



## The Fiftieth Anniversary of the Freedom of Information Act: How it Measures up Against International Standards and Other Laws

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# THE FIFTIETH ANNIVERSARY OF THE FREEDOM OF INFORMATION ACT: HOW IT MEASURES UP AGAINST INTERNATIONAL STANDARDS AND OTHER LAWS

TOBY MENDEL\*

*When the United States adopted its Freedom of Information Act in 1966, it was the third country in the world to put in place such a groundbreaking democratic mechanism for ensuring public access to the information held by government. As such, it was, by definition, a global leader in this area. Fifty years later, however, according to the internationally recognized tool for assessing legal frameworks for what has come to be known as the right to information, or RTI, the RTI Rating, the United States FOIA languishes in the fifty-first position globally. This article describes the way the RTI Rating works and analyses the strengths and weaknesses of the FOIA according to the rating. In some cases, these weaknesses appear to be derived, at least in part, from the age of the FOIA, and a correlation can be found between the performance of the United States law and other older laws. In other cases, further study is needed to identify the causes of the weaknesses.*

This year marks the fiftieth anniversary of the adoption of the United States Freedom of Information Act.<sup>1</sup> This type of law – which grants individuals the right of access to information held by public authorities – has come to be known globally as a “right to information,” or RTI law, in light of the fact that the right it guarantees is now recognized internationally as a human right, guaranteed as part of the broader right to freedom of expression.<sup>2</sup> The United States was the third country in the world to adopt such a law, following Sweden (1766, so that it is celebrating the 250th anniversary of its law this year) and Finland (1951).

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<sup>1</sup>Freedom of Information Act, 5 U.S.C. §552 (2012).

<sup>2</sup>See *infra* notes 17, 18, 19 and accompanying text.

Twenty-five years after the FOIA was adopted – in 1991 – only fourteen countries had adopted such laws, although the number has grown rapidly since then and, as of June 30, 2016, stood at 108 national laws (and a far greater number of sub-national laws) globally.<sup>3</sup>

As an early adopter, and a country that has introduced a significant number of amendments to its law, one might assume that the United States would be a leader in this area. According to the RTI Rating,<sup>4</sup> the leading global methodology for measuring the strength of the legal framework for RTI,<sup>5</sup> that assumption is wrong. Indeed, the rating puts the United States in a tie for fifty-first position globally, alongside Australia, Belize, Honduras and Romania, just about the middle point of all countries with such laws.<sup>6</sup> Furthermore, the rating only credits the United States FOIA with eighty-three points out of a possible 150, or less than 55%, far less than top-scoring Serbia, with 135 points (90%).<sup>7</sup>

This article describes the RTI Rating and the international and comparative standards from which it was developed and then looks at areas where the United States FOIA does comparatively better or less well, putting forward some theories to explain its performance. An initial observation is that the United States at least does better than a number of established democracies, which account for exactly one-half of both the bottom ten and bottom twenty countries on the rating and which are (from the bottom): Austria, Liechtenstein, Germany, Italy,<sup>8</sup> Belgium, Iceland, France, Denmark, Greece and Japan. Furthermore, not a single Western democracy makes it onto the top-twenty list, with Finland at the top of this group, in twenty-second position globally.

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<sup>3</sup>See *Global Right to Information, Country Data*, <https://www.rti-rating.org/country-data>. The data in this article are taken from the rating as it stood on June 30, 2016, and any changes since then are not reflected herein.

<sup>4</sup>RTI RATING, <https://www.rti-rating.org>.

<sup>5</sup>It should be stressed that the rating only measures the strength of the legal framework for RTI and not the quality of implementation of the rules. There are cases of countries with relatively weak laws which still achieve fairly high degrees of transparency, while a few countries with strong laws have done almost nothing to implement them. See Ethiopia: Article 19 Submission to the UN Universal Periodic Review of Ethiopia, Sept. 16, 2013, available at <https://www.article19.org/resources.php/resource/37245/en/ethiopia:-article-19-submission-to-the-un-universal-periodic-review-of-ethiopia>.

<sup>6</sup>Note that, as of June 30, 2016, only 103 countries had been assessed on the rating, and with ratings for five other laws still being completed.

<sup>7</sup>The high Serbia score, along with high scores of a few other countries at the top of the rating, suggests that the standards the rating relies on are not unrealistically strict or idealistic.

<sup>8</sup>A new law came into force in Italy in late June 2016, but the score on the RTI Rating has not yet been updated.

Sweden, for its part, sits a little bit ahead of the United States, in forty-first position with ninety-two points.

Age of the legislation – in the sense of the time since it was first adopted<sup>9</sup> – seems to have something to do with performance. None of the countries in the top twenty positions in the RTI Rating were adopted before 2000, while nine of the ten Western laws in the bottom twenty countries were adopted before 2000 (Germany, 2005, is the exception). And there are fairly plausible explanations for this. As elaborated below,<sup>10</sup> the development of clear international standards in this area has almost all taken place since 2000, and these standards have, in turn, provided a template or at least guidance for newer legislation. Recognition as a human right internationally has also come about since 2000, and that again has contributed to pressure for the development of stronger national legislation. Later laws have the advantage of building on the successes and failures of earlier laws. And cross-cutting these themes is the fact that while legislation can always be amended, there are usually barriers to this – at least in terms of time and legislative attention but there are often also more active forms of opposition such as resistance from the bureaucracy – and it is easier to incorporate new ideas into legislation from scratch or by design than to retrofit them into older legislation.

But there also may be a more structural element to the overall weak performance of Western democracies. Although Western democracies have been in the forefront of the development and recognition of many human rights, this has not been the case with the right to information. Indeed, it is significant that in cases dating back to 1985, the European Court of Human Rights consistently refused to recognize the right, and did so only in 2009, following recognition by the Inter-American Court of Human Rights in 2006.<sup>11</sup> One possible reason which has been identified for this is that access to information is viewed in the West primarily as a governance reform, rather than as giving effect to a human right, which is a more dominant view in at least some other countries.<sup>12</sup> This, in turn, has a profound affect on the political narrative and dynamics around both the development and implementation of the legislation.

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<sup>9</sup>As opposed to the time since the most recent set of amendments.

<sup>10</sup>See *infra* notes 17-26 and accompanying text.

<sup>11</sup>See *infra* note 17.

<sup>12</sup>See TOBY MENDEL, RIGHT TO INFORMATION: RECENT SPREAD OF RTI LEGISLATION 4 (2014), available at <http://siteresources.worldbank.org/PUBLICSECTORANDGOVERNANCE/Resources/285741-1343934891414/8787489-1344020463266/8788935-1399321576201/Recent-Spread-of-RTI-Legislation.pdf>.

## THE RTI RATING

The RTI Rating was developed by two civil society organizations – the Centre for Law and Democracy<sup>13</sup> and Access Info Europe<sup>14</sup> – which are recognized globally for their expertise on the right to information. Sixty-one indicators, according to which points are awarded for specific RTI legal qualities or attributes, lie at the heart of the RTI Rating methodology. The indicators are based on an analysis of a wide range of international standards relating to the right to information, as well as a comparative study of numerous right to information laws from around the world.

