in most of the former Soviet satellite states of Central and Eastern Europe. These nations join a number of other States which enacted FOI laws some time ago, such as Sweden, France, the United States, Finland, The Netherlands, Australia, and Canada. So far, over 70 nations have national FOI laws on the books.^{xvii} Sweden's Freedom of the Press Act, which was passed in 1766, is generally thought to be the oldest Freedom of Information Law in existence.^{xviii} Following State examples, a growing number of inter-governmental and international institutions, such as the European Union, the United Nations Development Program (UNDP), the World Bank, and the Asian Development Bank (ADB), have also adopted freedom of information policies.^{xix}

Access To Information: General Principles

In his 2000 Annual Report to the UN Human Rights Commission, the UN Special Rapporteur called on all States to revise their domestic laws to give effect to the right of information, and directed attention to nine important issues.^{xx} First, any FOI law must be guided by the principle of maximum disclosure. Second, public institutions should be obligated to publish and widely disseminate documents of significant public interest. Third, public bodies should promote the principles of open government and public education, including informing the public of its right to access information. Fourth, any exceptions to disclosure should be clearly and narrowly drawn. Fifth, all public bodies must establish open, accessible internal procedures and systems to ensure the public's right to receive information, rapidly and fairly. Sixth, the costs in obtaining public information should not be so high as to deter potential applicants and negate the intent of the law itself. Finally, there should be a presumption in favor of public meetings of governmental bodies, protection for whistleblowers,^{xxi} and a prioritization of any FOI law over secrecy provisions in other legislation.

Access To Information: Exceptions And Limitations

Under international law, restrictions on the right to information must meet the requirements set forth in Article 19(3) of the ICCPR. These requirements can be best applied by using a three prong test. In order to justify a refusal to disclose, a governmental body must

demonstrate all of the following: a) the information pertains to a legitimate protected interest listed in the FOI law; b) disclosure of the information would threaten to cause substantial harm; and d) the said harm must outweigh the public interest in disclosing the information. The purpose of this three prong test is to guarantee that any withholding of governmental information must only occur when it is in the overall public interest. Correct application of the test will help prevent blanket exclusions and exceptions, eliminate provisions that protect governmental bodies from public criticism or embarrassment, protect against governmental malfeasance, and prevent the concealment of information that might be detrimental to an existing government policy or political ideology.

Access To Information In Cambodia

Although there is currently no FOI law in Cambodia, the Royal Government, with the encouragement and support of donor countries has recognized the need for a national access to information policy and legislative framework. Three provisions in the current Cambodian Constitution provide the constitutional underpinnings of a protected right of “timely and effective access to high quality and accurate information held by the Royal Government of Cambodia and other public institutions”.^{xxii} Article 31 of the 1993 Constitution of the Kingdom of Cambodia pledges to “recognize and respect human rights as stipulated in the United Nations Charter, the Universal Declaration of Human Rights, the covenants and conventions related to human rights, women’s, and children’s rights.” Article 35 of the Constitution also gives Khmer citizens the “right to participate actively in the political, economic, social, and cultural life of the nation. Any suggestions from the people shall be given full consideration by the organs of the State.” Further, under Article 41, Khmer citizens “shall have freedom of expression, press, publication, and assembly.” The Press Law and the Archive Law might be the closest legislation that Cambodia has to a FOI Law. However, both laws have their limitations.

Access to Information Under the Press Law

Article 5 of the Press Law may be the closest thing that Cambodia has to an access to information law. It recognizes the “right of access to information in government held records”.^{xxiii} However, access can be denied on the following grounds:

- harm to national security
- harm to relations with other countries

- invasion of the privacy rights of individuals
- disclosure would lead to the exposure of confidential information and financial information
- disclosure would affect the right of a person to a fair trial
- cause danger to public officials carrying out their duties.

Although Article 5 may satisfy two of the three prongs of the restriction of disclosure test (legitimate protected interest and substantial harm), there is no explicit consideration given to the third prong of the test, i.e., balancing these factors with the overall public interest. Article 5 does not provide for appeal once a request is denied by a governmental body. There are no provisions for an independent administrative entity, or Ombudsman which hears any appeals by applicants.

