The Difficult Paths to a Right to Know

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The normative underpinnings of an individual right to government information (or "right to know") have proven as difficult to articulate as its technical composition has proven difficult to establish. This paper seeks to problematize the idea of a right to know as a legal check on state secrecy by looking in two places at efforts to establish one.

First, it considers the U.S., which developed the first modern access to information law and hosted an early debate on the source and extent of a right to know. The results of this debate and legal development have been a scattered and incoherent mess that satisfies no one. U.S. lawmakers and courts have identified various sources and justifications in federal law for its existence, and they have carved out specific areas where such a right exists, where it exists only as a legislated administrative law rather than an overarching constitutional one, and where it doesn't exist at all. At the same time, sub-federal state constitutions and local charters have enshrined a right to information as a constitutional means to check the secrecy of their own bureaucracies (and, to varying degrees, their legislatures and judiciaries).

This combination of pluralism and incoherence—officials located in the same city and even office building can be held to different transparency standards, based on different justifications—is representative of the limitations and varying reach of the right to know. The U.S. example demonstrates that the right to know can prove quite difficult to articulate and to serve as the basis for a pervasive and extensive check on government secrecy when put in the context of an actually existing constitutional system.

In its second part, the paper compares the U.S. example with similar efforts in other national and supranational institutions that have attempted to establish a right to know. The same contest and struggle for coherence appears elsewhere (in, for, example, the E.U., with its effort to establish supranational rights and to check secrecy in an overarching federal administration, and in Mexico, which has sought to create an extensive institutional basis for rights enforcement), especially in the effort to balance the right to know against the governing authority to withhold information.

In a final section, I want to suggest that the struggle to define and justify a right to know suggests a deeper ambivalence, as a matter of theory and practice, to a broad, affirmative informational right against the state.