The standards the RTI Rating sets for RTI laws, or the attributes which are credited with points, which are reflected in the indicators, are drawn from those international standards and comparative practice. A core idea behind the rating is that it is rooted in international human rights law, as opposed to simply an assessment of good or better practice. To this extent, the rating standards can claim to be legally binding on states. In most cases, the standards are based on a principled analysis of formally binding standards, but in a few cases – such as the cut-offs for awarding points for the time limits for responding to requests – reasonable but ultimately discretionary standards were adopted.

Although CLD and AIE led the process, an advisory council, which included members from countries around the world, was closely involved in the process and commented on successive drafts until the final version was essentially adopted by consensus. During the development phase, the indicators were applied to a representative sample of countries to assess whether they were workable and appeared to deliver sensible outcomes, and they were then revised to take into account the results.

The indicators are grouped into seven higher-order categories, namely: Right of Access, Scope, Requesting Procedures, Exceptions and Refusals, Appeals, Sanctions and Protections, and Promotional Measures. The total score allocated to the four central categories – Scope, Requesting Procedures, Exceptions and Refusals, and Appeals – is set at thirty points each, on the basis that these represent roughly equivalent general attributes of strong RTI laws, while the remaining three categories – Right of Access, Sanctions and Protections, and Promotional Measures – are together allocated another thirty points, or six,

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<sup>13</sup>Centre for Law and Democracy, <http://www.law-democracy.org/live/>.

<sup>14</sup>Access Info Europe, <https://www.access-info.org>.

eight and sixteen points, respectively, giving an overall total of 150 points.

A large majority of the indicators, fifty-two out of sixty-one, are worth a maximum of two points, while the other nine are allocated scores of up to ten points. The thinking here was to avoid trying to super-fine-tune scoring – which is misleading and may give the wrong impression as to the claims the authors are implicitly making regarding the level of precision of the tool, since more refined scoring suggests a greater level of precision – and instead aim to break down the qualities of laws into roughly equal granular attributes. At the same time, it would have been artificial to try to reduce all of the characteristics assessed by the indicators to the same small size. An example is the subject matter of different exceptions (or the types of interests they protect, such as national security or privacy), measured by Indicator 29, which is allocated a maximum of ten points.

Points are allocated by indicator, depending on how well the legal framework delivers the indicator, in accordance with a standardized scoring tool, which aims to ensure that points are allocated consistently across different countries and legal systems. In all but two cases, points are allocated on a positive basis (that is, points are awarded where a characteristic is present), but for the indicators on the subject matter of exceptions and whether exceptions are harm tested points are allocated on a negative basis (that is, countries are awarded, respectively, ten and four points, and then a point is deducted for each exception the subject matter of which is not recognized as legitimate under international law or which does not incorporate a harm test).

Although the primary indicators have not been updated since the tool was launched on September 28, 2011 (International Right to Know Day),<sup>15</sup> the scoring tool has been tweaked and updated over time. A particular challenge has been to ensure fair and yet fully standardized application of the methodology across different legal and access to information systems, but for the most part challenges in this area have been addressed in ways which have generally been deemed to be satisfactory.

The way the methodology is applied has been designed with the dual objectives of robust standardization and accuracy of assessment as the primary goals. To promote the former, assessments are closely overseen

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<sup>15</sup>For more information about International Right to Know Day, see [http://foiadvocates.net/?page\\_id=10255](http://foiadvocates.net/?page_id=10255). In November 2015, UNESCO adopted a declaration formally recognizing the same day as International Day for Universal Access to Information. For more information, see <http://www.opengovpartnership.org/blog/blog-editor/2015/11/25/international-day-universal-access-information-new-opportunity-advance>.

by researchers at CLD and AIE,<sup>16</sup> while the latter is promoted through both careful attention to detail and having local experts review initial assessments to identify any gaps or misinterpretations in the appreciation of the local legal framework. The RTI Rating is applied on a continuous basis as new countries adopt or amend their RTI laws and/or regulations, and an attempt is made as far as possible to keep up with other developments, such as jurisprudence which reaches the level of impacting on an Indicator. The support of local experts is of course essential for this.

### INTERNATIONAL SOURCES FOR THE RTI RATING

There are two main strands to the international sources for the RTI Rating. The first is application of the standards and principles relating to freedom of expression to the right to information. This, in turn, rests on the progressive recognition that the right to information is protected as part of the wider right to freedom of expression under international law. This recognition has become increasingly entrenched, especially in the five years between 2006 and 2011, and it is now very widely accepted.

Key milestones in the process were the September 2006 Inter-American Court of Human Rights case of *Claude Reyes and Others v. Chile*,<sup>17</sup> the April 2009 European Court of Human Rights case of *Társaság A Szabadságjogokért v. Hungary*,<sup>18</sup> and the September 2011 General Comment No. 34 of the United Nations Human Rights Committee.<sup>19</sup> In the *Reyes* case, the Inter-American Court of Human Rights held explicitly that the right to freedom of expression, as enshrined in

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<sup>16</sup>Various systems were also put in place to ensure standardization across the two organizations.

<sup>17</sup>Sept. 19, 2006, Series C, No. 151, available at [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_151\\_ing.doc](http://www.corteidh.or.cr/docs/casos/articulos/seriec_151_ing.doc).

<sup>18</sup>Apr. 14, 2009, Application No. 37374/05. Interestingly, the respondent State in the case, Hungary, did not even contest the claim that the guarantee of freedom of expression also included the right to information, and instead limited itself to arguing that the information in question fell within the scope of the exceptions to this right (i.e. that the refusal to provide it was a legitimate restriction on freedom of expression).

<sup>19</sup>General Comment No. 34, Sept. 12, 2011, CCPR/C/GC/34, available at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=8&DocTypeID=11](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=8&DocTypeID=11). The committee is the body tasked with promoting the implementation of the rights set out in the International Covenant on Civil and Political Rights, UN General Assembly Resolution 2200 A (XXI), adopted Dec. 16, 1966, entered into force Mar. 23, 1976.

Article 13 of the American Convention on Human Rights,<sup>20</sup> included a right to access information held by public authorities (that is, the right to information). The European Court came to a similar conclusion in the *Társaság A Szabadságjogokért* case,<sup>21</sup> while in General Comment No. 34 the U.N. Human Rights Committee stated simply, with reference to Article 19 of the International Covenant on Civil and Political Rights, or ICCPR,<sup>22</sup> also guaranteeing freedom of expression: “Article 19, paragraph 2 embraces a right of access to information held by public bodies.”<sup>23</sup>

In the *Reyes* case, the Inter-American Court of Human Rights discussed in some detail the legitimate scope of exceptions to the right, making it clear that its previous jurisprudence relating to restrictions on freedom of expression applied, *mutatis mutandis*, to the right to information.<sup>24</sup> It is relatively simple to extrapolate from this, and indeed directly from general principles of law, that recognition of the right to information as a component of the right to freedom of expression brings into play in respect of the former the full gamut of general principles and standards relating to the latter insofar as they are relevant and applicable. As regards exceptions to the right of access, under international law, to be legitimate, a restriction on freedom of expression (and so an exception to the right to information) must be prescribed by law, serve one of the interests listed in Article 19(3) of the ICCPR which are deemed to be sufficiently important to warrant limiting freedom of expression, and be necessary for the protection of that interest.<sup>25</sup> International law also imposes clear positive obligations on states to give effect to the right to freedom of expression and, by implication, the right to information.<sup>26</sup>

A number of the standards reflected in the RTI Rating indicators are drawn from a principled analysis of international standards, in

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<sup>20</sup>Adopted at San José, Costa Rica, Nov. 22, 1969, O.A.S. Treaty Series No. 36, entered into force July 18, 1978.