Access to Information Under the Archive Law

In 2005, the Archive Law was adopted. The Law regulates the management and maintenance of official archives and outlines the rights of persons to access archives for research purposes. Unfortunately, the Law suffers from a lack of clarity. Many of its provisions are vague or confusing, which may lead to various interpretations. Article 1 for example, outlines the purposes of the Law and refers to “historical documents”.^{xxiv} Yet, nowhere in the law is that term precisely defined. Chapter 5, Article 13 states:

Public archives which are publicized documents are permitted to be used by the public for research and consultations as unrestricted information. Other public activities shall be permitted for free research 20 years thereafter the date of the documents or thereafter the end of proceeding, or in special cases as stipulated in Article 14 of this Law.

The term “publicized documents” is never defined. This is problematic since documents which are not considered “publicized documents” cannot be accessed for 20 years after the date of creation or the end of a proceeding. Article 14 lists categories of documents that attract longer periods of secrecy:

- 40 years thereafter the date of the documents or thereafter the end of proceedings for the documents that affect national defense, national security, and public order as well as birth certificates, notary papers, and litigations.
- Documents that affect national defense, national security, and public order shall be specified by a sub-decree.
- 120 years thereafter inception for personal documents and medical documents of each individual.

As in the Press Law, there is no balancing test with the overall public interest. Nor is there any mention of harm or even substantial harm, which is required under the three prong test. Potential whistleblowers are certainly not protected under the Archive Law. In fact, the penalties for violating provisions of the Article 14 are severe – a violator is subject to a fine of between \$1,250 and \$6,250 US dollars and imprisonment of between seven and fifteen years.

Lack of defined institutional procedures in accessing information

Due to the lack of a clear FOI policy, many requests are handled informally and decided on a case by case basis. An officer from the Council of Ministers recently pointed out that:

Cambodia has no law on the classification of such documents. If people want to get access to a document then we need to follow informal procedures. If I am not sure whether to give the document, then I will ask my boss. If he is not sure, then he will ask his boss, and so it goes until someone can decide yes or no.^{xxv}

In a 2004 report to the U.N. General Assembly, the Special Representative for Human Rights in Cambodia, Peter Leuprecht outlined the difficulties in accessing governmental information:

It remains difficult to obtain access to basic information held by public authorities, given public reports, draft laws, that have been tabled in the National Assembly, government instructions and circulars, all of which are often treated as if they were confidential. Civil society groups face considerable problems in accessing information that is in the public interest, as do the media, despite the latter's right to access certain information being provided for in the Press Law. The problem of accessing information is customarily overcome through personal contacts, rather than through institutionalized and transparent mechanisms. . . Access to information held by public authorities has to be provided and legislation giving citizens the right to access to such information should be enacted and implemented, thereby assisting the effort to build open government, inform public debate, and reduce corruption.^{xxvi}

Recent Legislative Developments

Under pressure in recent years from donor countries to improve transparency and commit to a 'good governance' plan, the Royal Government moved tentatively toward the establishment of an FOI law that meets international human rights standards. In 2004, the Royal Government formally acknowledged the need for an FOI law, "in order to create transparent government, reduce corruption, and promote confidence in the government by the citizens of Cambodia".^{xxvii} A target was set (with donor approval) to develop a clear

policy framework on access to information, which would lead to an eventual drafting and adoption of an FOI law.

FOI Policy Paper

After three years of public workshops and conferences involving government officials, members of civil society, local and international NGOs, as well as members of the general public, the Council of Ministers mandated the Ministry of National Assembly Senate Relations and Inspections (MoNASRI) to draft a government Policy Paper on Access to Information, which would serve as a precursor to the drafting of a national FOI law.^{xxviii}

The purpose of the policy paper was outlined:

The Policy Paper will set out the framework for the government's strategy on increasing access to information. It will define access to information, the role of government agencies, and other stakeholders in promoting access to government information, fundamental principles to be included in the law, time frame for its passage and designated agency responsible for the development of the draft law.^{xxix}

The Policy Paper used a number of guiding principles relating to Access to Information, taking into account existing human rights instruments, current FOI laws in other States, opinions by international legal experts, and guidelines established by various international NGOs, most notably the international human rights NGO Article 19. These guidelines were similar in scope to the nine issues specified by the U.N. Special Rapporteur in his 2000 report. The Policy Paper also outlined the broad benefits of a national information policy based on international standards. It pointed out that:

. . . access to Information legislation promotes good governance and accountability, helps to educate the public about government programs and services, and encourages public participation in the society.^{xxx}

Determination of the public interest

The paper also proposed that in determining what is in the public interest, "officials should prioritize the need to contribute" to the following: effective decision-making and accountability; ensuring that a public body is adequately discharging its functions; the effective use and oversight of public funds; debate on issues of public interest; public participation in the political process and decision-making; public safety and public health; and protection of the environment.

