

**The Role of Access to Information in Promoting  
Democracy, Good Governance, and Development  
in Cambodia**

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## **Cambodia and Access to Information (A2I): An Introduction**

As Cambodia approaches nearly two decades as a post conflict society, establishing some semblance of transparency, both in the public sector and the burgeoning private sector, remains a daunting, if not overwhelming task.

However, in 2010, the Royal Government of Cambodia made a concrete effort to address this problem with the passage of the long awaited Anti Corruption Law, which had gone through several drafts since 1994. The new legislation also created an Anti Corruption Council to oversee policy implementation, and an Anti Corruption Unit (ACU) to oversee investigations. The ACU has already taken measures against some corrupt officials. At the end of November 2010, the Pursat provincial prosecutor and two bodyguards were arrested and charged with corruption, illegal detention, and extortion.<sup>1</sup>

Yet, mistrust, rumor, and flat out ignorance regarding public issues still permeate Cambodian society, particularly in the rural areas, where access to public information is often limited to ‘word of mouth’, gossip, rumor mongering, and pro forma proclamations from government officials. Often, these public rumors and gossip constitute nothing more than relatively harmless urban/rural legends, which can lead to amusing results, as happened during the 2003 SARS crisis.<sup>2</sup> However, sometimes these public rumors can lead to destructive results and social unrest, as witnessed by the 2003 anti-Thai rioting in Phnom Penh.<sup>3</sup>

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<sup>1</sup> “ACU Charges Pursat Prosecutor”, *Phnom Penh Post*, November 30, 2010

<sup>2</sup> During the SARS virus crisis in 2003, Phnom Penh city residents flooded the street in a desperate search to buy mung beans, after hearing a rumor that anyone who did not eat the vegetable by midnight would die from SARS. Bean prices jumped by as much as 500% in 24 hours, giving the bean sellers in the city a tidy profit.

<sup>3</sup> “Mobs Go Berserk in anti-Thai frenzy”, *Phnom Penh Post*, January 31, 2003.

Experts in conflict resolution often cite inadequate or inaccurate information as potential sources of conflict.<sup>4</sup> Assuming this is true, one could therefore argue, as many human rights advocates currently do, that in post-conflict societies such as Cambodia, a free flow of information, particularly from public institutions, is vital to the building and maintenance of a stable, functioning democracy and a vibrant, informed, and engaged citizenry. This information “free flow”, these advocates say, also creates a societal culture of tolerance, openness, honesty, and transparency, which provides a safeguard against corruption and oppressive governmental power. All of this leads to the creation and maintenance of a peaceful and stable society.

As Toby Mendel, a noted human rights lawyer and advocate with the London-based NGO Article 19 wrote:

Information held by public authorities is not acquired for the benefit of officials or politicians but for the public as a whole. Unless there are good reasons for withholding such information, everyone should be able to access it. More importantly, freedom of information is a key component of transparent and accountable government. It plays a key role in enabling citizens to see what is going within government, and exposing corruption and mismanagement. Open government is also essential if voters are able to assess the performance of elected officials and if individuals are to exercise their democratic rights effectively, for example through timely protests against new policies.<sup>5</sup>

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<sup>4</sup> See “Conflict Resolution: The Role of Information and Knowledge Management—The Kenyan Experience, Goethe Institute, Nairobi, pp.4-6. See also Johan Galtung, *Peace by Peaceful Means: Peace and Conflict, Development, and Civilization*. London: 1996.

<sup>5</sup> Toby Mendel, “Freedom of Information as an International Protected Human Right”, published by: Article 19 Global Campaign for Free Expression, June. 15, 2000.

However, how much of this is realistic? Can effective Access to Information (A2I) legislation help create an environment of domestic stability and peace, as well as establish democratic values in a society? And in particular, can such laws work in Cambodia?

Before we can answer these questions we must first refer to the current international legal instruments, opinions, and policies regarding Access to Information. After briefly examining the current status of proposed A2I legislation in Cambodia, we will then examine how an A2I law can aid in the achievement of specific Cambodian Millennium Development Goals, and in promoting other facets of development and good governance. We will also examine some possible flaws and mistaken assumptions that underlie the ‘free flow of information’ model, particularly with regards to developing countries and post-conflict societies, like Cambodia. Finally, suggestions and recommendations on how Cambodia can best overcome these flaws and create effective A2I legislation that: 1) achieves best practices and 2) contributes to the creation of a more effective and more efficient government which serves all of its citizens.

