

# THE CONSTITUTIONAL RIGHT TO INFORMATION

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## I. INTRODUCTION

As many as ninety states located on five continents currently recognize the right of individuals to obtain information held by public agencies. In the past twenty years, the right to information has become a universally recognized right in almost all democratic, and even numerous non-democratic, states. The issues raised by the legal recognition of this right have become the subject of a lively public debate among jurists, political scientists, and civil rights associations. Despite the general recognition of the right to freedom of information, specific aspects relating to its precise scope and manner of implementation remain controversial and continue to be debated in international tribunals, United Nations commissions, and international organizations such as constitutional courts, as well as in the academic literature on the subject. Within this torrent of activity, the legal decisions and the academic texts that have dealt with laws protecting freedom of information have generally neglected the constitutional aspects of the right to information. It is against this background that this Article attempts to provide the missing pieces and engage in a discussion that focuses solely on the right to information as a *constitutional* right.

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This Article proposes that the right to information should be seen as a constitutional right, due to its political nature and its unique role in protecting democracy. Such constitutional recognition can be realized through judicial recognition of this right, derived from a state's other constitutional rights, or through an explicit anchoring of the right in a state's constitution. This Article will delve into the proper route for anchoring the right to information in constitutional law.<sup>1</sup>

In the second section of this Article, the theoretical foundations for anchoring the right to information in a state's constitution will be laid out. This question is considered on an abstract, analytic level, divorced from the constitutional contexts of one or another state. In the third and fourth sections of the Article the status of the freedom of information will be discussed within the framework of comparative and international law, respectively.

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1. It is outside the scope of this Article to discuss the fundamental question of the desired status of constitutions, or the possibility of conducting judicial review of primary legislation. For a critical discussion of the issue regarding whether a constitution that allows judicial review of primary legislation is at all legally desirable, see J. Waldron, *Law and Disagreement* (1999); Mark Tushnet, *Taking the Constitution Away from the Courts* 129–54 (1999). The assumption on which this Article rests is that constitutions are desirable institutions and that it is advantageous to anchor certain basic rights within them. This Article does not deal with the level of change to be anticipated as a result of providing constitutional protection to basic rights in general and freedom of information in particular. Some authors are convinced that court recognition of constitutional rights is incapable of initiating any real social change. See Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* 35–36 (1991). Alternatively, other scholars are convinced that this contention is exaggerated, that it is possible to point to some substantive social changes effected in response to court rulings on constitutional issues. See, e.g., Michael Paris & Kevin J. McMahon, *The Politics of Rights Revisited: Rosenberg, McCann and the New Institutionalism*, in *Leveraging the Law: Using the Courts to Achieve Social Change* 63 (Dan Schultz ed., 1998) (discussing two alternative theories regarding the role of law and courts in mobilizing social change). In recognition of the fact that constitutional changes cannot be produced instantaneously, our hope is that constitutional recognition of the right to obtain information will eventually introduce the deep social transformations required to truly realize this right—transformations that have eluded many states where institutionalization was assumed to follow directly from the fact of legislation. We are aware of the limited influence of constitutional texts by themselves or of the interpretation given them by the courts. Our position, that court recognition of a constitutional right is, by itself, insufficient to bring about the hoped-for changes, does not deny its necessity as a contributing factor in more expansive processes of cultural transformation and that, in some contexts, it can meaningfully accelerate these processes.

Finally, the fifth and final section suggests a more appropriate drafting of constitutional articles securing the right to information.

## II. THEORETICAL JUSTIFICATIONS FOR CONSTITUTIONAL PROTECTION OF THE RIGHT TO INFORMATION<sup>2</sup>

The insertion of a basic right into a constitution requires compelling justification based on sound theoretical reasoning. This Section will provide the conceptual justification for the constitutional anchoring of the right to information. After identifying and reviewing the many grounds supporting legal recognition of the right, this Section concludes that the majority of those grounds belong to the constitutional sphere inasmuch as they relate to the “rules of the game.” They sustain democracy as well as the basic human rights recognized by the world’s enlightened regimes. These arguments provide evidence for the centrality and constitutionality of the right to information. While elaborating on each of the justifications, this Article will show how they support the constitutional character of the right to information.<sup>3</sup>

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2. It might be argued that advocates for the recognition of a constitutional right to information, a relatively young right within the international rights discourse, have contributed to a “rights inflation,” a phenomenon that, according to many, has impeded protection of those basic rights required for the preservation of human dignity and liberty. See Michael Ignatieff, *Human Rights as Politics and Idolatry* 90 (2002); Greg Dinsmore, *Debate: When Less Really is Less—What’s Wrong with Minimalist Approaches to Human Rights?* 15(4) *J. Pol. Phil.* 473, 474 (2007). We contend that even for a constitution focusing on traditional human rights or “first-generation rights,” it is essential to include the right to obtain information given that this right is an inseparable component of the freedom of expression, a right indispensable for the survival of orderly democratic regimes as well as a procedural right, required by the rules of the democratic game.

3. Some scholars support a minimalist approach to interpretation of constitutions, according to which only those procedural rights that protect the democratic rules of the game are to be included. This approach, which was rejected in the United States, is most clearly outlined in the work of John Ely. See, e.g., John Ely, *Democracy and Distrust* 87 (1980) (“[I]n fact the selection and accommodation of substantive values is left almost entirely to the political process and instead the [Constitution] is overwhelmingly concerned . . . with procedural fairness in the resolution of individual disputes (process writ small), and . . . with what might capaciously be designated process writ large—with ensuring broad participation in the processes and distributions of government.”). In contrast, others are convinced that this approach is too narrow and that other justifications exist for the constitutional anchoring of rights in addition to those related to the protection of the democratic process, such as those providing

The right to information is a multidimensional right. It serves a range of individual and group interests and rests on various theoretical justifications. The four major justifications are: (a) the political-democratic justification; (b) the instrumental justification; (c) the proprietary justification; and (d) the oversight justification.

#### A. Political-Democratic Justification

The first justification for recognition of the right to information as a fundamental constitutional right rests on its significance for the proper conduct of a democratic regime. This right represents, in effect, an initial condition for the public's participation in the democratic game. Indeed, access to information is central to the proper functioning of a democratic regime.

This argument is not new. James Madison, the fourth president of the United States and a co-author of the First Amendment to the American Constitution, explained the right's salience as early as 1822: "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives."<sup>4</sup>

This statement, so frequently quoted by American scholars, jurists, and politicians, is perceived as the explanation for why freedom of information contributes to and is a foundation of substantive constitutional democracy.<sup>5</sup> According to this widespread view, the right to information is a precondition for the exercise of procedural political rights, such as the freedom of expression.

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protection of private interests like individual human dignity and autonomy, as well as economic and social rights. The authors contend that it is possible to justify constitutional protection of the right to obtain information on the basis of the narrow (procedural democracy per Ely) as well as the broad approach.

4. *The Writings of James Madison* 103 (Gaillard Hunt ed., 1910). Reinforcing Madison's explanation is a comment made by the former president of Israel's Supreme Court, Meir Shamgar: "The democratic system of government is nourished by—and is dependent on—the public and free flow of information, which focuses on the core issues that influence community and individual life. Therefore, many view the free flow of information as a 'key' to the operation of the entire democratic system." HCJ 1/81 Shiran v. The Broadcasting Authority [1981] IsrSC 35(1) PD 365, 378.

5. *See* *Env'tl. Prot. Agency v. Mink*, 410 U.S. 73, 110–11 (1973) (Douglas, J. dissenting).

This notion is one foundation for inclusion of the right to request and obtain information in Article 19 of the Universal Declaration of Human Rights of 1948, which anchors the “freedom of thought and expression.”<sup>6</sup> Article 19 of the 1966 United Nations International Covenant on Civil and Political Rights also includes the right to information as a component of the freedom of expression: “Everyone shall have the right to freedom of expression; this right shall include the freedom to seek, receive and impart information and ideas of all kinds.”<sup>7</sup>

The relationship between the freedom of expression and the right to information is more than purely theoretical. The ability of individuals, interest groups, and organizations to actively participate in political debates deciding issues on the public agenda, as well as the very possibility of placing issues on that agenda, is tightly linked to their ability to obtain relevant information.

The association between the right to information and democracy is persuasively demonstrated through a contemporary example. In 2004, a request for information was submitted to the Pentagon by the National Security Archive, a non-governmental research institute at The George Washington University in Washington, D.C., for documents related to the 2001–2003 debates over troop levels for the Iraq war.<sup>8</sup> According to the documents released following approval of the request in January 2007, the military had predicted that approximately 5,000 soldiers would be stationed in Iraq by December 2006.<sup>9</sup> In reality, 134,000 American soldiers were still stationed on Iraqi soil at the time the information was disclosed,<sup>10</sup> with President Bush ordering the deployment of more than 20,000 additional soldiers a few weeks later.<sup>11</sup> Obviously,

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6. Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. Doc A/810 (Dec. 12, 1948) [hereinafter UDHR].

7. International Covenant on Civil and Political Rights art. 19, Dec. 19, 1966, 999 U.N.T.S. I-14668 [hereinafter ICCPR].

8. Interview with Meredith Fuchs, Gen. Counsel, Nat'l Sec. Archive, in Washington, D.C. (Mar. 16, 2007) (notes on file with the authors).

9. *Top Secret Polo Step*, Nat'l. Sec. Archive Elec. Briefing Book No. 214, <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB214/index.htm> (last visited Feb. 8, 2011).

10. Text of a Letter from the President to the Speaker of the House of Representatives and the President Pro Tempore of the Senate (Dec. 15, 2006), <http://georgewbush-whitehouse.archives.gov/news/releases/2006/12/20061218-5.html>.

11. President's Address to the Nation (Jan. 10, 2007), <http://georgewbush-whitehouse.archives.gov/news/releases/2007/01/20070110-7.html>; see also Michael

information regarding errors made in the force estimates played a crucial role in the public debate surrounding the conflict.

Another example of this principle was the publication of photographs taken during memorial services conducted at military airfields in the U.S. upon the arrival of the coffins of soldiers killed in Iraq. The American government had chosen not to make these photographs public. Professor Ralph Begleiter, a former journalist and currently a professor of political science at the University of Delaware, presented a freedom of information application to the Pentagon, requesting a copy of the cited photographs for the purpose of demonstrating the war's costs to the American public.<sup>12</sup> After the Pentagon's refusal to submit the photographs, Begleiter appealed to the Federal District Court for the District of Columbia. During the hearing, the Pentagon altered its stance and permitted the publication of 700 photographs,<sup>13</sup> an event that won considerable media attention.<sup>14</sup>

A similar situation recently arose in Israel. As a result of a petition submitted to Israel's High Court of Justice regarding the governmental commission of inquiry appointed to examine the conduct of the Second Lebanon War, known as the Winograd Commission,<sup>15</sup> the High Court ordered the release of hearing protocols that had been kept confidential prior to the court's decision.<sup>16</sup> Transcripts of the testimony given by the Prime Minister, the Minister of Defense, the Chief of Staff, and other senior political and military officials appearing before the Commission were consequently published. The publication of the testimonies brought extensive media coverage, which was used by government opponents

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Gordon, *A Prewar Slide Show Cast Iraq in Rosy Hues*, N.Y. Times, Feb. 15, 2007, at A16.

