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0521858704 - Blacked Out: Government Secrecy in the Information Age

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Excerpt

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THE GLASS CASE

Hoy todos estamos en una caja de cristal, porque hoy todo se ve, todo se lee y todo se escucha.

– Vicente Fox, President of Mexico, March 2004¹

The village of Kelwara sits in the arid folds of the Aravalli mountains in the southern part of the Indian state of Rajasthan. Above the village are Kumbalgarh Fort, half a millennium old, and luxury hotels for tourists who visit the Fort. The villagers are very poor; the price of a night's stay in one of the hotels, 3000 rupees, is more than many earn in a year. The villagers rely on wheat, sugar, and kerosene that is distributed by the government for sale by local ration dealers at reduced prices. But many ration dealers are corrupt. They falsify their registers to show that they have sold rations to poor villagers and then sell the supplies on the black market.

In January 2004, 400 villagers from Kelwara and neighboring *panchayats* gathered on a mango-shaded flat below the check dam that gathers Kelwara's water. The *jan sunwai* – Hindi for public hearing – was organized by an activist group, Mazdoor Kisan Shakti Sangathan (MKSS), which had worked with the poor of southern Rajasthan for fifteen years. The ration dealers were there as well, standing at the edge of the meeting; at the front was a table at which sat the leaders of MKSS, the local magistrate, and visitors from Delhi. A banner behind the table, in Hindi, said: "Democracy Is Transparency with Accountability to the People."²

This was perhaps the twentieth *jan sunwai* that MKSS had organized, and by now the dramatic arc of the meeting was well established. Shankar Singh, one of MKSS's leaders, led the villagers in a

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song that he had composed, and that had become the organization’s anthem:

A Hero Honda
I don’t demand
A new Maruti
I don’t demand
Pepsi Cola
I don’t demand
Full wages
We demand!
Food security
We demand!
The right to information
*We demand!*³

Next came a report on MKSS’s recent work, and then the highlight of the meeting: public testimony. MKSS organizers had acquired the registers in which ration dealers recorded the sale of rationed goods. “Did you buy thirty-five kilograms of wheat from your ration shop on the fourth of January?” an organizer asked Lal Singh Rawat, a red-turbaned quarry worker, after reading from the register. “I did not,” said Rawat. “I was told that there was no wheat available.” Quickly the meeting fell apart. Ration dealers surrounded Rawat, the generator that supplied power to the microphone suddenly shut off, and for twenty minutes the meeting fell into tempered anarchy. The disruption was expected. The villagers stayed, order was restored, and the truth came out. Nikhil Dey, another MKSS leader, read the list of alleged disbursements from the registers, while Shankar Singh checked entries in the villagers’ ration books. In eight *panchayats*, at least thirty ration dealers had defrauded the poor by making false entries in their registers.

This was theatre (agreed Aruna Roy, the former civil servant who with Dey and Singh had set up MKSS) – but with the very serious purpose of helping the poor. An earlier public hearing in nearby Janawad *panchayat* had revealed the depth of corruption in public works projects. Engineers recorded measurements for “ghost works” that did not exist, and muster rolls showed the payment of wages to villagers who had never worked on a project. Almost five million rupees could not be accounted for. The state government appointed a commission that concluded that only one out of seven projects in the

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panchayat had actually been completed, and twenty-six government officials were charged with corruption. In other meetings, village leaders faced with evidence of their fraud apologized, returned money to the *panchayat*, and promised to mend their ways.

In Janawad, and again in Kelwara, it had been bureaucratic routine – paperwork – that proved the undoing of officials and ration dealers. The revelation of a damning document was the highlight of a *jan sunwai*. The MKSS, realizing the power of this moment of revelation, made the right to documents the centerpiece of its work. “The right to information,” its slogan said, “is the right to life.” The MKSS began a campaign for adoption of a state law that would provide citizens with a right to obtain copies of documents, such as ration registers and muster rolls, held in government offices. Rajasthan’s Right to Information Act, adopted in 2000, entitles citizens to ask for such documents, outlines the circumstances in which officials are entitled to withhold them, and provides methods for enforcing the law against recalcitrant bureaucrats. The law does not always lead to ready access to documents – in Kelwara, the ration registers were not released until shortly before the *jan sunwai* – but it establishes the principle of transparency.⁴

By 2004, nine state governments in the world’s most populous democracy had adopted laws like Rajasthan’s Right to Information Act.⁵ Inspired by MKSS’s example, the advocacy group Parivartan used Delhi’s new disclosure law to obtain information about public works allegedly completed in two of the city’s poorest neighborhoods; a *jan sunwai* in one community revealed pervasive fraud and allowed Parivartan’s leaders to eke out a promise from local officials that notice of new projects would be publicly posted.⁶ Another group, Satark Nagrik Sangathan, exposed abuses by ration dealers in Delhi slums, leading the city government to offer tighter inspection of ration shops.⁷