### **Access To Information: International Standards**

The right to access information held by public bodies is also referred to as ‘freedom of information’ or ‘right to information’, and has been recognized in international law as a fundamental human right. Although there is no ‘right to information’ specifically listed in the earliest human right instruments, this right is now generally recognized as constituting part of the fundamental right of freedom of expression, which includes the right to seek, receive, and disseminate information. Article 19 of the Universal Declaration of Human Rights (UDHR) states:

Everyone has the right to freedom of opinion and expression; this right includes the right to hold opinions without interference, and to *seek, receive and impart information and ideas* through any media and regardless of frontiers. (Emphasis in italics added)

Although the UDHR is not directly binding on States, portions of it, including Article 19, are now generally regarded as part of customary international law.<sup>6</sup> Article 19 of the International Covenant on Civil and Political Rights (ICCPR), which unlike the UDHR is a formally binding legal treaty endorsed by over 160 countries, including Cambodia, guarantees the freedom of expression and information, using language similar the UDHR.<sup>7</sup>

As a result, the current consensus of much of the international community is that States have an obligation to enact A2I laws. Since the mid-1990's the United Nations Special Rapporteur on Freedom of Opinion and Expression has called on nations to adopt and implement A2I legislation. In 1997, the U.N. Rapporteur stated:

The Special Rapporteur, therefore, underscores once again that the tendency of many Governments to withhold information from the people at large. . .is to be strongly checked.<sup>8</sup>

The UN Commissioner on Human Rights then invited the Special Rapporteur to “develop further his commentary on the right to seek and receive information on his observations and recommendations arising from communications”.<sup>9</sup> In a 1998 report to the UN, the Special Rapporteur

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<sup>6</sup> *Filartiga v Pena* 630 F.2d 876 (1980) U.S. Circuit Court of Appeals, 2<sup>nd</sup> Circuit.

<sup>7</sup> UN General Assembly Resolution 2200 (XXI), December 15, 1966, entered into force, March 23, 1976.

<sup>8</sup> Report of the Special Rapporteur, “Promotion and Protection of the right to freedom of opinion and expression”, February 9, 1997, UN Doc. E/CN.4/1997/31.

<sup>9</sup> Resolution 1997/27, April 11, 1997.

elaborated his position on the issue, arguing that the right to information includes the right to access State information:

(T)he right to seek, receive, and impart information imposes a positive obligation on States to ensure access to information, particularly with regard to information held by Government in all types of storage and retrieval systems[.]<sup>10</sup>

A year later, the Special Rapporteur was joined by his two regional counterparts – the Representative on Freedom of the Media of the Organization for Security and Cooperation in Europe, and the Special Rapporteur on Freedom of Expression of the Organization of American States – in a Joint Declaration calling for legal recognition of the right to information access. Their call was most recently reiterated in a 2004 Joint Declaration:

The right to access information held by public authorities is a fundamental human right which should be given effect at the national level through comprehensive legislation (for example Freedom of Information Acts) based on the principle of maximum disclosure, establishing a presumption that all information is accessible subject only to a narrow system of exceptions.<sup>11</sup>

The right to access information has been recognized as an essential human right by regional bodies throughout the world. The Inter-American Commission on Human Rights, which approved the ‘Inter-American Declaration of Principles on Freedom of Expression’ in October 2000, recognized a right to access information held by the State as constituting not only an aspect of freedom of expression but also as a fundamental right of its

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<sup>10</sup> Report of the Special Rapporteur, “Promotion and protection of the right to freedom of opinion and expression”, Jan. 28, 1998, UN Doc. E/Cn.4/1998/40, paragraph 14.

<sup>11</sup> Joint Declaration adopted on December 6, 2004.

own.<sup>12</sup> In October 2002, the African Commission on Human and People's Right adopted a 'Declaration of Principles on Freedom of Expression in Africa.' Principle IV of the Declaration states in part:

1. Public bodies hold information not for themselves but as custodians of the public good and everyone has a right to access this information, subject only to clearly defined rules established by law.
2. The right to information shall be guaranteed by law in accordance with the following principles:
  - a. Everyone has the right to access information held by public bodies.
  - b. Everyone has the right to access information held by private bodies which is necessary for the exercise or protection of any right.
  - c. Any refusal to disclose information shall be subject to appeal to an independent board and/or the courts.
  - d. Public bodies shall be required, even in the absence of a request, actively to publish important information of significant public interest.
  - e. No one shall be subject to any sanction for releasing in good faith information on wrongdoing or that which would disclose a serious threat to health, safety or the environment save where the imposition of sanction serves a legitimate interest and is necessary in a democratic society.
  - f. Secrecy laws shall be amended as necessary to comply with freedom of information principles.<sup>13</sup>

Within the European Community, the Committee of Ministers of the Council of Europe adopted Recommendation No R (2002)2 on Access to Official Documents in 2002. Principle III provides that: "Member states should guarantee the right of everyone to have access, on request, to official documents held by public authorities. This principle should apply without discrimination on any ground, including that of national origin."<sup>14</sup>Effective

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<sup>12</sup> 108<sup>th</sup> Regular Session, October 19, 2000. See Principles 3 and 4.

<sup>13</sup> Ordinary Session of the African Commission on Human and People's Rights, October 17-23 2002, Banjul, Gambia.

<sup>14</sup> Recommendation No. R (2002)2 of the Committee of Ministers of the Council of Europe to member states on access to official documents, Feb. 21, 2002.

implementation of A2I laws is regarded as a key requirement on State parties to the 2005 UN Convention on Corruption, (acceded to by Cambodia in September, 2007). Article 13 of the Convention requires that States should “(ensure) that the public has effective access to information.”<sup>15</sup>

Since 1992, A2I legislation has been passed in Azerbaijan, Belize, Chile, China, Germany, India, Indonesia Jamaica, Japan, Pakistan, Peru, Russia, South Africa, Thailand, Trinidad and Tobago, the United Kingdom, as well as in most of the former Soviet satellite states of Central and Eastern Europe. These nations join a number of other States which enacted A2I laws some time ago, such as Sweden, France, the United States, Finland, The Netherlands, Australia, South Korea and Canada. As of 2010, 85 nations have national A2I laws<sup>16</sup>, including most countries in Europe, more than half in Latin America, nineteen in Asia Pacific, five in Africa, and two in the Middle East.