12. Upon publication of the photographs, Begleiter was quoted saying, "This significant decision by the Pentagon should make it difficult, if not impossible, for any U.S. government in the future to hide the human cost of war from the American people." *Return of the Fallen*, Nat'l. Sec. Archive Elec. Briefing Book No. 152, (April 28, 2005), <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB152/index.htm>.

13. For a description of the unfolding of the events, the related court documents and the related photographs, see *id.*

14. See, e.g., *Pentagon Releases Photos of Fallen US Troops: Open Records Requests Put Pressure on Military*, CNN (April 29, 2005), <http://www.cnn.com/2005/US/04/28/photos.fallen/index.html>.

15. HCJ 258/07 Galon v. Commission of Inquiry to Investigate the Conduct of the 2006 Lebanon Campaign [2007] IsrSC 93(5) 7.

16. *Id.*

as well as supporters in the virulent public debate that had exploded over the war's management. In this case as well, the publication of information had a critical impact on the formation of public opinion, which in turn influenced the citizens' voting preferences. These contemporary examples confirm that information is a basic requirement for the functioning of an open political system and a condition without which no citizen can fulfill the active role expected of citizenry in a democracy.

#### B. The Instrumental Justification

Supporters of the right to information have frequently employed the instrumental justification for access to information. This rationale stems from the idea that those fundamental interests that represent necessary conditions for the exercise of constitutional rights are, in and of themselves, of equal status to those rights and, thus, constitutional. For instance, one of the justifications for the constitutionality of the right to education is that education (at a certain basic designated level) is a condition that, in its absence, prevents citizens from enjoying their constitutional right to vote.<sup>17</sup> Conditions supporting the exercise of basic rights are therefore no less crucial than the rights themselves. In order for people to be capable of independently protecting their rights and thereby avoid dependence on the protections that the state professes to grant, they must have the tools necessary for such protection at their disposal. The philosopher Sir Isaiah Berlin elucidated this perspective on human rights in the introduction to his celebrated *Four Essays on Liberty*:

If a man is too poor or too ignorant or too feeble to make use of his legal rights, the liberty that these rights confer upon him is nothing to him . . . . Again, it must not be forgotten that even though freedom without sufficient material security, health, knowledge, in a society that lacks equality, justice, mutual confidence, may be virtually useless, the reverse can also be disastrous. To provide for material needs, for education, for such equality and security as, say, children have at school or laymen in a theocracy, is not to expand liberty . . . when they call

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17. See Yoram Rabin, *The Many Faces of the Right to Education, in Exploring Social Rights—Between Theory And Practice* 265, 268 (Daphne Barak-Erez & Aeyal Gross ed., 2007).

[that] freedom, this can be as great a fraud as the freedom of the pauper who has a legal right to purchase luxuries. Indeed, one of the things that Dostoevsky's celebrated fable of the Grand Inquisitor in *The Brothers Karamazov* is designed to show is precisely that paternalism can provide the conditions of freedom, yet withhold freedom itself.<sup>18</sup>

An additional example of a constitutional right supported by the instrumental justification is the right to petition the courts, which also represents a necessary condition for the exercise of other human rights, whether political-civil or individual-social.<sup>19</sup> Similar constitutional procedures are required, with the respective adaptations, in the case of the right to information. When a public agency stores information touching upon an individual's rights or duties, that person's only weapon in the protection of his or her other basic rights, constitutional and non-constitutional alike, is the right to information: "[I]ndeed the whole system for protection of human rights, cannot function properly without freedom of information. In that sense, it is a foundational human right, upon which other rights depend."<sup>20</sup>

There exists an almost inexhaustible series of cases in which the right to obtain information is necessary for the exercise of other political and human rights. States provide citizens and residents, as well as guests, a plethora of services. They are bound to do so by primary or secondary legislation. At the same time, the state demands of its citizens that they fulfill their own duties, the violation of which is likely to incur punishment. In such an intensive rights/duties relationship, access to information is one of the necessary conditions for the exercise of all the rights established by law as well as for the protection of the individual against actions taken by the state.

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18. Isaiah Berlin, *Four Essays on Liberty* liii–lv (1969).

19. See Frank Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Right—Part II*, 1974 *Duke L.J.* 527, 534 (1974) (“[L]itigating interests base a claim to ‘fundamentality’ on the idea that they are ‘preservative of all rights.’”); John Leubsdorf, *Constitutional Civil Procedure*, 63 *Tex. L. Rev.* 579, 591 (1984) (“Because rights are worthless without procedures to enforce them, a constitution that enumerates basic rights should provide procedures to secure remedies for violations of those rights.”).

20. Toby Mendel, *Freedom of Information: An Internationally Protected Human Right*, 1 *Comp. Media L. J.* 1, 1 (2003).



### C. The Proprietary Justification

The proprietary justification states that information held by public authorities is, in fact, the property of a state's citizens and residents. As such, citizens and residents are meant to enjoy free access to it. The information held by public agencies was "created" or gathered by civil servants—officials considered to be public trustees who carry out their mandate by means of taxes paid to the public. By the very nature of this structure, the owners of the information, those who financed its collection, should have access to it. Because an official's control over information rests solely on his or her status as a public trustee, use of that information must coincide with the terms determining the trusteeship. The justification for imposing limitations on owners' access to some of their property—in this case, limitations on the public's access to information—should emanate only from the need to protect the interests of other owners, that is, other members of the general public.<sup>21</sup> As the Australian Reform Commission wrote:

The information holdings of the government are a national resource. Neither the particular Government of the day nor public officials collect or create information for their own benefit. They do so purely for public purposes. Government and officials are, in a sense, 'trustees' of that information for the Australian people. The information which public officials, both elected and appointed, acquire or generate in office is not acquired or generated for their own benefit, but for purposes related to the legitimate discharge of their duties of office, and ultimately for the service of the public for whose benefit the institutions of Government exist, and who ultimately (through one kind of impost or another) fund the institutions of Government and the salaries of officials.<sup>22</sup>

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21. This justification is, in itself, insufficient as a basis for the right of free access to public information by individuals who are neither residents nor citizens of the state, a practice allowed by the majority of states that have legislated freedom of information laws. A non-resident's right to access information does not flow from a proprietary claim, but rather from the instrumental justification, discussed *supra* in Part II.B.

22. Austl. Law Reform Comm'n & Administrative Review Council, *Open Government: A Review of the Federal Freedom of Information Act 1982*, Report 77, art. 4.9, available at <http://www.alrc.gov.au/sites/default/files/pdfs/publications/ALRC77.pdf>.

To summarize, the proprietary justification treats the damage to the individual's right to information as if it were, in effect, damage to the individual citizen's property rights. Property rights have been recognized in the majority of constitutions legislated throughout the democratic world; hence, this justification, too, supports the constitutionality of the right to information. To paraphrase our argument, similar to the prohibition against a public agency's arbitrary and inequitable distribution of financial and other material resources considered to be public property, which includes allocation of these resources for the agency's exclusive benefit, public agencies are prohibited from preventing access to the information that they produced as public trustees.

#### D. The Oversight Justification—Transparency

A commonly held view is that constitutions should include mechanisms to enable the regulation and oversight of government agencies. This idea rationalizes the introduction of principles and institutions into a constitution—such as protection of the rule of law—aimed at guaranteeing the continuation of the democratic rules of the game. Such mechanisms simultaneously represent another justification for the constitutional protection of the freedom of the press and investigative journalism.

Accepting the proposition that transparency is vital to administrative oversight, which likewise has constitutional dimensions, this value represents an additional justification of the right to information. It has long been accepted that freedom of information encourages the transparency that alleviates corruption. In a broader sense, transparency ensures proper practice on a daily basis. As such, freedom of information (or “publicity”) can be understood as the “best disinfectant” for public ills, in the words of Justice Brandeis.<sup>23</sup> The constitutionality of access to information in this sense does not relate to its nature as a right, but to its nature as an important component of governance in any democratic regime. As is well known, constitutions not only protect rights, but also determine the structure of government. They do so in a manner that aims to promote proper functioning of government and to limit the

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23. Louis Brandeis, *Other People's Money and How the Bankers Use It* 92 (1913) (“Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants, electric light the most efficient policeman.”).

threats that stem from the power vested in government. Access to information is an important tool in such structures.

The public administration is meant to serve the public, its citizens, and residents. The public's right to oversee those who serve it resembles the right of beneficiaries to monitor their trustees. Beneficiaries have no need to uncover or even suspect corruption to justify their oversight. In the public sphere, such a review may indicate that officials have invested innocently, but unwisely, even while bearing the public good in their sights; they may nevertheless be required to pay the consequences. At other times, the same type of review may indicate that officials have not met expectations of efficiency and good judgment. In any case, as long as these trustees' decisions were reached free of any conflicts of interest, or on the basis of extraneous considerations—they were within the “range of reasonableness”—the judiciary will avoid intervening. The same does not apply with regard to the public trial conducted in their wake. The public is entitled to demand an account of its trustees' actions and the execution of their judgment. It is also entitled to demand that its trustees act not only reasonably, but optimally. Maintaining such oversight requires that the public have access to information.<sup>24</sup>

In Israel, publication of the protocols of the Government Commission of Inquiry—the Winograd Commission—investigating the conduct of the Second Lebanon War,<sup>25</sup> made possible by a High Court of Justice ruling delivered to the Commission, did more than inflame the public debate. By revealing how the political echelons had acted throughout the war, the Protocols exposed how its elected officials expressed themselves behind closed doors, in contrast to how they expressed themselves in the open media. The public could now differentiate between those who criticized the war in real time and those who were willing to do so only after the war's conclusion. The Protocols allowed the public to gain some insight into the balance of power between members of the security sphere and those belonging to the diplomatic-political sphere. The government officials who had

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24. For examples of how freedom of information laws enable citizens to police conduct, see *Freedom of Information*, The Guardian, <http://www.guardian.co.uk/politics/freedomofinformation> (last visited Nov. 11, 2010); *Special Reports: Freedom of Information*, BBC News, [news.bbc.co.uk/1/hi/in\\_depth/uk/2006/foi/default.stm](http://news.bbc.co.uk/1/hi/in_depth/uk/2006/foi/default.stm) (last visited Nov. 11, 2010); The National Security Archive, <http://www.gwu.edu/~nsarchiv> (last visited Nov. 11, 2010).

25. *Winograd Commission Final Report*, Council on Foreign Relations, (Jan. 30, 2008), [http://www.cfr.org/publication/15385/winograd\\_commission\\_final\\_report.html](http://www.cfr.org/publication/15385/winograd_commission_final_report.html) (official English-language summary of the Report).

exerted such an effort to delay the publication faced the glare of exposure. As a result of this information, the public was able to direct its criticism more accurately. It could likewise demand appropriate changes, such as higher allocations for military training and a greater voice for diplomats during decision making.

