

RIGHT TO INFORMATION IN THE UNITED STATES

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ABSTARCT

Amongst the developed states United States is where FOI has matured as system where it has achieved its required aims of right to attractive standard and developed into a system that can be adopted by other states. The historical development of the right can be used as guideline or can lead other newly emerging democracies as how all social actors/ factors like people, government and nongovernmental social organizations who in fact participated towards making it as tool for the public participation to assess the progress of their state organs and institutions.

Key words: Right to Information, USA , contributors to RTI , public participation.

Introduction

America like many other parts of the globe can be divided in different lines depending on the social, geographical, historical and political feature. However, there are some unique common features that unite this part of the globe. Christianity as major cultural and religious social attribute and colonial history has made the dominance of three major European language, English, Spanish and Portuguese reflected the unity in the region. Today the America is a land of poor and rich nations, and some most politically influential and controversial models and figures from north to south. The United States in 1966 became the third country, after Sweden and Finland, of the world and first in America to adopt Freedom of Information Laws. This was followed by Canada in 1982 and then many other countries from Southern and Central America in the last few decades.¹ In Latin America, the first full access to information was Mexican law that adopted in June 2002. Recognition and implementation in last several years has been progressively extended. The movement for RTI was a shift away or a transition from authoritarian rule to democracy and a fight against corruption and can also be linked with “Right to truth” following the human right abuses in past. Mexico and its functioning RTI law following the United States model also served and helped inspired other countries in the region and globally.²

Besides civil society activist, journalist and academics the Organization of American States also played a supportive role in the development of RTI laws in the region. Eduardo Bertoni an OAS Rapportuer on freedom of Expression in 2004 issued a significant report on access to information which successfully pushed the agenda forward. MESICIC³ an oversight body for inter-American Convention also contributed towards the movement significantly.⁴ Twenty countries in America have RTI laws⁵ but practice or implementation varies among them and reason could be, among others, only eight have administrative body empowered to receive and decide on complaints and uphold the compliance with the law. There is an essential civil activism in Americas, weaker in some countries like Canada, Panama, Colombia and stronger in others like Mexico, Peru and United States still a few states even without RTI Law includes Bolivia, Costa Rica, Venezuela and Paraguay, and Argentina with a regulatory RTI decree but not a full law on RTI.⁶

I. Political efforts towards the development of FOIA

US Freedom of Information Act(FOIA) in 1966 has a very interesting political back ground story when Lyndon B Johnson the then president very unwillingly with heavy heart signed the Act which lead to today’s one of the most successful regime of RTI in the world. Quietly he signed while vacationing at his Texas ranch, the Act on 4th July 1966, not a public event which could draw attention to it, with deep reservations attached a statement⁷ intended to restrict the scope of bill.⁸ The law was a major step towards the working of the government requiring federal agencies to provide access to government record or information when requested by the citizen in writing⁹ which still creates friction¹⁰ between the government and citizens, journalists, corporations and researchers.¹¹ The National Security archive at George Washington University discovered 1966 papers in the Lyndon Baines Johnson Library and Museum in Austin. Thomas Blaton, the archives director pleaded his concerns on the document that the statement was edited by Johnson personally or directed his press secretary, Bill Moyers to make the changes, who

later became a PBS journalist, recounted the Johnson's reluctance about signing the law.¹² Almost 50 years ago, land mark legislation Freedom of Information came to existence. The back ground of the legislation shows very twisted situations at times towards the finalization of the Act. The government's resistance to outside scrutiny, and some surprising roles like Donald Rumsfeld, the then champion of FOIA and Bill Moyers an opponent, at least for the time being.¹³ Mr John Moss, a democratic congress man, was the real hero behind the story of FOIA from California. In 1955 with lobbying by newspapers editors and supported by extensive press coverage Moss led the hearing that documented and denounce the excessive official secrecy but initially during Eisenhower tenure he could not find much support from republicans for his proposed openness reforms. Later During Kennedy and Johnson's administration with the support of Donald Rumsfeld he received better response. Initially not only President L. B. Johnson, a Democrat, opposed the bill but in fact, every federal agency and department at the time opposed it. However, when the Senate passed the bill, it was anticipated that the idea of government transparency was going to win out in the end. In his final report Moss clarified the rules and exemption for government agencies and soon after the bill was passed by the House with a vote of 307-0.¹⁴ The finalized bill for the President's signature was the last scene of the tale the signing of Freedom of Information bill showing the presidents deep concerns over the law which was done privately unlike for other major bills On the 4th of July, 1966, In fact, the signing statement includes more about the need to keep secrets than the urgency of openness. Yet the last sentence of his signing statement is the one that defines the moment: "I sign this measure with a deep sense of pride that the United States is an open society."¹⁵ Today the US government deals more than four million FOIA requests a year. In 1966 being the third country with FOI laws but today more than 60 countries enacted similar laws providing for open access to government information in 1966, the U.S. law was the third in world history, after Sweden and Finland.¹⁶

