Information Policy and Governance

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"A right of complete confidentiality in government could not only produce a dangerous public ignorance but also destroy the basic representative function of government. But a duty of complete disclosure would render impossible the effective operation of government."

Warren Bennis

Introduction

At the core of economic progress is wealth creation, and at the core of wealth creation is the contribution of know-how in transforming the gifts of nature into various forms of wealth. While knowledge and information have always been crucial inputs in such processes, in the recent past, the importance of information and knowledge capital compared to other forms of capital (financial, physical, human, etc.) has increased in relative terms.

The exponential growth of the importance of knowledge and information in the process of wealth creation has transformed the fabric of economy, society and polity, and has made access to information a major policy issue.

The governance challenge is that we have no clear view of "the rules and customs, skills and talents, necessary to uncover, capture, produce, preserve and exploit information" (Wriston 1992: 20). Yet there is an urgent need to design these new rules. These rules pertain to the scope of access to information rights, the fees attached to such access, the exemptions to such access rights, and the mechanisms to enforce these access to information rights.

Most important within these rules to be designed are those pertaining to access to information about the operations of government. This is the case because of the fact that governments constitute a most important and unique repository of information, and access to information held within government institutions is necessary if meaningful political participation is to be possible.

In this paper, we examine first the features of the knowledge-based and information society as they have emerged over the last half-century. Second, we identify some of the governance challenges the new information society has generated. Third, we underline the implications of these new realities on the information needs of the citizenry and suggest some principles to determine the contours of an optimal access-to-information policy.
1. Emergence of the knowledge-based and information society

In an economy predicated on the effective use of information and the ability to innovate, wealth creation is rooted in the capacity to learn, i.e. to harness the collective intelligence as a source of continuous improvement. From a public sector viewpoint, as information and knowledge are naturally distributed among social actors (and not in the sole possession of the state) and the socio-economic environment is rapidly changing (hence calling for continuous adaptation), it becomes imperative for public bureaucracies to ensure that they are in position to engage in a social process of collective learning and information sharing. In other words, whether we are concerned with the general creation of wealth or more specifically with the improvement of state interventions in society, special attention must be paid to processes of social learning.

Social learning in turn requires an effective access to, and the sharing of, existing knowledge by all the relevant stakeholders. It also necessitates a fair degree of cooperation in the production of new knowledge as collegiality helps in taking advantage of economies of scale and scope (the sharing of results preventing collaborators from reinventing the wheel) and underpins the processes of learning from experience. These requirements for more advanced collaboration have dramatically transformed the relationships between the state and the rest of society since government has had to become involved in a very intricate way in alliances, partnerships and interactions with other sectors and citizens.

Effective social learning depends a great deal on social cohesion and trust among partners to facilitate such sharing and cooperation. In the absence of trust, there must be basic rules capable of ensuring access to information to all concerned so as to prevent the possibility of coordination failures that can slow down the process of learning.

In times when forms of capital other than knowledge were relatively more important, material inputs were less mobile, and close cooperation less crucial, coordination could be effected through market mechanisms and a modicum of top-down state control when markets failed. But in a world dominated by complex information and knowledge flows and where extensive collaboration is central to learning, markets and hierarchical bureaucracies may not provide the optimal organizational arrangements and they may generate coordination failures. This is not only because information and knowledge are in the nature of a public good and markets do not allocate well such resources, but also because knowledge is power and state bureaucracies are naturally unwilling to share it. As a result, the stakeholders whose participation in the process of social learning is essential to our collective ability to create wealth, innovate and improve our collective lives (be they citizens, civic organizations or private firms) may not have access to all the information they need to contribute to the fullest extent to our governance or socio-economic development. This can only lead to coordination failures.

In the shorter run, such coordination failures as may occur as a result of a less than optimal allocation of information may be eliminated through process change, i.e., through a modification of existing
practices (more transparency, for instance), as a way of eliminating obstacles to information sharing and to the collaboration of the different stakeholders within the learning cycle. These modifications to conventions or habitudes usually emerge from experience and evolve mutually coherent expectations and common guideposts. The changing practices are largely a matter of slowly evolving organizational cultures.