Sweden’s Freedom of the Press Act, which was passed in 1766, is generally thought to be the oldest Freedom of Information Law in existence.<sup>17</sup> Following State examples, a growing number of inter-governmental and international institutions, such as the European Union, the United Nations Development Program (UNDP), the World Bank, and the Asian Development Bank (ADB), have also adopted freedom of information policies.<sup>18</sup>

## **Access To Information: General Principles**

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<sup>15</sup> UN General Assembly Resolution 58/4 Oct. 31, 2003, in force, December 14, 2005.

<sup>16</sup> “Freedom of Information powers to be expanded, Nick Clegg says”, *The Telegraph (UK)*, January 6, 2011.

<sup>17</sup> See “The Principle of Public Access”, <http://www.sweden.gov.se/5b/d/2184/a/15521>

<sup>18</sup> Toby Mendel, “Comments on the Draft Law of the Republic of Indonesia: Freedom to Obtain Public Information”, published by the World Bank, January 2008.

In his 2000 Annual Report to the UN Human Rights Commission, the UN Special Rapporteur called on all States to revise their domestic laws to give effect to the right of information, and directed attention to nine important issues.<sup>19</sup> First, any A2I law must be guided by the principle of maximum disclosure. Second, public institutions should be obligated to publish and widely disseminate documents of significant public interest. Third, public bodies should promote the principles of open government and public education, including informing the public of its right to access information. Fourth, any exceptions to disclosure should be clearly and narrowly drawn. Fifth, all public bodies must establish open, accessible internal procedures and systems to ensure the public's right to receive information, rapidly and fairly. Sixth, the costs in obtaining public information should not be so high as to deter potential applicants and negate the intent of the law itself. Finally, there should be a presumption in favor of public meetings of governmental bodies, protection for whistleblowers,<sup>20</sup> and a prioritization of any A2I law over secrecy provisions in other legislation.

## **Access To Information: Exceptions And Limitations**

Under international law, restrictions on the right to information must meet the requirements set forth in Article 19(3) of the ICCPR.<sup>21</sup> These requirements can

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<sup>19</sup> Report of the Special Rapporteur, "Promotion and protection of the right to freedom of opinion and expression, UN Doc. E/CN.4/2003/63, Jan 18, 2003, paragraph 44. These nine principles have been adopted by the international human rights / free expression NGO Article 19 as the standard for best practice in A2I legislation.

<sup>20</sup> Ibid.

<sup>21</sup> Article 19 (2) states that "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." Article 19(3) states that "the exercise of the rights provided for in paragraph 2 of this article carries with it special duties and

be best applied by using a three prong test. In order to justify a refusal to disclose, a governmental body must demonstrate all of the following: a) the information pertains to a legitimate protected interest listed in the A2I law; b) disclosure of the information would threaten to cause substantial harm; and d) the said harm must outweigh the public interest in disclosing the information.

The purpose of this three prong test is to guarantee that any withholding of governmental information must only occur when it is in the overall public interest. Correct application of the test will help prevent blanket exclusions and exceptions, eliminate provisions that protect governmental bodies from public criticism or embarrassment, protect against governmental malfeasance, and prevent the concealment of information that might be detrimental to an existing government policy or political ideology.

### **Access to Information in Cambodia**

Although there is currently no specific A2I legislation in Cambodia, the Royal Government, with the encouragement and support of donor countries has recognized the need for a national access to information policy and legislative framework. Three provisions in the current Cambodian Constitution provide the constitutional underpinnings of a protected right of “timely and effective access to high quality and accurate information held by the Royal Government of Cambodia and other public institutions”.<sup>22</sup> Article 31 of the 1993

Constitution of the Kingdom of Cambodia pledges to “recognize and respect human rights as stipulated in the United Nations Charter, the Universal Declaration of Human Rights, the covenants and conventions related to human

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responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:”

rights, women's, and children's rights." Article 35 of the Constitution also gives Khmer citizens the "right to participate actively in the political, economic, social, and cultural life of the nation. Any suggestions from the people shall be given full consideration by the organs of the State." Further, under Article 41, Khmer citizens "shall have freedom of expression, press, publication, and assembly."

### ***Access to Information and the Press Law***

Article 5 of the Press Law may be the closest thing that Cambodia has to an access to information law. It recognizes the "right of access to information in government held records".<sup>23</sup> However, access can be denied on the following grounds:

- harm to national security
- harm to relations with other countries
- invasion of the privacy rights of individuals
- disclosure would lead to the exposure of confidential information and financial information
- disclosure would affect the right of a person to a fair trial
- disclosure would cause danger to public officials carrying out their duties.

