

# WHAT WE NEED TO UNDERSTAND TO PROMOTE GOVERNMENTAL TRANSPERANCY

Yuko Kasuya\*

## Introduction

On his first day in office, President Barack Obama issued a memorandum urging that the “[g]overnment should be transparent,” and that his administration would “take appropriate action...to disclose information rapidly.”<sup>1</sup> This is just one of the many recent efforts to promote governmental transparency. Since around the 1990s, transparency—accessibility and availability of government information to the public—became a watchword for national governments, international institutions, and civil society groups around the world. It has been increasingly viewed as having numerous desirable benefits, such as curbing corruption and promoting good governance, political accountability, and economic development. Recognizing its importance, a number of international institutions, including the United Nations, World Bank, and the Council of Europe, have endorsed activities promoting transparency. Nevertheless, on ground, the struggle for transparency is far from over.

The purpose of this paper is twofold: first, to provide an overview of major issues

---

\* Yuko Kasuya is an Associate Professor at the Faculty of Law, Keio University in Tokyo, Japan.

concerning transparency. I will examine how this concept gained popularity, and what we know about its effects thus far. The first and second sections of the paper tackle these questions, respectively. Second, I will discuss why realizing substantial reforms on ground remains so difficult by drawing lessons from the policy-making of the freedom of information acts (FOIAs<sup>3</sup>) around the world. Since governments have an inherent interest in concealing information, and the issue of open government is rarely a major concern among the general public, policy instruments such as FOIAs tend to be sidelined. In this context, advocacy groups play an important role in pressuring the government to initiate, and not to shy away from, substantial reform. Section 3 elaborates on this claim by comparing the cases of Britain and Germany, among other examples. The conclusion discusses some policy implications of politics of FOI legislations.

## **Policy Context**

### *Transparency's Rise as a Global Norm*

Transparency, which was a relatively unheard of in the 1960s and 1970s, quickly emerged as a global issue since around the wake of the Cold War. Historically, state secrecy has prevailed in the development of modern states, as embodied in the absolutist principle

*arcana imperii* (the mysteries of state).<sup>4</sup> During the era of the Enlightenment in seventeenth and eighteenth-century Europe, the argument for transparency, or publicity, as it was called then, arose among some intellectuals as a “countervailing doctrine” to *arcana imperii*.<sup>5</sup> However, this ideal rarely became a mainstream discourse among policymakers, nor did it materialize as actual policy measures. The two World Wars further provided governments with justification for state secrecy. Since the end of World War II, there have been several international conventions and declarations that promoted “freedom of information.” Yet, what this principally meant was freedom from propaganda,<sup>6</sup> not access to publicly held information, which is the contemporary meaning of the term. With regard to the movement towards governmental transparency, little progress has been seen on a global scale, as indicated by the fact that only a handful of countries have ever had domestic legislation promoting transparency.

The end of the Cold War meant that there was no more need to turn a blind eye on governance issues and human rights violations in the name of anticommunism. Many international organizations joined this foray. The United Nations, the Organization of American States (OAS), and the Organization of Security and Cooperation of Europe (OSCE) have created special rapporteurs to transparency among member nations. Further,

around the end of the Cold War, transnational NGOs promoting this issue emerged, including the Article 19, the Carter Center, and the Open Society Foundation's Justice Initiative.

The Asian financial crisis of 1997 further highlighted transparency as a global concern. Many studies have noted that the lack of information disclosure by banks and corporations was responsible for triggering this crisis. As a result, transparency became a policy prescription to prevent a similar crisis in the future. For example, the International Monetary Fund (IMF) in 1998 set up an international standard for financial transparency called the Code of Good Practices on Transparency in Monetary and Financial Policies. OECD issued the Best Practice for Budget Transparency in 2000 to be used as a reference for financial disclosure. Since around 2000, multilateral and bilateral donors have started funding transparency-related projects.<sup>7</sup>

