The Right to Know: Insights in the right to information*

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Abstract

The right to information is laid down in a range of international, regional and national (human rights) instruments. Furthermore, over the past decades more than one hundred states enacted laws guaranteeing citizens access to information. Not without good reason: transparency is not only a right benefiting the information-seeker; it is also crucial in the fight against corruption and the accountability and credibility of administrative bodies.

This paper gives a background and development of the right to information (part 2). The third and fourth parts are dedicated to a study of the laws of the Netherlands and India, including its limitations, flaws and proneness to abuse. The fifth part deals with the lack of any such law in Kuwait, despite the country being signatory to international human rights and anti-corruption instruments, stating democratic values in its constitution and having faced the consequences of non-transparency more than once.

In all three studied systems it becomes clear that the 'belief in secrecy' of governments still lingers - to a greater or lesser extend and for various reasons – and that case law shows that widely formulated exceptions to the right to information help governments to withhold information. The final part of this paper therefore concludes that the right to information is still not optimal and suggests that the limits to the right to know should be as frugal as possible, with the no-harm principle as bottom line.

Key terms: freedom of information; transparency, Netherlands, India, Kuwait

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1. Introduction

In 1976, the Dutch government installed the 'Commission of Three' a commission of elderly statesmen. Their job was to find out what was true about the persistent rumours that Prince Bernard - the late husband of the then-queen of the Netherlands – took bribes from American aircraft constructor Lockheed.(1) The commission did not find conclusive evidence that the prince actually received bribes, but stated that he had been 'open to favours' and showed 'totally unacceptable behaviour'. It was not enough to prosecute the prince, and a constitutional crisis was avoided.(2)

That was not all. The report turned out to contain a secret appendix holding information about a second bribery case, involving the same prince, with another American aircraft builder, Northrop. The then-prime minister kept this second report under wraps, fearing more scandals around the prince would force the queen to resign and his government to fall. The Northrop-case only came to light after prince Bernard died in 2004, when the secret appendix came into the hands of an investigative journalist, to whom a 'brown envelop' was handed by a befriended history professor. Would the journalist – or any citizen – have had any means to obtain the documents, had there not been a friendly professor?(3) And does it matter? It does.

Ignorance may be bliss according to some(4), most people would disagree. They want to know about the workings of their governments, if only because they want to know what their government is doing with their money. It is usually, though not necessarily, the media which serves as a go-between (hence the name) for citizens and public agencies when it comes to collecting information and passing it on. For both media and individuals to be able to do this as truthfully and accurately as possible, and not to be accused of 'fake news' or 'spreading rumours' by the government, they need that government to provide them access to information. The right to information can therefore be considered

(1) Lockheed was seeking to sell fighter jets to the Dutch army. Indications of bribery came from a US Senate investigation which concluded that board members of Lockheed had paid bribes to high positioned figures in friendly countries in order to win contracts. The Netherlands popped up. Other countries allegedly involved were Germany, Japan, Italy and Saudi Arabia.

(2) The queen threatened to resign if her husband would be prosecuted. Her daughter, successor to the throne, said that she would refuse to take her mothers place.

(3) The Northrop-affaire did not bring to light much more than the Lockheed one. Proof of personally accepting bribes by the prince was never established.

(4) From Thomas Gray's poem Ode on a Distant Prospect of Eton College (1742): "Where ignorance is bliss, 'tis folly to be wise".

instrumental to the right to freedom of expression. Or, as Judge Bell of the Victorian Civil and Administrative Tribunal said: "Freedom of information is in the blood which runs in the veins of freedom of expression."(5)

2. International background of the right to information

Internationally, the right to information has been laid down in a range of international and regional human rights instruments, where it is often linked to the right to freedom of expression.(6) Art. 32 of the Arab Charter on Human Rights for example, guarantees "the right to information and to freedom of opinion and expression, as well as the right to seek, receive and impart information and ideas through any medium, regardless of geographical boundaries."(7) In 2009 the Council of Europe adopted the first international convention on the subject: the Convention on Access to Official Documents, also known as the Tromsø treaty.(8)

The rationale behind the right to information can be both seen as intrinsic and instrumental. Intrinsic as in it embodies a right in itself, a fundamental element of morality. In that perspective, the right follows directly from the fact that humans are endowed with reason, and not from the interests that people may have in speaking or finding out about specific topics. The instrumental approach on the other hand, would consider the right to information as a derivative of fundamental values such as the good of happiness, self-realization, knowledge and freedom. In that view, the right to information is not an intrinsic right in itself, but serves the realization of these fundamental human values, as well as rights, such as the right to democracy, the right to take part in public affairs, the right to a fair trial etc.(9)

International instruments and institutions such as the Council of Europe only acknowledge a limited scope of exceptions to the right to information. Generally speaking they apply when serious harm or the public interest is at stake. The

(5) XYZ v Victoria Police, [2010] VCAT 255 (16 March 2010), accessible through: www9.austlii.edu.au

(6) On the international level: Universal Declaration of Human Rights, art. 19; International Convention on Civil and Political Rights, art. 19; On the regional level: American Convention on Human Rights, art. 13; European Convention on Human Rights, art. 10; Arab Charter on Human Rights, art 32.

(7) Art. 32 par. 1 Arab Charter on Human Rights, as revised in 2004.

(8) Text available at: https://rm.coe.int/1680084826. At the date of writing the treaty has not entered into force yet, still lacking the ten necessary ratifications.

(9) For a more in-depth discussion about the conceptual basis for the right to information cf. M. McDonagh, *The Right to Information in International Human Rights Law*, Human Rights Law Review 13:1 (2013), p. 25-55.

