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# Legal Formulations of a Human Right to Information: Defining a Global Consensus

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# Legal Formulations of a Human Right to Information

## *Defining a Global Consensus*

Kimberli M. Kelmor

### Abstract

There is a growing body of law across the globe that seeks to define a right to information. Any study of such laws quickly reveals a great diversity of definitions for both the type of information covered and the nature of the right. Access to various particular types of information is routinely granted in piecemeal fashion through all levels of government including national sub-constitutional laws, national constitutions, and regional and international treaties. In the hierarchy of individual rights, constitutionally granted rights are commonly perceived as the strongest and are most likely to be accepted as inviolable. Thus, the increasing number of constitutional provisions granting a right to information, while still technically granting the right as a matter of law, does at least suggest that such constitutional rights have a source and justification that goes beyond mere law. In the end, a mature statement of the right to information is more than a list of its current enumerations. Both effective advocacy and sound legal interpretation will benefit from starting with the full statement of the right to information — the human right — to the information that is needed to live self-actualized.

There is a growing body of law across the globe that seeks to define a right to information. Any study of such laws quickly reveals a great diversity of defi-

nitions for both the type of information covered and the nature of the right. Access to various particular types of information is routinely granted in piecemeal fashion through a nation's sub-constitutional legal process (Right2Info.org, 2012a). Also, at the supra-national level, various rights to information are being staked out, bit by bit, region by region, through treaties and case law (Right2Info.org, 2012c). There is also a slowly developing right of access to information based in national constitutions across the globe (Right2Info.org, 2012b). In the hierarchy of individual rights, constitutionally granted rights are commonly perceived as the strongest and are most likely to be accepted as inviolable. This special status of trumping other laws, while still technically granting the right as a matter of law, does at least suggest that such constitutional rights have a source and justification that goes beyond mere law.

Just as at the other levels, countries grant access to particular types of information through their constitutions. The definition of the right of access to information and the scope of such right can typically be determined by the underlying justification for creating such a right. To date, the most frequent method of finding a constitutional basis for such a right is finding that the right of access to information is a necessary corollary to constitutional grants of freedom of speech or other freedoms explicitly stated in the constitution. The goals of this article are to assess the kinds of information rights and their prevalence; to determine if there is a global consensus that would strengthen assertions that there is an international human right to information; and to formulate a comprehensive statement of the human right of access to information that is being described through these discrete applications.

Without being sidelined into deep philosophical arguments about the nature of rights themselves, it is useful to consider the common heuristic of distinguishing rights as either positive or negative. Frank B. Cross (2000) describes the distinction in its simplest terms stating that “[o]ne category is a right to be free *from* government, while the other is a right to command government action” (p. 864, emphasis in the original). Negative rights prevent other people or government entities from interfering with an individual's exercise of that right, while positive rights create an obligation on other people or government entities to take action to provide the means to the individual to exercise that right. The current body of access to information law is largely an enumeration of negative rights interfering with an individual's access to information. A comprehensive statement of a right of access to information will fall much closer to the positive rights conception of human rights.

A final preliminary thought: of what use is such a formal statement? While I cite a growing trend of recognizing a constitutional right to information, the news and reports show increasing limitations on access to information — especially on the grounds of national security. Based on its annual report on press freedom, the watchdog organization Freedom House reported that “Global

press freedom has fallen to its lowest level in over a decade” (Karlekar & Dunham, 2014, p. 1). In its web page regarding the report the organization stated that the

decline was driven in part by major regression in several Middle Eastern states, including Egypt, Libya, and Jordan; marked setbacks in Turkey, Ukraine, and a number of countries in East Africa; and deterioration in the relatively open media environment of the United States [FreedomHouse, 2014, para. 1].

The last decade has seen the mass re-classification of U.S. government documents (Scott, 2006), and the U.S. White House trend toward denying freedom of information requests on grounds of national security steadily increased from 3,805 cases in 2009, to 4,243 in 2011, and to 5,223 in 2013 (Gillum & Bridis, 2013).

As disheartening as that trend is to information rights advocates, it does not invalidate the trend toward recognizing a right of access to information. That rights conflict is obvious. Human rights lawyers focus on how legal systems resolve these conflicts through legislation and litigation. More broadly though, such conflicts are resolved daily as individuals, organizations, and governmental entities consider what actions to take. No matter who is resolving the conflict, the more well defined a given right is, the more likely the resolution of such conflict will accurately reflect the weight and relevance of that right.