II. Legislative History of FOIA in USA

Today the long historical development of FOIA¹⁷ in USA demonstrates the maturity of the Act, a tool used by the citizens and journalists/ reporters for governmental transparency. History shows that only empowered and vigilant citizens can protect the hard-earned information and transparency rights.¹⁸ In United States, the access to public records in many states can be traced back for over a century. The court records and other legislative materials provided for open public access; in 1936, the Federal Register started publishing. Administration Procedure Act, 1947 (hereinafter APA) was enacted in 1946 requiring the government bodies to publish information regarding their structure, powers and procedures under section 3. However, the APA allowed holding the information in respect of "any function [...] requiring secrecy in public interest." and for internal management. The media groups and congress later in 1950s started advocating in favor of more comprehensive law.¹⁹

The brief over view of legislative progress in US is given below:

i) Freedom of Information Act 1966

Following the long periods of hearing and unsuccessful bills finally in 1966 the first enactment of FOIA took place, despite the opposition from the President Johnson to the legislation. The Act went into effect in 1967. Prior to the legislation there were held long congressional hearing on the issue of need of disclosure law.²⁰ In 1982 during President Reagan's term, issued an Executive Order 12356 tried to create the new rules for withholding the sensitive government information much easier as response to FOIA requests. Later many of such restrictions were reversed or relaxed when President Clinton released many of the classified documents for historical and archival purposes.²¹

ii) 1974 Amendment

Though a huge step towards the openness of the government but in fact the Act lacked the force needed to compel the agencies to meet the terms of the Act. Until 1974, the Watergate scandal, Nixon administration and bitter court battles the congress sought to amend the FOIA. After the detailed negotiations between Congress and Ford Administration broke down, the congress in the end amended the FOIA²² overriding the veto by Gerald Ford.²³

iii) **1976 Amendment**

In 1976, the FOI Act was further amended as part of Government in Sunshine Act, to clarify the terms and exceptions.²⁴

iv) **1986 Amendment**

In 1986, as small part of the bipartisan the Anti-Drug Abuse Act of 1986 the FOIA was amended mainly addressing the fee charged by the different categories of the requestor, and the scale of access to law enforcement and national security records.²⁵

v) **1996 Amendment**

The FOIA was significantly amended with the Electronic Freedom of Information Act Amendment in 1996 during President Bill Clinton's regime. Separate bills of both Senate and the House were reconciled by their promoters. A "finding and Purpose" section was included in the public law that was not codified into the text of FOIA.²⁶ The President acknowledged in his signing statement that the new technologies would affect the transparency as the agencies were required to make formatted electronic documents available and digital distribution.²⁷

vi) **2002 amendment**

The incident of 9/11 attacks in 2001 like many other laws FOIA was also amended. The government transparency witnessed number of restrictions. President George W. Bush issued Executive Order 13233 limiting the access to former presidential record and soon after FOIA was amended to limit the capacity of foreign agents to request record through the Intelligence Authorization Act of 2002.²⁸

vii) **2007 amendment**

FOIA was further amended in 2007 through the Open Government Act of unanimously passed by both the House and the Senate in December. It was aimed to fix the most continual problems of FOIA systems like excessive delays, litigations and lack of responsiveness by the federal agencies.²⁹ The office of Government Information Services was also established to oversee the governmental compliance with FOIA.

The Bush administration's compliance however was harshly criticized by open government groups and mostly considered as most secretive administration in the history. In 2009 the Obama on the first day of office issued a memorandum to reform FOIA by streamlining the agency response, refusing to use many of the exemptions and also promised to lead "the most transparent administration in the history". Unfortunately, the Obama administration could not have achieved the goals stated in the January 2009 memo rather made the government more secretive in many ways even more than Bush administration.³⁰

III. **The Working of FOIA in US**

Until 2006 nearly 70 states had adopting Freedom of information according to a global survey. Most of the freedoms of laws have similar basic provisions reasons could be that laws adopted by few countries early on have been used by the other as models later. The US FOIA has been one of them and most influential of them. Among those are the states of two kinds depending on the applicability of the Act. First group of states include the information held by the government and private bodies and the other only applies to information held by government bodies only.³¹