Transparency also gained support from the mainstream academic community in the post-Cold War era. Amartya Sen, who won the 1998 Nobel Prize, highlighted the role of information in development. His study on famine showed that the problem was not the shortage of food, but lack of information. The 2001 Nobel Prize in economics was awarded to George Akerlof, Michael Spence, and Joseph Stiglitz for their analysis of how

information asymmetry can lead to market failures. One of the implications of this insight is that transparency can help solve market failures. In addition, since around the 1990s, the rapid advancement of information technology, especially in the areas of Internet and electronic recording and storage systems, has provided an enabling environment. Initiatives to promote transparency, led by either governments or NGOs, have been able to take advantage of information technology in networking, disseminating information, and mobilizing public support.

In sum, the current popularity of transparency as a global issue results from a confluence of several factors: the end of the Cold War, the Asian financial crisis, academic endorsement, and the advancement of information technology. Today, it is no longer an ideal preached by intellectuals, but a concrete policy prescription promoted by leading international organizations and national governments.

#### *What Do We Know about the Effects of Transparency?*

A skeptic might say that transparency may be an indisputable norm, but does it actually have tangible benefits? Normatively, transparency is a prerequisite for accountability, which in turn is a cornerstone of modern representative democracy. It is also increasingly viewed as a “human right.” Since these virtues have been discussed

elsewhere,<sup>8</sup> this section focuses on recent empirical studies that have examined the impacts of transparency.

First, transparency helps reduce corruption. This relationship is supported by a cross-national statistical study, which found that the level of newspaper circulation has a strong correlation with a lower level of corruption.<sup>9</sup> Micro level studies corroborate this finding. An experimental study conducted in Indian slums has shown that filing FOIA requests is as effective as bribery in obtaining identification cards for various social services.<sup>10</sup> In Uganda, the government initiated a newspaper campaign to boost the ability of schools and parents to monitor officials' handling of school grants, and this led to a significant reduction in unaccounted allocations of grant money.<sup>11</sup> In countries such as Colombia and the Philippines, research has shown that preshipment inspection of imports performed by third-party firms reduces corruption in customs agencies, since it provides an independent source of information.<sup>12</sup>

Second, transparency makes governments more responsive to citizens. In India, states that had higher rates of newspaper circulation performed better in distributing food and other services.<sup>13</sup> In the study about US federal assistance to low-income households in the 1930s, communities where more households had radios, and thus where people were

better informed about government policies and programs, were able to demand better public service.<sup>14</sup>

Third, transparency has positive impacts on economic development. Countries with more transparent macroeconomic policy environments tend to attract better international investments than those with governments with opaque policies.<sup>15</sup> Better transparency can also reduce negative effects of financial deregulation, including currency attacks.<sup>16</sup> Central banks that have better disclosure policies perform better in economic management than those with lower-quality disclosure.<sup>17</sup>

Alongside the many positive features of transparency, it is important to recognize its drawbacks. When voters can better observe decision-making processes, representatives are better disciplined. At the same time, transparency encourages politicians to posture by adopting overly aggressive bargaining positions. This increases the risks of negotiation breakdown.<sup>18</sup> Transparency may also provide a mechanism to increase, rather than decrease, corruption. Since it leads to better identification of key decision-makers, “connections” for corruption may be cultivated.<sup>19</sup>

The above review of recent studies suggests that transparency is not only a theoretical virtue, but also a powerful and practical tool to improve people’s lives. While

there are some undesirable consequences, in overall terms, transparency's benefits seem to outweigh its "dark side."