However, in the longer run, coordination failures may not necessarily be eliminated organically by the evolution of practices. Indeed, sometimes the situation gets out of hand as expectations diverge instead of cohering. Consequently, there is often a need to intervene directly to revisit and modify the rules of the game in order to ensure effective learning. Broader structural changes are needed to redefine the existing institutional frameworks impacting on individual behaviour.

This is especially true as the ways in which information is made available and the ways in which it is used come to be transformed. The culture of the information users and the culture of the information holders are bound to interact in ways that lead to new dynamics, and often to important unintended consequences. For instance, if information accessed comes to be used in a selective and biases way for denunciation purposes only, this sort of sensationalist and exposé type use is bound to trigger a rationing of the information made available. In the same way, a certain devoir de réserve in the use of the information accessed for a critical evaluation of state activities would lead to more trust and more openness. The dynamics of cumulative rationing and cumulative trust are not equally likely: one of the staple complaints from both information requesters and information holders has been that there is a real danger that a dynamic of cumulative rationing of information has already begun as a result of the ways in which information accessed has been used.

The work of the task force, created as a result of the dissatisfaction expressed by some stakeholders with existing access to information rules and of the dynamics of confrontation that has developed between the Office of the Access to Information Commissioner and the government and its bureaucracy, would appear to be the development of new rules of the game better adapted to the present circumstances.

But such repairs are difficult without an agreement on a dominant logic capable of serving as a gyroscope in the refitting. This is where the governance perspective is useful in providing the foundation on which new rules of access to information might be built.

Governance underlines the importance of effective coordination when resources, information and power are widely distributed. It suggests that the information policy required in a learning socio-economy should ensure that citizens and managers become "drivers of learning" (Wriston 1992:119) in a game without a master.
2. Access to information in a participative democracy: new governance challenges

While in earlier periods information could reasonably be rationed on a need-to-know basis without much consequence, in the new information society, access to information is a basic necessity for without it social learning is stunted. In this new context, information is not only a public good but it is also a public resource. Some analysts have even talked about an “informational commons” comprised of all the information that is accessible as a matter of right to all citizens (Roberts 2000a). And the government has some responsibility to ensure that the citizenry and the population have access to this information required for optimal learning and governing. This is all the more important since the state is the largest repository of information in society and often the only source of some unique data of great relevance for understanding our contemporary social and natural environment, and therefore needed for meaningful political participation by the citizenry.

However, in adapting to its role in an information society, the state must also compose with a governance context that is changing in significant ways.

Among existing trends underscoring the need for modification in the rules of the game, we must first note the progressive blurring of the dividing lines between public bureaucracies and other sectors, and between the state and its partners. In most contemporary industrial democracies, governments are postulating the necessity to associate more extensively private and civic groups to the formulation of public policies and the delivery of public services. For example, recognizing the limitations of past organizational models in tailoring public interventions to the needs and realities of local communities or specific sectors, public-private partnerships are multiplying in a variety of areas, ranging from transportation infrastructure to social services delivery.

While there are divergent rationales underpinning the partnership movement, public-private partnerships should not be construed simply as a new version of privatisation. At their core, partnerships are often means to reconfigure the relationship between the state and other sectors with the purpose of designing more responsive and better-adapted public interventions. They are seen as much as a way to harness the knowledge of private and community actors for the public good or as a means to empower local communities as they are considered means for cost-cutting and risk-sharing. (Linder and Vaillancourt Rosenau, 2000) Recognizing its limitations in a socio-economic environment where success rests on adaptability and collective intelligence, the state is increasingly attempting to forge alliances with non-governmental actors and to associate them with the production of public goods and policies.

