

An Unhealthy Silence: Openness and the Error! Use the Home tab to apply Document name to the text that you want to appear here.

By David Banisar

“This is a time when, more than ever, governments need to be open and transparent, responsive and accountable to the people they are seeking to protect.”¹

UN Secretary-General António Guterres, April 2020

Ensuring the public’s right to information is a necessary response to the COVID-19 pandemic. Governments across the world are making difficult decisions about how to respond to the COVID-19 outbreak. Being open helps ensure public trust and accountability in the government’s actions. It also makes the public more aware of the situation and act accordingly to protect themselves and their communities. Furthermore, it enables people, scientists and other experts to scrutinise and propose improvements to these decisions; journalists and elected representatives to examine official statements and actions from a more informed perspective; and countries to share and learn from each other’s experiences.

However, instead of being open, in responding to the COVID-19 outbreak, many governments have taken measures that limit access to information held by public bodies relating to the pandemic and other crucial areas of public interest. The secrecy is everywhere: deaths, infections and lack of equipment for health care workers have been covered up and statistics manipulated, subsidies for large companies have been closed from public scrutiny, contracts for vital equipment have been given to politically-connected groups and key terms of vaccine contracts are hidden, shadowy groups have been offering science advice, and telecommunications companies and new mobile apps are collecting information on people without revealing what they are collecting and how the data is being used.

At the same time, right to information and other open government laws have been hobbled and state leaders trying to deflect criticism are claiming information about the crisis is classified. Whistleblowers and journalists have been harassed and arrested for revealing problems, accused of releasing “fake news” in the absence of government transparency.

These limitations violate international rights law’s obligations on access to information and public health. Complicating the problem is a gap in the international level is the International Health Regulations, where the default is on public secrecy between states, and a lack of guidance and recommendations on how states should make information publicly available from the World Health Organisation. While the WHO and World Health Assembly have more recently sought to address some of these gaps, much more needs to be done.

Why Access to Information is Important

The reduction in the public’s right to know about the activities of their governments is counterproductive to the effort in combating the COVID-19 outbreak – the right to information is crucial for ensuring public awareness and trust, fighting misinformation, ensuring

¹ UN, We Are All in This Together: Human Rights and COVID-19 Response and Recovery, 23 April 2020, <https://www.un.org/en/un-coronavirus-communications-team/we-are-all-together-human-rights-and-covid-19-response-and>

accountability as well as developing and monitoring implementation of public policies aimed at solving the crisis. It is crucial that the right to information is maintained during the emergency as much as possible.

When the public knows what the government is doing to address the pandemic, it builds trust, brings more awareness, and opens a dialogue with the institutions that will result in better behaviours from society. This is extraordinarily important because intrusive measures to limit free movement and association and prevent social gatherings are not be accepted unless clearly explained to the public.²

Public access to information facilitates the public's ability to evaluate and debate decision-making processes that affect their lives by encouraging informed participation and debate. Ensuring this external accountability is essential. The UN Secretary-General has said, "Authorities need to be open and transparent in their decision-making and willing to listen to and respond to criticism."³

Billions of dollars are now being committed by governments worldwide to purchase goods and services, vaccines, and to support businesses and communities. Transparency about the justification for, allocation of, and the results of this extraordinary expenditure is essential to provide oversight, ensure that it is used fairly and wisely, and to avoid corruption.

Reliable, accurate, and accessible information about the pandemic is also essential to reducing the risk of transmission of the virus especially when there is no available treatments and a lack of equipment so more of the burden of prevention is based on public response and cooperation.

It is an essential precaution against the dangers of disinformation, whether malicious or merely ill-informed. Disinformation can dangerously harm such groups even further because they do not have the necessary information to regulate their conducts accordingly. The UN Secretary General and the Director General of the WHO has warned that misinformation about the virus, equipment use, and vaccines has become an "Infodemic" which threatens to undermine the efforts against it.⁴

Openness Requirements and Gaps in International Law

The right to access to information is a fundamental component of the right to freedom of expression, as enshrined in Article 19 of the Universal Declaration of Human Rights⁵ and Article 19 of the International Covenant on Civil and Political Rights.⁶ This encompasses the right of individuals to seek, receive, and impart information. The UN Human Rights Committee

² See e.g. French, Enhancing the legitimacy of local government pandemic influenza planning through transparency and public engagement. *Public Administration Review*, 71(2), 253–264. (2011); Ölcer, S., Yilmaz-Aslan, Y. & Brzoska, P. Lay perspectives on social distancing and other official recommendations and regulations in the time of COVID-19: a qualitative study of social media posts. *BMC Public Health* 20, 963 (2020). <https://doi.org/10.1186/s12889-020-09079-5>; Ryan MJ, Giles-Vernick T, Graham JE Technologies of trust in epidemic response: openness, reflexivity and accountability during the 2014–2016 Ebola outbreak in West Africa *BMJ Global Health* 2019;4:e001272.