Although Article 5 may satisfy two of the three prongs of the restriction of disclosure test (legitimate protected interest and substantial harm), there is no explicit consideration given to the third prong of the test, i.e., balancing these factors with the overall public interest. Article 5 does not provide for appeal once a request is denied by a governmental body. There are no provisions for

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<sup>22</sup> "Access to Information: A Clear Policy Framework for Cambodia", July 22, 2007, Draft Policy submitted to Ministry of National Assembly and Senate Relations (MoNASRI), Royal Government of Cambodia, p. 4.

<sup>23</sup> *Press Law*, Kingdom of Cambodia, adopted 1995, unofficial English translation.

an independent administrative entity, or Ombudsman which hears any appeals by applicants.

### ***Access to Information and the Archive Law***

In 2005, the Archive Law was adopted. The Law regulates the management and maintenance of official archives and outlines the rights of persons to access archives for research purposes. Unfortunately, the Law suffers from a lack of clarity. Many of its provisions are vague or confusing, which may lead to various interpretations. Article 1 for example, outlines the purposes of the Law and refers to “historical documents”<sup>24</sup> Yet, nowhere in the law is that term precisely defined. Chapter 5, Article 13 states:

Public archives which are publicized documents are permitted to be used by the public for research and consultations as unrestricted information. Other public activities shall be permitted for free research 20 years thereafter the date of the documents or thereafter the end of proceeding, or in special cases as stipulated in Article 14 of this Law.

The term “publicized documents” is never defined. This is problematic since documents which are not considered “publicized documents” cannot be accessed for 20 years after the date of creation or the end of a proceeding.

Article 14 lists categories of documents that attract longer periods of secrecy:

- 40 years thereafter the date of the documents or thereafter the end of proceedings for the documents that affect national defense, national security, and public order as well as birth certificates, notary papers, and litigations.
- Documents that affect national defense, national security, and public order shall be specified by a sub-decree.
- 120 years thereafter inception for personal documents and medical documents of each individual.

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<sup>24</sup> *Archive Law*, Kingdom of Cambodia, adopted 2005

As in the Press Law, there is no balancing test with the overall public interest. Nor is there any mention of harm or even substantial harm, which is required under the three prong test.

Potential whistleblowers are certainly not protected under the Archive Law. In fact, the penalties for violating provisions of the Article 14 are severe – a violator is subject to a fine of between 1,250 and 6,250 US dollars and imprisonment of between seven and fifteen years.

In addition to the Press law and the Archive Law, the provisions of several other statutes and sub decrees make specific reference to Access to Information. For example, Chapter VII, Article 16 of the Law on Environmental Protection and Natural Resource Management states that “(t)he Ministry of Environment, following a request from the public, shall provide information on its activities and shall encourage public participation in environmental protection and natural resource management.”<sup>25</sup>

On the local (sub national) level, Article 10 of the Sub Decree on Decentralization of Powers, Roles, and Duties to Commune / Sangkat Councils states:

A Commune/Sangkat Council shall set up a public notice board at its office. Public notice boards shall be used to write or display official notices and news and information of the Commune/Sangkat Council. An official notice shall remain on the notice board for not less than 10 days.<sup>26</sup>

Article 33 of the sub decree states:

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<sup>25</sup> *Law on Environmental Protection and Natural Resource Management*, Kingdom of Cambodia, adopted 1996, unofficial English translation.

<sup>26</sup> *Sub Decree on Decentralization of Powers, Roles, and Duties to Commune / Sangkat Councils*, Royal Government of Cambodia, Sub Decree No. 22 ANK/BK, 2002..

A Commune/Sangkat Council shall ensure to regularly inform the residents of the Commune/Sangkat of all matters within its competencies and the decisions made at the meetings of the Commune/Sangkat Council.<sup>27</sup>

However, despite these provisions in the laws and sub decrees, implementation is often inconsistent or even non existent. Unclear regulations and procedures, entangling ministerial bureaucracies, as well as a lack of staff awareness and training contribute to this problem. And, one root cause is the lack of a clearly defined, coordinated, and consistent A2I policy at all levels of government.

### ***Lack of defined institutional procedures in accessing information***

Due to the lack of a clear A2I policy, many requests are handled informally and decided on a case by case basis. According to an official from the Council of Ministers:

Cambodia has no law on the classification of such documents. If people want to get access to a document then we need to follow informal procedures. If I am not sure whether to give the document, then I will ask my boss. If he is not sure, then he will ask his boss, and so it goes until someone can decide yes or no.<sup>28</sup>

In a 2004 report to the U.N. General Assembly, the Special Representative for Human Rights in Cambodia, Peter Leuprecht outlined the difficulties in accessing governmental information:

It remains difficult to obtain access to basic information held by public authorities, given public reports, draft laws, that have been tabled in the National Assembly, government instructions and

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<sup>27</sup> Ibid.