As stated, the right to information serves to improve efforts aimed at disclosing public corruption. A powerful example of this function was recently seen in the United Kingdom, when a four-year long freedom of information battle resulted in the “MPs’ Expenses Scandal.”<sup>26</sup> There, the release of hundreds of thousands of records detailing expense claims made by members of Parliament led to several revelations that sparked intense public outrage. It was revealed that many members had abused their right to claim expenses that were “wholly, exclusively and necessarily incurred for the performance of a Member’s parliamentary duties” for years.<sup>27</sup> Invoking their expenses privilege, these MPs had claimed reimbursement for private expenses ranging from pay-per-view pornography to dog food.<sup>28</sup> The foreseeable outcome of this scandal will be the swift termination of such widespread conduct among MPs. In addition, charges against MPs stemming from the scandal are likely, following probes faced by certain MPs at the time of this writing.<sup>29</sup>

Myriad instances of media-driven as well as individual efforts to uncover public corruption abound in states that have internalized the principle of freedom of information. Such states usually exhibit a “cleaner” public administration. Sweden was the first country in the world to legislate a freedom of information act and to provide constitutional protection for this right.<sup>30</sup> Finland inherited the right

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26. For in-depth coverage of the scandal, see *MPs’ Expenses*, Telegraph, <http://www.telegraph.co.uk/news/newsttopics/mps-expenses> (last visited Nov. 11, 2010) [hereinafter *MPs’ Expenses*].

27. *The Green Book: A Guide to Members’ Allowances* 59–60 (2009).

28. *MPs’ Expenses*, *supra* note 26.

29. *Full Statement of Criminal Charges Brought Against the MPs and Peer*, The Guardian, Feb. 5, 2010, <http://www.guardian.co.uk/politics/2010/feb/05/mps-expenses-criminal-charges-statement> (announcing the charges brought against three members of Parliament and a peer in relation to the scandal).

30. See Anders Chydenius, His Majesty’s Gracious Ordinance Relating to Freedom of Writing and of the Press (Peter Hogg, trans.) (1766), in *The World’s First Freedom of Information Act: Anders Chydenius’ Legacy Today* 8 (Juha Mustonen, ed., 2006).

from Sweden and was the third country to enact a freedom of information law,<sup>31</sup> following Colombia, which enacted the law in 1888.<sup>32</sup> Today, Sweden and Finland are considered the least-corrupt countries in the world.<sup>33</sup> The corruption-free character of these countries has arguably fostered a culture of transparency. Indeed, it is difficult to ignore the considerable weight that these states attach to administrative transparency. Conversely, totalitarian and corrupt regimes exert immense efforts designed to conceal information. Both of these situations suggest the existence of an inverse relationship between governmental decency and transparency.

The four constitutional justifications described above lead to the conclusion that constitutions adopted by democratic states should include targeted protections to guard the right to information. This conclusion flows from the fact that the right to information represents an essential ingredient in the proper functioning of substantive as well as procedural democracy, and that access to information is a necessary condition for the exercise of other human

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31. See Stephen Lamble, *Freedom of Information: A Finnish Clergyman's Gift to Democracy*, 97 *Freedom of Info. Rev.* 2, 2–8 (2002).

32. Following the innovative Swedish legislation in 1766, Colombia became the second state to legislatively anchor the right to obtain information in 1888. Dave Banisar, *Freedom of Information and Access to Government* 11 (2002), available at <http://www.article19.org/work/regions/latin-america/FOI/pdf/DbanisarFOI2002.pdf>. Colombia enjoys the second-oldest constitution in the western hemisphere. *Id.* For a political history of nineteenth-century Colombia, see Jorge P. Osterling, *Democracy in Colombia: Clientelist Politics and Guerrilla Warfare* 45–110 (1989).

33. These two countries have been ranked for many years as among the six states exhibiting the lowest level of corruption. See Transparency International: The Global Coalition Against Corruption, *Corruption Perceptions Index 2010*, [http://www.transparency.org/policy\\_research/surveys\\_indices/cpi/2010](http://www.transparency.org/policy_research/surveys_indices/cpi/2010). For an empirical analysis of the association between freedom of information, a free press, democracy, and corruption, see Catharina Lindstedt & Daniel Naurin, *Transparency and Corruption: The Conditional Significance of a Free Press* 2 (2005), available at <http://www.qog.pol.gu.se/conferences/november2005/papers/Lindstedt.pdf>. Lindstedt and Naurin offer an empirical analysis of the transparency index, regime structure, and level of corruption in 107 countries. They conclude that transparency *per se* does not ensure the reduction of corruption. *Id.* However, when transparency is linked to free elections, it represents an effective tool to reduce corruption. For another position stating that a reverse relationship can exist between freedom of information and corruption under certain conditions, see Samia Tavares, *Do Freedom of Information Laws Decrease Corruption?* 7 (2007), available at <http://mpira.ub.uni-muenchen.de/3560>.

and civil rights. Taken alone or together, these justifications underscore the importance of the constitutional recognition of the right to information. The final section of this Article proposes an appropriate method for anchoring this right.

### III. THE CONSTITUTIONAL RIGHT TO INFORMATION IN COMPARATIVE LAW

#### A. Explicit Inclusion of the Right to Information in State Constitutions

The widespread protection that the right to information currently enjoys in nearly all liberal democratic states is expressed in freedom of information legislation.<sup>34</sup> Some states also recognize a constitutional right to information from public agencies. A survey conducted in 2003 among the fifty-four member states of or observers to the Council of Europe found that thirty-six, or two-thirds, of the surveyed states had inserted an article in their respective constitutions specifically upholding a right to information.<sup>35</sup> Only thirteen of these were veteran democracies (Sweden, Germany, and Holland, for example), with the remainder being young democracies (Estonia and Poland, for example). Surprisingly, in the eighteen states without freedom of information articles in their constitutions, all but two, Bosnia-Herzegovina and Serbia, were veteran

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34. The pace of national acceptance of freedom of information laws has accelerated throughout the world in recent years. As mentioned above, Sweden, Colombia, and Finland were the first and only three nations to adopt freedom of information laws between 1766 and 1951. *See supra* notes 31–33 and accompanying text. By 1992, another eleven nations had introduced freedom of information acts into their body of laws. The majority of these states were veteran democracies, such as France, Australia and Holland. In the last seventeen years, freedom of information has been legalized in another seventy states, including nearly all the liberal democracies and several third-world countries such as Pakistan and Uganda. *See* John M. Ackerman & Irma E. Sandoval-Ballesteros, *The Global Explosion of Freedom of Information Laws*, 58 Admin. L. Rev. 85, 95–109 (2006); Roger Vleugels, *Overview of All FOI Laws* (Sept. 20, 2010), <http://right2info.org/resources/publications/Fringe%20Special%20-%20Overview%20FOIA%20-%20sep%2020%202010.pdf>. This stunning spread represents: (1) a broad international consensus that the right to information is of central importance in regimes recognizing human rights, and (2) information is a necessary condition for the existence of a democracy.

35. Access Info Europe, *Access to Information: A Fundamental Right, A Universal Standard* (2006), <http://www.access-info.org/en/get-connected-links>.

democracies. These veteran democracies include France, Denmark, and the United States (which acts as an observer at the Council of Europe).

It appears that the reason for this division lies in the escalating status of the right to information over the last two decades. The constitutions adopted by the veteran democracies were drafted many years before the right to information received its current formulation and recognition. Hence, this right was almost universally excluded from older documents. The main exception to this rule is Sweden, a pioneer that, as noted in Part II.D, *supra*, recognized the right to information as a constitutional right as early as 1766. The Swedish constitution is composed of four fundamental laws, one of which refers to freedom of the press.<sup>36</sup> The second section of this law, its longest and most detailed section, carries the heading of “On the Public Nature of Official Documents”; this is where the right to information is anchored.<sup>37</sup>

In other veteran democracies, freedom of information was appended to the constitution by applying a range of mechanisms. The 1874 Swiss constitution, for example, made no reference to this right at all; yet, it was inserted when the constitution underwent revision in 1999, within the section headed “Fundamental Rights, Citizenship and Social Goals” under the section entitled “Freedom of Expression and of Information.”<sup>38</sup> The constitution of the Kingdom of the Netherlands, dated 1815, also made no mention of the right but did add an article to its constitution when it was revised in 1983, which states that government organizations “shall observe the right of public access to information in accordance with the rules to be prescribed by Act of Parliament.”<sup>39</sup> Eight years later, in 1991, the

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36. Tryckfrihetsförordningen [The Freedom of Expression Act] [TF] [Constitution] 1:1 (Swed.). The 1949 Act is a modern version of the original 1766 Act.

37. *Id.* at 2:1. The Swedish Constitution allows changes to be introduced into this law only by means of two consecutive votes on the identical revision, in two consecutive parliaments, with general elections held between the two votes. Regeringsformen [The Instrument of Government] [RF] [Constitution] 8:15 (Swed.).

38. Constitution fédérale de la Confédération Suisse [Cst] [Constitution] Apr. 18, 1999, SR 101, art. 16 (Switz.); Constitution fédérale de la Confédération Suisse [Cst] [Constitution] May 29, 1874 (Switz.), [http://www.servat.unibe.ch/icl/sz01000\\_.html](http://www.servat.unibe.ch/icl/sz01000_.html) (last visited Feb. 8, 2011).

39. Grondwet voor het Koninkrijk der Nederlanden [GW] [Constitution] art. 110 [Neth.].

Netherlands enacted a freedom of information act in accordance with the article's dictates.<sup>40</sup>

In contrast with the veteran constitutions, almost all the constitutions drafted in young democracies, especially in those Eastern European countries formerly belonging to the communist bloc, include detailed articles on freedom of information in their original versions. For example, Article 44 of Estonia's constitution, dated 1992, is comprised of four paragraphs that include explicit instructions regarding the individual's right to obtain publicly held information.<sup>41</sup> Chapter 2, Section 32 of South Africa's constitution offers one of the most advanced formulations of the protection of freedom of information elaborated to date, with every person enjoying access to every item of information held by government authorities as well as every piece of information found in another person's hands, so long as that information is necessary for the exercise of the subject's other rights.<sup>42</sup>

Two factors seem to explain the progressive anchoring of freedom of information, however formulated, in the constitutions of young democracies. First, the status of the public's right to information was well-established and more highly prized at the time that the documents were drafted when compared to conditions at the time that the veteran constitutions were ratified. Second, these young democracies, only recently freed of their totalitarian yokes, had adequately internalized the notion that information was needed as a weapon to ensure public oversight of government. Furthermore, they had realized just how important it was to provide all sectors of society with the tools needed for participation in the democratic game. The corruption that had so characterized these states had succeeded in undermining whatever faith their citizens had in the public administration and the governing regime. The guarantee of free access to the information held by the authorities came to be perceived as essential for exercising human rights while limiting government power. Freedom of information clauses have consequently been included in the constitutions created or revised

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40. Act of 31 October 1991, Containing Regulations Governing Public Access To Government Information, *available at* [http://www.freedominfo.org/documents/NL%20public\\_access\\_government\\_info\\_10-91.pdf](http://www.freedominfo.org/documents/NL%20public_access_government_info_10-91.pdf).

41. Art. 44, Constitution of the Republic of Estonia (1992), *available at* <http://www.president.ee/en/estonia/constitution.php>.

42. S. Afr. Const., 1996, *available at* <http://www.info.gov.za/documents/constitution/1996/a108-96.pdf>.



since the early 1990s. It therefore currently appears inconceivable that any meaningful constitutional action would be initiated without providing a firm place to the constitutionality of this right.