## Sources of International Human Rights

A foundational issue to address is just how modern international human rights are created. As Andrew Clapham (2007) discusses in his opening chapter of his introductory text on human rights, people view human rights in a multitude of ways. This article will largely follow the view of the lawyer, who “consider[s] that human rights represent almost a term of art, referring to the details of accepted national and international human rights law” (p. 3).<sup>1</sup> From this perspective, international human rights come from the same sources as international law. Article 38, §1 of the Statute of the International Court of Justice (1945) defines these sources as:

- international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- international custom, as evidence of a general practice accepted as law;
- the general principles of law recognized by civilized nations; and
- subject to the provisions of Article 59 [of this statute], judicial decisions

and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Each of the possible sources provides evidence that an international human right to information of some sort does exist. In analyzing these sources, it is important to note that there is no requirement that every nation enact such law, or that the right be formulated exactly the same way.<sup>2</sup> As Jordan Paust (1996) states, "... human rights law is a complex and dynamic legal process profoundly interconnected with international law more generally and, like the latter, with regional and domestic legal processes throughout the globe" (p. 147).

## Existing Laws That Grant a Right to Information

### *International Agreements That Grant a Right to Information*

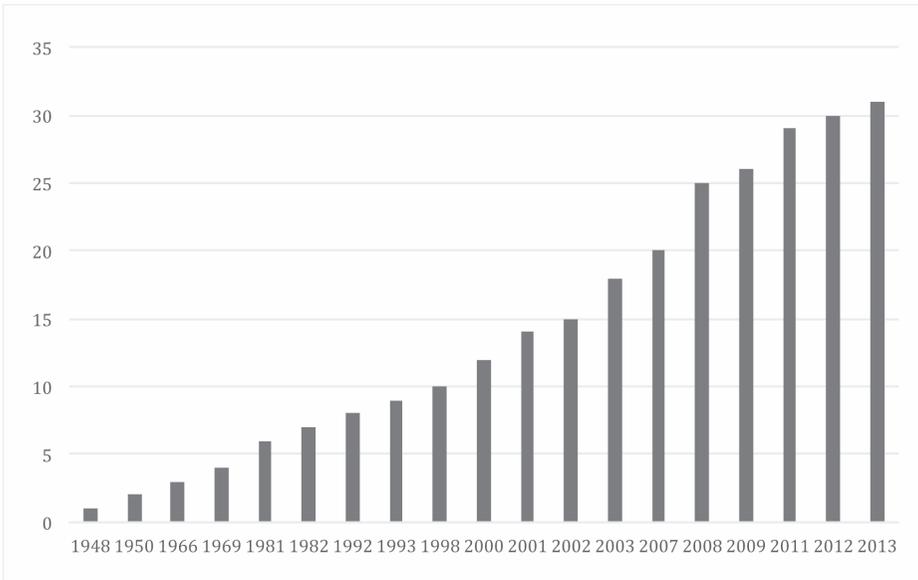
International agreements are the most explicit statements of a right to information. As rules of law enacted by multiple governments, they carry the greatest weight in establishing a global consensus. Since the first was made in 1948, we now have more than 30 such agreements (Right2Info.org, 2012c). Two examples of agreements that incorporate a right to information as part of other rights are the following:

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers ["Universal declaration of human rights," 1948 art. 19]; and,

Article 19 of the International Covenant on Civil and Political Rights (1966), which also creates a right to information:

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
  - a. For respect of the rights or reputations of others;
  - b. For the protection of national security or of public order (*ordre public*), or of public health or morals.