## **Policy Issue**

*How Can We Promote Substantial Reform?: Lessons from FOIA Politics*<sup>20</sup>

Despite the increasing recognition of the normative and practical importance of transparency, its practice on ground is far from satisfactory. Take the example of the Obama administration. Alongside launching a number of national and international initiatives to promote transparency, his administration has prosecuted a far larger number of federal employees for leaking classified documents under the Espionage Act of 1917, than the previous presidents combined.<sup>21</sup> Another example is the case of President Benigno Aquino of the Philippines. He listed transparency reform as one of the top priorities of his administration when he was a candidate in the 2010 election, and has served as one of the steering committee members of the Open Government Partnership, a global multilateral initiative launched in 2011. Nevertheless, as of 2012, President Aquino has kept resisting the enactment of a FOIA despite strong pressure from civil society groups. It appears that many governments are opting for "selective transparency": information deemed harmless is becoming more and more available to the public, while the governments are withholding



information that may imperil their power. The question to address, then, is this: how can we promote substantial transparency in the face of such inclinations of politicians and bureaucrats? The remainder of this paper focuses on this question. In doing so, I will analyze the policy-making dynamics of FOIA legislation as an illustrative example.

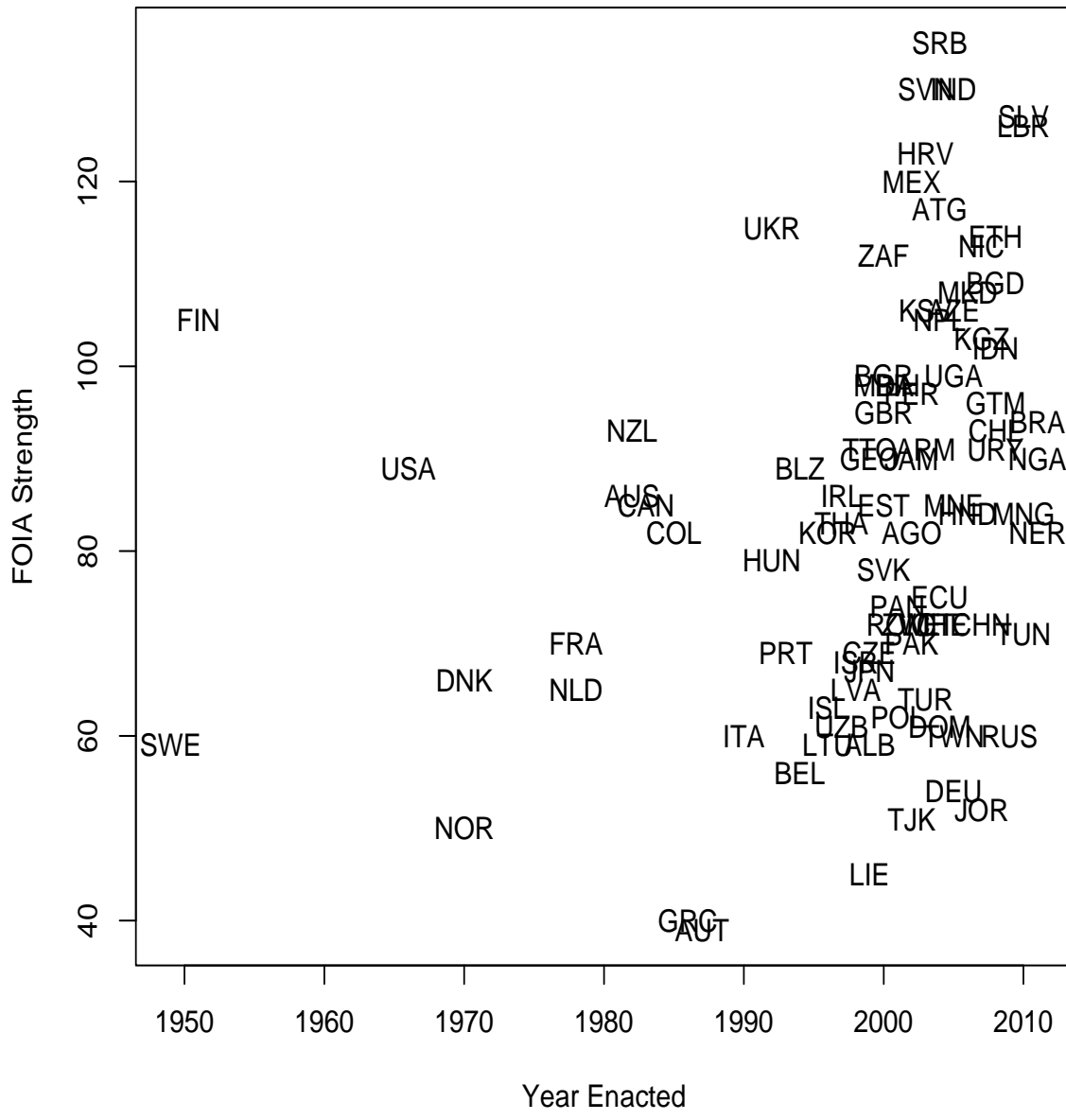
### **Policy Prescription**

FOIAs are one of the most comprehensive policy instruments for transparency currently available.<sup>22</sup> Historically, their origin can be traced back to Sweden in 1766, when its parliament enacted the Free Press Act. Another milestone in the history of FOIAs is the enactment of the Freedom of Information Act by the US Congress in 1966. In the 1970s and '80s, a handful of countries followed America by enacting similar laws. These include Australia, Canada, France, the Netherlands, and New Zealand. As of 2012, the number of countries with FOIAs is about ninety.

Figure 1 plots the timing and the strength of FOIAs enacted between 1946 and 2011 according to the rating provided by a Canadian NGO, the Center for Law and Democracy (CLD). It reveals that, first, the global spread of FOIAs started only around the early 1990s. This corresponds to my discussion in Section 1 that the norm of transparency became a global issue only in the wake of the Cold War. Second, and more importantly, Figure 1

reveals that there is quite a variation in terms of the strength of FOIAs around the world. Strength here is measured on criteria such as the law's scope, requesting procedures, exemptions, and sanctions.<sup>23</sup> Admittedly, the design quality of the law does not always guarantee a good implementation, but a well-designed FOIA has a better likelihood of being effective than those with many loopholes. Hence, one can interpret that strong FOIAs are reflections of governments' commitment to more substantial transparency reform. If so, it is important to investigate what conditions facilitate the enactment of a strong FOIA.