Council of Europe Recommendations lists the following limitations which may override the right to information: national security, defence and international relations; public safety; the prevention, investigation and prosecution of criminal activities; privacy and other legitimate private interests; commercial and other economic interests, be they private or public; the equality of parties concerning court proceedings; nature; inspection, control and supervision by public authorities; the economic, monetary and exchange rate policies of the state; the confidentiality of deliberations within or between public authorities during the internal preparation of a matter.(10) As we will see later on, most national instruments have similar lists of exceptions.

The right to information not only serves the purpose of the individual information-seeker. From a point of view of the government, transparency is equally impont as it gives a government credibility and trust. In 1992 the World Bank emphasized the importance of freedom of information in its report on good governance, stating(11): "Governments have legitimate reasons to withhold some types of information-on aspects of state security, for example, or if premature disclosure could invite behaviour undermining the policy (for example, changes in exchange rates). Aside from these special cases, there are three areas in which improved information and greater transparency are beneficial: economic efficiency; transparency as a means of preventing corruption; and the importance of information in the analysis, articulation, and acceptance of policy choices." (12)

It is not only the World Bank that links the level of a nation's (lack of) transparency to its level of corruption. One of the criteria used by Transparency International, which publishes the annual Transparency Index – also known as corruption-index - is how states guarantee access to information. Equally, many international anti-corruption instruments encourage states to optimize transparency, because - with a few exceptions such as Sweden, which already adopted an access to information framework in 1776 - many states have been rather slow in translating international standards into national legislation. It

(10) Recommendation R(2002)2 of the Committee of Ministers to Member States on Access to Official Documents, adopted on 21 February 2002.

(11) World Bank report on Governance and Development 1992, p. 39 (http://documents.worldbank.org/curated/en/604951468739447676/pdf/multi-page.pdf).

(12) For a study on the influence of the World Bank (and associated international financial institutions) on domestic politics through its lending conditions, cf. S. Limpach and K. Michaelowa, The Impact of World Bank and IMF programs on Democratization in Developing Countries, published by the Center for Comparative and International Studies, Zürich (accessible through: www.ethz.ch)

was only since the beginning of the 1990's that there has been an upsurge of domestic freedom of information laws. Nowadays more than one hundred countries having access to information laws(13):

This paper studies some of these countries in more detail. It tackles the question how the right to request and obtain information held by public agencies is implemented on the national level and how the right to information is dealt with in practice. It also deals with the question whether the right to information is unlimited and if not, what its limits are. To avoid any misunderstanding: it does not deal with specific domestic laws, which require publication - such as laws which require legislation to be published before it can enter into force. It also does not deal with (the protection of) whistle blowers who actively disclose otherwise unknown public-interest information.(14) This paper deals primarily with access to information which has not been given voluntarily or is published by force of an existing law or disclosed by a whistle blower, but which is on the contrary withheld by public agencies.

To that end, the 'Wet Openbaarheid Bestuur' (Government Information Public Access Act), locally known as WOB, of the Netherlands(15) will be used as an example, as will be the Indian Right to Information Act(16). Finally, it will be studied if, and if so how, the right to know is protected in Kuwait.

3. The Government Information Public Access Act – a Dutch example

The Dutch Constitution provides in Article 110: "In the exercise of their duties government bodies shall observe the principle of transparency in accordance with the rules to be prescribed by Act of Parliament." Initially, the government focused on its own role in providing the parliament with information. It then moved on to a broader role of providing citizens with information. To that end, various state-agencies were established, which were supposed to channel information to the people, mainly through the media. It was only in the 1960's – mostly pushed by journalists who were fighting for more rights to freely gather news - that the discussion flared up about whether a more active right

(13) Source: www.opendatastudy.wordpress.com

(14) The subject is left aside for being off-topic, not for being irrelevant. Protection of whistle blowers is an important pillar in international and national anti-corruption legislation.

(15) The choice for the Netherlands is justified by it being the country of origin of the author and having a civil law system similar to that of Kuwait.

(16) The choice for India is based on the fact that it is the biggest democracy in the world, which has recently managed to adopt a seemingly well-working right to information regime. It serves as an interesting example of how developing countries - even as large-sized as India – deal with the issue.

to information should be enshrined in the law. Eventually, in 1978, this led to the WOB, which has been amended and updated regularly since.(17)

The core of the act can be found in Art. 3, par. 1: "Anyone may apply to an administrative authority or to an agency, service or company carrying out work for which it is accountable to an administrative authority for information contained in documents concerning an administrative matter." To do so, an applicant must specify the administrative matter or the document relevant to it about which he wishes information. The applicant is not required to declare an interest in the application.(18)

If the information at stake is not with a Dutch authority, but with an EU-authority, documents cannot be accessed through the WOB. For this situation, the EU has its own regulation regarding the accessibility of documents of the European Commission, Council and Parliament.(19) It sees to documents drawn up by them as well as documents received by them. The regulation is comparable to the WOB – and known in the Netherlands as 'Eurowob'- in that it contains similar exceptions and limits to access. As under the WOB, no reasons need to be given why someone wants specific information, and the way in which the information can requested is form-free. The regulation will not be dealt with here any further.

a. Restrictions and limitations under the WOB

The right to obtain information is not unlimited. There are two categories of limitations; an absolute and a relative one.(20) Disclosure can be absolutely refused if the information endangers the unity of the Crown(21), might damage the security of the State, concerns data related to companies or manufacturing processes that were given to the government in confidence or concerns certain personal data, such as data related to someone's religion, convictions, origin, race, political affiliation, health, sexual life, membership of a union and criminal background.(22)

(17) An English translation of the act is provided by the Ministry of Foreign Affairs and can be found on https://www.access-info.org/wp-content/uploads/Government_Information_Act.pdf

(18) Section 3, par 2 and 3 WOB.