<sup>21</sup>Based on Article 10 of the European Convention on Human Rights, E.T.S. No. 5, adopted Nov. 4, 1950, entered into force Sept. 3, 1953.

<sup>22</sup>See General Comment No 34, *supra* note 19.

<sup>23</sup>Claude Reyes and Others v. Chile, Sept. 19, 2006, at paras. 18–19.

<sup>24</sup>Sept. 19, 2006, Series C, No. 151, available at [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_151\\_ing.doc](http://www.corteidh.or.cr/docs/casos/articulos/seriec_151_ing.doc), paras. 88-91.

<sup>25</sup>See General Comment No. 34, *supra* note 19, para. 22. See also *Mukong v. Cameroon*, July 21, 1994, Communication No.458/1991, at para.9.7 (UN Human Rights Committee); *Sunday Times v. United Kingdom*, Apr. 26, 1979, Application No. 6538/74 (European Court of Human Rights).

<sup>26</sup>See Toby Mendel, *Restricting Freedom of Expression: Standards and Principles Background Paper for Meetings Hosted by the UN Special Rapporteur on Freedom of Opinion and Expression 5* (2010), available at [http://www.law-democracy.org/live/wp-content/uploads/2012/08/Paper-on-Restrictions.10.03.22.rev\\_.pdf](http://www.law-democracy.org/live/wp-content/uploads/2012/08/Paper-on-Restrictions.10.03.22.rev_.pdf).



some cases as interpreted in light of better comparative practice. It is well established that restrictions on freedom of expression, even where some restriction is warranted to protect a legitimate interest, may not be overbroad in the sense of prohibiting speech (or access to information) beyond where this would cause harm,<sup>27</sup> and must employ the least intrusive means available for protecting the legitimate interest.<sup>28</sup> The flip side of this – less well articulated in the jurisprudence but clear from a logical extrapolation of principles – is the duty of states to give effect to their positive obligations in a, let us say “most enabling” manner, subject to reasonable limitations on resources and effort. Comparative practice on the part of other states is invaluable, among other things because it has been tested in practice, means of illustrating the specific modalities of all of these required characteristics (that is, narrowest scope of exceptions, least intrusive means of protecting an interest and most enabling manner of discharging positive obligations).

For example, there are obvious right-to-information benefits to applicants of being issued with a receipt upon lodging a request for information. At the same time, this imposes a limited burden on public authorities. It is also a requirement in the laws of many countries. As a result, the rating accepts that this is a minimum RTI standard and includes it in Indicator 18. General principles of human rights law – for example that all state actors are bound by that state’s human rights obligations – underpin other standards in the rating – in that case, the rules on scope and, in particular, the need to extend the right to all three branches of government. This is supported by the fact that many states effectively apply their right to information laws to all branches of government, apparently without placing undue strain on public resources or generating other negative impacts.

Relying on comparative analysis for an exercise like this brings with it a risk of offending against human rights principles which allow for local tailoring, at least in terms of the means of implementation, of international standards. However, given the nature of the right to information, and the rather extensive judicial interpretation of international guarantees of freedom of expression, the extent to which local tailoring of standards is justifiable is relatively clear. These sources make it clear that there is relatively little need or justification for this, at

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<sup>27</sup>See *Shelton v. Tucker*, 364 U.S. 479, 488 (1960); *R. v. Oakes*, [1986] 1 SCR 103, pp. 138-39 (Supreme Court of Canada).

<sup>28</sup>As the Inter-American Court of Human Rights stated in *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85, Nov. 13, 1985, Series A, No. 5, para. 46: “Hence if there are various options to achieve this objective, that which least restricts the right protected must be selected.”

least in terms of general standards, with the exception of the issue of institutional structures. For example, it is undisputed that it is legitimate to posit privacy as an exception to the right of access. While local cultural understandings of what constitutes privacy vary, this does not impact on the RTI Rating, which limits itself to recognizing privacy as a legitimate exception to the right of access (and not probing into the specific content of this). On the other hand, the peculiar exception in the U.S. FOIA in favor of “geological and geophysical information and data, including maps, concerning wells”<sup>29</sup> is not deemed by the RTI Rating to be legitimate because it is not included in the laws of other countries, this has not caused any harm which might justify the exception, and there are no particular cultural or other special characteristics of the situation in the United States which would justify the exception.

Only a handful of cases on the right to information have been decided by international courts and that was even more true in 2011 when the current indicators for the RTI Rating were developed.<sup>30</sup> However, this does not mean that the indicators were drawn exclusively from a principled analysis of freedom of expression standards in the context of the right to information, as interpreted using the practical filter of better national practice. In addition to this, as the second strand of international sources, the Indicators drew on a strong body of what might be called soft law standards relating to the right to information, which had started to be put in place well before even the first instance of judicial recognition of the right, a process which has continued since that time.

There were a few early standard-setting statements about the right to information, of which perhaps the earliest was the adoption, in 1981, by the Committee of Ministers of the Council of Europe, of Recommendation No. R(81)19 on Access to Information Held by Public Authorities.<sup>31</sup> However, these very early statements were not presented as rights-based statements, and so do not provide a solid basis for the RTI

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<sup>29</sup>Freedom of Information Act, 5 U.S.C. §552(b)(9)(2012).

<sup>30</sup>In addition to the cases mentioned, the European Court of Human Rights had also decided *Kenedi v. Hungary*, May 26, 2009, Application No. 31475/05 by that time. It has decided a few more cases since then. *See, e.g.*, *Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung eines wirtschaftlich gesunden land- und forstwirtschaftlichen Grundbesitzes v. Austria*, Nov. 28, 2013, Application No. 39534/07.

<sup>31</sup>Nov. 25, 1981, available at <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=600652&SecMode=1&DocId=673752&Usage=2>. *See also* statements adopted at the 1980 Barbados meeting of the Law Ministers of the Commonwealth, quoted in Promoting Open Government: Commonwealth Principles and Guidelines on the Right to Know, background paper for the Commonwealth Expert Group Meeting on the Right to Know and the Promotion of Democracy and Development, London, Mar. 30-31, 1999, available at

Rating Indicators which, as noted above, are intended to be rooted in international human rights standards.