³ Ibid, We Are All In This Together.

⁴ WHO, Statement, Call for Action: Managing the Infodemic, 11 December 2020. <https://www.who.int/news/item/11-12-2020-call-for-action-managing-the-infodemic>

⁵ UN, Universal Declaration of Human Rights, Article 19, <https://www.un.org/en/universal-declaration-human-rights/>

⁶ Office of the High Commissioner for Human Rights (OHCHR), International Covenant on Civil and Political Rights, Article 19, <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>

in General Comment 34 has specified that states should proactively publish information of public interest and take steps to facilitate access to information held by public bodies, including by passing freedom of information legislation.⁷

International human rights law on the right to health also imposes requirements on states to ensure public access to information.⁸ Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) states that everyone has the right to “the enjoyment of the highest attainable standard of physical and mental health.”⁹ The UN Committee on Economic, Social and Cultural Rights declared in General Comment No 14 that the right to health is “closely related to and dependent upon the realization of other human rights ... [including] ... access to information,” which it considers as addressing “integral components of the right to health.” States are obliged to “provide education and access to information concerning the main health problems in the community, including methods of preventing and controlling them.”¹⁰ The Committee noted in a footnote that “This general comment gives particular emphasis to access to information because of the special importance of this issue in relation to health.” The UN Special Rapporteur on the Right to Health has found that states have an obligation to inform the public in public health emergencies that “an effective emergency response system requires the public to be provided with useful, timely, truthful, consistent and appropriate information promptly throughout.”¹¹

Experts from the UN, the Inter-American Commission for Human Rights (IACHR), and the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media have also stressed the importance of the relationship between the two, stating that: “Human health depends not only on readily accessible health care. It also depends on access to accurate information about the nature of the threats and the means to protect oneself, one’s family, and one’s community.”¹² The UN Special Rapporteur for Freedom of expression says “In certain circumstances, information saves lives... censorship can kill, by design or by negligence.”¹³

However, a significant transparency gap still remains in the leading agreements on health. Under the [International Health Regulations](#), adopted in 2005, governments are required to provide information to the WHO in a crisis, without any equivalent obligation to inform their own citizens. The WHO can only make this information public if they receive the information from additional sources or consult with the Member State.¹⁴ Even after several pandemics in

⁷ UN Human Rights Committee, General comment No. 34, <https://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf>

⁸ ARTICLE 19, A healthy knowledge: Right to information and the right to health, 27 September 2012, <https://www.article19.org/resources/healthy-knowledge-right-information-right-health/>

⁹ UN, International Covenant on Economic, Social and Cultural Rights, Article 12, https://treaties.un.org/doc/Treaties/1976/01/19760103%2009-57%20PM/Ch_IV_03.pdf

¹⁰ OHCHR, Committee on Economic, Social and Cultural Rights (CESCR) general comment no. 14: The right to the highest attainable standard of health (Art. 12), 11 August 2000, <https://www.refworld.org/pdfid/4538838d0.pdf>

¹¹ UN Human Rights Council, Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover. Addendum: Mission to Japan, A/HRC/23/41/Add.3, 31 July 2013, https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A-HRC-23-41-Add3_en.pdf

¹² OHCHR, COVID-19: Governments must promote and protect access to and free flow of information during pandemic – International Experts (David Kaye, Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; Harlem Désir, OSCE Representative on Freedom of the Media; and Edison Lanza, IACHR Special Rapporteur for Freedom of Expression, 19 March 2020, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25729&LangID=E>; See also Report of the

¹³ Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Disease pandemics and the freedom of opinion and expression, A/HRC/44/49, 23 April 2020.