<sup>28</sup> Daniel Adler, 'Access to Legal Information in Cambodia: Initial Steps, Future Possibilities', [2005 \(2-3\) The Journal of Information, Law and Technology \(JILT\)](http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2005_2-3/adler/).  
[http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2005\\_2-3/adler/](http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2005_2-3/adler/).

circulars, all of which are often treated as if they were confidential. Civil society groups face considerable problems in accessing information that is in the public interest, as do the media, despite the latter's right to access certain information being provided for in the Press Law. The problem of accessing information is customarily overcome through personal contacts, rather than through institutionalized and transparent mechanisms. . . Access to information held by public authorities has to be provided and legislation giving citizens the right to access to such information should be enacted and implemented, thereby assisting the effort to build open government, inform public debate, and reduce corruption.<sup>29</sup>

## **Recent Developments**

Under pressure in recent years from donor countries to improve transparency and commit to a 'good governance plan' the Royal Government moved tentatively toward the establishment of an A2I law that meets international human rights standards. In 2004, the Royal Government formally acknowledged the need for an A2I law, "in order to create transparent government, reduce corruption, and promote confidence in the government by the citizens of Cambodia."<sup>30</sup> A target was set (with donor approval) to develop a clear policy framework on access to information, which would lead to an eventual drafting and adoption of a law.

### ***Access to Information Policy Paper***

After three years of public workshops and conferences involving government officials, members of civil society, local and international NGOs, as well as members of the general public, the Council of Ministers mandated the Ministry

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<sup>29</sup> Peter Leuprecht, Report of Peter Leuprecht, Special Representative of the Secretary-General for human rights in Cambodia. E/CN.4/2005/116. Geneva: UN Commission on Human Rights, December 20, 2004. Available UNHCHR:

<http://daccessdds.un.org/doc/UNDOC/GEN/G04/170/00/PDF/G0417000.pdf>.

<sup>30</sup> See "Access to Information: A Clear Policy Framework for Cambodia", July 22, 2007, Draft Policy submitted to Ministry of National Assembly and Senate Relations (MoNASRI), p. 7.

of National Assembly Senate Relations and Inspections (MoNASRI) to draft a government Policy Paper on Access to Information, which would serve as a precursor to the drafting of a national A2I law.<sup>31</sup>

The purpose of the policy paper was outlined:

The Policy Paper will set out the framework for the government's strategy on increasing access to information. It will define access to information, the role of government agencies, and other stakeholders in promoting access to government information, fundamental principles to be included in the law, time frame for its passage and designated agency responsible for the development of the draft law.<sup>32</sup>

The Policy Paper used a number of guiding principles relating to Access to Information, taking into account existing human rights instruments, current A2I laws in other States, opinions by international legal experts, and guidelines established by various international NGOs, most notably the international human rights NGO Article 19. These guidelines were similar in scope to the nine issues specified by the U.N. Special Rapporteur in his 2000 report. The Policy Paper also outlined the broad benefits of a national information policy based on international standards. It pointed out that:

. . . access to Information legislation promotes good governance and accountability, helps to educate the public about government programs and services, and encourages public participation in the society.<sup>33</sup>

### ***Determination of the Public Interest***

The Paper also proposed that in determining what is in the public interest, “officials should prioritize the need to contribute” to the following: effective decision-making and accountability; ensuring that a public body is adequately

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<sup>31</sup> Ibid.

<sup>33</sup> Ibid.

<sup>33</sup> Ibid.

discharging its functions; the effective use and oversight of public funds; debate on issues of public interest; public participation in the political process and decision-making; public safety and public health; and protection of the environment.<sup>34</sup>

### *Proposed Disclosure Exemptions in the Law*

The Paper included the following possible disclosure exemptions:

- Where disclosure would be reasonably likely to cause serious harm to national security, defense, international relations, and the national economy.
- Where disclosure would be reasonably likely to cause serious prejudice to the effective formulation, development, or delivery of government policy.
- Where disclosure would be reasonably likely to cause serious prejudice to the investigation or prosecution of a crime or the ability to conduct a fair trial, would constitute a contempt of court, is forbidden to be published by a court or tribunal or would facilitate an escape from legal custody.
- Where disclosure would constitute a breach of any relationship recognized by law.
- Where disclosure would endanger the health or safety of any natural person.
- Where disclosure would seriously prejudice the legitimate commercial or competitive position of the public institution or a third party or cause unfair gain or loss to any person or the information was obtained in confidence from a third party and it contains a trade secret protected by law; and
- Where disclosure would constitute an unreasonable invasion of privacy of a person who is not a government official or where the information is about a government official but has no relation whatsoever to their official position or duties

The three prong test would then be applied to determine whether non disclosure is justified. This means that the subject matter must fall within the above exemptions, but there must also be a showing of substantial harm, plus a

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<sup>34</sup> Ibid.

showing that non disclosure would outweigh the over all public interest in disclosure.

### ***Creation of an Information Commissioner***

The policy paper also provides for the creation of an “Information Commissioner”, who would handle any administrative appeals regarding denials of access. The Commissioner would have three roles: a) decide on administrative appeals; b) review and make recommendations about any revisions to the A2I law; and c) raise public awareness about public access to information and provide training to government employees.<sup>35</sup>

The policy paper envisions that the Commissioner would report directly to Parliament. However to ensure independence, it proposes that a National Assembly commission be responsible for managing the Commissioner’s budget, while a Senate commission “should consider the reports on investigations carried out and the discharge of their more ‘proactive’ functions under the Access to Information Law”.<sup>36</sup> However, there is no provision for judicial review, and having this presumably ‘independent’ Commissioner’s budget controlled by the legislative branch could be problematic.