(19) Regulation (EC) 1049/2001, accessible through www.eur-lex.europa.eu

(20) Section 10 WOB

(21) What is meant is the unity between the head of state (king/queen) and the ministers; together they constitutionally form the government. The legislator did not want differences of opinion between them to become public.

(22) This follows from the Personal Data Act, to which the WOB refers.

Relative restrictions – which are decided on a case by case basis – are in place if the information requested does not outweigh the importance of relations between the Netherlands and other states or international organizations, the economic and financial interests of the State, the investigation of criminal offences and the prosecution of offenders, inspection, control and oversight by administrative authorities, respect for personal privacy, the importance to the addressee of being the first to note the information and the prevention of disproportionate advantage or disadvantage to the natural or legal persons concerned or to third parties.

Let us take the Baan-case as an example as to how the government tries, and often succeeds, to rely upon the limitations. The Baan-company, a software developer, was in the beginning of the 2000's competing for a contract with the Ministry of Defense. It would deliver a system that would improve planning and management of army supplies. Eventually, it did not get the contract and sued the Ministry for costs made and profits lost. The Ministry settled with Baan, for it feared it might loose the case for breach of European public procurement rules. An application was filed at the Ministry by an individual who claimed he was entitled to the information in order to monitor the workings of the government and the spending of tax-payers money. The Ministry refused on the grounds that revealing the settlement amount would lead to the exposure of data related to companies or manufacturing processes that were given to the government in confidence: the absolute refusal ground as mentioned in art. 10 par. 1 WOB.

Applicant addressed the court of first instance, which upheld the decision of the Minister. Applicant then appealed at the highest instance, which rejected the lower courts reasoning stating that the settlement amount could not be considered data that were given to the ministry in confidence. However, it did agree with counsel of the Minister that there was a relative ground for refusal: publication would bring disproportionate advantage or disadvantage to the natural or legal persons concerned.(23) It elaborated that parties had stipulated confidentiality in the settlement agreement and that the Minister informed the parliament about the settlement amount, including the condition of confidentiality, which the parliament accepted. Thus, it seems relatively easy for the government to rely on these rather widely and vaguely formulated refusal grounds. A mere settlement agreement with a confidentiality clause did the trick here.

(23) Section 10 par. 2 under g.

Outside the WOB there are other laws exempt certain public authorities from falling under the WOB altogether. Under the Banking Law 1998 for example, certain regulatory tasks of the Central Bank are exempted from the WOB.(24) Equally, bids made under the Public Procurement Law are protected against disclosure requests under the WOB.(25)

If disclosure is refused, it must be done so in writing. The applicant can formally object to the refusal within six weeks at the same public authority that refused. Should the authority stck to its position, as happened in the abovementioned case, the applicant can object against the new decision at the court of first instance, and further on appeal at the Afdeling Bestuursrechtspraak van de Raad van State, an administrative branch of the judiciary. Eventually, having exhausted all domestic means, an applicant could file a case before the European Court of Human Rights. Which inevitably begs the question how that court deals with the right to information and albeit it is a side-step away from the WOB – subject of this paragraph – it will be discussed here.

Art. 10 par. 1 of the European Convention on Human Rights guarantees everyone the right to freedom of expression and clarifies that "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." It does not impose an obligation on governments to provide information. However, in its judgements the Court finds that, under circumstances art. 10 includes the enforceable right to receive information from administrative authorities, culminating in the Magyar-case.(26) The case involved a Hungarian NGO, which focuses on the rights of asylum seekers and foreigners in need of international protection.

As part of a project studying the quality of ex officio appointed defence lawyers, the NGO requested, under Hungarian law, the names of the public defenders selected in 2008 and the number of assignments given to each lawyer from twenty-eight police departments. The aim of the data request was to demonstrate whether there existed discrepancies in police departments' practice in appointing defence counsel from the lists provided by the bar associations. The NGO maintained that the number of defence counsel appointments

(24) Art. 4 par. 1 Bankwet (Banking Law)

(25) Art. 2.57 Aanbestedingswet (Public Procurement Law)

(26) Társaság a Szabadságjogokért v. Hungary, ECHR Application no. 37374/05, Merits 14 April 2009; Kenedi v. Hungary, ECHR Application no. 31475/05, Merits 26 May 2009; Magyar Helsinki Bizottság v. Hungary, Application no. 18030/11, Merits 8 November 2016. Case law accessible through www.hudoc.echr.coe.int

was public-interest data and that thus the names of defence counsel were data subject to disclosure in the public interest. Most police departments complied with the request; two didn't, claiming that the names of the defence counsel are not public-interest data nor should the information be subject to disclosure in the public interest. Having exhausted all national means, where its request had been rejected time and again, the NGO turned to the European Court of Human Rights, claiming that the refusal by the authorities constituted a breach of art. 10 of the ECHR.

