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**Paper delivered at the  
5<sup>th</sup> International Conference of Information Commissioners**

### **Future Challenges For The RTI Movement**

The Right-To-Information (RTI) movement has had a good ten years. Little more than a decade ago, transparency was not in vogue. The World Bank had not yet released its influential 1997 report on the importance of good governance. Transparency International had only just begun the publication of its annual corruption perceptions index. There were scarcely two dozen countries that had national RTI laws, most of them in the developed world.

Today, of course, we confront different circumstances. The concept of transparency is now so familiar that it has become, as Professor Christopher Hood recently observed, a "banal" idea, "taken as unexceptional in discussions of governance and public management." Almost seventy countries have national RTI laws. We have witnessed the emergence of an unprecedented global community of advocates, government officials, and academics interested in the promotion and study of RTI. And every day we hear stories about the ways in which RTI have helped to improve governmental accountability.

This is a considerable achievement. Nonetheless there are still several ways in which the RTI movement could be confounded. It is important -- and certainly consistent with our own insistence on the virtues of transparency -- to be candid about the challenges that the movement still confronts. I propose to outline five of these challenges.

## **1. The Workability of RTI Law**

The first and most immediate urgent task is to deal directly with the reality that RTI law is a complicated policy instrument, easily prone to failure. We can view the problem of workability from three perspectives: those of users, administrators, and independent arbitrators.

First, the user's perspective. While lobbying for RTI laws, advocates have often understated the difficulties encountered when citizens actually exercise their statutory rights.

Users require three resources that are generally in scarce supply. The first is knowledge about bureaucracy and the law. Individuals who are effective in using RTI laws know what documents are held by government agencies, and where they are likely to be held. They also know how to file a request; understand when they are being put off, and when excuses are being improperly invoked; and know how to complain about bureaucratic recalcitrance.

A second requirement is gumption -- by which I mean the courage to exercise the right to information. This is a quality that is in surprisingly short supply, even among citizens who are well-educated and not dependent on governmental largesse. Even in jurisdictions that have long-established RTI laws, citizens worry that they will disrupt relations with government officials, or simply cause offense, by filing a request for information.

The third resource is persistence. Individuals must be prepared to pursue cases for months, and sometimes for years.

The difficulties encountered by users are aggravated by administrative shortfalls. But here we must deal candidly with the reality that RTI laws are not easily administered. They require special procedures and staff training. In every country that has established a passable RTI system, this has meant a significant investment of money. Today, however, many countries have taken the symbolical step of adopting an RTI laws without taking the substantive step of investing in administrative capabilities. Moreover it is not clear, given their poverty, that many countries are capable of developing capabilities like those in the rich democracies. One warning sign is the substantial

proportion of "test requests" that result in mute refusals in countries outside the first world.

Bureaucratic compliance might be better if enforcement bodies (that is, Information Commissioners) were effective in responding to problems of bureaucratic misbehavior. But commissioners have their own difficulties, which arise from a combination of resource shortfalls and problems of institutional design. As to the latter: commissioners are principally designed to resolve *cases* of alleged misconduct, not *patterns* of non-compliance that may involve hundreds or thousands of cases. This is an approach that is congenial to lawyers, who like to apply their forensic skills to particular disputes. But is also an approach that is easily confounded by errant bureaucracies. More cases of non-compliance increase a commissioner's workload, which results in delayed resolution of complaints, which further corrodes bureaucratic incentives for compliance.

These observations about the weaknesses of RTI law are informed by personal experience. I recently received a response to an RTI request that I filed with the U.S. Federal Bureau of Investigation five years ago; sadly I cannot say that this was the oldest of my U.S. requests. The delay was partly attributable to my own unwillingness to commit time and money in making an application for compliance to the federal court. I have also one complaint with the Canadian Office of the Information Commissioner that is now over two years old. I have seven complaints with the U.K. Information Commissioner that range in age from 21 to 30 months, without prospect of immediate resolution. (As a consequence I have stopped filing requests in the U.K, because -- at least in my case -- there is no effective remedy against bureaucratic non-compliance.) I recently spent more than two years fruitlessly pursuing a request for information under the United Nations Development Programme's Information Disclosure Policy.

Delay is so widespread, and so extensive, that I now find it possible to gauge roughly how many requests I could file in the rest of my working life. Assuming that I can handle two or three files at once, and assuming that each takes two or three years to reach a conclusion, I have perhaps two dozen requests left in me. In my own case, the grand promise of RTI has been reduced to a game of Twenty Questions. This should be regarded as a damning comment on the efficacy of RTI systems, even in wealthy democracies, for I am fortunate to have advantages -- in terms of education and position -- that are not shared by the vast majority of the world's population.