An associated trend in contemporary democracies concerns the need and desire for greater consultation and engagement of citizens in the governance of democracies. As democracies are becoming more inclusive and participative, the quantity and quality of information required by the citizenry to do their governance work is much greater. Indeed, the right to information is commensurate with the obligation of the citizen to do governing work and with the scope of the citizen’s governance duties and ambitions. While these calls for greater citizen engagement might have been originally
louder at the local level, they are now heard at the national and even international levels of governance. And while national governments are attempting to improve the quality of their engagement and consultation processes (Wyman et al., 2000), the effective sharing and communication of information about public affairs is a crucial condition of success.

These significant trends in governance are clearly underscoring the need for a new approach to the disclosure and the sharing of information, but they also pose major new difficulties for the states will have to develop not only new rules but truly a new culture in information management. These trends will call for an adjustment in information policy as a result of the new circumstances they are creating.

Firstly, the development of a plurality of new organizational forms in the delivery of public service, such as extensive contractual arrangements with non-governmental parties, will place important information about public affairs outside of the traditional ambit of the state and will clearly force us to ask whether new rules about access-to-information should be extended to apply to these third parties. Yet, secondly, the decline of citizens’ trust in government institutions, a breakdown in centralized authority, and a more critical attitude toward state decision-making will make it more perilous to willingly expose its internal decision-making process for fear of negative repercussions. And, thirdly, the growing difficulty for governments to manage risks in an ever more complex scientific and industrial environment will also create new challenges for governments to communicate information about these constantly evolving complex issues to the public.

2.1 Structural pluralism and public sector restructuring

Over the last decades, in pursuing the need for more intensive interactions and partnerships with private and civic sector organizations, state bureaucracies have been experimenting with a variety of new, less hierarchal forms of organizational forms. Some of these organizational forms, such as executive agencies, are betting on new and looser relationships between political masters and civil servants. But many others, such as more or less formalized partnerships or out-sourcing arrangements, are building on the development of more intricate relationships among actors (transversal networks), which cut across state-private/civic sectors boundaries. The result has been the development of a multiplicity of organizational forms (the advent of what Anthony Giddens (2000) calls “structural pluralism”) and often a concomitant decline in central authority.

The advent of these new organizational patterns has many implications for public managers who must learn to manage networks that extend beyond the public service and seek to pursue and advance the public interest in a context in which their authority over the networks’ members can be uncertain or limited. While these new forms of relationships with ‘out-of-state’ actors are necessary (to tap into the resources and expertise held by these outsiders), network coordination is a more complex and difficult task than what was entailed by traditional public management (Stoker, 1999). In these new relationships, trust, interdependence, reciprocity and negotiation become the order of the day. According to some analysts, these organizational networks even defy steering by the state and are in fact largely self-organizing. (Rhodes, 2000)
An inevitable result of this structural pluralism is that it shifts the boundaries between state and society. As non-governmental actors get brought into networks of policy development and service delivery, the boundaries between the state apparatus and outside parties are blurred. With regards to the production, storage and diffusion of information, organizational pluralism and boundary shifting have the consequence of multiplying the sites of socially and politically relevant information and situating many of them outside the traditional reach of the state.

Recent debates in Western democracies regarding revisions of access-to-information rights and procedures are indicative of the difficulties created by these trends.

In Canada, the federal access to information legislation has been criticized in the past for inadequately covering some quasi-governmental organizations (Roberts, 2000b). But these debates have also been taking place in other jurisdictions. In the United States, the prominent use of litigation as a tool of social change has generated more jurisprudence regarding when quasi-governmental bodies (or governmental bodies *par alliance*) should be considered public agencies for access to information purposes. (Roberts, 2001; Greve, 1999) However, public service delivery networks involving outside contractors or partners will generate even greater difficulties as these outside parties will increasingly hold more and more of the important information on public matters.

In this context, a review of the scope of access-to-information rules to ensure that the relevant depositories of information are covered becomes imperative.

### 2.2 Critical citizens and declining trust in government

In parallel, at least since the 1960s, most Western democracies have witnessed a decline in public trust in their most enduring political institutions. This crisis of confidence has been apparent on several fronts. Firstly, there has been a remarkable drop in support for politicians as a group. An extensive project directed by Susan Pharr and Robert Putnam (2000) has recently confirmed a sustained, long-term decline in people’s confidence in politicians in twelve out of thirteen advanced democracies examined, including Canada. These results confirm other studies that have identified a persistent decline in trust in Canadian politicians since the 1960s (Clarke, 1992).