The Court identified the core question as "whether Article 10 of the Convention can be interpreted as guaranteeing the applicant NGO a right of access to information held by public authorities." It ruled that "the information sought by the applicant NGO from the relevant police departments was necessary for the completion of the survey on the functioning of the public defenders' scheme being conducted by it in its capacity as a non-governmental human-rights organisation, in order to contribute to discussion on an issue of obvious public interest. By denying it access to the requested information, which was ready and available, the domestic authorities impaired the applicant NGO's exercise of its freedom to receive and impart information, in a manner striking at the very substance of its Article 10 rights." It made clear though that this right to seek information does not apply to all; only journalists, NGO's and public interest groups could invoke art. 10. Thus, the ECHRM did not open the door to all applicants, but gave weight to the 'social watch-dog' function of the three mentioned categories. It now remains to be seen who can call himself a journalist or public interest group.

b. The meaning of the word 'document'

Section 1 of the WOB defines 'document' as a written document or other material concerning data deposited with an administrative authority.(27) It is thus not limited to written documents; case law shows that it sees to photos, films, sound carriers, e-mails, other electronic information stored at whichever data carriers etc. In a recent case it was decided that this includes whats-app and sms messages, albeit only when the telephone-subscription from which these messages were sent or received is in the name of the concerned administrative authority.(28)

(27) As to the meaning of administrative authorities; this will not be further dealt with, as it is inevitably leads to a detailed discussion about typical Dutch institutions, which may not be of great interest to the reader.

(28) District Court of Midden-Nederland, 28 November 2016; no. ROT 13/6199, accessible through www.rechtspraak.nl

Should an applicant ask for a specific document, or does it suffice if he requests for information about a specific administrative matter? According to the explanatory memorandum to the WOB, the latter is the case. It is then up to the administrative body to find out which documents contain information regarding the matter. However, the requested information must be available in concrete documents; the authority has no duty to roam through an unlimited amount of data to find the requested information.(29) Document furthermore does not only see to documents drafted by the administrative authority itself, but also to documents provided to the authority by citizens and companies.

c. Improper use of the WOB

Not all requests for information are (or have been) done for the right reasons. First of all, applicants may file requests for financial reasons. The administrative authority must give its decision regarding the request within two weeks from receipt of application, to be extended with another two weeks, and another four if the complexity of the issue at stake requires so.(30) Under general administrative law(31), if the concerned authority does not decide within the given time, a penalty payment must be paid to the applicant. This general rule used to apply to the WOB as well and led to abuse of the act. It became a business to file countless and impossible requests, or hidden requests in – for example – open job application letters to the government, hoping the recipient would not notice the request, which would then entitle them to penalty fines.(32) Entire (small) companies were set up, offering clients services in WOB-applications.

Other problems of abuse of the WOB are what researchers call the 'obsessive applicants'; those who are making a full-time job of filing requests, not for financial reasons but out of obsession for publication of everything they can think of ('all whole and half paving stones used by the municipality over the past 25 years"). Or by filing broadly formulated requests ("all licenses granted since 1990")(33) with the sole aim of frustrating the work of the government.

(29) Afdeling bestuursrechtspraak van de Raad van State, 1 juli 2009, cf. www.raadvanstate.nl
(30) Section 6 WOB.
(31) Laid down in the Algemene Wet Bestuursrecht, the General Administrative Law Act, of which an English translation is available at www.rijksoverheid.nl
(32) These false requests cost the government yearly between eight to fourteen million euro's in penalties, wasted time not count. (source: http://www.binnenlandsbestuur.nl/bestuur-en-organisatie/nieuws/einde-aan-misbruik-wob.9544234.lynkx - in Dutch only).
(33) Examples taken from a report of the Association of Dutch Municipalities, cf. https://vng.nl/onderwerpenindex/recht/wet-openbaarheid-van-bestuur/nieuws/vng-wil-snel-overleg-met-plasterk-over-misbruik-wob

In a test case, the municipality of Leiden filed a civil claim against a 'WOB-abuser', claiming damages caused by the excessive amount of work his requests entailed. Defendant repetitively sent long letters to the municipality, containing random information, in which he hid a WOB-request. As soon as the time period during which the municipality should have replied lapsed, he sent default notices to the municipality, claiming payment of the penalty fines. Fed up with the practice, Leiden filed a civil claim, on the basis of tort. The court awarded the municipality – modest – damages, stating that the practice of the defendant is an act of tort. It rejected the secondary claim of Leiden to allow defendant only two letters per month – deeming the right to information to prevail – but ordered him to clearly indicate in his future letterheads that it concerns a WOB-request.(34) Research shows that cases of improper use of the WOB were common, and time and money consuming.(35) Filing civil claims such as Leiden did, is evidently no remedy as this eventually costs even more time and money.

Since 1 October 2016, part of the problems has been solved by an amendment to the WOB, exempting it from penalty payments. That would at least eliminate the applicants with only financial gains in mind. However, it does not provide a solution to the applicants who either find satisfaction in frustrating the administrative apparatus or who are convinced that the government is hiding things from them. One of the bottlenecks is the lack of formal requirements to file an application. There is no standard form, it can be done by any possible means: letters, e-mails, faxes, all of unlimited length. Another feature of the WOB is that applicants do not have to indicate their specific interest in the request, making applications accessible for everyone. These low barriers – although understandable from a right to information perspective – make the act prone to improper use.

d. Effectiveness of the WOB

The number of WOB-requests in the Netherlands is low compared to countries like Canada or the Scandinavian countries, where a similar culture of open government exists. The reason for this could be twofold. Either the government is actively providing the public with so much information that there is relatively little need to apply for more under the WOB, or there is little confidence in success. It is hard to say which one it is, because there is no research available

(34) District Court The Hague, 22 July 2015, cf. www.rechtspraak.nl

(35) 'Omvangrijke en oneigenlijke Wob-verzoeken' report by Research for Beleid (done for the Ministry of Interior), to be found in Dutch at www.rijksoverheid.nl

as to why citizens don't do something. There are however, many complaints by journalists and lawyers, who experience the WOB as a cat and mouse game between information-seeker and information-provider, where the latter tries its best to find reasons not to provide the requested information. For example, recently the Ministry of Finance 'parked' certain documents about the downfall of a Dutch bank and insurer with a notary public, thus making sure the documents were shielded by confidentiality under the Act on Public Notaries, thereby frustrating a journalist who was requesting the information for years.(36)

Another recent example is the request done by three media outlets for access to policy documents – such as minutes of ministerial meetings - regarding the way the government was dealing with the aftermath of the MH17-disaster in 2014, where a plane of Malaysian Airways flying from Amsterdam to Kula Lumpur was shot down over eastern Ukrainian territory, killing all 298 passengers and crew. The editors of the media outlets wanted to reconstruct the policy of the cabinet of ministers after the disaster.