#### B. The Constitutional Right to Information: Interpretive Anchoring

In some veteran democracies, the anchoring of the right to information was accomplished through the courts' interpretation of human rights and other constitutional principles and occasionally on the basis of the state's democratic character. Japan's constitution,<sup>43</sup> for example, makes no reference to the right to information. However, Article 21 does guarantee the freedoms of assembly, organization, speech, and the press, together with any other form of expression, without specifically enumerating the right to freedom of information.<sup>44</sup> Nonetheless, the Japanese Supreme Court ruled that the right to information is protected by Article 21, as follows: "In order that the contents of the reports of such mass media may be correct, the freedom to gather news for informational purposes, as well as the freedom to report must be accorded due respect in light of the spirit of Article 21 of the Constitution."<sup>45</sup> Thus, the Court concluded that the right to information enjoys constitutional protection due to its instrumental role in realizing the freedom of the press.

A similar process transpired in India, where India's Supreme Court interpreted the constitution as including freedom of information even though the country's constitution does not explicitly refer to this right. In 1982, a petition was filed with the Supreme Court demanding that all correspondence between the Minister of Justice and the President of the Supreme Court that related to the appointment of Supreme Court justices be disclosed. The state argued that the discretionary power regarding exposure (or non-exposure) of the respective documents rested in its hands.<sup>46</sup> The Court, however, rejected this position, thereby establishing a precedent that elevated the right to information to constitutional status as a basic feature of the freedom of expression, protected by Article 19 of India's Constitution:

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43. Nihonkoku Kenpo [Kenpo] [Constitution], art. 1 (Japan).

44. *Id.* art. 21.

45. Kaneko v. Japan, 23 Keishu 1490 (Sup. Ct., Nov. 26, 1969).

46. S.P. Gupta v. Union of India, A.I.R. 1982 S.C. 149, 234 (India).

The concept of an open government is the direct emanation from the right to know which seems to be implicit in the right of free speech and expression guaranteed under Article 19(1)(a). Therefore, disclosure of information in regard to the functioning of Government must be the rule and secrecy an exception justified only where the strictest requirement of public interest so demands.<sup>47</sup>

An additional instance of this type of process occurred in South Korea. The South Korean constitution also does not contain any express mention of the right to information. Yet, in 1989, years before South Korea legislated a freedom of information law (which it eventually did in 1996),<sup>48</sup> its Constitutional Court recognized this freedom as a constitutional right after applying the instrument of interpretation to the events of the Forests Survey Inspection Request Case.<sup>49</sup>

There, a South Korean citizen petitioned the court after discovering that the land he had inherited from his father had been expropriated.<sup>50</sup> His request to obtain the documents that might prove his ownership of the respective parcels was denied by the authorities. Although his plea was based on interference with his property rights, the Court chose to ground its decision on the plaintiff's legal right to obtain information. Eight judges, representing the majority, declared that the plaintiff's freedom of expression was anchored in Article 21 of the South Korean constitution, which protected the free flow of thought and ideas.<sup>51</sup> Fulfillment of this right entailed the free assimilation of ideas, together with the free collection and analysis of

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47. *Id.* para. 55. It is interesting to note that this case linked expansion of the right of access to the courts with the right to information. As such, it was an unprecedented expansion of the right of standing to public plaintiffs within India. See Jill Cottrell, *The Indian Judges' Transfer Case*, 33 *Int'l & Comp. L.Q.* 1032, 1043-44 (1984) (discussing the Indian Supreme Court's broad construction of standing in order to hear "public interest litigation").

48. Act on Disclosure of Information by Public Agencies, Act. No. 5242, Dec. 31, 1996, art. 1 (S. Kor.).

49. Forests Survey Inspection Request Case, (1989) 1 KCCR 176, 88Hun-Ma22 (S. Kor.), available at [http://www.court.go.kr/home/english/decisions/mgr\\_decision\\_view.jsp?seq=374&code=1&pg=1&sch\\_code=&sch\\_sel=&sch\\_txt=&nScale=15](http://www.court.go.kr/home/english/decisions/mgr_decision_view.jsp?seq=374&code=1&pg=1&sch_code=&sch_sel=&sch_txt=&nScale=15) (English translation).

50. *Id.* para. 2.

51. *Id.* para. 4.

information. Moreover, the Court determined, the core of the right to know rested on free access to government-held information.<sup>52</sup>

Israel's experience is also noteworthy in this regard. Israeli constitutional law is rooted in a series of basic laws that make no mention of freedom of information. Yet, the right to obtain information was given quasi-constitutional status in a series of rulings handed down by the Supreme Court. Even before passage of the basic laws dealing with human rights,<sup>53</sup> the Supreme Court was petitioned in 1990 to instruct Shimon Peres, then a candidate for the office of prime minister, to disclose a political agreement completed with another party prior to the expected establishment of a coalition government.<sup>54</sup> The Court deliberated over the constitutional status of the citizen's right to obtain this information and ruled:

There is a third source [for the obligation to disclose] which is entrenched in the public's right to know. It has been her[e] that freedom of expression is one of the basic principles of our system of law. Freedom of expression is a complex value, at the crux of which is the freedom "to express one's thoughts and to hear what others have to say." In order to realise this freedom the law vests the holder thereof with additional rights derived from the freedom of expression. Among these additional rights it [sic] the "right to receive information." As against the individual's right to receive information is the governing body's study [sic] to provide that information.<sup>55</sup>

In contrast to these examples, one finds the United States. The Bill of Rights, amended to the Constitution in 1789, does not include the right to information. Despite the highly developed human rights discourse that has been waged, the U.S. Supreme Court continues to adopt a conservative stance regarding the derivation of a constitutional right to obtain information based on the freedom of expression, a right anchored in the First Amendment. In a case brought before the Supreme Court in 1977, a plurality of justices ruled that the Constitution does not include the right of access to

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52. *Id.*

53. Basic Law: Human Dignity and Liberty, 1992, S.H. 1391; Basic Law: Freedom of Occupation, 1994, S.H. 1454.

54. HCJ 1601/90 Shalit v. Peres 48(3) PD 353 [1990] (Isr.).

55. *Id.* at 353 (citations omitted).

information held by the government.<sup>56</sup> Chief Justice Burger, a member of the plurality, wrote that: “There is no constitutional right to have access to particular government information, or to require openness from the bureaucracy . . . . The Constitution itself is neither a Freedom of information Act nor an Official Secrets Act.”<sup>57</sup>

In his dissenting opinion, Justice Stevens brought forth a wealth of sources in which various constitutional protections of the media’s right to gather information and the public’s right to know were acknowledged. Justice Stevens included a citation touching on the freedom of the press, to which he added the following comment:

But “the protection of the Bill of Rights goes beyond the specific guarantees to protect from . . . abridgement those equally fundamental personal rights necessary to make the express guarantees fully meaningful . . . . The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers.” It would be an even more barren market-place that had willing buyers and sellers and no meaningful information to exchange.<sup>58</sup>

Justice Stevens was among the majority in the *Richmond* case, brought before the United States Supreme Court just three years later.<sup>59</sup> In this case, the Court ruled that the attempt to hold a criminal hearing behind closed doors for the purpose of preventing the public’s attendance and thus preventing their exposure to details of the case would interfere with the exercise of freedom of expression as guaranteed in the First Amendment.<sup>60</sup> Although the decision focused on an ostensibly prior, fundamental issue, Justice Stevens, in a solo concurrence, continued the line of argument taken in the *Houchins* case and pleaded for recognition of the constitutional right to information:

Today . . . for the first time, the Court unequivocally holds that an arbitrary interference with access to important information is an abridgment of the

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56. *Houchins v. KQED, Inc.*, 438 U.S. 1, 15–16 (1978).

57. *Id.* at 14.

58. *Id.* at 32, n.22 (Stevens, J., dissenting) (quoting *Lamont v. Postmaster General*, 381 U.S. 301, 308 (Brennan, J., concurring)).

59. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980).

60. *Id.* at 580 (“[T]he right to attend criminal trials is implicit in the guarantees of the First Amendment.”).

freedoms of speech and of the press protected by the First Amendment.

It is somewhat ironic that the Court should find more reason to recognize a right of access today than it did in *Houchins*.<sup>61</sup>

The *Richmond* decision inaugurated a complex judicial debate regarding the constitutional status of the right to information. In 2002, the Sixth Circuit Court of Appeals considered an appeal submitted by the government seeking to overturn a lower court's ruling that three newspaper plaintiffs—The Detroit Free Press, The Detroit News, and The Metro Times—had a First Amendment right of access to immigration proceedings under *Richmond*.<sup>62</sup> In its response nullifying the directive, the Court stated that the directive did contradict First Amendment rights.<sup>63</sup> The Court did agree, however, that the government was protecting an essential interest in closing the hearings to the public.<sup>64</sup> Yet it went on to say that the directive's sweeping wording ignored the requirement that for an inherently unconstitutional directive to remain in force, it must be narrowly tailored to serve the respective interest exclusively.<sup>65</sup>

The Sixth Circuit's decision in the *Detroit Free Press* case provides a clear indication of how far courts have distanced themselves from the position taken in the *Houchins* case. In *Detroit Free Press*, the Sixth Circuit claimed that the right to information does exist in the Constitution, even if only in a restricted fashion:

[T]here is a limited constitutional right to some government information . . . . [A]lthough *First Amendment Coalition* and *Capital Cities Media* recognize *Houchins* as holding that there is no *general* right of access to government information, the line of cases from *Richmond Newspapers to Press-Enterprise II* recognize that there is in fact a *limited* constitutional right to *some* government information . . . .<sup>66</sup>

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61. *Id.* at 583 (Stevens, J., concurring).

62. *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 684–85 (6th Cir. 2002).

63. *Id.* at 705.

64. *Id.* at 706 (“The Government certainly has a compelling interest in preventing terrorism.”).

65. *Id.* at 707–10.

66. *Id.* at 695, 700 (citing *First Amendment Coal. v. Judicial Inquiry & Review Bd.*, 784 F.2d 467, 473 (3d Cir. 1986) (en banc); *Capital Cities Media, Inc. v. Chester* 797 F.2d 1164, 1167 (3d Cir. 1986) (en banc); *Press-Enterprise Co. v. Sup. Ct. of Cal.*, 478 U.S. 1, 13 (1986)).

The Court concluded that “[a] government operating in the shadow of secrecy stands in complete opposition to the society envisioned by the Framers of our Constitution.”<sup>67</sup>

With respect to the analysis of the constitutionality of freedom of information, the *Houchins* decision remains the major and most decisive rulings to be handed down in the United States to date. Although the Court’s resolve regarding the lack of defense for this right in the Bill of Rights has flagged over the years in response to later rulings providing limited support for the public’s right to information, it cannot be said that these comments have reversed the *Houchins* rule. The constitutional status of freedom of information in the United States remains ambiguous. One explanation for the Supreme Court’s reticence to declare a ruling-based right to information may be the American approach to individual freedoms, which favors endowment of the broadest of protection to negative rights while withholding recognition of those rights that compel a positive duty by the government.