### ***Current Status of Policy Paper and Possible Future Legislation***

The Draft Policy Paper on Freedom of Information was completed in late August 2007. The Draft currently sits at the Ministry of National Assembly Senate Relations (MoNASRI). To date, it has still not been forwarded to the Council of Ministers for review.<sup>37</sup>

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<sup>35</sup> Ibid.

<sup>36</sup> Ibid.

<sup>37</sup> Author interview with Mr. Dustin Roasa, Communications Advisor, US Agency for International Development (USAID), US Embassy Phnom Penh, October 7, 2008. Since this interview, the Draft

## **Access to Information in Cambodia: The CMDGs**

A practical necessity for a national A2I law relates to attainment of the Millennium Development Goals. The Royal Government of Cambodia has made achievement of the Cambodian Millennium Goals one of its national priorities in its National Strategic Development Plan (NSDP).<sup>38</sup>

The Millennium Development Goals (MDGs) are eight international development goals that all United Nations members and at least 23 international organizations have agreed to achieve by 2015. The aim of the MDGs is to encourage development by improving the social and economic environments in the world's poorest nations.

Some of these goals include eradicating severe poverty, reducing child mortality rates, fighting disease epidemics such as AIDS and tuberculosis, and developing global cooperation in development.<sup>39</sup>

As a member of the United Nations General Assembly, the Royal Government of Cambodia, while adopting the eight universal MDGs in 2003, adapted the goals to better fit the realities of the Cambodian situation. According to the latest United Nations Development Program (UNDP) report on the current

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Policy Paper has still not been forwarded to the Council of Ministers and still sits at MoNASRI as of the date of this writing (December, 2010).

<sup>38</sup> See Royal Government of Cambodia, National Strategic Development Plan, 2006-10; approved by the Council of Ministers, January 27, 2006.

<sup>39</sup> <http://www.un.org/millenniumgoals/poverty.shtml>

status of the CMDGs, several of the goals are on track for 2015, while others are either off track or slow.<sup>40</sup>

A2I legislation could serve as valuable tool to facilitate achievement of several of the CMDGs, particularly CMDG 3 (Promoting Gender Equality and Empowering Women); CMDG 4 (Reducing Child Mortality); CMDG 5 (Improving Maternal Health); CMDG 6 (Combating AIDS/HIV, Malaria and Other Diseases) and CMDG 7 (Ensuring Environmental Sustainability).

For example although there is a greater awareness among citizens about the problem of domestic violence, and a legal framework in place to combat the problem, levels of acceptance or minimization of the problem remain high, particularly in rural areas. Most domestic violence victims “do not have access to or do not seek professional or legal help.”<sup>41</sup>

Effectively implemented A2I legislation can ensure that domestic violence victims (of which the overwhelming majority are women) get access to information on where to obtain legal assistance, to learn about their rights under the Law of Domestic Violence, and to inform themselves regarding social assistance and family counseling / mediation services in their local communities.

With regards to Reducing Child Mortality and Improving Maternal Health (CMDGs 4 and 5), effectively implemented A2I legislation could help facilitate access and dissemination of information regarding proper health

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<sup>40</sup> UNDP Cambodia, “Current Status of Cambodian Millennium Development Goals (CMDG)”, draft report, September 19, 2010, available at: <http://www.un.org.kh/undp/mdgs/cambodian-mdgs/what-are-the-cambodia-millennium-development-goals>

practices, health risks, nutrition, access to medical resources and treatment, reproductive health, and medicines. Not making this type of information readily accessible to women, particularly information related to reproductive health, can also constitute a form of gender based discrimination and hinder the empowerment of women, an issue also related to CMDG 3 (See above).<sup>42</sup>

The importance of A2I also applies particularly to combating infectious diseases. A clear recent example of this was the 2003 outbreak of SARS (Severe Acute Respiratory Syndrome) in China. At first the Chinese government denied the seriousness of the outbreak and did not release information about the measures necessary to restrict it. As soon the government reversed this policy, the outbreak was brought under control.<sup>43</sup>

Another example is the HIV/AIDS pandemic. In the early years, HIV infections spread rapidly because of the lack of publicly available information about the virus and how to avoid it. Countries that had effective public information programs, have been able to reduce the rates of HIV infection. Although Cambodia has made significant progress regarding this development goal (CMDG 6), particularly with regards to HIV/AIDS, implementing an effective A2I law and policy would be beneficial in combating other diseases in which lesser progress has been achieved, such as dengue and tuberculosis.

As for CMDG 7 (Ensuring Environmental Sustainability), an A2I law could assist in providing access and dissemination of information related to community fisheries, such as the provisions of the sub decree on Community

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<sup>41</sup> Ibid.

<sup>42</sup> See also Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),

Fisheries management, and facilitating greater community participation in decision making, and in outreach and registration programs. An A2I policy can also provide information on the negative environmental impact of fuel wood consumption, as well as educate communities on the use of energy efficient and environmentally friendly cooking methods.