**Figure 1: FOIAs: Time of Enactment and Their Strength around the World**



Source: Compiled by author based on the rating provided by the Center for Law and Democracy.<sup>24</sup>

In answering this question, several important characteristics of this policy area should be noted. First, for general voters, governmental transparency is an issue they are only marginally, if not latently, interested in. Having a legal guarantee to access governmental information is analogous to installing a fire alarm. The device’s usefulness is

only realized when there is a fire—in the case of FOIA, some wrongdoings committed by the government officials. At normal times, the value of the fire alarms, or transparency mechanisms, is not noticed. On occasions, big political scandals may create the momentum to raise citizens' awareness. Even then, sustaining their interest is difficult due to the technical nature of the issue. Transparency laws, including FOIAs, require specific and technical knowledge in order to understand and evaluate what works and what does not. In short, the public might perceive a FOIA as a desirable policy, but it is rare for transparency to become an important electoral issue for most voters, unlike those issues that are their immediate concerns, such as employment, social welfare, and/or education.

Second, those in government—politicians and bureaucrats—in principle have interests in not increasing transparency, for various reasons. Politicians in power would fear that the opposition might use information in a manipulative manner, and/or that any of their wrongdoings might be revealed and punished by the voters. Opposition politicians tend to be on the side of advocating transparency, because such a stance may make them appear virtuous. In addition, the opposition party might be motivated to advocate for transparency so that they can access information and then use it for political purposes. With these motivations, opposition parties often include transparency reform as one of the promises in

their electoral platform. However, opposition's interest in transparency reform may quickly wane once they are in the position of power. It is often the case that once elected, politicians switch from advocates to opponents of transparency. Some notable examples include Mexican President Vicente Fox<sup>25</sup> and Britain's Tony Blair.<sup>26</sup> In short, "politicians love transparency before and after they are in power."<sup>28</sup> Similarly, bureaucrats usually have many reasons to oppose transparency reform. They fear losing an informational advantage, which is one of the most important sources of their power. They also dislike FOIAs because of the expectation of an increased workload, or because of the fear that their wrongdoings may be revealed.