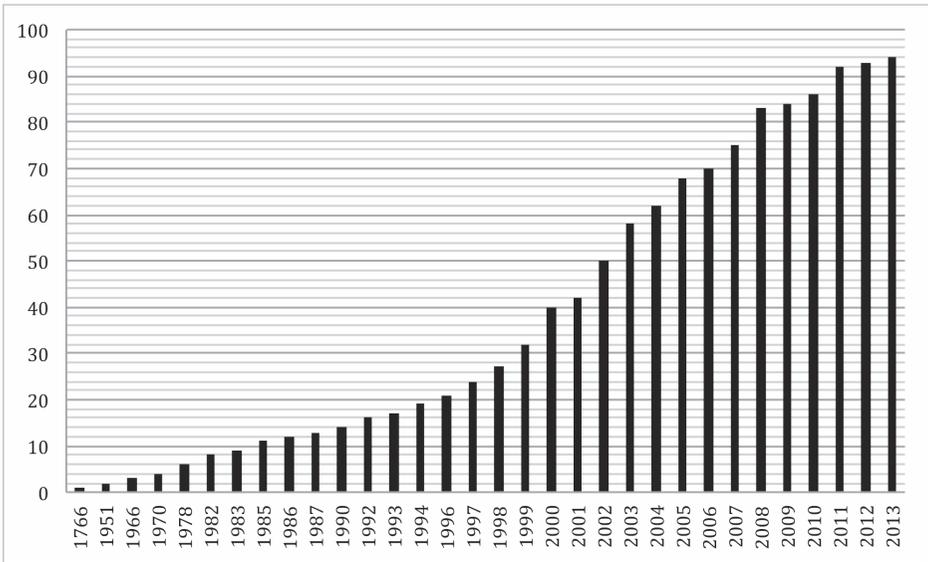
An example of an international agreement solely concerned with a right to information is the Council of Europe’s Convention on Access to Official Documents (2009). This agreement defines official documents to mean “all information recorded in any form, drawn up or received and held by public authorities” (art. 1) and continues to lay out the right of access to official documents; limitations to access; considerations for the request for access; process for receiving and fulfilling the requests for access; forms of access; charges for access; review procedure; and other procedural requirements. The signing countries, and the scope of the right vary by treaty, but charting just the numbers by year makes the growth and the rate of growth readily apparent as shown in Table 1.



**Table 1. Growth in Number of International Agreements Granting a Right to Information**

*National (but Sub-Constitutional) Bases of a Right to Information*

Commenting on the historical trend for rights to information, Ackerman and Sandoval-Ballesteros (2006) reported that the count of countries granting such rights by law grew from 10 in 1995 to 66 by 2005. The Open Society Justice Initiative and Right2Info.org (2014) jointly maintain a list of countries with laws or regulations granting rights to information. As with international agreements, the scope of the right varies with each law, but Table 2 makes the growth readily apparent. Also apparent is that the numbers do not always add up the same depending on who is doing the counting. The discrepancy



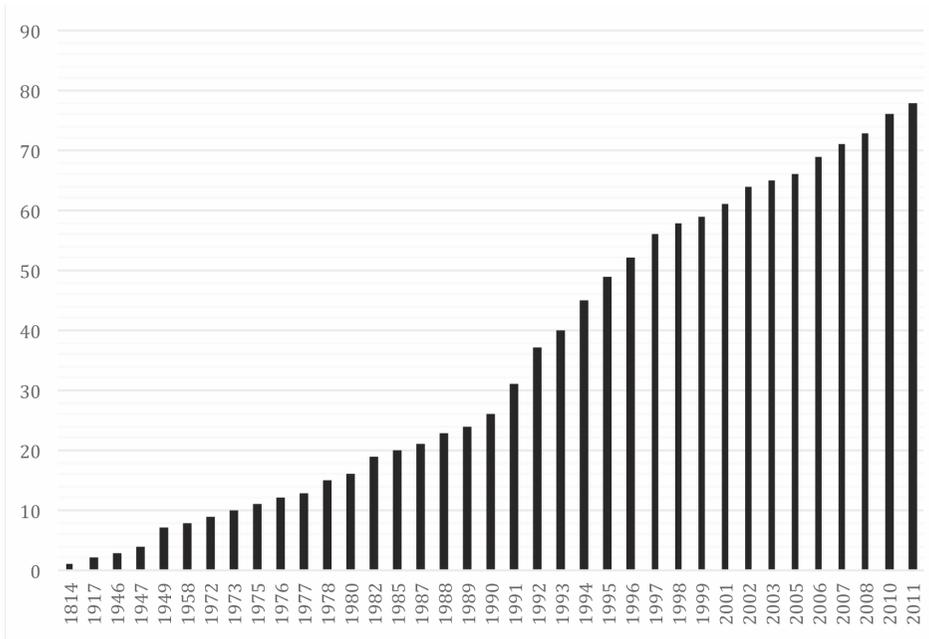
**Table 2. Growth in Number of Countries with Some Sort of Sub-Constitutional Right to Information**

between the counts provided by the Ackerman and Sandoval-Ballesteros (2006) article, and by the Open Society Justice Initiative and Right2Info.org (2014) web page are not necessarily due to errors, but rather to differences in terminology and definitions of such rights. These differences are critical in determining whether or not an international human right to information exists.