### **.A2I and the Cambodian Reality**

As noted above, national A2I legislation could aid in the achievement of the specific Cambodian Millennium Development Goals. But it could also further more general social, political, and economic development. This includes issues of democratic governance, public participation, promotion of economic growth and investment, the protection of traditionally disadvantaged groups, the promotion of human rights, protection of free expression, protection of the environment, and the maintenance of public security and social stability.

### **Democratic Governance**

Government officials are more likely to be held accountable to the needs of citizens if their actions are made public, as part of an A2I policy. A government, both on the national and sub national level could work more efficiently by keeping its documents and other records in order and accessible to the public.<sup>44</sup>

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<sup>43</sup> See Wenran Jiang “Hard lessons of SARS explain China’s tough policy”, *Toronto Star*, May 6, 2009.

<sup>44</sup> A recent survey found that around two-thirds of the population in 13 communes across five rural Cambodian provinces did not know the procedure and fee to register a birth certificate. The remaining third thought the processing charge was up to 10,000 riel instead of the official cost of 400 riel. The commune council could publicize the official procedure and charges to avoid confusion. See

## **Public Participation**

Citizens concerned with particular issues affecting their communities could use an A2I law to obtain policy information, particularly regarding those issues directly affecting their local communities. An A2I law would also require public meetings of decision making bodies at all levels of government, in which citizens could voice their perspectives and opinions during the policy making process.<sup>45</sup>

## **Promotion of Economic Growth and Investment**

Investors could use an A2I law to gather market information, understand business policy and more efficiently navigate the government system. In addition, the government could provide a mechanism to enable investors' access to government resources, and an accurate exchange of information could assist in better decision-making.

## **Protection of Disadvantaged Groups and Promotion of Human Rights**

Traditionally disadvantaged groups – of which women are the largest – could especially benefit from access to information, enabling their participation in decision-making processes.

Workers rights can also be greatly enhanced in a work place where critical information is available. Workers can be informed about health and safety issues, and other working conditions. They can obtain financial information

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“Information to Access to Information in Cambodia”, information booklet written by the author, in cooperation with the Advocacy and Policy Institute (API) and UNDP, August 2010, p. 5.

<sup>45</sup> A commune council in Kompong Thom province notified community members they could not grow rice next year along the Tonle Sap river. The council said the government notified them without explanation. A community meeting should take place for rice farmers, the commune council and government officials to discuss the decision and livelihood alternatives. Ibid., p. 5.

about their institution or company, which could help them in wage negotiations, or to form a workers union. Society can also benefit from boys and girls being aware of their right to an education. Awareness is likely to trigger a demand for education and ultimately result in a more highly skilled workforce.

### **Protection of Free Expression**

The Committee to Protect Journalists says, “a strong press freedom environment encourages the growth of a robust civil society, which leads to stable, sustainable democracies and healthy social, political and economic development.”<sup>46</sup> However, independent media can only thrive if protected by laws, including access to information legislation, enabling journalists to investigate and report stories without fear of reprisal or censorship.

As part of a joint declaration celebrating World Press Freedom Day on May 4, 2010, several Cambodian journalist organizations<sup>47</sup> noted that:

Access to information is a crucial element in ensuring that the Government operates in a transparent and accountable manner, and that journalists can transmit accurate information of public interest to all citizens. In addition, the Government has committed itself to the promotion of good governance as part of its rectangular strategy, and access to information is a key component of this commitment.<sup>48</sup>

### **Protection of the Environment**

An access to information law could encourage good environmental practices by the private sector, and reveal bad practices detrimental to local livelihoods and

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<sup>46</sup> Committee to Protect Journalists, [www.cpj.org/about](http://www.cpj.org/about)

<sup>47</sup> The Press Council of Cambodia (PCC); The Club of Cambodian Journalist (CCJ); and the Cambodian Centre for Independent Media (CCIM).

<sup>48</sup> “Declaration by Cambodian journalists for World Press Freedom Day,” delivered at World Press Freedom Day National Conference, Department of Media and Communications, Royal University of Phnom Penh, May 4, 2010.

the environment. For example, a lack of managerial oversight of industrial waste disposal, urban construction with no zoning laws, or wholesale logging and mining without environmental controls or community consultation could be exposed. Information and communication could foster long-term solutions between communities, businesses, environmentalists and the government.

### **Maintenance of Public Security and Combating Rumor**

Transparency encourages the national security sector to focus on state-sanctioned activities, publicly accountable to a civilian leadership and ultimately, the general population. Some groups or communities feel they are treated unfairly by the government, or by another group. An access to information law could help address the causes of conflict by allowing people to examine and participate in the decision-making process. This could contribute to reducing tensions, feelings of marginalization and exclusion from power.

