



TRANSPARENCY POLICIES AND PUBLIC GOVERNANCE

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TRANSPARENCY AND FREEDOM

Amartya Sen: “*Development as Freedom*” (1999)

Constitutive Freedoms

political participation
and public political
dissent are
constitutive parts of
development as well
as its goal

Instrumental Freedoms

1. Political freedom
2. Economic facilities
3. Social opportunities
4. Transparency guarantees
5. Protective security



Transparency Guarantees

They deal with the need for openness that people can expect: the freedom to deal with one another under guarantees of disclosure and lucidity

Along with the right to disclosure they are an important category of instrumental freedom

Transparency guarantees have a clear instrumental role in preventing corruption, financial irresponsibility and underhand dealings

(A. Sen op. cit. pp. 39-40)

TRANSPARENCY AND DEMOCRACY

For the last 20-25 years in OECD countries: the increasing citizens' demand for openness in government translates into 3 stages:

1. **Hope** to obtain information (petition right) where the government decides what to reveal: citizens obliged to trust the government
2. **Demand** to obtain information as needed for the exercise of freedom (e.g. of entrepreneurship): high transaction costs for individuals
3. **Right to Know**: a positive, fundamental right, to obtain information of public interests and to re-use the information



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From discretionary benevolence to a right

In Europe the access to the information held by the government (any of its three branches) is today recognised as a fundamental right:

- Article 10 of the European Charter of Human rights (as interpreted as from 2006 in a case against the Czech republic)
- European Convention on access to documents (2008)
- Article 15 of the Lisbon Treaty (TFEU), which links it to the goal of good governance
- Article 42 of the Charter of Fundamental Rights



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Principles of democratic public governance (mostly from ECJ case law)

- Rule of law (culture of legality)
- Transparency and openness
- Accountability
- Equity and Integrity
- Efficiency and effectiveness of public action



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How did OECD countries respond to the challenges posed by that right to know?

The majority of countries come from a culture of confidentiality. The new situation leads them to attempt striking a balance between:

1. More openness: policies oriented towards facilitating access to information and increasing transparency and responsiveness of the administration
2. Confidentiality: what to keep hidden from the public eye and why?



Right to know vs. procedural right of the party

- **Procedural transparency** (all EU countries): is the right given to a party interested in an administrative procedure to access to related documents → **Insufficient to promote democracy**
- **Right to know** (not all EU and OECD countries have it yet) → only the right to know, without needing to justify a personal interest is useful to the economic, social and political development



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Different policies by different countries lead to different degrees of quality in public management

- Specific policy choices vary from country to country depending on the political context and the national priorities
- The consequence is that disparate national policy choices lead to dissimilar grades of openness across countries and therefore to different levels of democratisation and administrative modernisation.
- Introducing more openness has led to more systemic changes in public management and in general to better quality of public services



But certain lessons on processes are rather clear

- Developing an open government requires a long political and citizen effort sustained over a long period of time
- It is necessary to involve the whole of the government and administration to produce systemic effects (it is necessary to create a “movement”)
- A need to strike a balance between transparency and confidentiality based on majority social values(but bearing in mind that social values are malleable through social, political and media activism)
- There is a need to establish a clear legal basis delimiting rights, obligations and responsibilities
- Media pressure and civil society activist are vigorous elements of a social debate pro transparency
- However, the change is incremental, not radical



Resistance to the right to know

- In general from those having reasons for the information to be kept hidden
- Specifically it comes mainly from politicians and civil servants (*however those working in public archives tend to favour disclosure*)
- Overcoming the resistance implies a deep cultural change: the right to know is of recent creation whereas the official confidentiality is as old as the humankind



Arguments against openness

- Confidentiality produces more efficiency in decision-making processes and better government
- Civil Servants will be freer in their advice to politicians in a climate of confidentiality, where the fear to err may be solved through “political” negotiations
- Information contents are too important to be launched into the open
- Disclosure and publication are expensive
- Technology and human resources are not ready yet



Arguments in favour of Openness

- More efficiency in decision-making on the management of public services (it enables participatory management)
- Better equipped against corruption
- Facilitation of the citizens' capacity to hold politicians and civil servant to account for their actions and decisions
- Promotion of public trust in government institutions and the confidence in the politicians



Right to Know Principles

(article 19 of UN Universal Declaration of Human Rights)

1. **To maximize openness and disclosure**
2. **Obligation to publicise**
3. **Promoting open government and administration**
4. **Limiting strictly the exceptions**
5. **Working procedures designed to facilitate access to information**
6. **Costs for the applicant should be reasonable, not a deterrent**
7. **Preference for open sessions of collegial bodies**
8. **Laws and regulations inconsistent with the openness principle should be considered abrogated**
9. **Legal protection should be guaranteed to those who publish information on questionable behaviours effecting the public interest**



RIGHT TO KNOW

Laws of Free Access to Information (FOIAs)

- FOIAs have been one of the means used to implement those principles
- **Objectives of a FOIA:**
 1. To recognise the effective right to access to information held in public offices (in Europe it was recognised as a fundamental right in the Amsterdam Treaty of 1997)
 2. To expose publicly the activity of politicians as to promote accountability



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Usual Limits to Access Information

- Personal privacy (personal data protection)
- National Security / international relations
- Criminal investigations
- Protection of legitimate trade secrets and national economy
- In certain cases, the deliberations of collegiate bodies before a decision is made (draft decisions and non-papers)
- Unreasonable costs of disclosure (but those of a FOIA management are usually lower than those of political / public information campaigns)



EU countries

(studied in SIGMA Paper # 46)

Access to Information Regimes based on a FOIA:

1. Sweden (1766/1949)
2. Finland (1766/1999)
3. Portugal (1993/ 2007)
4. Czech Republic (1999)
5. UK (2000, in force 2005)
6. EU (2001, under revision)
7. Estonia (2000)
8. Poland (2001)
9. Romania (2001)
10. Slovenia (2003)
11. Germany (2005m in force 2006)

Access to documents Regimes based on a Law on Administrative Procedures:

1. Austria (1987)
2. France (1978)
3. Italy (1999/2009)
4. Spain (1992)



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Other means to make an administration more open (1)

- 1. Better Laws on administrative procedures**
- 2. Strengthening of judicial control over the government and administration**
- 3. Strengthening of the ombudsman**
- 4. Strengthening of the court of accounts**
- 5. Determined implementation of “better regulation” guiding principles**
- 6. Systematic Public Policy Evaluation**



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Other means to make an administration more open (2)

- 1. Development of inspections and control institutions (e.g. anticorruption bodies of articles 5-6 UNCAC)**
- 2. E-government**
- 3. Public consultations over upcoming public decisions of general interests**
- 4. Administrative Simplification (including organisational) and use of plain language**
- 5. Policies oriented towards a Better Quality of public services**
- 6. Better standards of use of public archives**



Open Government Agenda

In general it is discussed more in terms of a **movement** than in terms of a recipe of solutions (e.g. President Obama *US Open Government Directive* of December 2008 or the Council of Europe Convention of 2008, not in force yet)

“Transparency Movement” implies a policy mix oriented to promote:

- **Policy goals:** a more transparent government and more accessible as well as at recognising the dignity of the citizen
- **Policy instruments:** better policies, laws institutional reforms and new public management instruments