But this decline in confidence has not been limited to the political class; a similar trend is observed in attitudes toward political parties. In a recent study, Carty, Cross and Young (2000) found a steady decline in Canadians’ positive attitudes toward political parties. This trend accompanies a rising cynicism regarding elected officials and governments as a whole, which are increasingly regarded as being “out of touch” and “uncaring” with respect to citizens’ wishes.

Finally, and maybe most worrisome, citizens of advanced democracies, including Canadians, have also shown a declining level of trust in the executive and legislative branches of government as a
whole. According to 1996 surveys, only 21% of Canadians trusted Parliament to represent them, a sharp decline of about 60% since the mid-1970s (Leduc, 1995; Clarke et al., 1995). In most Western democracies, levels of confidence in executive branches have suffered similar trends (Pharr and Putnam, 2000).

However, this decline in trust should not be confused with growing apathy toward politics. In contrast, many surveys have noted a significant level of preoccupation and concern with the political, and anyone remotely familiar with the history of the 1960s and 1970s will have noted the extraordinary level of political activism demonstrated by the peace, civil rights, environmental and women’s movements during those tumultuous decades. In fact, if the decline in people’s confidence in government can be associated with disengagement by many citizens from many traditional avenues of political participation, such as political parties, it was also associated with the growth of alternative forms of political engagement, which tend to be more grassroots-based and confrontational vis-à-vis state agencies. This translates into a greater motivation to seek out information (Nevitte 2001). Recent comparative longitudinal studies of political attitudes in Western democracies have found a simultaneous decline in respect for government authority and a growth in support for democracy (Inglehart, 2000).

These trends in the relationship between citizens and political actors and institutions should have a significant impact on the way governments approach information policy, and access to information in particular. First, it must be noted that the decline in confidence is likely to underpin a more critical stand toward state secrecy for some time to come. Distrust can no doubt already partly explain previous calls for the expansion of existing freedom of information measures. The robustness and stability of this trend leads us to believe that such calls are likely to continue in the near future.

Similarly, while some level of confidentiality can be rightfully considered a pre-requisite for effective policy-making and government operations, critical citizens are unlikely to be satisfied by entrusting politicians and civil servants in making the difficult determinations of what should be disclosed and what should be kept confidential “in the public interest”. Pressures for fuller disclosure and for the attribution of greater powers to an independent third party are to be expected.

At the same time, the increasingly critical and adversarial attitude toward government is bound to have an adverse effect on the willingness of governments and bureaucrats to disclose information because of the apprehensions about the political repercussions of disclosure in a climate where information will be mostly used to fuel attacks on the political and bureaucratic processes. The difficulties of operating transparently in a political environment of distrust and acerb criticism will be further exacerbated if the media and opposition politicians appear to use access-to-information provisions mainly as a tool to search for potentially damaging information that can be used to publicly embarrass the government of the day.

In such a context, where access-to-information requests can come to be regarded as potential triggers for political crises for the government, it would only be natural that many ministers and public servants would resist a generous interpretation of the law.
2.3 **Scientific complexity and the risk society**

Since its advent is partly defined by the growing centrality of knowledge in production and social processes, the information society is one where science is particularly prevalent in people’s lives. As current debates about genetically modified food are illustrating, the growing application of scientific discoveries to industrial production, and even medicine, will likely generate heated controversies in which it will not be easy to discern the public interest.

In an environment marked by greater risks and complex scientific issues, governments will have enormous difficulties weighting conflicting aspects of the public good and making sound decisions on behalf of their communities. However, these difficulties might pale in comparison with the task that they will face in effectively communicating their decisions and the nature of the risks entailed by their decisions. And given the nature of the distrust highlighted in the previous section, citizens are increasingly unlikely to give them the benefit of the doubt.