Some of the earliest rights-based statements about the right to information came in the annual reports of the U.N. Special Rapporteur on Freedom of Opinion and Expression, whose mandate is formally limited in scope to human rights.<sup>32</sup> In his 1998 Annual Report to the Human Rights Commission, for example, the Special Rapporteur stated: “[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.”<sup>33</sup> The U.N. Special Rapporteur substantially expanded his commentary on this subject in his 2000 Annual Report<sup>34</sup> and has provided further elaborations in a number of subsequent reports. The U.N. Special Rapporteur’s counterparts – the Organization for Security and Co-operation in Europe Representative on Freedom of the Media, the Organization of American States Special Rapporteur on Freedom of Expression, and the African Commission on Human and Peoples’ Rights Special Rapporteur on Freedom of Expression and Access to Information – have also often included commentary on the right to information in their reports.<sup>35</sup>

These special international mandates on freedom of expression have since 1999 adopted a Joint Declaration each year on a different freedom of expression issue. The first Joint Declaration was general in nature, and included the following statement about the right to information: “Implicit in freedom of expression is the public’s right to open access to information and to know what governments are doing on their behalf, without which truth would languish and people’s participation in government would remain fragmented.”<sup>36</sup>

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[http://www.humanrightsinitiative.org/programs/ai/rti/international/cw\\_standards/commonwealth\\_expert\\_grp\\_on\\_the\\_rti\\_99-03-00.pdf](http://www.humanrightsinitiative.org/programs/ai/rti/international/cw_standards/commonwealth_expert_grp_on_the_rti_99-03-00.pdf).

<sup>32</sup>The mandate of the Special Rapporteur was originally set out in United Nations Commission on Human Rights Resolution 1993/45, Mar. 5, 1993, para. 11., [http://ap.ohchr.org/documents/E/CHR/resolutions/E-CN\\_4-RES-1993-45.doc](http://ap.ohchr.org/documents/E/CHR/resolutions/E-CN_4-RES-1993-45.doc). If he or she does address an issue, that signifies his or her view that it falls within the mandate of the office, which is limited to topics relating to the right to freedom of expression.

<sup>33</sup>Report of the Special Rapporteur, Promotion and Protection of the Right to Freedom of Opinion and Expression, UN Doc. E/CN.4/1998/40, Jan. 28, 1998, para. 14, *available at* <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G98/103/12/PDF/G9810312.pdf?OpenElement>.

<sup>34</sup>Report of the Special Rapporteur, *Promotion and Protection of the Right to Freedom of Opinion and Expression*, UN Doc. E/CN.4/2000/63, Jan. 18, 2000, para. 42.

<sup>35</sup>*See, e.g.*, the 1999 Report of the OAS Special Rapporteur on Freedom of Expression, at 29-33, <http://www.oas.org/es/cidh/expresion/showarticle.asp?artID=135&lID=1>.

<sup>36</sup>Adopted Nov. 26, 1999. All of the Joint Declarations are *available at* <http://www.osce.org/fom/66176>.

The mandates provided more detailed statements on the nature of the right to information in their Joint Declarations of 2004,<sup>37</sup> 2006<sup>38</sup> and 2010.<sup>39</sup>

Other important sources of right to information standards are the declarations on freedom of expression adopted in 2000 by the Inter-American Commission on Human Rights<sup>40</sup> and in 2002 by the African Commission on Human and Peoples' Rights.<sup>41</sup> Both declarations include important statements about standards regarding the right to information, based on its status as an element of the right to freedom of expression.

In addition, in 2002, the Committee of Ministers of the Council of Europe adopted Recommendation No. R(2002)2 on Access to Official Documents,<sup>42</sup> which is specifically dedicated to the right to information and contains more detailed standards than the general declarations adopted in the Americas and Africa. In 2008, however, the Americas followed suit when the Inter-American Juridical Committee adopted a progressive set of Principles on the Right of Access to Information.<sup>43</sup>

In both the Americas and Africa, official human rights bodies have also adopted model laws on the right to information. In the Americas, a Model Inter-American Law on Access to Information was prepared by the Department of International Law of the Secretariat for Legal Affairs of the OAS, and welcomed in a resolution of the OAS General Assembly,<sup>44</sup> while the African Commission on Human and Peoples' Rights adopted the Model Law on Access to Information for Africa in 2013.<sup>45</sup> Although these are intended more to provide guidance and support to countries which are considering the adoption or amendment of right to information legislation, they also provide some insight into what are considered to be minimum standards regarding these rights.

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<sup>37</sup>*Id.* adopted Dec. 6, 2004.

<sup>38</sup>*Id.* adopted Dec. 19, 2006.

<sup>39</sup>*Id.* adopted 3 Feb. 3, 2010.

<sup>40</sup>The Inter-American Declaration of Principles on Freedom of Expression, 108th Regular Session, Oct. 19, 2000, <http://www.iachr.org/declaration.htm>.

<sup>41</sup>The Declaration of Principles on Freedom of Expression in Africa, 32d Ordinary Session of the African Commission on Human and Peoples' Rights, Oct. 17-23, 2002, Banjul, The Gambia, [http://www.achpr.org/english/declarations/declaration\\_freedom\\_exp\\_en.html](http://www.achpr.org/english/declarations/declaration_freedom_exp_en.html).

<sup>42</sup>Adopted Feb. 21, 2002, available at [http://www.right2info.org/resources/publications/instruments-and-standards/coe\\_rec\\_ati\\_en\\_2002](http://www.right2info.org/resources/publications/instruments-and-standards/coe_rec_ati_en_2002).

<sup>43</sup>Adopted at its 73d Regular Session, Aug. 7, 2008 in Rio de Janeiro, Brazil, OAS/Ser.Q, CJI/RES.147 (LXXIII-O/08), available at [http://www.oas.org/cji/eng/CJI-RES\\_147\\_LXXIII-O-08\\_eng.pdf](http://www.oas.org/cji/eng/CJI-RES_147_LXXIII-O-08_eng.pdf).

<sup>44</sup>AG/RES. 2607 (XL-O/10), June 8, 2010, available at [http://www.oas.org/en/sla/dil/docs/AG-RES\\_2607-2010\\_eng.pdf](http://www.oas.org/en/sla/dil/docs/AG-RES_2607-2010_eng.pdf).

<sup>45</sup>Available at [http://www.achpr.org/files/news/2013/04/d84/model\\_law.pdf](http://www.achpr.org/files/news/2013/04/d84/model_law.pdf).

**Table 1**  
**Scores of the United States FOIA on the RTI Rating**

Section	Max Points	Score	Percentage
1. Right of Access	6	2	33
2. Scope	30	18	60
3. Requesting Procedures	30	16	53
4. Exceptions and Refusals	30	17	57
5. Appeals	30	14	47
6. Sanctions and Protections	8	4	50
7. Promotional Measures	16	12	75
Total Score	150	83	55

Finally, within Europe, a formal legal treaty, the Council of Europe Convention on Access to Official Documents, was adopted in 2009.<sup>46</sup> Although not yet in force,<sup>47</sup> the Convention does again provide useful evidence of what at least European States consider to be minimum standards in this area. All of these sources were relied upon to help develop the Indicators for the RTI Rating.<sup>48</sup>

## APPLICATION OF THE RTI RATING TO THE UNITED STATES FOIA

The scores of the United States FOIA, broken down by category, are set out in [Table 1](#). Formally, these scores do not represent an assessment only of the FOIA but of the wider legal framework for access to information. In some cases, RTI Rating indicators explicitly refer to other laws, such as Indicator 1, which asks whether the right to information is constitutionally protected. In all cases, a formal legal rule or even binding policy which, in fact, delivers the quality described in an indicator will garner the points for the country, regardless of whether it is found within or under the RTI law or elsewhere.