The request was for the most part denied by the Ministry of Security and Justice, and the few documents that were provided, were largely made black. The court in the first instance and the court of appeal both ruled that most documents must be made public, except for the minutes of ministerial meetings, for 'ministers should be able to freely discuss matters with each other, without having to fear that their words become public.'(37)

Cases like this often involves journalists who are – financially – backed by a media-organization. Individual citizens may give up sooner than that, because they do not have the financial means to proceed to the highest court against the administrative authority at stake. Under Dutch law, most of the lawyer's costs are not recoverable, even if the case is won. That said there are examples galore where applicants – journalists and citizens alike – successfully obtain information. These cases obviously never reach the courts, which is why case law may give the wrong impression that virtually every request for information is denied. Research shows that it differs from one administrative authority to another whether requests are timely and positively dealt with.(38)

(36) Cf.https://www.villamedia.nl/artikel/nieuwe-wob-truc-houdt-documenten-bij-journalisten-weg?utm_medium=email&utm_source=mailplus&utm_campaign=08_03_2018

(37) NOS et. al v. Minister van Veiligheid en Justitie, Afdeling bestuursrechtspraak van de Raad van State, 25 October 2017, accessible through www.uitspraken.rechtspraak.nl

(38) Cf. 'Omvangrijke en oneigenlijke Wob-verzoeken' report by Research for Beleid (done for the Ministry of Interior), to be found in Dutch at www.rijksoverheid.nl

All in all, the law has its flaws, and is often seen as a neglected piece of legislation, which needs improvement. Suggestions done in legal literature mostly focus on educating and appointing WOB-specialists at the authorities at stake. From the side of the authorities, there is a call for amending the law in such a way that applicants must state their interest in receiving the requested information. The Dutch legislators may want to have a look at the level of details of the access to information law in the largest democracy in the world: India.

4. The Right to Information Act – an Indian example[39]

a. The (history of the) Act in a nutshell

In 1904, under British colonial rule, the Indian Official Secrets Act was adopted. The main goal of the act was to restrict the freedom of the press. In 1924 the act was replaced by the Official Secrets Act, further restricting access to information, which was in 1964 extended by the Civil Service Conduct Rules which prohibit the communication of government documents to anyone without authorization. As such, a culture of secrecy has been historically embedded in the dealings between the Indian administration and the people. Documents were being classified to certain degrees, based on their level of required confidentiality, to which end ministerial and departmental manuals were drafted. Despite repetitive requests from human rights activists, the criteria for classification were never disclosed. Hence, information could easily be kept out of the public sphere and corruption was rampant.

For years, countless activists and lawyers incessantly pressed for more transparency. It took 25-years of legislative battle and judicial activism[40] for the Right to Information Act of 2005 (hereinafter RTI) to see the light, in the fifty-sixth year of India's independence.[41] The preamble leaves no doubt as to the objective. It states that as the Constitution of India has established a democratic republic, this means that such democracy requires an informed citizenry and transparency of information, "which are vital to its functioning and

(39) For the official text, as published in The Gazette of India, cf. http://www.rti-rating.org/wp-content/themes/twentytwelve/files/pdf/India.pdf

(40) India's Constitution does not contain a specific right to information of freedom, but the Supreme Court over the years expanded the scope of freedom of speech and espression to include the right to information. Cf. Bennett Coleman and Co. V. Union of India, Supreme Court, AIR 1973 SC 106 and Dinesh Trivedi v. Union of India, AIR 1977 SC 306, accessible through www.indiankanoon.org

(41) Meanwhile, some federal states had already adopted open access legislation before the federal act entered into force.

also to contain corruption and to hold governments and their instrumentalities accountable to the governed."

What follows are thirty-one detailed provisions as to the practical implementation of the right to access to information. The act does not hold back and is generous in its scope. Information, for example, means material in any form, including records, documents, memos, e-mails, opinions, advices, press releases, circulars, orders, logbooks, contracts, reports, papers, samples, models and data material held in any electronic form.(42) It also covers a wide range of public authorities, and requires each of them to appoint public information officers. Apart from that, an intricate – and possibly bureaucratic - system of independent bodies on state-level are set up to enhance the practical implementation of the law.

Applying under the act is straightforward: it can be done in writing or orally. No reason as to why the information is sought needs to be given. Standard forms are widely available online on both federal and state level.(43)

The RTI furthermore provides for a detailed penalty system in case any of the responsible 'officers' fail to receive information, furnish a decision or information in time (30 days) or give incorrect, incomplete or misleading information or destroy information.(44) As such, the RTI contains not only the right to information; it contains the right to the right information.