Canada represents another state whose constitution<sup>68</sup> does not provide explicit anchoring of the right to information. However, a decision handed down by its Supreme Court in June 2010 offers constitutional status to some aspects of the right to information, while possibly laying groundwork for future constitutional debate and expansion of the right’s constitutional protection.<sup>69</sup> This case focused on a lengthy report on an inquiry of alleged police misconduct in the investigation of a 1983 Ontario murder case. A request by the Criminal Lawyers’ Association to receive a copy of the report was refused, among other reasons, on the basis that it was a product of a law enforcement investigation,<sup>70</sup> which is exempt from Ontario’s

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67. *Id.* at 710. Some contend that despite similar decisions handed down by the Supreme Court in at least two other instances, explanatory notes to the decision lay the foundations for constitutional recognition of selected features of freedom of information. See Ralph Gregory Elliot, *Constitutionalizing the Right to Freedom of Information: A Modest Proposal for the Nations of Central and Eastern Europe*, 8 Conn. J. Int’l. L. 327, 330–31 (1993) (arguing that even if the absence of constitutional protection undermines the effectiveness of U.S. Freedom of Information Act, *Houchins* and similar cases teach that the Supreme Court is willing to connect freedom of access to pre-existing constitutional rights, such as those found within the First Amendment).

68. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act 1982, ch. 11 (U.K.).

69. Ontario (Public Safety and Security) v. Criminal Lawyers’ Association, [2010] 1 S.C.R. 815 (Can.).

70. *Id.* ¶¶ 12–13.

Freedom of Information and Privacy Protection Act (“FIPPA”).<sup>71</sup> Unlike most of the law’s other exemptions, this exemption was not subject to a public interest override test.<sup>72</sup> When the case reached the Ontario District Court of Appeals, the Court ruled that since the right to information is a component of the freedom of expression, all exemptions in the law must be subjected to a reasonableness test, as each of these exemptions authorizes a breach of a constitutional right.<sup>73</sup> Hence, the Court concluded, an interpretation of the law as subjecting only some of the exemptions to a public interest test is unconstitutional, and a wider interpretation should be read into the article.<sup>74</sup>

The case was appealed to the Supreme Court of Canada.<sup>75</sup> In a 7-0 ruling, the Supreme Court found a limited constitutional right to information. The Court concluded that while Section 2(b) of the Charter guaranteed freedom of expression rather than access to information,<sup>76</sup> “there is a *prima facie* case that s. 2(b) may require disclosure of documents in government hands where it is shown that, without the desired access, meaningful public discussion and criticism on matters of public interest would be substantially impeded.”<sup>77</sup> Although the Supreme Court of Canada recognized the constitutionality of the right to information only under these circumstances, future litigation will likely argue that the same reasoning applies to cases in which information is needed to promote other forms of expression and other purposes that the charter clearly sets to advance.

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71. Freedom of Information and Privacy Protection Act, R.S.O 1990, ch. F.31., § 14(2) (1990). FIPPA determines that “[a] head may refuse to disclose a record, (a) that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law.” *Id.*

72. Ontario (Public Safety and Security) v. Criminal Lawyers’ Association, [2010] 1 S.C.R. 815, ¶ 24 (Can.).

73. The Criminal Lawyers Association v. Ontario (Public Safety and Security) [2007] 86 O.R. (3d) 259, ¶¶ 62–63 (Can.). The Court of Appeals is the highest court in Ontario.

74. The Court acknowledged that during the drafting of the Charter, a proposal to include the right to information had been discussed and rejected by Canada’s Parliament. *Id.* ¶ 2. It stated that this was insufficient to prevent an appropriate constitutional interpretation of the Freedom of Information and Privacy Protection Act, legislated after the Charter was ratified. *Id.* ¶ 4.

75. Ontario (Public Safety and Security) v. Criminal Lawyers’ Association, [2010] 1 S.C.R. 815 (Can.).

76. *Id.* ¶ 30.

77. *Id.* ¶ 37.

As has been demonstrated, the right to obtain information from government agencies has achieved the status of a constitutional right in many democracies. In effect, every democratic state that has opened a meaningful constitutional debate on the subject in the last few decades—whether through adoption or broad revision of a constitution—has afforded constitutional anchoring to the right to freedom of information. In those democratic states where this right has not won direct constitutional anchoring, awarding of constitutional status has reflected the courts' willingness to derive that status by means of interpretation of recognized rights. Courts in Japan, India, South Africa, and, most recently, Canada, have chosen this strategy while building on paragraphs in their constitutions that anchor freedom of expression.<sup>78</sup>

However, the United States has not followed this trend. In *Houchins*, the United States Supreme Court refused to recognize the existence of an independent, constitutional right to information.<sup>79</sup> In addition, some Supreme Court justices have voiced their view that the time has come to overturn *Houchins* and recognize the constitutional right to freedom of information.<sup>80</sup>

The fact that many countries have adopted constitutions in which the freedom of information is securely anchored and that constitutional courts in other countries have ruled in favor of recognizing the constitutional right to obtain information shows that in the majority of democracies freedom of information is constitutionally anchored. It can therefore provide the foundations for judicial review of administrative actions and parliamentary legislation.

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78. See Part III, *supra* for a discussion of the constitutions of Japan, India, South Africa, and Canada.

79. *Houchins v. KQED, Inc.*, 438 U.S. 1, 14 (1977) (“There is no discernible basis for a constitutional duty to disclose, or for standards governing disclosure of or access to information.”).

80. See, e.g., *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 582–84 (1980) (Stevens, J., concurring) (reiterating a disagreement with *Houchins* by noting that “the First Amendment protects the public and the press from abridgment of their rights of access to information about the operation of their government”).



#### IV. THE PROTECTION OF FREEDOM OF INFORMATION IN INTERNATIONAL LAW<sup>81</sup>

##### A. General International Law

The first reference to the right to obtain information in international law arose during the first session of the United Nations General Assembly, held in New York City in 1946. At that meeting, the General Assembly called for the convening of an international convention to explore the subject of freedom of information, recognizing that “[f]reedom of information is a fundamental human right and is the touchstone of all the freedoms to which the United Nations is consecrated.”<sup>82</sup>

The convention was held and two years later it drafted an international covenant on the subject of freedom of information.<sup>83</sup> Yet, the U.N. committee established to promote ratification of the covenant was unable to shape an agreement among the organization’s members, which ultimately resulted in the covenant being abandoned and unsigned.<sup>84</sup> Nevertheless, the 1948 Universal Declaration,<sup>85</sup> which is not binding in nature, included an article

81. This discussion is to be distinguished from the previous discussion on the status of freedom of information as a constitutional right. In international law, the duty to recognize any given right is generally perceived as the duty to recognize the right in the nation’s domestic law, although not necessarily as a constitutional right. Nevertheless, it appears to be widely agreed that the elevated status of international law and the linkage between international and domestic-state law both strengthens the status of a right within the framework of domestic law and reflects on the right’s constitutional status. For more on this issue, see Kristen Walker, *International Law as a Tool of Constitutional Interpretation*, 28 *Monash U. L. Rev.* 85, 97–102 (2002) (discussing the internalization and interaction between domestic constitutional norms and norms in international law); see also Ann I. Park, *Human Rights and Basic Needs: Using International Human Rights Norms to Inform Constitutional Interpretation*, 34 *UCLA L. Rev.* 1195, 1243–46 (1986-1987) (discussing how internationally recognized human rights norms may help inform judicial review of legislation which denies full satisfaction of basic human needs, such as shelter and food).

82. G.A. Res. 59(I), at 95, U.N. Doc. A/229 (Dec. 14, 1946).

83. Carol Binder, *Freedom of Information and the United Nations*, 6 *International Organization* 210 (1952).

84. *Id.* (describing the disagreements between countries about whether and how the U.N. should limit the right to information that brought about the covenant’s failure).

85. UDHR, *supra* note 6, art. 19.

referring to the right “to seek, receive and impart information.”<sup>86</sup> Identical wording appears in Article 19 of the International Covenant on Civil and Political Rights.<sup>87</sup> This laconic phrasing does not, however, indicate the force behind the positivist duty; its implications have thus remained the province of interpretation by international tribunals and expert bodies. This lack of clarity eventually prompted the U.N. Commission on Human Rights to invite a Special Rapporteur on the subjects of the right to expression and thought to delineate a prototype of the right to information.<sup>88</sup> In the annual report prepared by the Special Rapporteur and submitted to the U.N. Commission on Human Rights in 1998, the following was written:

The Special Rapporteur has consistently stated that the right to seek and receive information is not simply a converse of the right to freedom of opinion and expression but a freedom on its own . . . . [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>89</sup>

According to the Report, international law recognizes the right to information, which it considers to be a positive right, deriving from the freedom of expression according to its definition in the respective documents,<sup>90</sup> especially the International Covenant on Civil and Political Rights.<sup>91</sup> This conclusion was elaborated in the Special Rapporteur’s 2005 annual report:

Although international standards establish only a general right to freedom of information, the right of access to information, especially information held by public bodies, is easily deduced from the expression “to seek [and] receive . . . information” as contained in articles 19 of the Universal Declaration of Human

86. *Id.*

87. ICCPR, *supra* note 7, art. 19 (referring to the “right to seek, receive and impart information”).

88. The Special Rapporteur Abid Hussain, *Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment, delivered to the Commission on Human Rights*, U.N. Doc. E/CN.4/1998/40 (Jan. 28, 1998), available at <http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/7599319f02ece82dc12566080045b296?Opendocument>.

89. *Id.* ¶¶ 11, 14.

90. *Id.* ¶ 14.

91. ICCPR, *supra* note 7, art. 19.

Rights and the International Covenant on Civil and Political Rights.<sup>92</sup>

In addition to references to freedom of information in general, several international law documents expressly recognize the freedom of information in specific contexts. Thus, for example, the 2003 United Nations Convention against Corruption<sup>93</sup> compels member parties to take steps to intensify the transparency under which their public agencies operate. Article 10 instructs states to take measures in this direction, including: “Adopting procedures or regulations allowing members of the general public to obtain, where appropriate, information on the organization, functioning and decision-making processes of its public administration . . . .”<sup>94</sup>

Article 13 of the same covenant, entitled “Participation of Society,” instructs member states to ensure that the public has effective access to information.<sup>95</sup> In another document expressing international intentions—The Rio Declaration on Environment and Development<sup>96</sup>—an article was likewise inserted for the same purpose—to guarantee responses to public requests for information:

Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities.<sup>97</sup>

Following the Rio Declaration, the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters,<sup>98</sup> more commonly referred to as

92. The Special Rapporteur Ambeyi Ligabo, *Civil and Political Rights, Including the Question of Freedom of Expression*, ¶ 39, delivered to the Commission on Human Rights, U.N. Doc. E/CN.4/2005/64 (Dec. 17, 2004), available at [http://ap.ohchr.org/documents/alldocs.aspx?doc\\_id=10460](http://ap.ohchr.org/documents/alldocs.aspx?doc_id=10460).

93. United Nations Convention Against Corruption, Oct. 31, 2003, 2349 U.N.T.S. 41, available at [http://www.unodc.org/pdf/crime/convention\\_corruption/signing/Convention-e.pdf](http://www.unodc.org/pdf/crime/convention_corruption/signing/Convention-e.pdf).

94. *Id.* art. 10(a).

95. *Id.* art. 13.

96. The United Nations Conference on Environment and Development, Rio de Janeiro, Brazil, June 3-14, 1992, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26 (Aug. 12, 1992), available at <http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm>.

97. *Id.* para. 17.

98. Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, June 25, 1998,

the Aarhus Covenant, was signed in 1998. This covenant, prepared by the United Nations Economic Commission for Europe, has been signed by forty of the Commission's fifty-six members.<sup>99</sup> The covenant includes detailed instructions regarding the members' obligations to ensure that every government agency and any other body fulfilling a public role transmit information on issues related to the environment as well as distribute that information.<sup>100</sup> This is the first international document having an obligatory legal status to include detailed instructions regarding the transmission of information related only to environmental matters.<sup>101</sup>

#### B. International Regional Law: Europe

In 1981, the Minister's Committee of the European Commission (the Commission's decision-making forum) advised its member states (with reservations adopted by Italy and Luxembourg) to adopt freedom of information laws:

Considering the importance for the public in a democratic society of adequate information on public issues; Considering that access to information by the public is likely to strengthen confidence of the

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2161 U.N.T.S. 447 (entered into force Oct. 30, 2001) [hereinafter the Aarhus Covenant], available at <http://www.unece.org/env/pp/documents/cep43e.pdf>.

99. Despite its title, the Commission includes the United States, Canada, and a number of South Asian and other states among its 56 members. United Nations Economic Commission for Europe, Member States and Member Representatives, [http://www.unece.org/oes/nutshell/member\\_states\\_representatives.htm](http://www.unece.org/oes/nutshell/member_states_representatives.htm) (last visited Nov. 18, 2010). The Covenant is open to all members of the Commission, although only forty European and Asian member states have signed so far. The United States and Canada have yet to sign the Convention. For more on the Convention, including a list of members, see UNTC, [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XXVII-13&chapter=27&lang=en#1](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-13&chapter=27&lang=en#1) (last visited Jan. 19, 2011).

100. Aarhus Covenant, *supra* note 98, art. 3.

101. The status of the Aarhus Covenant as customary or treaty international law underwent detailed analysis in a case argued in 2003 before the International Court of Arbitration, The Hague. In that case, Ireland petitioned the British government to publish a report prepared by the United Kingdom as part of a licensing procedure for a planned radioactive waste disposal plant. In a majority ruling, the court denied Ireland's contention that the Aarhus Convention applies to all parties, even if not yet signed by them, and that the Convention does not represent an instance of customary law. The detailed discussion on the status of the Convention appears in the minority opinion written by Gavan Griffith. See *OSPAR (Ireland v. U.K.)*, 42 I.L.M. 1118, 1161 (Perm. Ct. Arb. 2003), available at <http://www.pca-cpa.org/upload/files/OSPAR%20Award.pdf>.

public in the administration . . . . Recommends the governments of member states to be guided in their law and practice by the principles appended to this recommendation . . . . Everyone within the jurisdiction of a member state shall have the right to obtain, on request, information held by the public authorities other than legislative bodies and judicial authorities.<sup>102</sup>

The Charter of Fundamental Rights of the European Union effectively determined that residents of the Union had the right of access to documents held by the Union's institutions.<sup>103</sup> Yet, this covenant does not specifically obligate each member state to provide information. The *prima facie* basis for such a right is contained in the article on freedom of expression found in the European Convention for the Protection of Human Rights and Fundamental Freedoms<sup>104</sup> (applying to all Council of Europe countries, unlike the Charter of the European Union, applying only to Union members). However, the Convention's article 10 includes a more limited definition of freedom of expression than the Universal Declaration of Human Rights, asserted two years earlier. Article 10 of the European Convention guarantees all persons the right to "receive and distribute information," but omits the word "seek," included in the Universal Declaration and later international documents. According to Article 10: "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers."<sup>105</sup>

The Treaty Establishing a Constitution for Europe, signed in 2004 but not ratified (it was rejected by public referendums in Holland and France), includes a similar article.<sup>106</sup>

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102. Recommendation No. R (81) 19 of the Committee of Ministers to Member States on the Access to Information Held by Public Authorities, Comm. Of Ministers, Appendix, at 7, Doc. No. H (82) 1 (1981), available at [http://www.coe.int/t/e/legal\\_affairs/legal\\_cooperation/administrative\\_law\\_and\\_justice/texts\\_&\\_documents/Conv\\_Rec\\_Res/Recommendation\(81\)19.asp](http://www.coe.int/t/e/legal_affairs/legal_cooperation/administrative_law_and_justice/texts_&_documents/Conv_Rec_Res/Recommendation(81)19.asp).

103. Charter of Fundamental Rights of the European Union, art. 42 2000, O.J. (C 364/01) 19.

104. Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222, entered into force Sept. 3, 1953, as amended by Protocols Nos 3, 5, 8, and 11, which entered into force on 21 Sept. 1970, 20 Dec. 1971, 1 Jan. 1990, and 1 Nov. 1998, respectively.

105. *Id.* ¶ 10.

106. Treaty Establishing a Constitution for Europe, 2004 O.J. (C 310) 1, 47.

Several cases, presented below, illustrate how, for many years, the European Court of Human Rights, located in Strasbourg, France, denied recognition of a sweeping right of access to information. Nonetheless, it has heard a number of petitions submitted by citizens against their countries' governments due to the refusal to transmit requested information. As will be shown, in each of the cases heard, the petition was rationalized as flowing from the right to freedom of expression and the right to "receive and distribute information" as guaranteed by Article 10 of the European Convention.

The absence of the concept "to seek" in the phrase at issue, as previously noted, may explain the Court's reluctance to recognize the respective states' duty to provide information to those having an interest in obtaining it. For instance, in the 1987 *Leander* case, a Swedish citizen sought to compel his home country's government to reveal documents about him collected by the Swedish Security Service.<sup>107</sup> In its decision, the Court adopted a narrow approach to every aspect related to the interpretation of Article 10 and concretely rejected the possibility of applying the article to freedom of information:

[T]he right to freedom to receive information basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him. Article 10 does not, in circumstances such as those of the present case, confer on the individual a right of access . . . nor does it embody an obligation on the Government to impart . . . information to the individual.<sup>108</sup>

Two years later, in 1989, the Court heard the appeal of a Liverpool resident seeking a court order aimed at obligating his government to allow him access to documents from his personal adoption file.<sup>109</sup> In this instance, the Court ruled for transmission of the information after determining that the government had interfered with the petitioner's right to respect his private life, anchored in Article 8 of the Convention.<sup>110</sup> Nevertheless, the Court simultaneously denied recognition of the petitioner's rights to freedom of information from Article 10 of the same Convention, citing

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107. *Leander v. Sweden*, App. No. 9248/81, 9 Eur. H.R. Rep. 433 (1987).

108. *Id.* para. 74.

109. *Gaskin v. The United Kingdom*, App. No. 10454/83, 12 Eur. H.R. Rep. 36 (1989).

110. *Id.* para. 37.

the earlier *Leander* decision.<sup>111</sup> This ruling demonstrates the frequently recurring tendency to recognize the right of citizens to obtain information by referring to the outcomes of a specific case's conflicting interests, coupled with recalcitrance regarding the recognition of a comprehensive right to obtain information from public authorities.

Thus, in another case, heard in 1998, the European Court of Human Rights ordered the Italian government to transmit to one of its citizens information regarding the environmental implications of a plant situated in the proximity of his residence.<sup>112</sup> In his petition, the petitioner argued that the plant interfered with the human right to enjoy one's home as well as the right to respect one's private and family life.<sup>113</sup> The Court ruled that the right to respect one's private and family life can be considered as anchored in Article 8, which declares that governments, in this case the Italian government, respect that right:

[A]lthough the object of Article 8 is essentially that of protecting the individual against arbitrary interference by public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in effective respect for private or family life.<sup>114</sup>

In this case, the Court therefore demonstrated the readiness to adopt a broad interpretation of the right to respect (or human dignity), quite different from the narrow approach previously adopted with respect to freedom of expression.

An end to the lack of clarity regarding the status of the right to information may come with the significant changes introduced into European human rights law in 2009. In April 2009, the European Court of Human Rights issued a landmark decision, ruling for the first time that withholding of information on matters of public importance may pose a violation of freedom of expression as enshrined in Article 10 of the Convention. The case involved an appeal by the Hungarian Civil Liberties Union against the Republic of Hungary for refusal by the Hungarian judiciary to order disclosure of a complaint submitted by a Hungarian member of Parliament to

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111. *Id.* para. 53.

112. *Guerra v. Italy*, 26 Eur.Ct. H.R. 357 (1998).

113. *Id.* at 357.

114. *Id.* at 360.

its Constitutional Court based on the argument that the complaint contained “personal data.”<sup>115</sup> While the Court ruled that there had been interference with the applicant’s rights as enshrined in Article 10, it explicitly refrained from recognizing a general right of access to official documents.<sup>116</sup> On the one hand, the Court noted its recent “advance[] towards a broader interpretation of the notion of ‘freedom to receive information’ . . . and thereby towards the recognition of a right of access to information”<sup>117</sup>; on the other hand, it recalled and reinforced the ruling in *Leander* that “Article 10 . . . does not . . . confer on the individual a right of access to a register containing information on his personal position, nor does it embody an obligation on the Government to impart such information to the individual.”<sup>118</sup> The Court distinguished *Tarsasag A Szabadsagjogokert* from previous cases as involving “interference—by virtue of the censorial power of an information monopoly—with the exercise of the functions of a social watchdog, like the press”, and thus attempted to avoid contradiction with the case law it had developed in relation to the freedom of the press.<sup>119</sup> Despite this cautionary note, it took the Court no more than one month to rule, for the second time and in a separate case, that a refusal to allow access to state documents performed a violation of an appellant’s right to freedom of expression,<sup>120</sup> thus clearly indicating that a departure from the Court’s previous approach as expressed in *Leander* was not a one-time event.

These rulings may have been influenced by another important development from the Council of Europe when its Committee of Ministers adopted, in November 2008, the first independent binding legal document on the subject of access to official documents.<sup>121</sup> The Convention on Access to Official Documents had been signed by twelve Council of Europe member states by

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115. *Tarsasag A Szabadsagjogokert v. Hungary*, App. No. 3734/05, available at <http://www.echr.coe.int/eng>.

116. *Id.* para. 36.

117. *Id.* para. 35.

118. *Leander v. Sweden*, App. No. 9248/81, 9 Eur. H.R. Rep. 433, para. 74 (1987).

119. *Tarsasag A Szabadsagjogokert*, *supra* note 115, at para. 36.

120. *Kenedi v. Hungary*, App. No. 31475/05 (Eur. Ct. H.R., May 26, 2009) (HUDOC Portal, Eur. Ct. H.R. Case Law), available at <http://cmiskp.echr.coe.int/tkp197/viewhbk.asp?sessionId=24386497&skin=hudoc-en&action=html&table=F69A27FD8FB86142BF01C1166DEA398649&key=73487>.

121. *Council of Europe Convention on Access to Official Documents*, Council of Europe Treaty Series No. 205, 18 VI 2009.