[Table 1](#) makes it clear that the worst performing area in the United States is Right of Access, which, along with Appeals, are the two categories where the score drops below 50%. However, if we exclude the top and bottom performing categories (the former being promotional

<sup>46</sup>CETS No. 205, opened for ratification June 18, 2009, not yet in force, <http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/205>.

<sup>47</sup>According to Article 16 of the Convention, it will enter into force three months after receiving the tenth ratification. As of June 24, 2016, eight states had ratified the convention.

<sup>48</sup>Although the African Model Law had not yet formally been adopted by the time the rating was first launched, work on it had already started by then.

measures, where the FOIA does relatively better), the other scores fall within the reasonably narrow range of 47% to 60%.

### ***Right of Access***

The United States gets no points on two of the three indicators in this category of the RTI Rating and two points on Indicator 2, which asks whether the right has clearly been recognized in law. The FOIA does not include a reference to its wider benefits or provide any interpretive guidance, so it gets no points for Indicator 3, which measures these qualities. An explicit constitutional guarantee of this right clearly meets the standards of Indicator 1.<sup>49</sup> According to some sources, nearly sixty countries include explicit guarantees of the right to information in their constitutions.<sup>50</sup> This does not include the many countries around the world, mostly from among civil law countries, which incorporate international law and/or international human rights law directly into their national legal systems. While such provisions are not given proper legal effect in many countries, this is not the case everywhere. In Europe, for example, the courts of many countries treat European Court of Human Rights decisions as formally binding, thereby effectively incorporating the guarantee of the right to information from that system into national law. In the United States, however, there is no explicit guarantee of the right to information in the Constitution and nor is any international guarantee incorporated into United States law in the overriding (constitutional) sense, as required by Indicator 1.

This indicator also accepts a constitutional interpretation by a superior court holding that the right to information is included within or covered by another constitutionally protected right. Leading courts in a number of countries have interpreted constitutional guarantees – free expression, for example – to include the right to information.<sup>51</sup> However, the language of the First Amendment to the United States Constitution does not easily lead itself to such an interpretation, being cast in the negative term of prohibiting the government from passing laws restricting free speech. And, in practice, the Supreme Court of the United States has held that the guarantee of freedom of speech in the

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<sup>49</sup>Technically, the indicator is looking for whether the legal framework recognizes a “fundamental right of access to information.”

<sup>50</sup>See Right2Info, Constitutional Protections, <http://www.right2info.org/constitutional-protections>.

<sup>51</sup>See, e.g., Ontario (Public Safety and Security) v. Criminal Lawyers’ Association, 2010 SCC 23, June 17, 2010 (Supreme Court of Canada), available at <http://www.canlii.org/en/ca/scc/doc/2010/2010scc23/2010scc23.html>.

first Amendment does not mandate “a right to access government information or sources of information within government’s control.”<sup>52</sup>

### *Scope*

This category assesses the scope of the rules in terms of three metrics: who may make a request for information, what information is covered, and what public authorities (or agencies to use the term in the United States FOIA) are covered. The act does very well in terms of the first two metrics, only losing one point out of a possible eight.<sup>53</sup>

The situation is different in terms of the scope of the act in terms of public authorities, where it garners only one-half of the twenty-two points. The main losses come because the act is limited in scope to the executive branch of government, along with state-owned enterprises and regulatory bodies. While it does very well in these areas, fully eight points are lost for lack of coverage of the legislative or judicial branches of government, along with two more for a failure to cover private bodies that operate with significant public funding or that undertake a public function.

The obligation to apply the right to information to all three branches of government flows quite clearly from recognition of the right to information as a human right. As the U.N. Human Rights Committee stated in General Comment No. 31:

The obligations of the Covenant in general and article 2 in particular [requiring States to respect and to give effect to rights] are binding on every State Party as a whole. All branches of government (executive, legislative and judicial), and other public or governmental authorities, at whatever level - national, regional or local – are in a position to engage the responsibility of the State Party.<sup>54</sup>

Reflecting this, nine of the top ten scoring countries on the rating got the full eight points for coverage of the legislative and judicial branches of government (which are measured by Indicators 8 and 9), while one (Mexico in both cases) received two out of four points for each branch.

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<sup>52</sup>*Houchins v. KQED, Inc.*, 438 U.S. 1, 15 (1978).

<sup>53</sup>This is because the extent to which public authorities must compile information from different documents in response to a request is not entirely clear.

<sup>54</sup>General Comment No. 31, May 26, 2004, CCPR/C/21/Rev.1/Add. 13, paragraph 4, available at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=8&DocTypeID=11](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=8&DocTypeID=11).

**Table 2**  
**Scores of Different Groups of Countries for Coverage of the Legislative and Judicial Branches**

Legislative/Judicial	No points	1 point	2 points	3 points	4 points
Earliest Laws	7/5	1/3	0/0	0/0	2/2
Latest Laws	1/1	1/1	0/1	1/0	7/7
Best Laws	0/0	0/0	1/1	0/0	9/9

The date the right-to-information law was adopted would appear to play a role here, with only two of the earliest ten laws scoring more than one point for either branch (these being Sweden and Finland, which both scored full points for both branches). In contrast, fully seven of the ten countries with the most recent laws<sup>55</sup> scored full points for both the legislative and judicial branches, with scores ranging from zero to three for the other three countries. These results are presented in [Table 2](#).

There may also be a difference here between established Western democracies where, as noted previously, the human rights status of access to information is not always fully appreciated, and countries in some other regions of the world. It is perhaps significant that the worst performer in this area among the countries with the latest laws is Spain, with only one point for both branches, which is also the only Western democracy in that cohort.<sup>56</sup> More research on this issue is needed before a firmer conclusion can be drawn.

The top-scoring countries also do very well in terms of coverage of private bodies that operate with public funding or that undertake public functions, with eight of the ten scoring the full two points here and the other two obtaining one point. Older laws do comparatively better here than in relation to branches of government, albeit with only one (Denmark) getting two points but with another six getting one point (leaving only two of the ten – Australia and Canada – alongside the United States with no points here).

### ***Requesting Procedures***

This is perhaps the category where the standards of the RTI Rating represent the greatest extrapolation of the principle of the most

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<sup>55</sup>As included on the RTI Rating at the time this article was written. Due to the time it takes to assess new laws, and in some cases delays due to translation, the most recent laws are not always available on the rating.

<sup>56</sup>Although Sierra Leone only garnered two points for these two indicators.



enabling approach towards discharging positive obligations. At one level, it is clear that user-friendly procedures are key to the practical success of an RTI law, and there is ample evidence of the problems that unfriendly or unduly flexible procedural rules can cause. This has also been chronicled in the United States, for example in relation to delays in responding to requests<sup>57</sup> and fees.<sup>58</sup> At the same time, it is hard to describe all the standards reflected in the indicators in this category as strict human rights obligations. For example, Indicator 22 allocates one point for time limits of twenty or fewer working days and two points for limits of ten or fewer days. Obviously, at some level these are arbitrary cut-offs, although there is a logic to them. Overall, it is clear that an RTI law simply cannot function well absent strong procedural rules governing the making and processing of requests.