This difficulty will be compounded by the fact that communities and citizens have also grown much less deferential toward the scientific establishment. On health and environmental issues, citizens are no longer content to take scientific evidence at face value. Studies in environmental and health policies have shown that, especially when dealing with issues where the assessment of risk is a matter of probability and where uncertainty is the norm, affected citizens do not hesitate to second-guess medical and scientific experts. The scientific basis for state decisions is increasingly a matter of contention (Fisher, 1993). Frequently, alternative scientific experts are enlisted to generate alternative findings and criticize the scientific basis for the state’s conclusions. In some cases, science is essentially regarded as one form of discourse among many other plausible and legitimate ones that should serve as the basis for policy decisions (Torgerson, 1996).

In this context, especially considering the decline in confidence in politicians and bureaucrats, citizens will increasingly demand to be informed of the scientific basis of state decisions and will request the opportunity to appraise its value for themselves. They will want more decisions to be made in the open and, often suspecting the worst, they will demand that community participation be substituted for deference to scientific and political authority.

Risk perception studies show that the public does not think about risks as scientists do: while the latter think in terms of probability and balance competing sources of risk, the former tends to think in absolute terms and attaches more importance to sources of risk that are not the result of individual choices. In sum, the divide that exists between the public and scientists can make disclosure a risky strategy in the minds of many public managers.

The public is often seen as unqualified and ill prepared to manage the information, and the potential for disinformation being propagated, controversy and loss of control by the state seems to be heightened.
However, recent history has shown that, for states, secrecy rarely yields positive results in dealing with these pressures. The mismanagement of risk controversies by governments has cost national economies billions of dollars over the past years. In fact, as the work of Douglas Powell and William Leiss suggests, the absence of risk information can be an important factor amplifying risk controversies. (Powell and Leiss, 1997)

Governments must instead invest considerably more in risk communication and seek the development of a reasoned dialogue with the public about the nature of different risk factors and acceptable risk management strategies. Success in ensuring that a reasoned dialogue is established will depend on the development of trust among stakeholders (citizens, government, industry, etc.) and the timely diffusion of balanced information about risk issues by government and industry. In short, more openness, candor and foresight appear to be components of a better approach to governing in the risk society.

Moreover, as Leiss points out, such trust and reasoned dialogue are almost impossible to create once a controversy has erupted. (Leiss, 1999) The best policy here must be the ongoing timely disclosure of accurate information, and governments must be ready to strike preemptively by drawing attention to potential sources of concerns. “Letting sleeping dogs lie” will no longer do. In sum, the prevalence of risk issues in the emerging information society also makes an extensive disclosure and generous access-to-information policy a wise course of action for government, however difficult it may prove for public managers.

This ‘wise’ counsel will bring no sense of security to politicians and bureaucrats who have noticed the growth of citizen’s distrust and the crusading pugnacity of the media in their pursuit of scandals to expose. While they may perceive the need for more timely and extensive disclosure rules in principle, they may also fear that, until trust is rebuilt and a certain devoir de reserve of the media is ensured, a more liberal disclosure policy may simply trigger yet more criticisms and distrust of the politicians and bureaucrats. This can only lead to more information rationing and a greater deterioration of the situation.

Nothing less than a cultural change will transform the nature of the game. And this cultural change will be necessary on both sides of the divide if the new liberal disclosure rules are to be envisaged and meaningfully implemented.

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In sum, as the state learns to deal with the new governance context of the information society, it must face contradictory pressures.
While the new governance context calls for an open approach to access-to-information policy, it also raises some key challenges for managing government information and its disclosure to citizens. Accompanying pressures for greater citizen engagement in governance, with the concomitant need for greater information sharing, we also find the development of a more critical and distrustful citizenry, creating an environment that reduces trust and encourages natural tendencies to conduct state business in secret.

While responding to the need for social learning and the sharing of expertise, the development of new forms of organization crossing the public-private boundary also challenges existing public control over important information associated with public policies and services and raises critical questions about the limits of existing access-to-information rules.