June 2009. Based on the collective experience of the countries that had legislated freedom of information laws, drafters of the Convention realized that it was imperative to include detailed instructions regarding the scope of the Convention's force with respect to public agencies, the manner in which requests for information were to be transmitted, the restrictions to the freedom of information, and the costs to be imposed on those requesting information. In spite of criticism by human rights organizations over some of its shortcomings, the Convention represents a breakthrough regarding the status of freedom of information in international law.<sup>122</sup>

### C. International Regional Law: The Americas

With respect to freedom of information, inter-American human rights law appears to be more progressive than that of its European counterparts. The American Convention on Human Rights ("American Convention")<sup>123</sup> stipulates in Article 13 the rights to freedom of expression<sup>124</sup> in a manner similar to the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.<sup>125</sup> Like other international documents, Article 13 adopts the language of "to request, to receive and to impart information."<sup>126</sup> The Inter-American Court of Justice for Human Rights, responsible for the enforcement and interpretation of the Convention, determined in an advisory opinion in 1989 that the freedom of expression as anchored in the covenant includes freedom

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122. These organizations argue that the Covenant, as formulated, does not abide by existing progressive European standards of freedom of information. Among other things, the Covenant does not impose the duty to disclose information on judicial or legislative bodies, does not include the duty to transmit information of a public nature found in private hands, nor does it compel proactive disclosure of information by the authorities. For more information, see Council of Europe Convention on Access to Official Documents, <http://www.access-info.org/en/council-of-europe> (last visited Feb. 8, 2011).

123. Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 143. The American Convention on Human Rights, drafted by the Organization of American States ("OAS") in 1969, came into effect in 1977. Of the Organization's thirty-five members, twenty-eight of them, including the United States (which has yet to ratify the Convention), Argentina, and Brazil, have signed the Convention.

124. *Id.* at 148–49.

125. See *supra* Part IV.A for a discussion regarding the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

126. American Convention on Human Rights, *supra* note 123, at 148–49.

of information: “For the average citizen it is just as important to know the opinions of others or to have access to information generally as is the very right to impart his own opinions.”<sup>127</sup>

The Court noted that, according to the Convention, freedom of information can be limited only by law so long as that law serves ends enumerated in the Convention itself.<sup>128</sup> The Court essentially limited states’ abilities to set limitations in their domestic law on the general rule of freedom of information. By doing so, the Court essentially raised freedom of information to the status of a “quasi-constitutional” right, effective for all the Convention’s signatories. This argument received practical reinforcement in a decision handed down by the Court twenty years later.

In addition, the Organization of American States appointed a Special Advisor for Freedom of Expression. The advisor repeatedly expressed his opinion that the right to freedom of expression includes, among other things, the right to scrutinize documents held by public authorities. This position, as presented before the OAS Human Rights Committee, led to the adoption of the Declaration of Principles on Freedom of Expression in 2000.<sup>129</sup> Principle 4 of the Declaration establishes that: “Access to information held by the state is a fundamental right of every individual. States have the obligation to guarantee the full exercise of this right.”<sup>130</sup>

This duty is based on the argument that guaranteed access to information promotes government transparency and strengthens democratic institutions. The detailed wording of the American Convention, the 1985 advisory opinion of the Inter-American Court of Justice, and the cited declaration of principles represent a firm legal basis for the pioneering decision handed down by the Inter-American Court for Human Rights in 2006. In this case—*Claude-Reyes v. Chile*<sup>131</sup>—the Court was asked to determine whether civil associations, political activists, and residents in a region of Chile that

127. Compulsory Membership in Association Prescribed by Law for the Practice of Journalism, Advisory Opinion, 1985 Inter-Am. Ct. H.R. (ser. A) No. OC-5/85(1985), ¶ 32.

128. *Id.* ¶ 40.

129. Declaration of Principles on Freedom of Expression, Inter-Am. Comm. Human Rights Res., 108th Sess. (Oct. 2000), available at <http://www.cidh.oas.org/Relatoria/showarticle.asp?artID=26&lID=1>.

130. *Id.*

131. *Claude-Reyes v. Chile*, Case 151, Inter-Am. C.H.R., Ser. C. (2006), available at [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_151\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_151_ing.pdf).

was to be the site for a large-scale deforestation project had the right to receive commercial information from the state regarding the firm that had won the contract to implement the project.<sup>132</sup> The Court ruled that Article 13 of the American Convention protects the rights of all individuals interested in obtaining information held by state authorities and that the state was duty-bound to provide them with that information.<sup>133</sup> At the time of the decision, Chile had yet to legislate a detailed freedom of information law,<sup>134</sup> although the Court of Justice did stipulate that limitations on freedom of information could be set only by law.<sup>135</sup> It went on to add that such laws were meant to serve the objectives designated by the Convention, with only those limitations necessary in a democratic society for furthering “compelling” public interests.<sup>136</sup> The Court ultimately declared the following:

[T]he Court finds that the State violated the right to freedom of thought and expression embodied in Article 13 of the American Convention . . . . In addition, by not having adopted the measures that were necessary and compatible with the Convention to make effective the right of access to State-held information, Chile failed to comply with the general obligation to adopt domestic legal provisions arising from Article 2 of the Convention.<sup>137</sup>

In its decision, the Court stressed that the Convention compelled Chile to enact a freedom of information law.<sup>138</sup> Also noted in the decision was the requirement that the new law provide administrative mechanisms for obtaining information from the authorities, especially a schedule for transmitting requests and receiving responses.<sup>139</sup> In addition, the Court ordered Chile to educate its employees with respect to their duty to transmit information.<sup>140</sup> It

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132. *Id.* at para. 3.

133. *Id.* at para. 174.

134. *Id.* at para. 94.

135. *Id.* at para. 89.

136. *Id.* at paras. 90–91.

137. *Id.* at para. 103.

138. *Id.* at para. 161. The Court found it appropriate to make such a declaration despite its awareness that at the time of the decision’s drafting, such a legislative process was underway in Chile. *Id.* at para. 162.

139. *Id.* at para. 163.

140. *Id.* at para. 165.

also ordered the Chilean government to comply with these directives within “a reasonable time.”<sup>141</sup>

Chile’s constitutional court complied with alacrity. In August 2007, it ruled that Chile recognized the constitutional right to obtain information from its government agencies based on the protected constitutional right to freedom of expression and Chile’s status as a democratic state.<sup>142</sup> Chile eventually passed its own freedom of information act, confirmed by its parliament and signed by its president on August 11, 2008.<sup>143</sup>

In August 2008, the Inter-American Juridical Committee, which is the OAS advisory body for legal matters, published comprehensive guidelines regarding the right to information.<sup>144</sup> These guidelines incorporated national policy recognition concerning the right to information. Although the Committee’s guidelines do not have compulsory legal force vis-à-vis documents written by other branches of the OAS, they do provide standards that presumably can serve as models for determining future laws. These standards can also function as criteria that the Inter-American Court of Justice can consider when propounding its rulings. It is important to note that the Committee’s guidelines are more detailed and set higher standards than those delineated in the European Covenant.<sup>145</sup> The guidelines propose a broader definition of the law’s incidence on government agencies, advocate establishment of an administrative appeals court, stress simple procedures for exercising one’s right to information, and impose sanctions on those who interfere with this right.<sup>146</sup>

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141. *Id.* at para. 168.

142. Tribunal Constitucional [T.C.] [Constitutional Court], 9 Agosto 2007, “Requerimiento de inaplicabilidad respecto del artículo 13 de la Ley N° 18,575,” [“In the Matter of Constitutionality of Article 13 of Law No. 18, 575, the Constitutional Organic Law of General Bases of the State Administration,”] Rol de la causa: 2336-2006 (Chile).

143. Law No. 20.285, Agosto 20, 2008, Diario Oficial [D.O.] (Chile), available at <http://www.diariooficial.cl/actualidad/20ulle/20285.html>.

144. Inter-American Juridical Committee, Principles on the Right of Access to Information Forwarding Resolution CJI/RES. 147 (LXXIII-O/08), available at <http://scm.oas.org/IDMS/Redirectpage.aspx?class=CP/doc.&classNum=4337&lang=e>.

145. See *supra* Part III for a discussion of the European Covenant.

146. Inter-American Juridical Committee, Principles on the Right of Access to Information Forwarding Resolution CJI/RES, *supra* note 144, at 38.

To summarize developments in general international law, European law and inter-American law suggest an accelerating trend with respect to recognizing freedom of information as a right that flows from the right to freedom of expression. In addition, there are indications that the international legal community is beginning to recognize freedom of expression as an autonomous right. For example, the U.N. anti-corruption and environmental covenants incorporated the duty to provide access to information within their texts. These covenants were the first binding international documents to make provisions for the duty to provide access to information.<sup>147</sup> Additionally, the European Court of Human Rights recognized that the state's duty to provide information in certain cases stems from the right to freedom of expression. The Inter-American Court of Justice more explicitly recognized the right as directly flowing from the state's duty to respect the freedom of expression. Finally, the European Covenant on Access to Official Documents intertwined the European and American conceptions of freedom of information and transformed the concept into a recognized right in the two most important spheres of international human rights law. The burgeoning perception in legal circles is that the right to freedom of information has been established as a recognized right in international law, and that we can expect further institutionalization in states' laws in the coming years.

#### V. A DRAFT OF CONSTITUTIONAL ARTICLES ANCHORING THE RIGHT TO FREEDOM OF INFORMATION

The following section summarizes the argument that has been developed in this Article by presenting a model that is capable of securing the foundations for anchoring the right to information in future constitutions as well as those constitutions undergoing revision. Explanatory notes are attached to each of the subsequent articles in order to present the rationale behind the suggested provisions. The purpose of presenting such a model is to create more detailed grounds for discussion, not only to the constitutional nature of the right to information, but also its content (two inseparable issues). However, the unique conditions, context, and legal culture of different countries may call for variations. The following, however, presents a basic model for proper constitutional anchoring of the right to information.

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147. See *supra* Part IV.A–B.

Constitutions tend to include two major chapters—one which sets the cornerstones for the states' institution, and another that details the rights to be protected by the constitution. The next two chapters will present two articles which propose methods to capture the right to information.

#### A. Proposed Article for Compelling Administrative Transparency

An article which compels administrative transparency should be entered in the institutional segment of every constitution in the following manner:

1. Administrative agencies will act under full transparency and permit the public to become familiar with their modes of operation.
2. The authorities will make available to the public, by electronic means and proximate to their creation, all internal rules and regulations guiding administrative behavior, the allocation of funds, decisions made by the agency's different divisions, and any other item of information capable of contributing to the disclosure of administrative behavior to the public.
3. Arrangements guaranteeing administrative transparency will be anchored in law.

##### 1. General Explanatory Notes

Recognition of freedom of information as a constitutional right does not itself resolve a long list of issues arising from the positivist character of the right. Effective exercise of the right is subject to administrative compliance with its assigned duties. Therefore, a simple, straightforward definition of the rights forthcoming to those who request information is insufficient.

To make such a definition meaningful, government agencies should be compelled to act in a transparent manner that will expose the majority of their conduct to the public. Contrary to delineation of the rights of those requesting information, proactive release of information is targeted at altering the views of managers and workers. Its purpose is to underscore the duty of agency personnel to act openly while equipping themselves with accessible technologies, even if the respective information has yet to be requested. Compliance with this duty will more effectively root the right to information as the public becomes exposed to a steady flow of

information in addition to the practical tools for regulating administrative behavior. Once the public adjusts to receiving the input needed to formulate opinions regarding issues on the public agenda, it will be freed from the onus of struggling to obtain that information.

## 2. Explanatory Notes to Article 1

- a. “Administrative agencies will act under full transparency . . . .”