The state of Maharashtra – home to one of the world’s largest cities, Mumbai – adopted a Right to Information Act in 2003, prodded by the hunger strike of a prominent activist, Anna Hazare. (“All corruption can end only if there is freedom of information,” said Hazare, who resumed his strike in February 2004 to push for better enforcement of the Act.⁸) Within months, residents of Mumbai seized on the law to learn how many city employees had been suspended with pay, what fees contractors were allowed to collect in city parking

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lots, how frequently politicians had interfered in transfers of police officers, and how often leaky sewer pipes were inspected. In Maharashtra's second-largest city, Pune, activists obtained logbooks that showed civic leaders had taken frequent vacations in official cars.⁹

Elsewhere there were similar rebellions against official secretiveness. In Bangkok, Thailand, Sumalee Limpa-ovart was troubled after her daughter Nattanit was denied admission to the first grade of the prestigious Kasetsart University Demonstration School. In 1998, school officials told Limpa-ovart that Nattanit had failed the admission exam, taken by over 2000 children. Limpa-ovart, frustrated after two years of test preparation, asked the school to provide the test results for her daughter and the 120 successful applicants. The school refused. However, Limpa-ovart had a new recourse: As part of a constitutional reform program undertaken the preceding year, Thailand had adopted the Official Information Act, which operated much like Rajasthan's Right to Information Act. Limpa-ovart, a public prosecutor, appealed to Thailand's Official Information Board for an order that would oblige the school to release the test results.

Midway through her two-year struggle, school officials offered Limpa-ovart a compromise: a list of test results for the first grade class, with student names removed. The list showed that one-third of the newly admitted students had also received a failing grade. Limpa-ovart suspected that these students were *dek sen* – children from privileged families who used social connections or payments of “tea money” to gain access to the publicly funded school. In 2000, Thailand's Supreme Court finally ordered the disclosure of the names of these students, revealing that many were the sons and daughters of leading political and business families. The wide press coverage of Limpa-ovart's case prodded other parents to make similar demands for the release of information about admission tests. The Thai State Council ruled that the Kasetsart University Demonstration School's admission policy violated a constitutional guarantee against discrimination on social or economic grounds, and Thailand's Ministry of University Affairs ordered schools to reform their admission procedures – an “historic ruling,” said *Asiaweek*, that undercut “nepotism and cronyism” in the nation's school system.¹⁰

In Japan, most local governments had adopted ordinances to implement *shiru kenri* – the right to know – by the mid-1990s. Promoted by a coalition of consumer groups, civil libertarians, and

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progressive legislators, the laws were modeled on the U.S. Freedom of Information Act. In 1995, an extraordinary group of lawyers volunteered for a nationwide campaign to uncover spending abuses by local officials. Calling themselves the *Zenkoku Shimin Ombudsmen* (the Citizens' Ombudsmen Association), the lawyers filed simultaneous requests for information about spending on travel and entertainment across the country, and discovered that in one year officials had spent at least one-quarter of a billion dollars, largely aimed at currying favor with bureaucrats in the national government. A new phrase, *kan-kan settai* – “official-to-official entertainment” – entered the popular lexicon. Soon it was joined by another – *kara shutcho*, the “empty business trip” – as investigators found that expense vouchers had often been forged to hide embezzlement. (In one government, even the auditors had falsified expense reports to create a private slush fund.) The ombudsmen's study led to dramatic changes in the spending and accounting practices of local government.¹¹

Japan's national government adopted its own Information Disclosure Law, also patterned on American legislation, in 1999. (To a degree, the law was also the result of American prodding: U.S. trade negotiators argued that the lack of a disclosure law constituted a barrier to free trade in Japan.¹²) When it went into effect in April 2001, Japanese ministries received 4,000 information requests in the first week.¹³ In 2003 the Cabinet Secretariat was ordered to provide Tokyo's *Daily Yomiuri* with documents showing that the chief cabinet secretary controlled a secret \$13 million fund; critics alleged that the money was used to “smooth business” in the legislature.¹⁴ Sometimes the consequences of disclosure were more profound. In February 2004, the Health Ministry was ordered to release the names of 500 hospitals that had been supplied with blood products contaminated with the hepatitis C virus over the last two decades. The information was sought by Japanese legislator Satoru Ienishi, a hemophiliac who was infected with AIDS and hepatitis C through tainted blood products in the 1990s. It was estimated that thousands of other Japanese might have fallen ill in the same way.¹⁵

Uganda did not have a disclosure law until early 2005.¹⁶ However its 1995 constitution, drafted in an effort to restore democratic control of government, recognizes that citizens have “a right of access to information in the possession of the State.”¹⁷ In 2001 the Ugandan environmental group Greenwatch, backed by the California-based