And the complexity of risk management and the challenges of effective risk communication is making disclosure and transparency both more necessary and more problematic.

In other words, state bureaucracies are currently facing a paradoxical environment where the need and pressures for a more open attitude in information management co-exist with some real challenges to the actual development of a practice of greater transparency.

3. The importance of dialogue and a renewal of guiding principles

At this point in time, the consequences of the tensions described above are difficult to predict. While in some cases organizations may recognize the central importance of an open policy and practice regarding information exchange, and naturally evolve toward it, they are unlikely to be the majority or to correspond to the norm. The distrustful environment sketched in the previous section is more likely to engender a climate of confrontation and hostility between the state (politicians and bureaucrats) and the citizens demanding more disclosure. This is bound to deter any easy and natural evolution. As a result, a more formal revision and a vigorous recasting of the operational mechanisms of the rules for information sharing and disclosure are probably in order.

However, by the same token, an exclusive focus on a change in legal and administrative rules is unlikely to be sufficient. If the root problem of current practices of information access lies in part with the changes in attitudes affecting state-society relations, a change in culture is essential.

In fact, what seems even more important is (1) the re-establishment of a reasonable ‘moral contract’ between the state and its citizens about the principles that should guide government information disclosure and (2) the development of the mutual trust necessary for these principles to be adhered to by all.

If access to information provisions are to be functioning in a satisfactory way in practice, they must allow the state to make the kind of arbitrations required in a complex political environment while
citizens are ensured that they will get the means to fully engage in their role as producers of governance and as persons charged with an adequate oversight of the state’s performance. To reach such an arrangement, it will be necessary to re-establish some consensus around some basic principles and to build on those mutually acknowledged principles nothing less than an informal practice of information disclosure that is generally constitutive of a collaborative governance.

In other words, while there will always be need for some final arbitration procedures to settle cases of irreconcilable differences between the state and requesting parties about disclosure, an effective access-to-information policy should mostly aim at fostering a culture of transparency, collaboration and reasoned dialogue between the state and its citizens – a regime of collaborative governance. (Juillet, Paquet, Scala 2001)

In this context, at a broad level, we believe that governments should be guided by two basic principles that are already largely recognized in law but are in need of reiteration in order to underscore their fundamental importance for contemporary governance. The current context of the information society and tensions around disclosure of government information requires their modernization but also their reaffirmation as the bedrock of a modern access to information policy.

**Principle 1: Access granted by default and extensive routine disclosure**

The first principle is the rule of disclosure by default. It places on government the burden of proof for demonstrating that some requested information should be kept confidential. Recognizing the social value of the wide dissemination of public information in the information society, governments must start with the premise that citizens can access, upon request, all the information in their possession. This policy of extensive access should cast a wide encompassing net over the current organizational realities and seek to include associated parties and new organizational actors as much as possible. To keep up with the new organizational forms and the complex patterns of association between the state and outside parties, access by default should also become the norm in these new organizational arrangements. While this extension of access to information principles will require some difficult arbitrage about how to deal with some typically confidential information (such as the one typically considered commercial secrets), there should be a serious examination of the legal changes potentially required to ensure the appropriate coverage of these partnerships and contractual arrangements.

The experience of other jurisdictions suggests that the political, the technical and legislative means are available for adapting access-to-information provisions to the new organizational context.

Moreover, the state representatives engaging in such alliances and partnerships should clearly convey to private partners the particular responsibilities and expectations of the public associated with their choice of working on matters of public policy and services. Again, this is a matter of culture and common understanding as much as a matter of written rules.
This first principle about rights of access to information should also be accompanied by, or embedded in, a broader and explicit information policy, actively seeking to make government information as widely and easily accessible as possible, without having to resort to access-to-information procedures. The wide and passive diffusion of government information through the use of information technologies, such as the World Wide Web, should be part of a stated policy of routine disclosure of government information.