One implication of the above two points—the general public's weak interest in and governments' aversion to transparency reform—is that substantial transparency reform is less likely to be realized through electoral competition. This is because an opposition that comes to power with a promise of transparency reform is likely to back out once in power, since the general public does not care much or does not have the means to monitor the progress of FOIA legislation. In this context, FOIA advocacy groups, by which I mean international and domestic organizations that specifically focus on promoting transparency, become important. They engage in various types of lobbying activities, including

disseminating information to the general public and mass media, providing technical assistance to lawmakers and civil servants, and monitoring legislative and implementation processes. Without their expertise and pressures, governments are likely to dilute the reform, and might just implement “window dressing” transparency.

A comparison of the UK’s 2000 FOIA and Germany’s equivalent law enacted in 2005 succinctly illustrates the importance of FOIA advocacy. These countries had very similar backgrounds at the time of their FOIA enactments, including their geographic location, level of socioeconomic development, membership in international organizations, and a long history of state secrecy. Further, both had a center-left government (the UK’s Labor Party since 1997 and Germany’s SPD-Green coalition since 1998), and they made promises before they came to power to enact a FOIA once elected. These similarities might lead one to expect that they would enact FOIAs of comparable strength. However, the outcome was very different: the UK enacted a strong FOIA and Germany a very weak one.<sup>29</sup>

One of the important differences that correspond to this divergent outcome is the strength of FOIA advocacy. In the UK, an NGO called the Campaign for Freedom of Information (CFI) played an instrumental role in making FOIA a priority issue of the Labor

Party when it was in the opposition. It also helped prevent the Blair government's attempt to dilute the law. While CFI was a very small organization, with only several full-time staff, its persistent lobbying activities since its foundation in 1984 have cultivated expertise on this issue and earned respect from politicians, civil servants, and mass media. In contrast, Germany's FOIA advocacy came very late and was very weak compared to the UK's. It was only 2004 when a group of NGOs launched a campaign called the "Transparency Initiative" (hereinafter the "Initiative"), after observing years of inertia of the SPD-Green coalition on their campaign promise. Moreover, its activities were considerably weaker: the Initiative did not have a full time staff, and it did not have a close relationship with established media or policymakers. Just around the end of their second term, the SPD-Green coalition has fulfilled their electoral promise of enacting a FOIA, but the law ended up to be very restrictive, reflective of the opposition within the government.

If FOIA activism is important for substantial transparency reform, what conditions facilitate their emergence and influence? It appears that there are few generalizable conditions for the rise of FOIA advocacy; rather, their emergence depends on contingent factors. They are launched based on a variety of causes, including anticorruption (e.g., India), demand for environmental information disclosure (e.g., Bulgaria), democratic

transition (e.g., Mexico, South Africa), and reaction to state secrecy (e.g., UK). Their organizational structure also varies. Among the actors considered to be influential, some are a coalition of a wide variety of NGOs and professionals (e.g., India, Mexico, South Africa). In some other countries, it is a single NGO (e.g., UK).

It is also important to consider when FOIA advocacy groups are not so effective despite their efforts. On this point, a study about Latin American FOIAs argues that when the chief executive is strong enough to resist pressures from advocacy groups, only a weak FOIA results. Strength here refers to various aspects, including the constitutional authority given to the executive to block legislation, and the ruling party's share in the parliament. For example, Argentina's President Nestor Kirchner had a comfortable majority in both the upper and lower houses of the parliament. Despite strong NGO pressure, the president avoided enacting a strong FOIA as the senate killed the FOIA bill in 2004. In contrast, Mexico's President Vicente Fox, who faced a divided government and was endowed with relatively weak constitutional authority, gave in to the pressures coming from NGOs, the mass media, and opposition parties. This resulted in legislation of a strong FOIA in Mexico in 2001.<sup>30</sup> These findings suggest that government resistance is a mediating factor. Still, FOIA advocacy is crucial in making governments take an interest in the issue.