### *Constitutional Bases of a Right to Information*

As of 2012, Right2Info.org (2012b) reported that the “right of access to official information is now protected by the constitutions of some 60 countries” (para. 1). Adding in countries where the constitutional text has been judicially interpreted as providing a right of access gives a count of 78 (Right2Info.org, 2011).

It is important to note that, in Table 3, these are constitutional protections, not sub-constitutional laws. In both practice and theory, rights created by legislative action, governmental agency action, or judicial action, can be overruled as violating constitutionally granted rights (Dworkin, 2009). While constitutionalism is an especially strong trait in the United States, it is not unique to the United States. As other countries write, amend, and rewrite their constitutions, those constitutions also become the strongest legal symbol of legitimacy



**Table 3. Growth in Number of Countries with a Right to Information in their Constitution**

in that country (Scheingold, 2004). The trend toward constitutionalizing rights to information is therefore a qualitative increase in the weight of such rights, above and beyond the quantitative increase.

### Assessing the Rights Granted: Is the Right to Information Purely Derivative?

The level of government at which the right to information is granted is one factor in assessing the strength. A second factor to consider is the scope of the right granted. Even when granted at the constitutional level, the scope of the right granted still varies broadly by country. The scope of the right is circumscribed by the underlying theory used to justify the existence of the right to information. These underlying theories are an independent factor and thus are largely the same regardless of the level of government creating the right.

By far the most common scope involves a right of citizens to government held information. For example, Article 32 of the Belgian constitution states that “Everyone has the right to consult any administrative document and to obtain a copy, except in the cases and conditions stipulated by the laws, federate laws or rules referred to in Article 134” (“La constitution,” 1994). Others limit

the scope of the right to information by tying it to the right of freedom of expression. For example, in Switzerland, Article 16 of the constitution (Bundesverfassung) is titled Freedom of Expression and of Information, and states that,

1. Freedom of expression and of information is guaranteed.
2. Every person has the right freely to form, express, and impart their opinions.
3. Every person has the right freely to receive information to gather it from generally accessible sources and to disseminate it [“Bundesverfassung,” 2012].

A country-by-country, law-by-law comparison is beyond the scope of this article and has been thoroughly covered elsewhere.<sup>3</sup> Some of the differences in scope are reflected in the terminology used in both law and scholarship. “Freedom of information” is common at both the state and national level in the United States and typically means some level of responsibility of the government to provide government held information. “Access to information” has a different connotation than “Right to information” which tends to include some duty to provide and perhaps even create the information (Baram, 1984). Some scholars advocate for the “right to knowledge” (Emerson, 1976), and some are expanding the concept to advocate for a right to information and communication technology (Ifeanyi-Ajufo, 2013). But two distinct rubrics for analyzing laws granting rights to information seem to shape the way we think about rights to information, whatever terminology we use.

The first is a functional classification that is well explained by Peled and Rabin (2011) in their analysis of constitutional provisions. They set out four types of justifications based on the use of the information:

- Political-democratic justification: the right to the information is necessary for citizens to be active participants in their government, and that such participation is necessary to maintain a democracy.
- Instrumental justification: the right to information is necessary to give meaning to other enumerated rights.
- Proprietary justification: the information created by the government is created and owned by the citizens.
- Oversight justification: the government must be held accountable to its citizens and the right to government held information is necessary for that accountability and transparency.

Bishop (2012), in reviewing treaties and other supra-national means of establishing rights to information has a slightly different analysis. Expanding on previous work by Weeramantry (1994), her work finds that any right to

information is always a corollary to some other (well established) right, the strongest of which are,

- freedom of expression;
- information privacy rights to information about themselves;
- a right to a healthy environment; and
- a right to truth [Bishop, 2012].

These different conceptualizations give the rationale and reach of the resulting rights. Bishop (2012) analyzes the various treaties and demonstrates how the strength of the resulting right is constrained by the underlying conceptualization. Ultimately, she determines the freedom of expression foundation results in the strongest and most effective rights. Comparing this to Peled and Rabin's (2011) work suggests that she views a right to information as mainly an instrumental right and occasionally a proprietary right. Many scholars in the field seem to make any right to information a derivative of other, freestanding rights.