Proposed Exemptions for Cambodia

Disclosure exemptions would cover the following:

- Where disclosure would be reasonably likely to cause serious harm to national security, defense, international relations, and the national economy.
- Where disclosure would be reasonably likely to cause serious prejudice to the effective formulation, development, or delivery of government policy.
- Where disclosure would be reasonably likely to cause serious prejudice to the investigation or prosecution of a crime or the ability to conduct a fair trial, would constitute a contempt of court, is forbidden to be published by a court or tribunal or would facilitate an escape from legal custody.
- Where disclosure would constitute a breach of any relationship recognized by law.
- Where disclosure would endanger the health or safety of any natural person.
- Where disclosure would seriously prejudice the legitimate commercial or competitive position of the public institution or a third party or cause unfair gain or loss to any person or the information was obtained in confidence from a third party and it contains a trade secret protected by law; and
- Where disclosure would constitute an unreasonable invasion of privacy of a person who is not a government official or where the information is about a government official but has no relation whatsoever to their official position or duties

The three prong test would then be applied to determine whether non disclosure is justified.

In other words, the subject matter must fall within the above exemptions, but there must also be a showing of substantial harm, plus a showing that non disclosure would outweigh the over all public interest in disclosure.

Creation of an Information Commissioner

The policy paper also provides for the creation of an ‘Information Commissioner’, who would handle any administrative appeals regarding denials of access. The Commissioner would have three roles: a) decide on administrative appeals; b) review and make recommendations about any revisions to the FOI law; and c) raise public awareness about public access to information and provide training to government employees.^{xxxii} The policy paper envisions that the Commissioner would report directly to Parliament. However to ensure independence, it proposes that a commission of the National Assembly should be responsible for managing the Commissioner’s budget, while a Senate commission “should consider the reports on investigations carried out and the discharge of their more ‘proactive’ functions under the Access to Information Law”.^{xxxiii} There is no provision for judicial review, and having this presumably ‘independent’ Commissioner work under the arms of the legislative branch could constitute a potential separation of powers issue.

Current Status of Policy Paper and Possible Future Legislation

The Draft Policy Paper on Freedom of Information was completed in late August 2007. The Draft currently sits at the Ministry of National Assembly Senate Relations (MoNASRI). To date, it has still not been forwarded to the Council of Ministers for review.^{xxxiii} This is certainly not surprising, given the usual snail's pace of the Cambodian legislative process.

Access To Information: A Regional Overview

As of this date, seven States in Asia – China, Hong Kong, India, Japan, Pakistan, South Korea, Taiwan, and Thailand have existing FOI legislation. A few others, like the Philippines, have included freedom of information as explicit provisions in their national constitutions.^{xxxiv} In contrast with Europe and the North American countries of Canada and the United States, legal recognition of the right in Asia has come more slowly. South Korea was the first Asian nation to pass a specific law, although its Constitutional Court had previously ruled in 1989 that there was a constitutional right to information. The Act on Disclosure of Information by Public Agencies was enacted in 1996 and went into effect in January 1998. It allows citizens to demand information held by public agencies.^{xxxv} In 2007, China became the latest Asian nation to pass a Freedom of Information Law. Several laws are pending in legislative bodies, including most notably Indonesia, Sri Lanka, and Malaysia.^{xxxvi} This section of the paper will look at three different case studies from three different countries at different developmental levels: Japan, Singapore and Indonesia.

Freedom of Information in Japan

Much of the effort toward establishing a FOI Law has come from a coalition of Japanese consumer/civic activists, academics, and public interest lawyers, who have been lobbying for a national disclosure law since the early 1970s. Their efforts had their genesis in growing public concern over governmental involvement or negligence in various high profile incidents, such as: the Lockheed corruption scandal; illnesses and birth defects due to defective drugs; severe cases of industrial pollution; as well as other public scandals and governmental regulatory failures. After more than 20 years of intense lobbying by these groups, along with opposition political parties, a national FOI Law, “Law Concerning Disclosure of Information Held by Administrative Agencies” came into effect on April 1, 2001.^{xxxvii} Although a number of local government FOI laws had been in existence in Japan since the late 1960s, this new law creates for the first time a legally enforceable right of access to Japanese national government files.