Again, while this probably reflects the spirit of the current law, it is uncertain that it is accurately reflected in the practice of the state. There is still much of a culture of secrecy surrounding the activities of the politicians and public servants. It must be clearly understood that, beyond providing the information required for the retroactive control of government operations by citizens (the traditional function of access to information provisions), routine extensive disclosure is also meant to ensure social learning and effective governance in the new information society. More than an accountability requirement, it derives from a proper understanding of the value of information as a public good and as an essential resource for the creation of value in the knowledge economy as well as to provide the requisite amount of information for the citizen to perform his governance functions. In the context of contemporary governance, dependent on continual social learning for its effectiveness, a wide access to government information is also a pre-requisite for better-adapted and more successful public policies.

**Principle 2: The Justification of Limits**

This first principle of broad disclosure must however be tempered by a second principle of necessary confidentiality to guarantee that excessive transparency does not result in personal harm or unreasonably hamper the ability of the state to operate effectively in the public interest.

In some cases, the disclosure of information can result in the harm of individuals. For example, public access to personal information about an individual’s health or financial status can violate his right to privacy and hurt his ability to defend his personal well-being. In this context, the protection of the fundamental rights and basic interests of citizens should be a central concern in establishing the boundaries of access to government information. When the disclosure of state information would result in inflicting harm to an individual, public access to this information should be denied.

In the event of a conflict between the public good and individual harm, clear and publicly known procedures for weighing both against each other should be developed. The key requirement here is for a basic test to be developed, establishing reasonably clear procedures and standards to be applied by public servants. Of course, there will always be a necessity to have a third party, such as an independent commissioner, to make the final arbitration about the correct interpretation of existing rules for weighing the need for privacy against the need for public disclosure. But, for the system to be practical and lead to the development a broad culture of openness and reasoned dialogue between the
state and its citizens, public servants must come to be trusted to make these complex arbitrage most of the time.

In this perspective, the emphasis in reforming the access to information framework should resolutely be placed on enhancing the capacity of the public service to make these arbitrations fairly and consistently rather than on a growing reliance on third party arbitration. But the only way to restore mutual trust between citizens and the politicians and public servants in the management of government information – the kind of trust required by the development of a true culture of transparency and dialogue - is to have them directly engage in a reasoned dialogue about what constitutes the justifiable limits to disclosure in a democratic society. The tribunal model embodied by an extensive and routine reliance on third party arbitration seems, in contrast, like a recipe for on-going conflict and mistrust.

However, protection against personal harm is not the only justifiable limit on access to government information. At times, transparency can also disserve the public interest by affecting the soundness of government decision-making processes.

At a certain point, too much transparency will alter the good functioning of policy and managerial processes. For example, for fear of appearing disloyal to some influential constituencies, politicians will alter their behavior and discourse, and advisers will be reluctant to advocate politically unpopular views that they nevertheless consider to be in the public interest. For fear that it will make its way into the public domain, and that retaliation will ensue, the quality of public records might decline as people become hesitant to confine their views on paper. Indeed, it is already clear that the intrusion of the access to information scope to cover internal documents and personal notes has already had an impact on managerial processes and the work of public servants. This echo effect will further increase if the jurisprudence continues to push the ambit of the law to cover more and more personal documents. For example, if personal notes taken during meetings or work sessions come to be seen as being necessarily covered by the legislation, it may come to affect the ability of public servants to work normally.

In sum, too much transparency could also affect managerial and policy processes in ways that are detrimental to advancing the public good. As the Canadian government had already rightly remarked in its Green Paper in 1977, “the candour and comprehensiveness of recorded dialogue within government might be eroded by systematic public access”. (Canada. Secretary of State, 1977: 4)

As a result, reasonable limits must be agreed upon to protect the ability of governments to receive candid, independent advice about policies being considered and for public servants to feel that they have access to a work environment where their personal notes and their work-in-progress can reasonably be considered to be off-limit from external third parties who would be unable to place them in the appropriate context. The denunciation of hyper-privacy must be countered by a commensurate denunciation of hyper-transparency.