## A Comprehensive Statement of the Human Right to Information That Reflects Its Integral Relationship to Other Human Rights

The problem with the above analyses is not that they are necessarily wrong, but that they are incomplete. The human right to information is all of this, all at once. A right to information is instrumental to the right of free speech; it is necessary for government oversight. A right to information is a detailed component of the Aarhus Convention (Convention on access to information, public participation in decision-making and access to justice in environmental matters, 1998) because it is not possible to have public participation in environmental matters without such information. It is *inherent* in each of those situations and more.

These rubrics for analysis, and specific instances of their application, are not actually defining the right to information, and are not merely describing the ways the right is created. Instead, they are actually ways of constraining that right. All rights have some limitation, or at least have some instances when they must be balanced against conflicting rights. Theoretical arguments of concrete versus abstract absolutism notwithstanding, no right is absolute (Gewirth, 1981). My right to freely move my fist does in fact end at the tip of your nose.

If not defined by the constraints, what then would be the formulation of a freestanding right to information? What would be additional facets of that

right? And what other rights would be instrumental to that freestanding right to information?

Here I step back from the perspective of the lawyer. The lawyer's view is one of the best at envisioning and arguing the constraints on rights, and at litigating for preferred outcomes when rights conflict. But to define the freestanding right to information, I step into the role of a rights advocate, and the perspective of an information specialist.

The human right to information can be nothing less than the right to the information a human needs to live completely actualized.<sup>4</sup> The human right to information defined that way logically requires

- Accuracy of information. A right to accuracy may seem difficult to enforce, and depending on interpretations of subjectivity and objectivity, even theoretically impossible. But just as the constraints of libel and slander laws constrain freedom of expression by requiring a level of truth and accuracy, so too can constraints be made to provide some assurances of accuracy to the right to information.
- Availability of information to all. This in itself has several components such as
  - Issues of format: whether information is presented in oral, print, or digital format, and even whether a digital presentation is formatted for smart phone or tablet is more than a matter of personal preference. It can, at times, determine whether or not the information is really available at all.
  - Issues of cost: some level of subsidization will be required to ensure that information is available to all regardless of economic status. This issue comes up frequently in discussions of the "digital divide."
  - Issues of open access: mechanisms to protect the impetus that intellectual property rights give to creative work, and mechanisms to keep intellectual property laws from stifling access to and further development of creative work.
  - Issues of accessibility: mechanisms to ensure that information is available to all regardless of disability.
  - Issues of privacy and confidentiality: privacy law will need to expand to more thoroughly protect the information seeker. These are issues that have long been addressed by librarians in keeping library circulation records confidential, and that are currently as hot as web tracking.
  - Issues of information literacy: some level of information literacy on the part of the information seeker is required to have the right to information be at all meaningful.
- Changes in legal and societal values. Legal and societal issues will need to be addressed, including but by no means limited to the following:

- Cost of information infrastructure: cost was mentioned as inherent to information being available to all. But there are also the costs of the overall information infrastructure. Acknowledging the human right to information will not answer the question of a public versus a private Internet, but it will definitely affect the way we answer such questions.
- Duty to provide information: the legal system will need to define who will have a duty to provide information that is already in existence.
- Duty to create information: the legal system will need to define if there is a duty to collect or create information, as well as who will fulfill that duty.
- Duty not to obstruct access to information: the legal system will need to define whether the duty *not* to obstruct binds more than just governments?

The growth in laws at all levels defining instances of a right to information should not be evaluated as if the question is whether there is a global consensus for some least common denominator derivative right to be found. Instead, each law cumulatively adds weight to the proposition that there is in fact a strong, freestanding human right to information. The question is not whether a right to information about my genetic code has been legislated, but rather is there something about genetic information and other implicated rights that should constrain my right to know about my genetic code? Both effective advocacy and sound legal interpretation will benefit from starting with the full statement of the right — the human right — to the information that is needed to live self-actualized.

## Notes

1. To address the philosophical, ethical, moral, or historical origins of human rights is far beyond the scope of this article. For such coverage see, for example, Brierly (2012) and Beitz (2009).
2. For more detailed analyses of the required elements to find the existence of a human right see Simma and Alston (1988).
3. For such coverage, see for example Banisar (2006) and Mendel (2008).
4. This has similarities to both Nussbaum's (1997) idea of capabilities and Berlin's (1969) idea of self-realization. This can either be viewed as totally confounding the ideas of negative or positive rights, or perhaps as transcending them.

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