The act is a closed system, containing its own appeal and penalty clauses, all of which are only applicable to the public authorities and state officials at stake. It thus bars applicants from going to the court until all remedies under the act – such as approaching the local RTI committees - are exhausted.

b. Restrictions

As under the WOB, the RTI contains limitations and restrictions, some of which are absolute (security interests, protection of whistle blowers life, impediment of criminal investigations etc.), some of which are relative (where disclosure of business secrets is likely to affect others, where the information relates to personal matters etc.) and will only apply if the interest of non-disclosure outweighs disclosure.

(42) Section 2 (f) RTI
(43) For an example, cf. www.rtionline.gov.in
(44) Section 20 RTI

Apart from these general restrictions, the RTI does not apply to eighteen intelligence and security agencies.[45] Information cannot be requested from them, full stop. There is, however, an exception to the exception: when the information pertains allegations of corruption or human rights violations, the exclusion – after approval of the Central Information Commission – is lifted.

c. Flaws

According to The Right to Information Rating[46], a programme analysing the quality of the worlds access to information laws, India is now ranking higher than the Netherlands, with India belonging to the top 10 of countries; no minor achievement in a relatively young country of almost 1.5 billion people. The most recent annual report of the Central Information Commission shows a (mind boggling) number of 976.679 received requests for information during 2015-2016 alone.[47] However, the total number of still-pending request over the same reporting year was 1.165.217.

Slowness in dealing with applications and in appointing public information officers are some of the shortcomings mentioned by Sangra in her study of the RTI.[48] Rahul Wadke, a journalist of The Hindu, India's second most circulated English-language newspapers, describes the situation as follows: "The Indian Railway Board recently took 624 days to finally dispose of an RTI application filed by Business Line. This period, a little over 20 months and 15 days, is what it takes for a female Asiatic elephant to deliver her baby. Such elephantine delays are sapping the very spirit of the RTI Act."[49]

The Act has created a new bureaucracy, with tens of thousands of bureaucrats manning a range of institutions. Literacy rates in India are still low in certain states and areas, and it is questionable whether all can find their way to the right to information. And if they find their way, it remains questionable whether the information can be found. Filing and archiving has been notoriously chaotic in India, although the RTI did bring with it a countrywide effort to digitalize public documents.[50]

(45) Art. 24 in conjunction with annexed Second Schedule.
(46) Cf. www.rti-rating.org
(47) Annual report 2015-2016, cf. www.cic.gov.in
(48) B. Sangra, A Critical Study of the Right to Information Act 2005, PhD thesis University of Jamma, published in 2010 and accessible through: http://shodhganga.inflibnet.ac.in/handle/10603/89622
(49) https://www.thehindubusinessline.com/opinion/columns/from-the-viewsroom/rti-is-practically-dead/article22143969.ece1
(50) Cf. annual report CIC 2015-2016, referred to above.

A more serious shortcoming Sangra finds in the fact that the exemptions of Section 8 are often used to "veil the misdeeds in the name of secrecy", a flaw to which all right to information regimes are prone. However, the Central Information Commission, where decisions can be appealed against, seems to be rather applicant-friendly. For example, in a case where a university hospital denied information relating to the treatment and subsequent death of a student on the grounds of Section 8, the Commission held that simply quoting the provisions of that Section was not acceptable. It ordered the public authority to provide reasons for its rejection.(51)

All in all, the Indian RTI is a legislative achievement. Its shortcomings are not necessarily legislative problems – such as the Dutch (albeit now fixed) penalty fine system - but problems having to do with its practical implementation, such as high illiteracy rates and out-dated and inaccessible paper archives. Non of these flaws are surprising for a developing country of over 1.5 billion people. Which brings us to Kuwait, a developed country with a citizenry of 0.1 % of that of India.

5. No right to information legislation – a Kuwaiti example

In 2009 the Egyptian Organization for Human Rights organized a conference on the situation of information exchange in the Arab region. The participants – lawyers, civil society organizations and journalists came to the conclusion that instead of guaranteeing access to information "most Arab countries criminalise the availability, exchange and publishing of information without permission from the competent authorities in many of their penal laws."(52) They called for domestic legislation to be adopted guaranteeing individuals access to information, "in line with the international standards and best practices of freedom of information in democratic societies."(53) In most of the Arab countries, the declaration did not result in concrete legislation.(54)

Kuwait is no exception. Despite being party to various international treaties that guarantee freedom of information(55), the country has not adopted legislation to

(51) Dhananjay Tripathi vs. Banaras Hindu University, 7 July 2007, cf. http://ciconline.nic.in/cic_decisions/Decision_19102006_2.pdf

(52) Cairo Declaration on the right to access information in the Arab world, report published by Al Urdun Aljadid Research Center.

(53) Ibid.

(54) Yemen, Tunisia and Jordan are the only countries in the Arab world that have enacted a right to information bill.

(55) Such as the ICCPR, the Arab Charter on Human Rights and the United Nations Convention Against Corruption.

that end. The Constitution merely lays down a right for individuals to address "public authorities in writing and over his own signature." That however, does not guarantee that the individual will actually get any information. No supportive legislation to that end has been enacted so far.

On the contrary: in 2007 Kuwait Transparency Society called for a transparency-bill and presumably presented a draft in 2009.(56) In 2015 the board of the Transparency Society was dissolved, after being accused by some members of parliament "of exaggerating the level of corruption in Kuwait and pursuing a political agenda".(57) The board was replaced by five government appointees and there are currently no signs that any right to information legislation is being pushed for.