¹⁴ See International Health Regulations, Article 11 (3).

the last two decades, the WHO has no publicly available guidelines on what states should publish, which has led to vast discrepancies and confusion between states as they report on testing, infection and mortality rates, using different definitions and criteria for reporting.¹⁵ To say nothing of guiding states on what they reveal about their health spending. At most, the WHO Risk Communication guides give advice on good public relations techniques without giving any guidance on what should be transparent.¹⁶ This needs to be incorporated in international law. Further, the WHO's own access to information policy prohibits disclosure of information given in confidence or which "may adversely affect WHO's relations with a Member State or other intergovernmental organization" - without any consideration of the public interest and no external appeal.¹⁷ This is in stark comparison to other international obligations, such as the recently adopted Minamata Convention which requires Member States to make public information on mercury risks.¹⁸

There has been some slight progress since the pandemic began. In response to many of these concerns, the World Health Assembly in 2020 called on Member States to:

Provide the population with reliable and comprehensive information on COVID-19 and the measures taken by authorities in response to the pandemic, and take measures to counter misinformation and disinformation and as well as malicious cyber activities[.]¹⁹

In September 2020, a joint statement by WHO, UN, UNICEF, UNDP, UNESCO, UNAIDS, ITU, UN Global Pulse, and IFRC called for member states to:

develop and implement action plans to manage the infodemic by promoting the timely dissemination of accurate information, based on science and evidence, to all communities, and in particular high-risk groups; and preventing the spread, and combating, mis- and disinformation while respecting freedom of expression.²⁰

The UNGA also included a similar call in its Omnibus Resolution on COVID in September 2020, stating that it

...re-emphasizes the importance, in the context of public health, of ensuring public access to information and protecting fundamental freedoms, in accordance with the international human rights obligations of States and national legislation, recognizing therefore the important contribution of the promotion and protection of the safety of journalists in this regard, and recognizes the importance of the free flow of information and knowledge, while taking steps to counter the spread of misinformation and disinformation online and offline, including through the dissemination of accurate, clear and evidence- and science-based information, bearing in mind the right to freedom

¹⁵ For how this impacts state reporting, see P O'Malley a, J Rainford b & A Thompson, Transparency during public health emergencies: from rhetoric to reality, *Bulletin of the World Health Organization* 2009;87:614-618. doi: 10.2471/BLT.08.056689

¹⁶ WHO, Risk Communication and Community Engagement (RCCE) Action Plan Guidance COVID-19: Preparedness and response, 16 March 2020, [https://www.who.int/publications-detail/risk-communication-and-community-engagement-\(rcce\)-action-plan-guidance](https://www.who.int/publications-detail/risk-communication-and-community-engagement-(rcce)-action-plan-guidance)

¹⁷ WHO Information Disclosure Policy, March 2017. <http://www.who.int/suggestions/InfoDisclosurePolicy.pdf>

¹⁸ Minamata Convention on Mercury, Article 18.

¹⁹ World Health Assembly, COVID-19 Response, 18 May 2020, A73/CONF./1 Rev.1. https://apps.who.int/gb/ebwha/pdf_files/WHA73/A73_CONF1Rev1-en.pdf

²⁰ Managing the COVID-19 infodemic: Promoting healthy behaviours and mitigating the harm from misinformation and disinformation, 23 September 2020. <https://www.who.int/news/item/23-09-2020-managing-the-covid-19-infodemic-promoting-healthy-behaviours-and-mitigating-the-harm-from-misinformation-and-disinformation>

of opinion and expression and the freedom to seek, receive and impart information and ideas of all kinds.²¹

While these are positive steps, a further binding regulation and practical guidance are clearly needed.

The Country Response: Secrecy and Censorship

In comparison to the uplifting worlds of the UN Secretary General and the World Health Assembly and the urging of the UNGA, the situation in countries across the world have been less positive. Many countries, regions, and cities across the world have declared states of emergency or invoked extraordinary powers to reduce the transmission of the virus. Many of these measures have an impact on existing human rights obligations, including the right to information.

Since the pandemic began, many jurisdictions have had a significant gap in public knowledge as public and private bodies often have not accurately and proactively informed the public about the situation. As noted by a letter from nearly 100 civil society groups around the world: “Emerging areas of concern include health system capacity and delivery, public procurement, violations of health and safety and labour law, inequitable and ill-prepared global supply chains, unfair competition practices and market abuses, and significant violations of personal privacy rights at scale through the digital tracking of individuals.”²²

A number of countries have introduced emergency legislation that affects the public right to information.²³ These vary from waiving or extending deadlines for responses to requests to more extreme limits on the laws’ functions. In some countries, overbroad restrictions have already been suspended by the courts or regulators.²⁴

Billions have been spent on procurement of equipment, services and vaccines but many of the underlying contracts remain secret.²⁵ Numerous investigations have found money given away to politically connected and unqualified individuals and companies, fraud, and mismanagement.²⁶ A need for quick actions does not eliminate the need for quality and efficiency.