While the arbitrage between personal harm and the public good is tricky enough, the cases where a disclosure of government information can threaten the ability of the state to act in the public interest is
even more difficult. If developing operational procedures to ensure that citizens are guarded against excessive disclosure will be difficult enough, the challenge of developing satisfactory operational procedures to safeguard the state’s ability to operate effectively promises to be even more significant.

In the context of a trusting relationship between politicians, bureaucrats and citizens, the integrity of the political and bureaucratic personnel could be seen as a sufficient safeguard against abuse. Unfortunately, as we have seen, the days when such trust could be assumed to be prevalent are no longer with us.

The traditional notion of “raison d’État” used to justify secrecy and confidentiality can easily serve as a blanket principle allowing politicians and civil servants to withhold the disclosure of information without further requirements for justification. Consequently, there is an urgent need to develop alternative mechanisms to implement a softer version of the “raison d’État”, one that is limited by the need to demonstrate that confidentiality is a necessity for good governance. Here the need for “giving reasons requirements” is obvious, but it should also be done in a language that is acceptable to all stakeholders. Without such public and clear offer of reasons, there will be no trust building and the likelihood of a broad consensus emerging about what represents acceptable limits to disclosure is slim. And, without trust, the potential for social learning is limited.

Finally, it must be noted that third party arbitration should also be subjected to the same dual requirement of “giving reasons requirements” and providing it in a language acceptable to all stakeholders. The publication and dissemination of the rationale that leads the independent third party to determine what should be done in specific cases will be essential for the development of a consistent practice about access to information. Moreover, given the strategic position of the independent third party as the final arbiter about acceptable practice in this area, the rules and rationale that it uses to make such determinations will send clear messages to the whole of the public service and citizens about what is considered acceptable justifications for denying disclosure of government information.

These evolving norms will slowly be integrated in the new organizational culture evolved through the practice of access to information policy.

**Conclusion**

Several characteristics of contemporary societies present important challenges for the state to provide effective governance. Amongst these, we can include the fast-paced nature of socio-economic changes that create the need for continual adaptation by public and private actors, the risks associated with many contemporary issues where uncertain and contested science is prevalent, and a more critical citizenry that is distrustful of traditional political institutions and more skillful at opposition and contestation. Many of these features can be partially or wholly attributed to the development of the information society.
In looking for a response to these challenges, national states may be tempted to turn inward and ration information in an attempt to regain greater control, and shield themselves from opposition and criticism by depriving the citizenry of information about its internal decision-making and operations. In this context, access-to-information policies would be tightened in order to minimize the potential basis for the contestation of state decisions.

Such a course of action, we believe, is unlikely to succeed in restoring state authority and it would fail to acknowledge the structural changes currently affecting our industrial democracies.

A more forward-looking course of action would require the acknowledgment that information increasingly plays a crucial role in the generation of personal and collective prosperity and well-being. As such, the information and knowledge generated and stored by government agencies constitute a resource which, used skillfully by state agencies, corporations and citizens, could contribute to enhanced personal growth, private and collective prosperity, and improved democratic governance. In this perspective, it is imperative that access-to-information policies find a place in a broader public policy on the production, use and access of information. In this context, maximum openness would be a sensible goal, provided that it is offset by operational principles seeking to ensure that the fundamental rights and basic interests of citizens are protected and that the state preserves the ability to act effectively in the public interest.

Finally, we must also note that achieving this goal is primarily a cultural challenge. While changes in the law are required, they will not be sufficient. Democratic accountability and social learning will best be served by a widely-shared culture of openness and transparency in government and the Public Service and by the creation of a reasoned dialogue among public servants, politicians, and citizens that recognizes that some limitations to complete transparency are also in the public interest. But such a culture of openness and reasoned dialogue will not emerge unless we can restore greater trust in government and get passed some of the bitter conflicts that have characterized the recent relationship with the Commissioner’s Office, opposition parties and external critics. While undoubtedly the result of a genuine commitment to democratic values, the on-going reliance on such litigious and confrontational dynamics will not likely lead to the kind of agreeable routine disclosure and transparency that we should be aiming for.

References