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International Rivers Network, invoked the constitutional guarantee to obtain a confidential agreement between the Ugandan government and AES Nile Power Limited to build a major hydroelectric dam. (Greenwatch claimed that the dam would unnecessarily ruin the culturally important Bujagali Falls.) The government refused to disclose the agreement, but in 2002 the Ugandan High Court ruled that there was no valid reason to withhold the document.¹⁸ Greenwatch and the International Rivers Network claimed that the agreement showed the Ugandan government had agreed to excessive payments of almost \$300 million.¹⁹ A month later, AES withdrew from the project.²⁰

In Mexico, the reformist National Action Party led by Vicente Fox promised a right to information law as part of a program to transform government into “una caja de cristal, donde todo lo que hacemos, absolutamente todo, puede ser sujeto de hacerse público”: a glass case, in which “absolutely everything” officials do would be laid open to public view.²¹ Adopted in 2002, the law soon proved to be a useful tool for scrutinizing political parties themselves. Parties registered with Mexico’s Federal Electoral Institute are generously supported by public funds, but critics have complained that party leaders face little accountability for their use of public money. (In 2003, one minor party was fined \$18 million for embezzlement and other abuses of public funds.²²) A journalist with Mexico City’s *El Universal*, Arturo Zárate Vite, asked the Electoral Institute to release information it had collected on the salaries of senior party officials; in November 2003, the Institute refused. With the aid of a nongovernmental organization, Libertad de Información-México, Zárate appealed to a federal tribunal, which ruled in 2004 that the salary data should be released. Within a week, Mexico’s major parties published salary details on their websites, adding fuel to the debate over federal policy on the funding of political parties.²³ (Libertad de Información-México scored a second victory in early 2005, when the Mexican attorney general’s office was compelled to release parts of an indictment against former President Luis Echeverría relating to the murder of student protesters by paramilitary troops in 1971.²⁴)

Around the world, stories about the large and small victories attained by the use of new right to information laws continued to tumble out. On September 28, 2004 – the date selected by transparency advocates in 2003 as the global Right to Know Day – an American nongovernmental organization catalogued other disclosures: in

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Romania, statistics about domestic surveillance by the intelligence service; in South Africa, information about apartheid-era deals between the government-owned arms corporation and foreign weapons manufacturers; in Ireland, documents showing weaknesses in a new electronic voting scheme; and in the Slovak Republic, details about the privatization of state-owned industries.²⁵

The British Labour Party led by Prime Minister Tony Blair promised a new Freedom of Information Act as part of its own reform platform in 1997, and the Blair government eventually adopted the law in 2000. However, time in office had dulled Blair's enthusiasm for transparency, and his government delayed implementation until New Year's Day of 2005. The public's appetite for information was not diminished: In the first four weeks, major government departments received 4,000 requests.²⁶ Newly released documents showed that the British royal family received more than £1 million in farm subsidies from the European Union in the previous two years,²⁷ and that the government's financial losses from the 1992 "Black Wednesday" debacle (a failed effort to defend the pound against attacks by currency speculators) had actually been only a fraction of earlier public estimates.²⁸

Records also exposed the sordid corners of British history, such as the torture of detainees during the Kenyan Mau Mau rebellion of the 1950's, and governmental complicity in the bribery of foreign officials by British arms dealers before the practice was outlawed in 2002. One confidential memorandum contained the reply of a British army chief to a query from Britain's ambassador in Venezuela as to whether the government was prepared to tolerate such bribery:

I am completely mystified by just what your problem is. . . . People who deal with the arms trade, even if they are sitting in a government office . . . day by day carry out transactions knowing that at some point bribery is involved. Obviously I and my colleagues in this office do not ourselves engage in it, but we believe that various people who are somewhere along the train of our transactions do. They do not tell us what they are doing and we do not inquire. We are interested in the end result.²⁹

Most surprising, perhaps, was the extent to which the rhetoric of transparency had permeated China – one of the most secretive regimes in the world and notorious for its persecution of journalists

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and official whistleblowers who reveal details of government policy. Ministries of the central government took limited (but nonetheless unprecedented) steps to release crime reports, documents from diplomatic archives, and details about procurement procedures. “China’s progress in the area of transparency is irreversible,” claimed the state-run *People’s Daily* in 2003.³⁰ The *Economist* reported that the Chinese State Council was contemplating the adoption of a regulation that would acknowledge a citizen’s right of access to government information and affirm the principle that government information should be publicly available except in enumerated circumstances.³¹

The Chinese government had good reason to improve access to government information. Some of its actions were mandated in trade agreements that China signed as part of the process of joining the World Trade Organization. The country had also been embarrassed by its mishandling of its SARS epidemic, which was rooted principally in official recalcitrance in providing details about the spread of the disease. As well, China’s leaders hoped that transparency would curb official corruption and quell growing public restlessness evidenced, ironically, in newly released statistics showing a dramatic increase in “mass group incidents.”³² And even Chinese policy makers were sensible of the extent to which the “right to information” was becoming entrenched in the laws of other countries.