Those seeking for information have to do with what is actively – either by law or voluntarily – given to them. And although it is said in the introduction to this paper that the focus will be on the right to request and receive information, in a country where no such right exists, there is no other option (other than cutting this chapter very short) than to discuss what information people may or should have access to. The examples given below are chosen for their relevance to society.

a. The Kuwait Investment Authority

Kuwait Investment Authority (KIA) is the body that manages the various State funds. In other words: it manages part of the country's oil money, which ultimately belongs to the people. Sovereign wealth finds are therefore under scrutiny of 'transparency watchers', such as The Sovereign Wealth Fund Institute. This institute holds an index, rating the transparency of sovereign wealth funds worldwide. On a scale from 1 to 10, Kuwait's fund ranked 6. In comparison, the Norwegian fund scores 10 out of 10.(58) That does not mean the Norwegian fund performs better; it may perform poorly; the only – but crucial - difference is that this can be checked at any time by whoever is interested.(59) Take the enormous 'Spanish Embezzlement' scandal that hit Kuwait in the 1990's, involving the Kuwait Investment Office in London, which led to a

(56) Previous links to the draft have been removed from the internet, and so far, the author did not manage to find a copy.
(57) www.hrw.org/news/2015/06/21/kuwait-authorities-dissolve-transparency-society
(58) Cf. https://www.swfinstitute.org/sovereign-wealth-fund-rankings/, last accessed on 26 March 2018.
(59) The Norges Bank Investment Management has real time information about the current market value of the fund on its website, cf. www.nbim.no

5 billion USD loss due to wrong investments and the embezzlement of 500 million USD, all 'achieved' by a handful of high-placed officials at the KIO. What exactly happened, has never become fully clear. One only has to read Alhusain's PhD thesis in which he tries to unveil the truth, to understand that secrecy is king.(60)

One would expect such scandals, and the public outrage that came with it, to lead a way to change. And some things did, especially from accountancy, auditing and accountability perspective. When it comes to transparency, very little seems to have been done, although the KIA says on its website that its investments are "completely transparent" and in line with the Santiago-principles.(61) The chairman explains: "KIA is accountable to the people of Kuwait, whom we report to via their elected representatives, the members of the parliament of the National Assembly. I can say, proudly and confidently, that KIA has one of the strongest governance structures in the industry based on our system of accountability and reporting, clear mandate, strong audit framework, and active parliamentary oversight. I am frequently requested to appear before various Parliamentary Committees in addition to appearing before the full Parliament during discussions on KIA's budget and performance."(62)

It is questionable though whether the above-described practice of parliamentary control and an obligation to report its funds and performances to the council of ministers(63), suffices to meet the Santiago Principles, more specifically Principle 17, which prescribes public disclosure of relevant financial information. KIA beliefs to have implemented this principle in its self-assessment by stating that it is "investments are completely transparent to the State of Kuwait, which is responsible for protecting the interests of KIA's beneficiaries – the citizens of Kuwait." (64) However, it seems unlikely that "transparent to the State" equals "public disclosure", as required by the principles. Although the word 'public' is not defined by the principles nor its explanatory notes, it is reasonable to understand it as publicly available to all, which in KIA's case it is not. KIA may inform the ministers and the parliament, but that does not mean that the

(60) W. Al Husaini, The Kuwait Investment Office (KIO) Scandal: A Study of Auditing and Audit Expectations in an International Context", March 2000, http://etheses.whiterose.ac.uk/6032/1/313315.pdf

(61) A set of principles and practices that promote transparency, good governance, accountability and prudent investment, voluntarily endorsed by the members of the International Forum of Sovereign Wealth Funds, among which Kuwait.

(62) http://www.kia.gov.kw/en/ABOUTKIA/OrganizationStructure/Pages/TRANSPARENCY.aspx

(63) Article 5 Law 47/1982 Establishing the Public Investment Authority.

(64) http://www.kia.gov.kw/en/Documents/IFSWF/IFSWF%20Santiago%20Principles%20Self-Assessment%202016%20FINAL.pdf

average Kuwaiti citizen has access to the information, for there is no obligation for the ministers or parliament to disclose all the received information. On the contrary, sessions in the Council of Ministers and the Parliament regarding the subject, are held behind closed doors. (65)

KIA itself does not publish any details about its financial or portfolio positions on its website.(66) On the contrary, Article 8 of its establishing law states: "The Members of the Board of Directors, the employees of the Authority or any of those participating in any form in its activities, may not disclose data or information about their work or the position of the invested assets, without a written permission from the Chairman of the Board of Directors, and this prohibition remains in force even after cessation of the relation of the person with the business of the Authority." Breaking this rule leads to imprisonment of maximum three years.(67)

b. The anti-corruption authority

In 2016 Kuwait introduced a new law concerning the establishment of a Public Authority for combatting corruption, the "Public Anti-Corruption Authority" (PACA), better known as Nazaha.(68) The main function of this authority is to establish principles of transparency and integrity in the application of the United Nations convention against corruption. One of the authority's tools is to enforce financial and asset disclosures by officials. An extensive list of officials are held to disclose their assets, containing – among others – the prime minister, ministers, speaker and members of the parliament, judges, chairmen of municipal councils etc. (69) Delay to disclose leads to fines, and ultimately – if disclosure fails to happen at all, or is incomplete or incorrect – to prosecution, imprisonment and possibly the termination of office.

However, under these new rules and practices, the information only needs to be disclosed to the authority, not to individual information seekers. (70) The

(65) Z. Ali, The Legal & Governance Structure of Kuwait's Sovereign Wealth Funds, Master thesis KILAW (2017), p. 52.