The soft law standards noted above provide some assistance here as to appropriate procedural rules for RTI laws. A number of standards refer to general principles governing procedures. For example, the 2004 Joint Declaration of the special international mandates on freedom of expression calls for procedures to “be simple, rapid and free or low-cost.”<sup>59</sup> The Principles on the Right of Access to Information adopted by Inter-American Juridical Committee call generally for “clear, fair, non-discriminatory and simple rules” for processing requests. Principle 5 goes on to stipulate that these should include “clear and reasonable timelines, provision for assistance to be given to those requesting information, free or low-cost access, and does not exceed the cost of copying and sending the information.”<sup>60</sup>

The Council of Europe’s Recommendation No. R(2002)2 on access to official documents contains significant detail on the standards which are applicable to requesting procedures, including:

- requests should be dealt with on an equal (non-discriminatory) basis and with a minimum of formality;
- applicants should not have to provide reasons for their requests;
- requests should be dealt with promptly and within established time limits;
- assistance should be provided “as far as possible”; and

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<sup>57</sup>See, e.g., National Security Archives, Eight Federal Agencies Have FOIA Requests a Decade Old, According to Knight Open Government Survey, July 4, 2011, <http://nsarchive.gwu.edu/NSAEBB/NSAEBB349/>.

<sup>58</sup>In an extreme case recently, a \$660 million fee was assessed. See J. Pat Brown, *The Pentagon’s \$660 million FOIA fee: Secretary of Defense Estimates That Scouring Contract Data Would Take “15 Million Labor Hours,”* Feb. 26, 2016, <https://www.muckrock.com/news/archives/2016/feb/26/biggest-foia-fee-all-time/>.

<sup>59</sup>Joint Declaration, *supra* note 37.

<sup>60</sup>Principles on the Right of Access to Information, *supra* note 43.

- where they indicate a preference, applicants should be given access in that form, including inspection of the record or being given a copy.<sup>61</sup>

Despite having robust procedures in many respects, the U.S. act lost fourteen points over ten indicators in this category for these reasons:

1. The lack of a clear requirement for public authorities to have rules relating to the lodging of requests which are minimally onerous for requesters (Indicators 14 and 15, two points deducted, subparagraph (a)(3)(A)).
2. Limited obligations to provide assistance to requesters other than disabled persons (Indicator 16, two points deducted, clause (a)(3)(B)(ii) and subsection (1)).
3. Provision of a receipt acknowledging requests only where these take more than ten days to process (Indicator 18, one point deducted, paragraph (a)(7)).
4. The absence of any obligation to transfer requests where another public authority than the one which receives a request holds the information (Indicator 19, two points deducted).
5. The absence of any obligation to respond to requests as soon as possible, time limits of 20 working days (as opposed to the ideal of ten working days) and undue flexibility in terms of the length of extensions to the time limit (Indicators 21-23, four points deducted, paragraph (a)(6)).
6. The absence of limitations on fees to reproduction and sending the information or any obligation to waive fees for impecunious requesters (Indicators 25 and 26, three points deducted).

Looking at this category by age of the law does not yield the same conclusions as for scope. For example, the average score on this category for the ten latest laws was just 16.1 points, compared to 18.1 for the ten oldest, and it represented one of the weaker categories for the latest laws as compared to one of the stronger categories for the oldest laws. Interestingly, this category was also a relatively weaker area for the top ten laws (with an average score of just 22.2 points or 74%). Furthermore, no country managed to achieve an exceptional score in this category with Slovenia coming in top position here, albeit with just twenty-six out of a possible thirty points. The performance of the United States in this category was quite close to its overall average performance (53% vs. 55%) and this was also true for the full sample of countries (56% vs. 58%).

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<sup>61</sup>Recommendation No. R (2012)2, Principles V-VII, *supra* note 42.

There may be various explanations for the relatively weaker performance of stronger and later laws, as compared to the median overall performance, in this category. The range and complexity of the indicators here may help explain the fact that even best practice counties lose a few points. It may also be that the extrapolated ‘most enabling’ approach resulted in more stringent standards here than for some other categories.

### ***Exceptions and Refusals***

The regime of exceptions is at the heart of an RTI law, as it defines the line between what shall be disclosed and what is secret. Theoretically, a law that did wonderfully in every other category could be almost entirely neutered by a weak regime of exceptions.<sup>62</sup> It is also the area where international standards are the most developed. This is due in part to the very extensive body of case law relating to restrictions on freedom of expression, which has established very clear rules and principles for this which are also applicable to the right to information.

Pursuant to Article 19(3) of the ICCPR, the right to freedom of expression is not absolute, and conditions for restrictions on the right are delineated:

The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

- (a) For respect of the rights or reputations of others;
- (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.<sup>63</sup>

This imposes a strict and cumulative three-part test for the validity of any restriction on freedom of expression (cumulative in the sense that restrictions must pass all three parts of the test).<sup>64</sup> First, the restriction must be provided for by law. This requirement will be fulfilled only where the law is accessible and “formulated with sufficient precision to

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<sup>62</sup>At its extreme, that is true of other categories, for example, because an otherwise perfect law that had no scope would not deliver any openness. But this problem seems to kick in much earlier for exceptions and is far more common in practice.

<sup>63</sup>International Covenant, on Civil and Political Rights, *supra* note 19.

<sup>64</sup>*See*, *Mukong v. Cameroon*, July 21, 1994, Communication No. 458/1991, paragraph 9.7 (UN Human Rights Committee).

enable the citizen to regulate his conduct.”<sup>65</sup> In the context of the right to information, this rules out vague or unduly discretionary exceptions to the right of access.

Second, the restriction must be for the protection of a legitimate interest. The list of interests in Article 19(3) of the ICCPR is exclusive in the sense that these are the only interests the protection of which could justify a restriction on freedom of expression. Although this seems clear enough, in fact, it provides only limited guidance in the context of both the right to freedom of expression and the right to information. This is reflected, for example, in the very limited number of international cases which have been decided on the basis of this part of the test. In particular, the reference to the “rights” of others in Article 19(3)(a) has been interpreted very broadly by international courts, with the result that this part of the test has largely been deprived of any substance.

To resolve the fairly fundamental issue of which interests it accepts as being of sufficient importance to justify an exception to the right of access, the RTI Rating essentially combined this part of the test with the necessity part (discussed later), and a review of comparative practice. The underlying theory was that if a number of countries managed to do without an exception in favor of one or another particular interest, other countries could as well, and so protecting that interest through secrecy could not be justified as necessary.

In theory, the particular circumstances of a country could justify the protection of a unique or uncommon interest. In practice, however, the lack of real differences in terms of secrecy needs between countries, taking into account the relatively high level of generality at which the RTI Rating operates, meant that this theoretical construct was not actually relevant. That is not to suggest that the interpretation of exceptions could not vary, for example, based on local cultural values or the particular circumstances of a country. But the standards in the RTI Rating do not drill down to that level of detail. As noted previously, for example, the rating recognizes privacy as a legitimate interest which might justify secrecy, but it does not probe in any detail into what privacy means in practice, something which does vary among countries.<sup>66</sup> Similarly, countries’ actual national security needs vary considerably based on a number of factors, but the principle that national security needs to

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<sup>65</sup>The *Sunday Times v. United Kingdom*, Apr. 26, 1979, Application No. 6538/74, paragraph 49 (European Court of Human Rights).