The government bodies include ministries or agencies that provide for health, environment, law enforcement, military, communications and transportation on the national level and their subsidiary bodies whereas the private

bodies includes the statutory bodies that are not owned by state and working for the profits like companies , businesses , banks , corporations and firms that may or may not be performing public functions. The FOIA 1966 has been amended several times as discussed earlier in this part, and recently after 2007 Open Government Act, the Obama government specifically focused on open government policies.³² The laws allows any citizen to ask for information held by any governmental agencies including executive and military departments and corporations and other entities performing governmental functions excluding the Congress, the Courts and presidents staff at White House including the National Security Council. Under the law agencies are required to respond within 20 working days. Unlimited Public access however is not granted under the law based on preservation of rights of American Citizens. Information can be denied due to sensitivity and privacy of the content. The law classified the nine-exemption including

- i) The National security,
- ii) Internal Agencies Rules
- iii) Information protected by other statutes
- iv) Business information
- v) Inter or Intra agencies memos
- vi) Personal privacy
- vii) Law enforcement records
- viii) Financial institution records
- ix) Oil wells data³³

IV. The Model Inter American Law on RTI

On demand of member states OAS developed a model inter American Law on RTI as a guideline for the member states to develop and improve their own RTI laws , was an important regional development. It was developed by the group of experts on Access to information of the secretariat for the Legal affairs of the OAS, coordinated by Department of International Law. The guidelines are mainly based on the principles derived in the case of *Claude Reyes Vs Chile* by Inter American Court of Human Rights.³⁴ The debates on model law not only strengthen the legal standards in America but also enhance the capacity of local groups to monitor and assess their relative national laws as for instance the Peru and Dominican Republic RTI laws were reviewed as to add enforcement bodies and establish more efficient system of resource allocations. Further the laws not only require public body to provide information but also made it obligatory to act proactively publishes information, protect personal data and create effective management system. Furthermore, it also highlights the importance of the political will of government employees in providing the information, enforcement bodies, and specific exceptions, administrative and judicial resources to ensure the citizens to benefit from the RTI laws.³⁵

V. Impact of Civil Society Advocacy on RTI in US.

The United States, amongst the oldest nation with RTI laws, the role and the influence of civil society groups towards the development of RTI laws has been indispensable. The historical events of letting the law through Congress and President L.B Johnson's signature, though not a fan of sharing information, are no secret, but was due to successful campaign by advocates of media freedom. Formative period of FOIA witnessed a strong support from number of civil society groups also known as public interest groups, started to advocate for its proper and full implementation specially through aggressive litigation. The Public Citizen Litigation Group, an organization of young attorneys along with Consumer activists Ralph Nader, were amongst the main advocates. These early litigation successes together with the "public interest and public support" and specially the Watergate scandal led to the major development of many later pro disclosure laws in US to strengthen the RTI.³⁶ The bold action by civil societies groups advocating the FOIA and United States administration, pressurizing the greater and timely disclosure in a tug and pull with government bodies that mostly resisted disclosure, failing to comply with the law's timeframes. The range of FOIA advocating groups expanded to include litigation advocates, media groups and organizations, government watch dogs, environmental groups and others. The challenges and opportunities for FOIA civil society advocates vary as the change in the governments but at no point the issue faced the most challenging for government than aftermaths of the September 2001 terrorist attack in USA called as 9/11.³⁷

Following the “Ashcroft Memorandum”³⁸ and the Department of Justice, the post 9/11 the federal agencies were required to view the disclosure of information through the new lens and employ the exception to the greater effect. After 9/11 the many federal agencies reduced the posting the amount and types of information which they regularly posted on their website and increase the safe guarding labels were planned and used by many federal agencies like “sensitive and unclassified information” and later “controlled and unclassified information” creating a whole new sphere of pseudo secrecy. This led to another episode of public chaos or perception of excessive governmental secrecy. Many civil society organizations and groups like American Civil Liberties Union, the Project on Government Oversight, and the National Security archive and many civil society organization successfully advocated against what was seen as overreaction to new security threats, by publicly challenging undue secrecy by the governmental authorities. success stories include the land mark court decisions as well as the ultimately the concession by Bush administration issued an exceptional executive order on FOIA backlog reduction to effect delays in responding to the citizen’s requests.³⁹