The Japanese FOI law was patterned after the U.S. Freedom of Information Act (FOIA), which was first enacted in 1966 and has been revised and expanded ever since. The public reaction in Japan toward the new law was generally positive, and more than a

thousand information disclosure requests were filed with national government agencies during the first week of its existence alone. Japan's law provides that "all persons have the right to demand information" and outlines the various procedures by which governmental information can be accessed. Six specific exemptions from disclosure are listed: individual privacy information; business information and trade secrets; national security and diplomacy information; criminal investigation information; deliberative process information; and agency operations. One major criticism is that the language creating each of these exemptions is broad and appears to give a great deal of discretion to agency personnel. If requests for information are denied, requesters can appeal the denial in two different ways. They can file a request for review of the non-disclosure decision by an "Information Disclosure Review Board" established by the law under Articles 21-26, or they can file a suit for nullification of the non-disclosure decision directly with the district courts located at the eight appellate court venues throughout Japan.^{xxxviii}

The Review Board consists of nine members, attached directly to the Office of the Prime Minister, with panel members appointed by the Prime Minister subject to Parliamentary (Diet) approval. In the majority of cases, the Review Board reviews appeals in three-member panels. These panels have the power to demand that the agency submit document(s) in question for an in camera examination. When the Review Board reaches a decision, it issues a written opinion on the matter, which is published and sent to the agency head. The agency then must decide whether to follow the opinion of the Review Board, or stand by its original disposition. The Review Board does not have the power to compel the agency to follow its decision, however. All Review Board recommendations are published on the Internet.^{xxxix}

If a requester decides to take the case directly to the court system and file a lawsuit, there is no requirement that the requester first appeal to the Review board. In contrast with the Cambodia draft policy paper proposal, which provides for an Information Commissioner, but includes no provision for judicial review, the Japanese law does provide for a judicial review option, even to the extent of giving the requester the option of completely bypassing the administrative appeal avenue.^{xl}

Singapore and FOI

Most official information in Singapore that is within the public domain is updated regularly, ranging from daily to quarterly, depending on the nature of the information. This includes general social data, population census data, official audit reports of government agencies, election contributions and expenditures, national government budget records and government loans and contracts.^{xii} Because of its well developed and modern information technology sector, information is made available quickly and efficiently in a variety of formats. But beneath this veneer of seeming transparency, the situation in Singapore is much different than what it appears to be. Despite its reputation for efficiency, good governance, economic development, and lack of corruption, Singapore still has no Freedom of Information Law. Instead, information disclosure is regulated in a variety of formal and informal ways.

Both formal regulations and a pervading informal culture of secrecy serve to prevent the public's full access to information. Although there have been some reforms, particularly in the areas of corporate and fiscal transparency, there has been little or no progress in expanding the public access to governmental information. The ruling party (PAP) controls nearly all segments of the governmental machinery, and its authorities still exercise a high degree of control over the release of information.^{xiii} Information disclosure and dissemination are regulated through a series of law, most notably the Official Secrets Act (OSA), which provides stiff penalties to those who divulge "any type of information which is prejudicial to the safety or interests of Singapore." An informal culture of secrecy pervades governmental institutions in Singapore, including government employees. Many officials are suspicious of the motives of the person or group seeking information. Journalists are also met with suspicion.

This lack of transparency is the result of over 40 years of quasi-authoritarian rule, in which the guiding philosophy of governmental operations was in preserving secrecy. Government data is often "cherry picked" in which only "positive" or non-controversial data is released to the public. Economic data is routinely withheld. Information regarding Government Linked Companies (GLC) is also restricted, along with (up until 2008) data from the Government of Singapore Investment Corporation (GIC).^{xiii} The "informal culture of secrecy" that is common in Singapore can best be described as:

. . . a strategic fog maintained around economic data that makes it impossible to monitor the government's performance record. Its refusal to open government accounts to scrutiny seems less a matter of national security than of concern that transparency would reveal the Government's investment performance for all to see.^{xliv}