Finally, having a strong access to information law reduces the danger of rumor. Rumors often occur when people are unable to get the true information. This often occurs in societies that lack transparency in public and social affairs. Rumors can have a serious negative impact and Cambodia has suffered from this in the recent past.<sup>49</sup> (See Introduction, footnote 4 above)

### **Freedom Of Information: The Hope Vs. The Reality**

Much has been written about the assumed public benefit of effective freedom of information legislation, particularly with respect to its role in promoting transparency, good governance, and public accountability. But is this

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<sup>49</sup> A beer factory in Kompong Chhnang province drilled water wells on company property. Local villagers complained their community water wells were dry as a result. The commune council held a public discussion to explore possible reasons why the residents lack water, including the shallowness of the village wells. The factory has since conducted an analysis of local water use, and could release the results to combat rumor, and build a positive relationship with the community. Ibid., p. 8.

assumption correct? Does a progressive A2I legal framework automatically provide a public or societal benefit? In a 2004 study for Harvard University's John F. Kennedy School of Government, authors Archon Fung, David Weil, Mary Graham, and Elena Fagotto make compelling arguments questioning this public benefit assumption, particularly with respect to transparency schemes.<sup>50</sup> The authors contend that an effective transparency system (which would include an A2I legal framework) must satisfy certain conditions:

[T]ransparency systems must meet two challenging conditions in order to be effective. First they must embed information into the ordinary decision-making and action processes of information users and (government) disclosers. Second the responses of both users and disclosers must automatically be congruent with policy objectives.<sup>51</sup>

The authors also contend that any analysis/critique of a transparency system should primarily focus on that system's impact on government policy, and not only on the interests of the competing interests (users and disclosers). Much of the current NGO and human rights literature on access to information focuses on the rights of the user or requester of information, and relatively little on public policy impact. Transparent governance may not always equate with effective governance.

Transparency is effective regulation only if it influences the performance of targeted organizations in the direction of a specified policy goal. Improvement in quality, scope, and use are necessary, though not sufficient, pre-conditions for effectiveness. Systems that do not keep pace with changing markets and public priorities can become counter-productive.<sup>52</sup>

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<sup>50</sup> Anson Fung, David Weil, Mary Graham, and Elena Fagotto, "The Political Economy of Transparency: What Makes Disclosure Effective?", published by the Ash Institute for Democratic Governance and Innovation, John F. Kennedy School of Government, Harvard University.

<sup>51</sup> *Ibid.*, p. 29.

<sup>52</sup> *Ibid.*, p. 29.

The authors further point out that the sheer diversity of users in a transparency scheme can be problematic. With regards to access to information, requesters can be journalists, representatives of NGO and civil society groups, or political organizations, each with their own particular agendas and contradictory interests in accessing government information. These groups may not always act in concert or with shared purpose. This is especially true in Cambodia, where many civil society/NGO groups are heavily dependent on donor aid, and are often engaged in fierce competition with each other for the donor largesse. Mere disclosure without effective follow up in making the information relevant and understandable to the public does little or nothing in the long run to effectuate progressive change in a society:

(S)imply placing information in the public domain does not mean that it will be used or used wisely. In practice information cannot be separated from its social context.<sup>53</sup>

. . . A (transparency system) has effects when the information that produces enters the calculus of (citizen) users and they consequently change their actions and when information disclosers (public officials) respond to user actions. It is effective when the discloser responses significantly advance policy aims.<sup>54</sup>

If the information informs and educates the public to such an extent that it embeds into their behavior and decision making process, it can play an important role in effectuating positive societal change. The information must have value to the citizen-users, and be relevant to their common, everyday life challenges.

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<sup>53</sup> Ibid., p. 8.

<sup>54</sup> Ibid., p. 8.

## **Conclusion: A2I and Current Challenges in Cambodia**

For any A2I legislation to be effective, the Royal Government must prioritize three principles of best practice. First there must be a policy of maximum disclosure, with as much information made available to the public as is possible.

Second, a proactive information release policy should be implemented. This would involve public institutions unilaterally releasing information to the public, and then following up by engaging and educating citizens regarding the information and its value to their lives. This would be especially useful with information related to domestic violence, environmental impact, development projects, disease control and prevention, sanitation, children's health, and women's reproductive health. In addition, even simple bits of everyday information useful to citizens, such as the costs of birth certificates or the importance of registering a marriage, could also become parts of a proactive information policy.

Third, the information should be easy to access, and obtained at little or no cost. Staff at ministries and other government bodies should be able to understand the procedures involved in releasing information, as well as be able to assist citizens with their access.

As has been noted, even in those ministries and other public bodies that have some semblance of an A2I policy, specific rules, procedures, and regulations governing public information access are often confusing, vague or even non-existent. And, even in cases where the policy procedures are clear, staff often lack the knowledge, training, and motivation to effectively implement the policies.

In addition, the often overlapping jurisdictions, mandates, laws, sub decrees and circulars among government ministries and other public bodies cause further confusion and inefficiency.

It is crucial that in drafting such a law, cross-ministerial cooperation and input is included, along with participation and input from civil society, the public, and sub national authorities. This should also be accompanied by a parallel effort at capacity building to educate government officials and employees on how to properly implement the law, and to ensure that all administrative rules, regulations, and procedures are consistent with it.

These are no easy tasks. And to be sure, there will be plenty of challenges faced in the lawmaking process. Yet despite these challenges, the long term benefits of passing such a piece of legislation clearly outweigh the challenges.

An effective A2I law can help create a new future for Cambodia—a future of more accountable, effective, and responsive government, along with a reduction in the fear, suspicion, distrust, and even disinterest that many Cambodians have toward public institutions in general. Creating a climate of openness and trust toward public institutions, can help foster a more aware, perceptive, and engaged citizenry, and with it a more peaceful and productive society.