This clause will ensure that the principle of transparency is anchored within the institutional section of the constitution. Its acceptance will help maintain the balance required when deciding the numerous quandaries associated with requests for information and interpretation of freedom of information laws. The rule will thereby promote transparency not only as an individual right, but also as a basic tenet of administrative behavior, irrespective of any individual’s interests.

- b. “[A]nd permit the public to become familiar with its modes of operation.”

This provision is an attempt to assign effective responsibility for adopting the principle of transparency, as well as translate that principle into proactive actions by taking the practical steps needed to facilitate public observation of administrative operations. The details of such steps appear in Article 2.

## 3. Explanatory Notes to Article 2

Article 2 contains a list of categories of information that, being held by official agencies, are to be brought before the public prior to any request for transmission of their contents. Such information is to be made public “proximate to its creation” in order to sustain its timeliness. At this point, the information can be assigned to three categories. The categories are: (a) internal rules and regulations; (b) agency decisions and budgetary allocations; and (c) information that can meaningfully contribute to understanding how an agency performs its works. The first two categories define the minimal standards for voluntarily making information available to the public; the third category applies a value phrase (“a meaningful

contribution”) that leaves some discretion in the hands of the authorities with respect to which forums will be opened to the public and which will remain closed. This category also instructs the authorities to base their discretion on the disclosure’s foreseeable contribution.

#### 4. Explanatory Notes to Article 3

In order for the “transparency principle” to be constitutionally anchored, government agencies must be appropriately organized for the purpose of formulating solutions to structural and administrative issues. Nonetheless, the mechanisms promoting transparency ought to be established in primary legislation.

#### B. Proposed Article Determining the Right to Information

The following article should be added to the constitution’s section on human rights:

##### Freedom of Information

1. Information held by government agencies is to be considered public property.
2. Every citizen and resident has the right to access all the information held by an agency exercising legal power or performing a legal duty, and to any information of public significance regardless of its holder; hence, all the information having a public character is to be made available to the petitioner.
3. Every person has the right to free access to all information held regarding herself as well as information required for the purpose of exercising her rights, including the right to receive such information.
4. The right is subject only to such reasonable limitations as prescribed by law that can be demonstrably justified in a free and democratic society for purposes of defending state security, its foreign relations, and the rights of individuals, but only to a justifiable extent.
5. Arrangements for the exercise of the rights guaranteed by this Article will be stipulated by law in a manner that will ensure their full, efficient, and effective realization.



## 1. Explanatory Notes to Article 2

## a. “Every citizen and resident has the right to . . . .”

Democratic constitutions can be distinguished according to how they treat the right to information. Sweden is the world’s most progressive country with respect to the exercise of freedom of information. Accordingly, its constitution stipulates universal access to information,<sup>148</sup> as do the constitutions of Finland and South Africa.<sup>149</sup> Conversely, several Eastern European constitutions in countries like Estonia and Poland grant the constitutional right to information solely to citizens.<sup>150</sup> Israel’s freedom of information law grants this right to citizens as well as to residents and, to a limited extent, to persons who are neither citizens nor residents so long as the requested information impinges on the exercise of their rights within Israel.<sup>151</sup>

Constitutions that prescribe protection of obligatory rights while allowing judicial review of primary legislation make it possible to differentiate between persons who belong to a political community and those who do not with respect to the right to obtain information held by official parties. Freedom of information, in its broadest terms, is awarded to the owners of that information. In this case the state’s citizens and residents, as participants in national life, are stakeholders in this information. Since the right to information is often a fundamental condition for the exercise of *other* human rights, this right should be constitutionally guaranteed to every person, although in a more limited scope to non-citizens and non-residents.

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148. Tryckfrihetsförordningen [TF] [Constitution] 2: 1, 14. Article 1 defines the right holder as a “Swedish citizen.” *Id.* art. 1. Article 14 states that the public authority may not inquire into a requester’s identity. *Id.* art. 14.

149. Suomen perustuslaki [SP] [Constitution] Jun. 11, 1999, sec. 12 (Fin.); S. Afr. Const. 1996 art. 32(1).

150. Eesti vabariigi põhiseadus [Constitution] Jun. 28, 1992, art. 44 (Est.). This particular article differentiates between the “right to obtain information,” which is universally available, and the right to obtain information from the authorities, which is available only to Estonian citizens. *Id.*; see also Konstytucja Rzeczypospolitej Polskiej [KRP] [Constitution] Apr. 22, 1997, art. 61 (Pol.).

151. Freedom of information Law, 5758-1998, LSI 4 arts. 1, 12 (1998).

b. The Right to Free Access and the Right to Obtain Information

It is important that a state's constitution confirms the petitioner's *free access* to information. This right represents, in effect, access to one's own property. The right to free access means that the placement of barriers to information before petitioners is to be prohibited, whether those barriers entail imposition of a fee on access (as opposed to a fee on the reproduction of information), or by means of other bureaucratic constraints. Using the phrase "and the right to obtain information" is appropriate since the phrase "free access" is often inadequate, given that transmission of information depends on cooperation on behalf of the ruling authorities. Since citizens should have free access to information, governments should not be satisfied with providing access exclusively—they should introduce effective measures to ensure provision of the requested information to citizens.

- c. "[T]o all the information held by an agency exercising legal power or performing a legal duty, and to any information of public significance regardless of its holder . . ."

Different approaches have been applied in order to resolve the issue of what type of information is to be covered by freedom of information as well as which entities are to be duty-bound to provide it. According to the narrow approach, a closed list of entities, which generally are agencies belonging to the executive rather than the judicial or legislative branches of government, are subject to compliance with this right.

This rule should be applied along two axes. First, compliance with the right of access to information would be imposed on every type of information held by any entity that fulfills a legally mandated function. At the foundation of this rule is the view that information is public property. The respective agencies draw their authority from the public through legislation and are usually publicly funded. In this sense, the legislative and judicial branches are indistinguishable from the executive branch.

Second, the rule would apply to all items of information of public significance, irrespective of where those items are found. Implementation of this principle is especially crucial today, when an increasing number of public services are being privatized or

outsourced.<sup>152</sup> When the government transfers management of public information to a private entity, it should be clear that the latter takes the associated duties upon itself. This principle also applies to public services. When government delegates the administration of prisons to a concessionaire, or the operation of toll roads to a private firm, some guarantee should be instituted to ensure continued public access to the information for the purpose of protecting the public interest. Thus, the citizen's right to obtain information from these entities as well as the priority of that right over the commercial interests of the respective bodies, which are protected by law, should be constitutionally anchored. Nevertheless, any appeal to these private entities will be required to demonstrate that the information requested is indeed public in character. Constitutions should not force these private entities to disclose strictly private or commercial information regarding other non-public activities in which they are engaged.

## 2. Explanatory Notes to Article 3

There are two types of access to information that should be guaranteed to all individuals, regardless of their civil status. The first type of information pertains to one's own person. Under this category, a tourist should have the right to review her medical files kept in the hospital where she underwent treatment, or a migrant worker should have the right to receive personnel files held by his employer even if he is an illegal migrant or no longer resides in the relevant state. The second category entails information necessary for the exercise of other human rights. For example, it should be possible for anyone to obtain information kept in government offices against former employers, even if the petitioner no longer resides in the state where that employer is situated or operates. Alternatively, it should be possible to obtain information held in a foreign country regarding, for example, contracts signed with an international firm that executed projects affecting human rights in another country.

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152. For an analysis of the impact of privatization and altered views of the public sector on human rights, see Daphne Barak-Erez, *A State Action Doctrine for an Age of Privatization*, 45 *Syracuse L. Rev.* 1169, 1169–92 (1995); Daphne Barak-Erez, *Civil Rights in the Privatized State: A Comparative View*, 28 *Anglo-American L. Rev.* 503, 503–34 (1999).

### 3. Explanatory Notes to Article 4

The constitutions adopted by Western democracies commonly contain restrictive clauses that stipulate the considerations that may interfere with guaranteed rights.<sup>153</sup> Such a general paragraph is germane to the freedom of information article.

### 4. Explanatory Notes to Article 5

Experience accumulated from the implementation of freedom of information laws in various countries has revealed numerous bureaucratic barriers to the exercise of this right. This is especially apparent in countries which have a relatively short democratic tradition. Experience supports the argument for instituting detailed arrangements to facilitate and secure the exercise of this right. The above provisions would introduce statements clarifying the purpose of detailed arrangements, specifically to guarantee in law full exercise of the right to information together with efficient and effective access to the respective information.

Such a statement implies the need for strict adherence to a reasonable schedule for transmitting information, reduction of the administrative barriers currently in effect, institution of mechanisms encouraging transmission of information (for example, by imposing sanctions on officials who refuse to comply with the directives by providing opportunities to receive information through the Internet and so forth), and by eliminating delaying mechanisms.<sup>154</sup> Such provisions are crucial for establishing the law's legislative intent. It clarifies that the purpose of the law is to promote human rights in

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153. The version proposed here was inspired by Part I of the Constitution Act, being Schedule B to the Canada Act 1982, ch. 11 (U.K.), as reprinted in R.S.C. art. 1. For additional sources, see The Constitution of the Republic of Estonia, art. 11; Grundgesetz [GG] [Constitution] art. 19 (F.R.G.); S. Afr. Const. 1996 art. 36; Constitution of the Republic of Hungary, art. 8(2); Constitution Act 1986 art. 5 (N.Z.); The Spanish Constitution, art. 55; The Constitution of the Republic of Poland, art 31(3); Constitution of the Portuguese Republic, art. 18(2); Constitution of the Slovak Republic, art. 13; Regeringsformen [RF] [Constitution] 2:12 (Swed.).

154. In another article, the authors discussed "delaying mechanisms in the transmission of information" and "mechanisms encouraging the transmission of information." See Yoram Rabin & Roy Peled, *Between FOI Law and FOI Culture: The Israeli Experience*, <http://www.opengovjournal.org/article/view/324/276> (last visited Nov. 9, 2010) (examining the extent to which the Israeli freedom of information law has created transparency in interactions between citizens and the government).

obedience with the described criteria. By doing so, it should counteract a tendency among public authorities faced with expanding disclosure requirements to employ bureaucratic barriers and inadequate funding as pretexts for the non-transmission of information.

## VI. CONCLUSION

This Article has presented a description of the right to information as well as the justifications supporting incorporation of that right into the constitutions of democratic states. These justifications include anchoring administrative transparency, the individual's right to obtain information from public authorities (and private entities in specific cases), and the authorities' obligations to provide the information requested.

The meaningful contribution of freedom of information to the safeguarding of orderly democratic regimes, together with the role that it plays in the exercise of other human rights, makes establishing the constitutionality of this right imperative for new states currently drafting their initial constitutions as well as veteran states revising their original constitutions.

Global developments in the human rights discourse further sustain this position. The current perception of freedom of information has evolved over the last twenty years in a manner that warrants such revision. A constitutional right to freedom of information will be more likely to introduce authentic changes in state administrative culture in addition to civil society, changes that may transform relationships between states and their citizenry. By endowing the right to obtain information with constitutional status, the public will be provided with tools facilitating greater participation in the democratic discourse, in addition to more effective oversight of state agencies. Most importantly, doing so will remove some of the barriers preventing the maximization of human and civil rights that, although enshrined in the world's constitutions, are far from full realization in practice.