(66) Compare for example the Norwegian sovereign wealth fund, which tries to achieve the maximum possible transparency through its website: www.nbim.no

(67) Article 9 Law 47/1982 Establishing the Public Investment Authority

(68) Law no. 2/2016

(69) www.nazaha.gov.kw

(70) For example, in the Netherlands, lists are published of all business interests, gifts received and trips abroad made by each named member of the parliament. Cf. https://www.tweedekamer.nl/sites/default/files/atoms/files/reizen_15-03-2018.pdf

authority itself is under no obligation to make public what it receives. This can be explained by the fact that the primary goal of the authority is not to guarantee access to information but to fight corruption. However, to reduce (the perception of) corruption, maximum transparency is key, and a transparent anti-corruption authority could be a first step. Furthermore, in the rather long list of functions as per its law of establishment, Nazaha is not charged with optimizing transparency countrywide.(71) A missed chance.

c. Private sector

Transparency in the private sector is obviously a different story, because the private sector does not deal with money from the people and is as such under less scrutiny from access to information or transparency perspective. However, private companies can and do have great influence in the public sphere - think energy, public works, education or health care - and can thus affect tax payers (or oil proceeds) money. Publication duties for reasons of public interest are therefore found in many countries. The EU for example has a directive in place, which requires all member states to ensure publication of annual reports. (72) Furthermore, it dedicates a separate chapter to the extractive industry, which is held to explicitly publish all payments above EUR 100.000 made to governments.(73)

In Kuwait, there is more transparency in the private sector, albeit far from complete, than in the public one. Some types of companies – companies with limited liability and listed and unlisted shareholder companies - must file their annual reports at the Ministry of Commerce and Industry, but those files are not open to the public. However, listed and unlisted licensed companies actually do have a duty to disclose publicly, and for example the website of Kuwait's Stock Exchange shows detailed information of all listed companies.(74)

The relative transparency in the private sector however, is of equally relative importance. What the public is usually looking for is not information related to private companies, but information about the workings of their governments, including but not limited to their dealings with private companies.

(71) Article 5 Law 47/1982

(72) Cf. Directive 2013/34/EU on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings.

(73) Chapter 10 Dir. 2013/34/EU.

(74) www.boursakuwait.com.kw/Stock/Companies.aspx

6) Conclusion

The right to information has taken off over the past few decades, with many countries enacting legislation guaranteeing access to public information as well as information related to financial data of private companies. The Dutch, Indian and Kuwaiti systems were studied. Being countries with a different level of development and a different size of population, the information that people are looking for may be different, but the core of the issue – access to it – is similar.

As to abuse of the law, the Dutch WOB for years had been a way of moneymaking for some, who filed impossible or hidden applications for information, knowing they would be entitled to indemnity if the authority did not respond in time. This has recently been repaired by an amendment to the law, exempting the WOB from these penalty fines. The Indian system is less prone to abuse for financial reasons, but at the same time that may also be considered one of its flaws, for failure of the relevant public authority to deal with a request goes unpunished.

Other flaws in both laws are more matters of practical implementation than legal issues, such as out dated and sloppy filing systems – which applies not only to India but to the Netherlands as well. For India – high illiteracy rates and a lack of awareness with the uneducated public plays a role as well. Non of these weak points however, warrant a conclusion that the laws do not work. They do, just not good enough.

Kuwait is a different story altogether. Despite being signatory to international human rights instruments guaranteeing freedom of information, and despite having a constitution based on democratic principles, neither that same constitution, nor a special law actually guarantees this right. Availability of information depends on specific laws, or voluntary submission. Laws that do require certain data to be submitted to a certain authority usually do not require the receiving authority to make those data publicly available. This thus may at best lead to more accountability, but not to more transparency (which makes it hard to know whether there is actual accountability to begin with). Groups who pushed for more transparency were shut down. Thus, what Alhusain calls the ‘belief in secrecy’ stands firm.(75)

(75) Alhusain, p. 172.

But, it is not only in Kuwait where this still lingers on the background. Sangra, while generally enthusiastic on the achievements of the Indian RTI, concludes that the law would work better if there would be less "reluctance of the higher echelon to take the "quantum jump in their public accountability"(76) And it was the Dutch Minister of Justice who, in a speech about press freedom in 2011 said: "It is with decisions just as Bismarck said about laws: they are like sausages, you better not know how they are made."

All in all, the conclusion should be that having access to information laws is better than having no such laws at all. But even with those laws in place, there remains a certain level of 'belief in secrecy', as became all too clear from the speech of the Dutch minister, who seems to have forgotten that he is minister because people have asked him to be this, on their behalf. Such is the social contract in a democracy. It is therefore only natural that people would like to know how things are going.

It could therefore be argued that freedom of information should be as unlimited as possible, with the bottom-line being the threshold set by John Stuart Mill, the 19th century – liberal - philosopher. He found that the only limit to freedom (any freedom, not only freedom of information) lies in the Harm Principle: 'The only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.'(77)

Governments would of course argue that the limitations in the access to information laws are there for exactly those reasons: preventing harm to others. For some restrictions – especially those protecting privacy and security - this can certainly be argued. However, others are less obvious. If we go back to the Baan-case, where the settlement amount could not be disclosed because it was so agreed between parties and would be unpleasant for them, one can wonder if such limitations are not missing the point. After all, the money paid by the Ministry of Defence to the Baan-company was tax payers money. And would the case have gone to court, whichever amount Baan would have been awarded would have been public knowledge. Keeping cases out of court – by settling them (or going to arbitration, where awards are usually confidential) – should therefore not be rewarded with the right to keep the outcome secret, because people do not only want to know how the sausages were made; they have the right to.

(76) Sangra, p. 255.
(77) John Stuart Mill, On Liberty (1859).

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