Proposed FOI Legislation in Indonesia

A proposed "Freedom to Obtain Public Information" Law has been under consideration for several years now. The current version drafted by Parliament is being reviewed by the government, which is in favor of a more restrictive draft.^{xlv} Article 7 of the latest draft contains a number of provisions that establish a governmental duty to provide and/or publish non-exempt public information. Articles 9-12 sets the main "proactive" publication duties, i.e., categories of information that must be published regularly, at least once every six months. These include information on each public body, including its performance and financial reports. The information must be disseminated in a manner that can be easily accessed and understood by the general public.^{xlvi} Article 12 also requires that each public body publicize its progress and performance in implementing the Law. Article 11 lists information that must be available at all times, for public perusal. This includes all non-exempt public information held by the public body, decisions, policies, supporting documents, work plan, and estimates of annual expenditures, and opinions of public officials expressed at public meetings.^{xlvii} Article 10 requires public bodies to publicize immediately information which is required to save lives, in a manner easily accessible and understood by the public.

One of the more progressive elements of this law, as compared with other FOI laws is its emphasis in requiring proactive publication by the governmental bodies. Unlike many FOI laws, which often do not require bodies to proactively reveal government information to the public, the draft Indonesia FOI specifically cites that Government has an affirmative duty to actively disclose. As Toby Mendel states:

. . . proactive publication is increasingly being recognized as one of the most important aspects of a right to information law. It helps ensure at least a minimum platform of information is being disseminated to members of the public, many of whom will never actually make a request for information. And it also helps to reduce the number of requests for information by; making information available before it is requested. Given the relatively high cost of processing individual requests, and the falling costs of posting information on the internet, this an attractive option. Indeed, some laws are calling for as much information as possible to be made available on a proactive basis to limit the need for individuals to make specific requests for information.^{xlviii}

Article 15 lists the exemptions under the Law as: Law Enforcement and Investigations; Commercial and Trade Secrets; National Security; Protection of Natural Resources; National Economic Interests and Foreign Relations; Personal Information; and Internal Deliberations of Public Bodies. In addition, the Law requires a showing of harm that outweighs the public interest. These particular provisions are currently the subject of much discussion with the Government. The Law also includes provisions dealing with appeals of denials of disclosure. As with Thailand, Article 4 and 22-46 address the issue of independent bodies which would be in charge of oversight and appeals.^{xlix} The Articles provide for the establishment of Central and Regional Information Commissions, which would rule on disclosure appeals. Members would be appointed by the Government for five year terms. As in Thailand, there are no provisions for judicial review.

Freedom Of Information: The Hope Vs. The Reality

Much has been written about the assumed public benefit of effective freedom of information legislation, particularly with respect to its role in promoting transparency, good governance, and public accountability. But is this assumption correct? Does a progressive FOI legal framework automatically provide a public or societal benefit? In a 2004 study for Harvard University's John F. Kennedy School of Government, authors Archon Fung, David Weil, Mary Graham, and Elena Fagotto make compelling arguments questioning this public benefit assumption, particularly with respect to transparency schemes.¹ The authors contend that an effective transparency system (which would include an FOI legal framework) must satisfy certain conditions:

[T]ransparency systems must meet two challenging conditions in order to be effective. First they must embed information into the ordinary decision-making and action processes of information users and (government) disclosers. Second the responses of both users and disclosers must automatically be congruent with policy objectives.^{li}

The authors also contend that any analysis/critique of a transparency system should primarily focus on that system's impact on government policy, and not only on the interests of the competing interests (users and disclosers). Much of the current NGO and human rights literature on access to information focuses on the rights of the user or requester of information, and relatively little on public policy impact. Transparent governance may not always equate with effective governance.

Transparency is effective regulation only if it influences the performance of targeted organizations in the direction of a specified policy goal. Improvement in quality, scope, and use are necessary, though not sufficient, pre-conditions for effectiveness. Systems that do not keep pace with changing markets and public priorities can become counter-productive.^{lii}

The authors further point out that the sheer diversity of users in a transparency scheme can be problematic. With regards to access to information, requesters can be journalists, representatives of NGO and civil society groups, or political organizations, each with their own particular agendas and contradictory interests in accessing government information. These groups may not always act in concert or with shared purpose. This is especially true in Cambodia, where many civil society/NGO groups are heavily dependent on donor aid, and are often engaged in fierce competition with each other for the donor largesse. Mere disclosure without effective follow up in making the information relevant and understandable to the public does little or nothing in the long run to effectuate progressive change in a society:

(S)imply placing information in the public domain does not mean that it will be used or used wisely. In practice information cannot be separated from its social context.^{liii}

. . . A (transparency system) has effects when the information that produces enters the calculus of (citizen) users and they consequently change their actions and when information disclosers (public officials) respond to user actions. It is effective when the discloser responses significantly advance policy aims.^{liv}

If the information informs and educates the public to such an extent that it embeds into their behavior and decision making process, it can play an important role in effectuating positive societal change. The information must have value to the citizen-users, and be relevant to their common, everyday life challenges.