Lower levels of Chinese government actually raced ahead of central government. In 2002 the government of Guangzhou, a metropolis of ten million people on China’s south coast, announced a “revolutionary” change in policy on access to government information.³³ Guangzhou’s Provisions on Open Government Information acknowledge the “right to know of citizens and organizations,” establish a “general principle” that government information should be made public, and promise that a detailed list of documents will be published on the government’s own initiative. In 2004, the municipality of Shanghai – home to another seventeen million – adopted a similar code. Like the Guangzhou law, the Shanghai code requires officials to release information within fifteen days or provide reasons for refusal.³⁴

Whether the Guangzhou and Shanghai codes can be effectively enforced by citizens remains a critical question. No citizen of Guangzhou attempted to sue the municipality over a refusal to

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comply with the disclosure rules during the first two years in which they were in force. In Shanghai, however, an attorney quickly filed a suit after local officials declined to provide documents that might have shown whether his client was the true owner of a home taken during the Cultural Revolution. “This is a pre-conceived legal test,” said He Guoping, who conceded that he was surprised when the Xuhui District Court agreed to hear the case in August 2004.³⁵ (By spring 2005 the case still had not been decided.) Municipal officials in Shanghai claimed at the end of 2004 that they had already received 3000 requests for information and approved almost 70 percent of the applications. At the same time, however, officials warned that they would “stand firm on holding back information that has a strong bearing on state security and social stability.”³⁶

From arcani imperii to data smog

Central to this global “right to information” movement is the presumption that information held by government should be publicly available, unless government officials can make a good case that legitimate interests – perhaps the public interest in preserving national security, or the need to protect another citizen’s privacy – would be harmed by releasing information. By the end of the 1990s there were many people who believed that the “right to know” – and the presumption of openness – had finally become entrenched as a basic principle of democratic governance. If so, this would mark the final overthrow of a much older proposition: that the business of government should, as a rule, be done in secret.

The tussle over access to information has always been closely tied to struggles over the distribution of political power. In pre-revolutionary France, the absolute authority of the King was bolstered by a practice of strict secrecy in public affairs, extending even to a ban on the distribution of friendly commentaries on government policy.³⁷ As a practical matter, secrecy was easily preserved at a time when the only method of distributing information was by manuscript (that is, handwritten) texts. A dramatic advance in information technology – the printing press – triggered a government crackdown, culminating in the “law of silence” of 1764, which prohibited public discussion of matters of state.

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This technological transformation, and the challenges to state authority it encouraged, also forced supporters of the King’s prerogatives to articulate an explicit defense of the practice of secrecy. The political philosopher Jean Bodin revived the term used by the Roman historian Tacitus to describe the “secrets of imperial policy” that had to be protected against senatorial prying: the *arcana imperii*. Following Tacitus, Bodin and other supporters of absolutist rule argued that the King’s ability to maintain the integrity of the state would be undercut if *arcana imperii* were not protected: With publicity, the King’s plans “would be as effective as an exploded mine.”³⁸ In seventeenth-century England, the political theorist Robert Filmer wrote a defense of kingly authority that also accepted the presumption of secrecy:

I have nothing to do to meddle with Mysteries of State: such *Arcana Imperii*, or Cabinet Counsels, the Vulgar may not pry into. An implicate Faith is given to the meanest Artificer in his own Craft, how much more is it then due to a Prince in the profound Secrets of Government. The Causes and Ends of the greatest politique Actions and Motions of State dazle the Eyes, and exceed the Capacities of all men, save only those that are hourly versed in the managing of Publique Affairs.³⁹

Revolutions in England (in 1688) and France (in 1789) led to an abandonment of the absolutist conception of state secrecy. The right to free speech was gradually entrenched, legislatures improved their capacity to monitor taxing and spending, and the process of lawmaking was itself opened to public scrutiny. The pace of reform should not be over-estimated. It was not until 1803 that the British House of Commons acknowledged the right of the press to sit in the public gallery and record its debates; the now-familiar *Hansard*, the daily record of British parliamentary debates, did not begin publication until 1829. Elaine Scarry has recently noted the lengths to which the drafters of the U.S. Constitution went to emphasize the need for open lawmaking – for example, by requiring publication of a “regular statement of Account of the Receipts and Expenditures of all public Money,” as well as a journal of Congressional proceedings.⁴⁰ In 1789, these matters could not be taken for granted.

By the end of the nineteenth century, the Western democracies had achieved what we might call a level of basic transparency: The