The Obama administration in early 2009 especially after Obama’s “day one” pronouncement of having “the most open administration in American history” gave civil societies idea to celebrate and believe that they had a friend of open government in the White House. Exceptions were high initially but after many years with mixed results, advocates of government openness in US are no longer rejoicing, though they are as active as before looking to what will come next.⁴⁰ The role of Civil Society Organizations (CSO) in different capacities played a very crucial role towards the development of FOIA in US at every stage of evolution. The strategies adopted by CSOs varied according to the situation and need of areas and have included the parliamentary advocacy as in case of El Salvador, technical assistance and sharing expertise in countries such as Argentina, Mexico Chile, and Guatemala. Campaigns to amend and approve the laws as in case of Colombia and Paraguay. Similarly, in past Coalition building strategy among civil society groups used in Nicaragua, Guatemala and Colombia in 2006,2007 and 2010 respectively. Civil Society groups are also actively working in Ecuador, Peru and Dominican Republic to promote legal reforms. Campaign for RTI reforms in Canada is also but assessed as being weak. In Argentina, various campaign are being conducted for the adoption of a national law. Due to the difficulty faced by civil CSOs in several countries to get RTI adopted led the civil society groups to adopt the strategy of working together across the region through regional networks, Alianza Regional, in order to generate the greater pressure for reforms.⁴¹ The RTI progress in Mexico is very important in context of American RTI regime. Having a Federal law and 32 sub national laws besides the constitutional recognition, diverse and active transparency community working in the state. Members of civil society, academia and media played a crucial role in promoting RTI and also helped in articulating in federal, local and constitutional reforms since 2007. CSOs in Mexico are constantly working towards the better legal framework and institutional arrangements and to ensure the proper implementation of transparency laws through exercise of RTI at federal and local levels. Different networks are used to promote and defend RTI by advocacy and awareness campaigns by CSOs.⁴²

Conclusion

RTI in US has been recognized progressively on national as well as state level in some federal countries such as US and Mexico. Its recognition and implementation has been increased greatly in last two decades. The movement of RTI was stimulation for the transition from authoritarian and secrecy to openness in the context not only to fight corruption but also the human rights abuses in last few decades. The setback and the advancement in RTI in Americas show the importance that RTI as power tool to be used by the citizens to oversee the governmental activities towards accountability. RTI laws in America are focused on both improving existing laws and promoting the better implementation of them. Another side of RTI activities is strongly working for the countries that do not have a law yet and to ensure these countries and progress the enactment and implementation of these laws in accordance with the standard set by Model American Law on Access to information. Strong regional networks and relationship playing a key role towards better RTI regime in the region. CSOs are exploring for new opportunities to work together to facilitate local works to create greater positive impact on RTI.

Though amongst the most developed legal regime still need a constant check and updating. It is an evolving phenomenon which needs some adjustments in accordance with every new social and legal change. A change in Government is also a change in policies which needs a compatible relation of these two. For instance during

Obama's regime 2012 though specifically announced by the government but in as test 19 out of 20 agencies failed to respond to the FOI based requests by Bloomberg News though required by law. This can be concluded as citizens must continue to demand and hold the responsible accountable when they do not deliver. The strong and comprehensive legal framework based on Model Inter American RTI can be used as guidelines not only in American states but also the other states of the globe. Pakistan is a state where RTI is at its infancy stage can also take guidance from the experienced states. The case study of Mexico and other states can also be used as considered to the one of the best in the world as being the extract of the long-standing experimentation.

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- ² Ibid.
- ³ The Mechanism for Follow-Up on the Implementation of the Inter-American Convention against Corruption (MESICIC) is an inter-governmental body established within the framework of the OAS. It supports the States Parties in the implementation of the provisions of the Convention through a process of reciprocal evaluation, based on conditions of equality among the states. In this mechanism, recommendations are formulated with respect to those areas in which there are legal gaps or in which further progress is necessary.
- ⁴ The questionnaire for oversight of implementation included questions on access to information and regular recommendation calling for the right to information were made
- ⁵ Namely Antigua and Barbuda, Belize Brazil, Canada, Chile Colombia, Dominican Republic, Ecuador, El Salvador, Guatemala, Jamaica, Honduras, Mexico, Nicaragua, Panama, Peru, Saint Vincent and the Grenadines, Trinidad and Tobago Document 31.pdf, United States and Uruguay.
- ⁶ Ibid., 28
- ⁷ The controversial statement includes "Draft language from [Johnson's](#) statement arguing that "democracy works best when the people know what their government is doing," was changed with a handwritten scrawl to read: "Democracy works best when the people have all the info that the security of the nation will permit." This sentence was eliminated entirely with the same handwritten markings: "Government officials should not be able to pull curtains of secrecy around decisions which can be revealed without injury to the public interest." Another scratched sentence on the document said the decisions, policies and mistakes of public officials "are always subjected to the scrutiny and judgment of the people. The controversial statement as believed by some was intended to undercut the measures purpose of forcing government to disclose records except in narrow cases and 2) at the same time there a doubt as it be the same as was written by himself or not."
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- ⁴² "México Infórmate, is a network of activists and journalists with representation in the nation's capital and 22 states. Each year they make the most of Right to Know Day with a week of activities throughout the country, including around 25 local events and workshops around the country and a Transparency Fair (Feria de la Transparency) organized with other local groups. The occasion is used as an opportunity for the organization to present key findings and concerns of the network to the government and the public"