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Using the right to information to improve the country

The American example



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How has the global use of Right to Information (RTI) laws brought about important new developments and catalysed change? The Freedom of Information Act (FOIA) regime in the US is the perfect example to illustrate this story.

The US—the "leader of the free world" —did not enact the FOIA until 1966, a full two centuries after the first such law was enacted in Sweden in 1766. This lag speaks volumes about the general fear of authorities of the law's inherent power to expose government misdeeds and abuse of power.

After the Second World War, when the US and the Soviet Union emerged as superpowers, one outcome was increased government secrecy. So in the early 1950s, when President Eisenhower fired several thousand federal employees suspected of being communists, demands for records associated with the dismissals arose. In response, the administration claimed official secrecy. Proponents of transparency argued that such a "trend toward government secrecy could end in a dictatorship".

The public debate that followed for over a decade led to the adoption of the FOIA in 1966 by a reluctant President Johnson. However, unlike the broader reach of the law in countries like Bangladesh, only the records of federal executive branch agencies and departments were subjected to FOIA. The law did not apply to the Congress, the Federal Courts, the President and his immediate staff and the Vice President. This was changed subsequently under the Presidential Records Act of 1978, whereby the public can now access most presidential records through the FOIA, five to twelve years after a President exits the White House. The FOIA also does not apply to state governments; each state has its own transparency laws.

The FOIA makes only nine exemptions that enable federal agencies to withhold records—in cases where doing so would be harmful to national security or foreign policy, personal privacy, confidential business information, law enforcement records, and a few other interests. Comparatively, the Bangladesh RTI law lists twenty exemptions.

Since 1966, the American law has had its ups and down through different administrations and a series of amendments, starting in 1974 in the aftermath of the Watergate scandal involving President Richard M. Nixon. In 1996, the passing of the Electronic Freedom of Information Act Amendments (E-FOIA) brought important improvements. Further improvements were made during the fiftieth anniversary of the adoption of the law, when President Obama signed the FOIA Improvement Act of 2016.

The most notable change has been an exemption for information about the "deliberative process" of government agencies, such as memorandums, drafts and letters. It was one of the most frequently abused provisions over the decades and was often invoked indefinitely. The new law says that it can be used to withhold information for only 25 years, which means, for example, that the "deliberative process" of President Ronald Reagan's administration and those before it, previously exempted, should now become open. The Bangladesh law prohibits disclosure of such information permanently.

Another important improvement is that the new law enshrines the presumption of openness. In other words, the default position of government should be to disclose, not withhold. Information may be withheld only if it is "reasonably foreseen" that disclosure would harm an interest protected by a FOIA exemption. This is far from the law and practice in Bangladesh.

Over the past 50 years, the FOIA has been put to use in the US across a range of issues related to government misconduct, waste and mismanagement, privacy rights of citizens, questionable

decisions on national security, threats to food safety, public health and the environment. A few examples of these cases are—a product labelled "parmesan cheese" had no parmesan at all; the FBI carried out surveillance on dozens of well-known African-American writers for five decades; the Environmental Protection Agency knew paper mills were discharging a toxic substance, dioxin, into rivers; recovery efforts after Hurricane Katrina in 2005 were marred by wasteful government spending; the cost-driven decisions by administrators in Michigan not to add corrosion controls to the water supply caused lead poisoning in children; and government audits showed widespread billing mistakes, primarily overcharging, in the Medicare Advantage programme.

Recent FOIA requests have sought records concerning the Customs and Border Protection Department's use of facial recognition to implement a biometric entry/exit program at airports and other ports of entry. Requests have also included records related to the Department of Homeland Security's assessment and expansion of a system for monitoring media representatives. The current president's tax records and those of his business entities have also been sought. Requests have pertained to records related to investigations of Russian interference in the 2016 presidential elections, to the Inspector General's report concerning surveillance of Muslims and persons of Arab descent by the New York police department in collaboration with the CIA, and about the monitoring of news organisations and social media services by the Department of Homeland Security.

We hope these examples will spur civil society in Bangladesh to consider putting the RTI Act 2009 to similar use. Of course, the differences in the circumstances between the two countries and the provisions of the two laws may not permit seeking the same kind of information, but even apparently deniable requests can be made submissible by careful crafting. The ostensive purpose of the law is to advance interaction between citizens and public bodies to promote democracy and good governance. Requested information may or may not always be disclosed, but by asking for them, citizens play an important role in making their concerns known. Unless the law is put to use for a varied range of governance issues, its full potential will never be realised.

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