## **Conclusion**

The benefits of governmental transparency are many. They can reduce corruption, make governments more responsive to people's needs, and facilitate economic growth. Since around the end of the Cold War, the international policy community has recognized its transformative potential and urged national governments to implement concrete measures to promote transparency. Nevertheless, reform on ground often lags behind expectations.

Using FOIA policy-making as an example, this paper has argued the importance of advocacy in bringing about substantial reforms. Since the government has an inherent incentive to conceal, and the voters rarely regard transparency as a priority policy issue, governments tend to have timid reforms or slide back to secrecy. Thus, advocacy activities, both national and international, play an important role in pressuring governments not to slack. These dynamics observed in the FOIA legislation process also apply to the amendment and implementation phases, and likely to be so in other types of transparency reform efforts.<sup>31</sup>

Some policy implications of this paper's argument are the following. First, it is important to promote environments where transparency advocacy groups can thrive, so that

they can pressure, monitor, and help governments to legislate and implement substantial reforms. For this purpose, funding organizations and developmental institutions can provide various resources, including funding, technical assistance, training, and knowledge development and exchange. Second, it is important to increase voters' awareness of the importance of transparency. Transforming indifferent public opinion into support for transparency will make reforms not only substantial, but also sustainable—governments would have a harder time sliding back to secrecy under the watch of concerned citizens. Mass media, advocacy groups, the research community, and international organizations can build coalitions towards this end.

## Notes

---

<sup>1</sup> “Transparency and Open Government,”

[http://www.whitehouse.gov/the\\_press\\_office/TransparencyandOpenGovernment/](http://www.whitehouse.gov/the_press_office/TransparencyandOpenGovernment/) (6 August 6, 2012).

<sup>3</sup> In this paper, I use FOIAs as a general term for laws that provide for citizens access to public information. In actuality, countries have used various names, such as access to information law, public records law, and transparency law. The name FOIA was first used in the United States, and is often used as a generic name to refer to similar laws.

<sup>4</sup> Sissela Bok, *Secrets: On the Ethics of Concealment and Revelation* (Oxford: Oxford University Press, 1983).

<sup>5</sup> Jürgen Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society* (Cambridge: Polity, 1989), 26–56.

<sup>6</sup> Collin Darch and Peter Underwood, *Freedom of Information in the Developing World: The Citizen, the State and Models of Openness* (London: Neal-Schuman Publishers, 2010), 72–85.

<sup>7</sup> Toby McIntosh, “Freedom of Information Laws Added to the Development Agenda,”

<http://www.freedominfo.org/2006/03/foi-laws-and-development-agend/> (4 August 2012).

<sup>8</sup> For example, see Joseph Stiglitz, “On Liberty, the Right to Know, and Public Disclosure,” Oxford Amnesty Lecture, 1999, mimeo.

---

<sup>9</sup> Alicia Aderesa, Carles Boix and Mark Payne, “Are You Being Served?” *Law, Economics, and Organization*, 19 (2003): 445–490.

<sup>10</sup> Leonid Peisakhin and Paul Pinto, “Is Transparency an Effective Anti-corruption Strategy? Evidence from a Field experiment in India,” *Regulation & Governance* 4 (2010): 261–280.

<sup>11</sup> Ritva Reinikka and Jakob Svensson, “The Power of Information: Evidence from a Newspaper Campaign to Reduce Capture,” Policy Research Working Paper, World Bank (2003).

<sup>12</sup> Dean Yang, “The economics of anti-corruption: lessons from a widespread customs reform,” in *International Handbook of Economics of Corruption*, ed. Susan Rose Ackerman (Massachusetts: Edward Elgar Publishing, 2006), 512–545.

<sup>13</sup> Timothy Basely and Robin Burgess, “Political Economy of Government Responsiveness: Theory and Evidence from India,” *Quarterly Journal of Economics* 117 (2002): 1415–1451.