Moreover the evidence tends to support this skeptical view of RTI law. Who do we often find using RTI? Exactly those constituencies who have the advantage of the three resources that I described earlier: Businesses; current and former government employees; law firms; and well-funded interest groups. A case can be made, of course, that disclosure serves the public interest even in these circumstances. But it is a different and more complicated case than would be made if the *typical* requester were the citizen-hero who champions the dispossessed, as we often suggest.

I say this as a friend of RTI, wishing to see RTI laws work for the advantage of the vast majority of the world's citizens. However, attaining this goal will not be easy. Unless we grapple with the implementation challenges I have just described, we are at risk of achieving, on a global scale, the result that Antonin Scalia once said had befallen the U.S. Freedom of Information Act. The US FOIA, Scalia said in 1982, had become "the Taj Mahal of the Doctrine of Unanticipated Consequences . . . [The provisions of the law] were promoted as a boon to the press, the public interest group, the little guy; [but] they have been used most frequently by corporate lawyers."

## **2. The Changing Infostructure**

A second RTI challenge may be peculiar to the developed countries. It arises because of changes in the governmental "infostructure" -- that is, the systems that are used by government organizations to contain and share information. (Professor Luciano Floridi defines the infostructure as "an organization's information assets that comprise the information base of the organization, including hardware, software, networks, infrastructure, information, and applications."). RTI laws were developed in a different and simpler era, so far as infostructure is concerned -- an era in which information was typically recorded on paper, contained in physical files and cabinets, and reproduced through relatively expensive photo-mechanical processes. This era has now faded away. Information is now typically digitized, and aggregated into vast electronic databases. The cost of storing and reproducing information has dropped dramatically, and consequently the volume of information held by government organizations has skyrocketed.

This technological transformation has profound implications for the operation of RTI systems. Increasingly, a request for information will pertain not to physical records, but

to digitized information held within government databases. In one sense this might seem to simplify the process of responding to RTI requests. After all, RTI officers might be able to use new document management systems to locate records that are responsive to a request more quickly.

On the other hand, new complications might be added. The volume of responsive records will probably increase substantially. Moreover, requesters might not want a specific record, but rather bulk data. This sort of request is much more complicated. Deciding precisely what to ask for, and whether it can be retrieved, requires a high degree of technical literacy on the part of requesters, RTI officials, and investigators within Commissioners' offices. Requesters may also lack the technical capacity to interpret bulk data after it is released.

Digitization also creates the threat of new impediments to access. Increasingly the databases that are used to warehouse government data are designed and maintained by private contractors.

Consider the following predicament, taken from personal experience. A request is made for information contained in a departmental database. The department replies that the database does not have the capability to download the requested information, because the department did not specify that capability when it procured the software. It is too expensive to hire the contractor to amend the software, says the department, which consequently refuses the request.

What has happened here? The department has effectively locked away a mass of information by the simple expedient of failing to insist that the contractor provide a capacity for retrieval. It should be added that this functionality can usually be added at little additional cost. But the department has no incentive to insist on it, and can justify its indifference by saying that the functionality is not essential to its "business needs." Nor does there appear to be a remedy for this predicament under major RTI laws. It is as though government departments have locked their filing cabinets and dropped the keys in the Thames (or the Potomac, or the Ottawa River).

### 3. Private and Quasi-Public Governance

A third challenge is the shift of functions to private or quasi-public organizations. It used to be said in the United States that certain activities -- known as "inherently governmental functions" -- could never be transferred out of the hands of government departments. We have now learned that this boundary line cannot be maintained in practice. There is nothing in the governmental sphere that could not be given to a contractor or autonomous agency. This creates significant difficulties for RTI systems, which are not well suited to these so-called "alternate service delivery mechanisms."

The problem is often framed as one of access to contract documents. While this is an important subject it is actually only one aspect of the larger issue. For example, should there be a right of access to *internal* documents of the contractor, if they pertain to the performance of some critical activity such as prison management or education? And if we acknowledge a right of access to such documents, how should it be exercised -- against the contractor directly, or through the contracting government?

Even more difficult are the cases in which critical services are delivered by organizations that are not tethered to a government department by contract. Air traffic control in Canada is a good example. We might add the National Electricity Reliability Council in the United States, which oversees the country's power grid; or the regulatory components of many of the world's major stock exchanges; or national organizations that run components of the World Wide Web. We lack generally accepted criteria for deciding when such organizations should be covered by RTI. And there is also little political support for the extension of RTI law to such organizations, even if the criteria should be decided upon.

The problem of assuring transparency when responsibilities are given to contractors and other non-governmental actors is not only, or even primarily, a rich-country problem. In the next thirty years, the developing world will undergo an unprecedented build-up of infrastructure, as a consequence of rapid urbanization and trade liberalization. Fiscal constraints, and pressure from eager investors, means that much of this build-up will be accomplished through private action. The ground rules for governance of such infrastructure are being negotiated now, and it is not likely that RTI will be properly accommodated in those negotiations.