Many intergovernmental, national, and local governments have closed meetings of their councils, committees, boards, and commissions. Some limits to open-meetings requirements

²¹ UNGA Resolution 73/306, p.29.

²² CISLAC, Coalition to make whistleblowing safe during COVID-19 and beyond, 27 April 2020, <https://cislacnigeria.net/coalition-to-make-whistleblowing-safe-during-covid-19-and-beyond/>

²³ For an international survey, see Toby McIntosh, Governments delaying access to information because of pandemic, 25 March 2020, <https://eyeonglobaltransparency.net/2020/03/25/governments-delaying-access-to-information-because-of-pandemic/>; and US Congressional Research Service, Freedom of Information Act (FOIA) processing changes due to COVID-19: In brief, 27 March 2020, <https://crsreports.congress.gov/product/pdf/R/R46292>

²⁴ Brazil, Suspensa norma que restringe acesso a informações públicas, 26 March 2020, <http://www.stf.jus.br/portal/cms/verNoticiaDetalhe.asp?idConteudo=440207>; Argentina, Agencia de Acceso a la Información Pública, Resolución 70/2020, 14 April 2020, <https://www.boletinoficial.gob.ar/detalleAviso/primera/227825/20200415>

²⁵ Open Contracting Partnership, Findings and recommendations for better emergency procurement from 12 countries. <https://www.open-contracting.org/resources/action-research-lessons-covid19/>; UNODC, COVID-19 vaccines and corruption risks: preventing corruption in the manufacture, allocation and distribution of vaccines, December 2020. https://www.unodc.org/documents/corruption/COVID-19/Policy_paper_on_COVID-19_vaccines_and_corruption_risks.pdf

²⁶ See e.g. UK NAO, Investigation into government procurement during the COVID-19 pandemic, 26 November 2020. <https://www.nao.org.uk/wp-content/uploads/2020/11/Investigation-into-government-procurement-during-the-COVID-19-pandemic.pdf>

during the pandemic are unavoidable. Nonetheless, the need for accountability requires that governments maintain their open-meetings laws to the fullest possible extent during the crisis, especially because in many cases open meetings are a legal requirement for adopting deliberations. Many are now conducting virtual meetings, including public hearings. Similar problems arise for courts to ensure open justice requirements.

Those who have attempted to reveal these many problems – whistleblowers- have often faced serious retribution for their revelations. Health care workers are particularly impacted by the current crisis, with many expressing concerns about their exposure to the virus, poor planning, and the lack of adequate equipment and protections. They have been risking their careers, liberty, and often even their lives to expose mismanagement, wrongdoing, and corruption.²⁷

Recommendations

The national and international response to the pandemic has revealed a significant transparency gap between what the public in the countries need and the information provided by the bodies.

- *Member states should make available information and data to all communities about key areas including cases and results, policies and decisions taken, testing, equipment and facilities available, scientific research, budgets and expenditures, and contracts.*²⁸
- *Member states should ensure that national access to information and open meetings laws are not abrogated; public interest whistleblowers are fully protected; information collected for health purposes should not be used for other purposes; Other crucial human rights including freedom of expression, assembly and association should be fully protected.*
- *Amend the International Health Regulations to require that Member States provide comprehensive information about pandemic impacts and responses in a regular and timely manner. The WHO should issue guidance for Member States on information and data that should proactively make available.*

²⁷ See Samantha Feinstein, COVID-19: The largest attack on whistleblowers in the world, 8 April 2020, <https://whistleblower.org/blog/covid-19-the-largest-attack-on-whistleblowers-in-the-world/>

²⁸ See ARTICLE 19, **Error! Use the Home tab to apply Document name to the text that you want to appear here.** for a detailed list of data to be published. <https://www.article19.org/resources/ensuring-the-publics-right-to-know-in-the-covid-19-pandemic/>; Pria Group, Governance Statistics in the COVID-19 Era: A PRAIA CITY GROUP GUIDANCE NOTE, September 2020. <http://ine.cv/praiagroup/wp-content/uploads/2020/09/PRAIA-GROUP-Guidance-Note-Governance-Statistics-in-Covid-19-Era-FINAL.pdf>