<sup>14</sup> David Stromberg, “Distributing News and Political Influence,” in *The Right to Tell: The Role of Mass Media in Economic Development* (Washington D.C.: World Bank Institute, 2002).

<sup>15</sup> R. Gaston Gelos and Shang-Jin Wei, “Transparency and International Investor Behavior,” NBER Working Paper No.9260, 2002.

<sup>16</sup> Frank Heinemann and Gerhard Illing, “Speculative Attacks: Unique Equilibrium and Transparency,” *Journal of International Economics*, 58 (2002): 429–450.

<sup>17</sup> Sylvester C. W. Eijffinger and Carin Van der Crujjsen, “The Economic Impact of Central Bank Transparency: A Survey,” CEPR Discussion Paper No. 6070, 2007.

<sup>18</sup> David Stasavage, “Open-Door or Closed-Door?: Transparency in Domestic and International Bargaining,” *International Organization* 58 (2004): 667–703.

<sup>19</sup> Mehmet Bac, “Corruption, Connections and Transparency: Does a Better Screen Imply a Better Scene?” *Public Choice*, 107 (2001): 87–96.

<sup>20</sup> This section’s discussion is based on the author’s ongoing work, a part of which is presented in “Democracy and Transparency: Enacting Freedom of Information Acts around the World,” a paper prepared for delivery at the International Transparency Conference, Utrecht, the Netherlands, June 10–12, 2012.

<sup>21</sup> As of August 2012, the Obama administration has prosecuted six people, while all the prior administrations combined have prosecuted three; <http://www.nytimes.com/2012/02/27/business/media/white-house-uses-espionage-act-to-pursue-leak-cases-media-equation.html> (6 August 2012).

<sup>22</sup> Other types of instruments include the following: laws that provide access to environmental information, health information, and meeting minutes (the US’s Sunshine Act), which have a narrower scope than FOIAs.

<sup>23</sup> In the CLD rating scheme, the maximum score is 150. The breakdown of scoring dimensions and their maximum points are as follows: Right of Access (6), Scope (30), Requesting Procedures (30), Exceptions and Refusals (30), Appeals (30), Sanctions and Protections (8), and Promotional Measures (16).

<sup>24</sup> “Global RTI Rating,” <http://www.law-democracy.org/live/global-rti-rating/> (6 August 2012).

<sup>25</sup> Gregory Michener, *The Surrender of Secrecy: Explaining the Emergence of Strong Access to Information Laws in Latin America*, Ph.D. dissertation, University of Texas at Austin (2010).

<sup>26</sup> Kasuya, Yuko. “Democracy and Transparency: Enacting Freedom of Information Acts around the World,” a paper prepared for delivery at the International Transparency Conference, Utrecht, the Netherlands, June 10–12, 2012.

<sup>28</sup> This is a remark of a former information commissioner of British Columbia, quoted by Hungarian FOIA expert Ivan Szekley in his message to FOIANET mailing list on 18 July 2012.

---

<sup>29</sup> Based on the Center for Law and Democracy's rating, the UK's law scored 95 out of a theoretical maximum of 150, and was ranked 27th out of 89 countries with FOIAs. Germany's law scored 54 out of 150, and was ranked fifth from the bottom.

<sup>30</sup> Michener, Gregory. *The Surrender of Secrecy: Explaining the Emergence of Strong Access to Information Laws in Latin America*, Ph.D. dissertation, University of Texas at Austin, 2010.

<sup>31</sup> For more on the amendment process, see Toby Mendel, "Amending Access to Information Legislation: Legal and Political Issues," World Bank Institute Working Paper, (Washington D.C.: World Bank, 2011). For more on the implementation, see Daniel Berliner, "The Strength of Freedom of Information Laws After Passage: The Role of Transnational Advocacy Networks," a paper prepared for the 1st Global Conference on Transparency Research, Rutgers University-Newark, May 19–20, 2011.