Conclusion: FOI and the Cambodian reality

Whether it has been the divine rule of the Angkor Empire, the ethnocentrism of the French colonialists, the paternalistic “Buddhist Socialism” of the Sangkum Reastr Niyum in the 1950’s and 60’s, the corruption and cronyism of the Khmer Republic, the paranoiac Maoism of Pol Pot, or the ‘machine’/ patronage politics of the present day ruling CPP, transparency and ‘open government’ have never been the hallmarks of Cambodian governments or their leaders. Yet, at the same time, given the low educational level of much of the population, as well as the fear, suspicion, distrust, and even disinterest that many Cambodians have toward public institutions, there is no guarantee that a ‘free flow’ of information to the public would

ever be utilized by citizens. Obviously, passage and effective implementation of an FOI Law in Cambodia is clearly necessary. It can help foster a climate of openness and trust in public institutions, which in turn, can serve to empower citizens by involving them more directly in the workings of their government. However, a law that simply makes information available to the Cambodian public is not enough. Such a law must be accompanied by increased public outreach by governmental institutions, as well as a total commitment to an ongoing development of the education sector, which will make for a more aware, perceptive, and engaged citizenry, and which will help them utilize the benefits of an FOI Law to their fullest extent.

ⁱ *Transparency International*, Corruption Perceptions Index 2008.

ⁱⁱ “EU Increasingly Impatient with Cambodia over anti-corruption law”, *Deutsche Presse Agentur*, January 23, 2007.

ⁱⁱⁱ During the SARS virus crisis in 2003, Phnom Penh city residents flooded the street in a desperate search to buy mung beans, after hearing a rumor that anyone who did not eat the vegetable by midnight would die from SARS. Bean prices jumped by as much as 500% in 24 hours, giving the bean sellers in the city a tidy profit.

^{iv} “Mobs Go Berserk in anti-Thai frenzy”, *Phnom Penh Post*, January 31, 2003.

^v See “Conflict Resolution: The Role of Information and Knowledge Management—The Kenyan Experience, Goethe Institute, Nairobi, pp.4-6. See also Johan Galtung, *Peace by Peaceful Means: Peace and Conflict, Development, and Civilization*. London: 1996.

^{vi} Toby Mendel, “Freedom of Information as an International Protected Human Right”, published by: Article 19 Global Campaign for Free Expression, June. 15, 2000.

^{vii} *Filartiga v Pena* 630 F.2d 876 (1980) U.S. Circuit Court of Appeals, 2nd Circuit.

^{viii} UN General Assembly Resolution 2200 (XXI), December 15, 1966, entered into force, March 23, 1976.

^{ix} Report of the Special Rapporteur, “Promotion and Protection of the right to freedom of opinion and expression”, February 9, 1997, UN Doc. E/CN.4/1997/31.

^x Resolution 1997/27, April 11, 1997.

^{xi} Report of the Special Rapporteur, “Promotion and protection of the right to freedom of opinion and expression”, Jan. 28, 1998, UN Doc. E/Cn.4/1998/40, paragraph 14.

^{xii} Joint Declaration adopted on December 6, 2004.

^{xiii} 108th Regular Session, October 19, 200. Available at <http://www.lachr.org/declaration.htm>. See Principles 3 and 4.

^{xiv} Ordinary Session of the African Commission on Human and People’s Rights, October 17-23 2002, Banjul, Gambia. Available at http://www.achpr.org/english/declaration/declaration_freom_exp_en.html.

^{xv} Recommendation No. R (2002)2 of the Committee of Ministers of the Council of Europe to member states on access to official documents, Feb. 21, 2002.

^{xvi} UN General Assembly Resolution 58/4 Oct. 31, 2003, in force, December 14, 2005.

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