<sup>66</sup>In practice, this is consistent with the approach taken in most RTI laws, which simply list privacy as a general value and leave its precise scope to future interpretation. In some cases, laws provide a list of privacy interests but these would be accepted by the rating unless there was some other flaw (for example, because they lacked a harm requirement).

be protected by secrecy, in appropriate cases (which would in practice need to be established by reference to actual facts), is established. This underlay the RTI Rating's recognition of national security as a legitimate interest to be protected by an exception.

The RTI Rating also recognizes that states may approach the specific protection of different legitimate interests in different ways. For example, one of the interests it recognizes as legitimate is the "prevention, investigation and prosecution of legal wrongs." There are numerous ways to do this and, as long as the approach taken remains within the scope of this interest, it is accepted by the Rating. Subsection (c) of the FOIA, for example, takes a rather unique approach to this issue, but no points were deducted on the United States rating assessment for this.

Third, according to Article 19(3) of the ICCPR, any restriction on freedom of expression must be necessary to protect the interest. The vast majority of international cases on freedom of expression are decided based on this part of the test, and, as a result, it usually attracts more attention and detailed analysis than the other parts. "Necessary" has been interpreted to encompass a number of elements, including that there must be a pressing social need for the restriction, that the means chosen to protect the interest is the least intrusive effective means available (that is, no less intrusive measure is available which would be effective), that the restriction is not overbroad in the sense that it only encompasses harmful speech, and that the restriction is not disproportionate in the sense that the harm caused by the restriction does not outweigh its benefits.<sup>67</sup>

In the context of the right to information, the necessity part of the test has a few implications beyond helping to define the interests which are considered to be worthy of protection *via* an exception. It means, first, that only information the disclosure of which would actually pose a risk of harm to a protected interest should be covered by an exception. It is fairly clear that, absent a risk of harm, the necessity of the exception cannot be made out. This leads to the idea that all exceptions should be harm tested (that is, include a reference to a risk of harm, as in "cause prejudice to national security" as opposed to simply relating to national security).

A second key implication of the necessity test is that all exceptions should be subject to what is often termed the public interest override, by which is meant a limit on the exception so that it applies only when

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<sup>67</sup>See, e.g., *Lingens v. Austria*, July 8, 1986, Application No. 9815/82, paragraphs 39-40 (European Court of Human Rights).

the benefits of secrecy (or protecting the interest) outweigh the harm done by secrecy (or are greater than the benefits that would accrue if the information were disclosed). This is a direct corollary of the proportionality part of the necessity test.

These standards are largely reflected in the Council of Europe Recommendation No. R(2002)2, which provides a detailed and exclusive list of the possible grounds for restricting the right to information in Principle IV, titled “Possible limitations to access to official documents”:

1. Member states may limit the right of access to official documents. Limitations should be set down precisely in law, be necessary in a democratic society and be proportionate to the aim of protecting:
  - i. national security, defence and international relations;
  - ii. public safety;
  - iii. the prevention, investigation and prosecution of criminal activities;
  - iv. privacy and other legitimate private interests;
  - v. commercial and other economic interests, be they private or public;
  - vi. the equality of parties concerning court proceedings;
  - vii. nature;
  - viii. inspection, control and supervision by public authorities;
  - ix. the economic, monetary and exchange rate policies of the state;
  - x. the confidentiality of deliberations within or between public authorities during the internal preparation of a matter.
2. Access to a document may be refused if the disclosure of the information contained in the official document would or would be likely to harm any of the interests mentioned in paragraph 1, unless there is an overriding public interest in disclosure.<sup>68</sup>

Necessity also leads to some other standards in the RTI Rating, such as the idea of severability in Indicator 34. This calls for non-exempt information to be removed or redacted from a document and the rest of the document to be disclosed. Another standard which is derived from necessity, found in Indicator 32, is the idea of overall time limits, for example of fifteen or twenty years, for exceptions.

One of the more controversial standards in the rating, found in Indicator 28, is that the “standards in the RTI Law trump restrictions on information disclosure (secrecy provisions) in other legislation to the

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<sup>68</sup>Recommendation No. R (2012)2, *supra* note 42.

extent of any conflict.” Strictly speaking, it would be perfectly legitimate for a legal system to locate all of the exceptions to the right of access in other (secrecy) laws, as long as they in fact conformed to the standards noted above. In practice, however, in almost every country there are numerous secrecy provisions in other laws which fail to meet international standards, and the only practical way to address this in the short term is to provide for overriding effect for the RTI law.

The United States FOIA does not stipulate that it overrides conflicting legislation, although it does place some conditions on secrecy laws (paragraph (b)(3)), so earns one of four points under Indicator 28. Three exceptions in the act are not deemed to meet international standards, resulting in the loss of three points, namely the exception for internal personnel rules and practices (paragraph (b)(2)), because it is too broad, the exception for geological and geophysical information and data, including maps, concerning wells (paragraph (b)(9)), because it is not an interest that needs secrecy protection, and the foreign intelligence records exception (paragraph (c)(3)), because it is too broad and is also not harm tested. It should be noted, however, that this is actually a very respectable score on this Indicator, with most countries polling at or below this figure.

Three out of four points under Indicator 30 are lost for exceptions which do not include a harm test, including:

- information properly classified under an Executive order relating to national security or foreign policy (paragraph (b)(1));
- inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency (paragraph (b)(5)); and
- reports by agencies responsible for the regulation or supervision of financial institutions (paragraph (b)(8)).

The act also lacks a comprehensive public interest test.

The United States achieves an equal score in this category to the average score of the ten latest laws (57%), suggesting that this is not a particularly age sensitive category. On the other hand, seven of the ten latest law countries scored three or four points for harm testing exceptions, suggesting that this may be an area where performance has improved over time. Furthermore, the gap between the United States and the average of the top ten countries in this category (57% versus 78%) is almost exactly the same as the overall gap in averages (59% versus 83%). In other words, the comparative performance of the United States on this category is consistent with its overall average.

## *Appeals*

It is in this area that the RTI Rating arguably diverges furthest from strict international legal standards. It is clear from general human rights principles that there should be a remedy where claims are made that human rights have been breached. Thus, Article 2(3) of the ICCPR states:

Each State Party to the present Covenant undertakes:

- (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
- (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; and
- (c) To ensure that the competent authorities shall enforce such remedies when granted.<sup>69</sup>

But, as even the language of this provision suggests, international law does not prescribe the precise nature of the remedy that should be made available.

As regards the right to information, it is clear that requesters need to be able to avail themselves of an appeal to an independent body where they are refused access to information by a public authority. Otherwise, the right of access essentially lies at the discretion of the public authority, and hence cannot be described as a right. That public authorities have strong vested interests in the release or otherwise of information further highlights this need.

The idea of an appeal is firmly reflected in soft law standards relating to the right to information. Thus, Council of Europe Recommendation No. R(2002)2 refers to the right to appeal to a “court of law or another independent and impartial body established by law.”<sup>70</sup> The Declaration of Principles on Freedom of Expression in Africa, for its part, refers to two levels of appeal, “to an independent body and/or the courts.”<sup>71</sup> The Inter-American Juridical Committee’s Principles on the Right of Access

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<sup>69</sup>International Covenant on Civil and Political Rights, *supra* note 19.