#### **4. Growing Complexity in the Security Sector**

There are also mounting challenges in the sphere of national security. Of course, there is renewed sensitivity to security considerations in the post-9/11 era. In some countries -- notably the United States -- there are also serious problems in the operation of the security classification system, an invention of the early Cold War years that has become massive and unwieldy.

In addition, there have been important changes to the very structure of the security sector that threaten to undermine the right to information. In Iraq, for example, we have witnessed the substantial role of the private sector in functions that were once the exclusive preserve of governmental actors. Even combat roles are now fulfilled by contractors. This is only one instance of the threat to RTI posed by privatization.

A less obvious and even less tractable problem is the growth of intergovernmental security networks. By this I mean the interlinking of defense, intelligence and police organizations in different countries, and the corresponding growth of agreements on the sharing of information within these networks. One consequence is that the proportion of information held by one agency that has been received from other governments, often under strict assurances of confidentiality, continues to grow. This results in a quiet corrosion of national RTI requirements.

It is difficult to preserve openness in the security sector because of the deference that courts, legislatures and ombudsmen have traditionally shown to executives on national security issues. This is compounded by a massive mismatch in resources between security agencies and non-governmental watchdogs. The secrecy systems of most countries are highly complex. Few non-governmental groups have the resources to understand these systems, or to monitor changes such as the growth of transnational security networks.

#### **5. Building Reliable Knowledge About RTI Systems**

There is a final difficulty: the limits of our knowledge about the operations of RTI systems. As I noted earlier, there are now almost seventy national RTI laws, and many dozen sub-national laws. Some of these laws have been in force for decades. Still, consider how little we know about these basic questions:

- Who actually uses RTI laws?
- What sort of information do different kinds of requesters usually seek?
- What do requesters actually do with the information they obtain under RTI?
- Can we undertake a benefit/cost analysis of different types of requests, and distinguish those that yield great benefits at low cost, from those that yield little benefit despite substantial processing costs?
- To what extent do RTI laws simply reroute requests for information that were once handled by other means?
- How do RTI laws affect the internal operations of government agencies?
- How do fees and other administrative barriers -- such as requirements relating to the form of a request -- affect the demand for information?

These are important questions, some of which go to the core of the argument for RTI. Suppose, for example, that we found that many requesters did nothing at all with the information they received; how would we adjust our views about the value of RTI? Or suppose that the most costly requests came from affluent individuals or businesses: how would we adjust our views about fee policies?

Not only are these important questions; they are also questions that are frequently asked by government officials in poorer countries who are being encouraged to adopt new RTI laws. It is possible, of course, for any practiced advocate of RTI to hobble together a plausible answer to some (but not all) of these questions. Too often, however, these answers rely on anecdotes, selected because they bolster the case for adoption of an RTI law. Careful, reliable research is in short supply.

Why don't we do better in producing reliable knowledge about RTI? One reason, regrettably, is the impatience of funders and activists, who are reluctant to invest scarce resources in research that does not have a clear short-term payoff. Another reason is the defensiveness of government agencies, which are reluctant to support research whose conclusions cannot be controlled. (Hence the common resort to consultants, whose work can be more tightly controlled, but who often lack good knowledge of the RTI field.) Yet another reason is (again) the professional bias of lawyers -- whether situated in ombudsmen's offices, government departments, or advocacy organizations. Lawyers are good at interpreting law, and good at analysis of cases. They are less adept in studying complex bureaucratic and social systems.

We could know more about the operation of RTI systems than we do. And knowing more would be useful, in the long run. It would put us in a better position to make the case for RTI, or to adjust RTI systems so that benefits and costs are better balanced. There is an emergent community of new scholars who could be encouraged to undertake this research. However, good scholarship requires three things: a serious commitment of resources; tolerance of a long-time frame for production of results; and a willingness to cede complete control over the production of research to the scholarly community.

### **Only in the Foothills**

A few months ago I had the good fortune to visit the Indian government's training facility for senior civil servants, the Lal Bahadur Shastri National Academy of Administration, which is located a few hours northeast of Delhi, on the edge of the Himalaya range. During a tea break I mentioned to an Indian colleague that the view of the mountains was breathtaking. My colleague corrected me. I was not looking at the mountains, he said; I was looking at the foothills. The mountains were hidden in the distance.

The RTI movement stands in a similar position. In the last decade the idea of transparency has seized public attention, and there have been great strides in persuading governments to acknowledge the right to information as a matter of principle. Compared to where we were only a few years ago, the prospect is spectacular. Nonetheless we are only in the foothills. Full realization of the RTI idea will require many more years of steady marching.

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