<sup>70</sup>Recommendation No. R (2012)2, *supra* note 42, at Principle IX(1).

<sup>71</sup>Declaration of Principles on Freedom of Expression in Africa, *supra* note 41, at Principle IV(2).



to Information also call for two levels of appeal, to “an administrative jurisdiction” and to the courts.<sup>72</sup>

Despite the somewhat equivocal nature of these statements, the experience of countries around the world has been that the presence of an independent administrative level of appeal provides a huge boost to efforts to implement RTI laws effectively.<sup>73</sup> This is, in part, because appeals to the courts, which are the other main option, are simply too costly and time consuming to be accessible or practical for the vast majority of requesters. But it is also in part due to the wider role many administrative appellate bodies play in terms of providing positive support for implementation efforts.

For these reasons, the RTI Rating focuses quite heavily in this category on the existence and qualities of administrative oversight bodies, alongside a number of other positive appeal features, such as having broad grounds for appeals, and placing the burden on public authorities to justify refusals to provide access.

The United States does not provide for an administrative level of appeal relating to the right to information, and so necessarily loses all of the points for Indicators 38-43,<sup>74</sup> resulting in a poor overall score in this category, despite doing well on most of the other indicators here.

It is tempting to attribute the lack of an administrative oversight system in the United States to the early adoption of the law, and amendments in 2007 did very partially address this problem by at least creating the Office of Government Information Services (paragraph (h)(1)), which has the power to offer mediation services to resolve disputes between requesters and public authorities (paragraph (h)(3)). However, Sweden had an ombudsman based oversight system as early as 1810,<sup>75</sup> and of the nine other ten earliest laws (that is, other than the United States), fully eight provide for an administrative oversight body. Indeed, this is one of the few categories where the oldest laws outperform the latest laws, by a margin of 64% to 55%.

<sup>72</sup>Principles on the Right of Access to Information, *supra* note 43, at Principle 8.

<sup>73</sup>*See, e.g.*, OAS Special Rapporteur for Freedom of Expression, The Right to Access to Public Information in the Americas: Specialized Supervisory and Enforcement Bodies, March 2015, available at <http://www.oas.org/en/iachr/expression/docs/reports/ACCESS/Thematic%20Report%20access%20To%20public%20information%202014.pdf>; LAURA NEUMAN, ENFORCEMENT MODELS: CONTENT AND CONTEXT (2009), available at <http://siteresources.worldbank.org/EXTGOVACC/Resources/LNEumanATI.pdf>.

<sup>74</sup>These indicators look at the presence and various attributes of an administrative oversight body.

<sup>75</sup>The first ombudsman, Lars August Mannerheim, was formally appointed in 1810 with responsibilities that included overview of the right to information system. Information provided by Swedish lawyer Per Hultengård, on file with the author.

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### *Sanctions and Protections, and Promotional Measures*

The rules in the RTI Rating on sanctions and protections are, once again, largely derived from soft law statements, as well as the practical experience of different countries in these areas. The 2004 Joint Declaration of the special international mandates on freedom of expression calls for “sanctions for those who wilfully obstruct access to information,”<sup>76</sup> while the Declaration of Principles on Freedom of Expression in Africa states: “[N]o 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 sanctions serves a legitimate interest and is necessary in a democratic society.”<sup>77</sup>

The RTI Rating calls for two types of sanctions – for willful obstruction of access by individuals and for systemic failures by public authorities to meet their openness obligations – and two types of protections – for individuals who release information pursuant to the law in good faith and for individuals who release information about wrongdoing (whistleblowers).

In the United States, there are laws preventing the destruction of documents<sup>78</sup> and disciplinary actions can be undertaken under the act in limited circumstances,<sup>79</sup> but there are no general rules on sanctions for willful obstruction of access. Similarly, there are only limited systems for imposing measures on public authorities which structurally fail to respect the act. The United States has strong rules on whistleblower protection<sup>80</sup> but it fails to provide formal legal protection to those who release information pursuant to the FOIA. The latter is important, among other things, to give individuals the confidence to release such information.

Promotional measures is another category of the RTI Rating where standards are extrapolated largely from a ‘most enabling’ approach towards discharging positive obligations, better comparative practice and soft law statements. This is the category where the FOIA does by far the best, fully 15 percentage points ahead of any other category, with twelve out of sixteen points, or 75%. This is based on strong provisions relating to issues such as the appointment of specialized officials to deal with requests (the Chief FOIA Officers, subsections (j) and

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<sup>76</sup>Joint Declaration, *supra* note 37.

<sup>77</sup>Declaration of Principles of Freedom of Expression in Africa, *supra* note 41, at Principle IV(2).

<sup>78</sup>See Records Management by Federal Agencies, 44 U.S.C. §3106 (1968).

<sup>79</sup>*Id.* at (a)(4)(F)(i).

<sup>80</sup>*Id.* at § 1201 (Prohibited Personnel Practices).

(k)), the existence of a lead body for undertaking promotional measures (the Office of Government Information Services, subsection (h)), and very detailed reporting requirements for both public authorities and the Attorney General (subsection (e)). Two points are lost in this category due to the lack of any obligation on public authorities to publish lists of the records that they hold, and another two are lost due to the failure to impose any formal obligation on public bodies to train their officials (although it is recognized that in practice training is widely provided in the United States).

## CONCLUSIONS

As the third country in the world to adopt a law giving individuals a right to access information held by public bodies, or the right to information, the United States was, by definition, a global leader in this area. As it celebrates the fiftieth anniversary of the adoption of this groundbreaking legislation, the United States can look back proudly on the leading role it has played globally in terms of putting in place RTI legislation.

In terms of the quality of the FOIA, however, according to the RTI Rating, the leading global methodology for assessing the legal framework for the right to information, the United States sits at an unremarkable fifty-first position globally out of 103 countries. Given the fact that the FOIA has been regularly amended and improved, and that the RTI Rating is based on a set of minimum human rights standards, this is a cause for some concern. Particular areas of weakness are protection for the right of access, the system for lodging appeals against refusals to provide information, and the set of sanctions and protections for obstructing or disclosing information, all of which score 50% or lower on the RTI Rating.

In some cases, the weaknesses of the FOIA find resonance among other older RTI laws, with many of the other older laws suffering from the same flaws. Thus, few early adopters included the legislative and judicial branches of government within the scope of their RTI laws. However, in the United States, unlike in some other early adopting countries, the RTI law has been amended on a number of occasions. While these successive amendments have contributed to somewhat improved scores on the RTI Rating, they have done little to address the main structural flaws, raising questions as to why this might be.

In other cases, the FOIA's shortcomings do not appear to be based on the era in which it was adopted. The absence of an administrative body which has the power to decide on appeals regarding the way requests for information were processed, for example, is an area where, in

general, the early adopters actually do better than the later adopters. The United States does not seem to be able to move forward strongly on this issue, despite having established a central support body with the power to mediate disputes, in the form of the Office of Government Information Services.

Anecdotal evidence, along with some high profile instances of whistleblowing, notably the Edward Snowden disclosures, suggests that in practice the United States remains among the more open countries globally. Efforts to amend the legal framework for RTI so as to reflect better international standards in this area could only further bolster openness in practice.