DATA ON TAP:

Realizing Human Rights through Water Utility Reporting Laws

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The Program on Human Rights and the Global Economy (PHRGE) at Northeastern University School of Law was founded in 2005 to engage in study, promotion, implementation and constructive critique of rights-based approaches to economic development and social transformation. PHRGE supports cutting edge human rights scholarship and movement building, with particular focus on economic, social and cultural rights, and works with students to ensure that human rights perspectives will continue to be vital to future generations of scholars and advocates. This is PHRGE's eighth publication in a series on the human right to water. The other publications are: (1) The Human Right to Water: A Research Guide and Annotated Bibliography; (2) The Human Right to Water: Using Freedom of Information Laws to Understand Rising Water Rates; (3) The Human Right to Water: A Primer for Lawyers and Community Leaders; (4) A Drop in the Bucket: Water Affordability Policies in Twelve Massachusetts Communities; and (5) Disconnected: How Household Water Shutoffs in the United States During the COVID Pandemic Violate the Human Right to Water; (6) Voluntary Local Reviews and the Human Right to Water; and (7) PHRGE Briefing Paper: How Five Creative Utilities Are Assisting "Hard to Reach" Renters as Water Rates Rise. These publications are available at https://www.northeastern.edu/law/academics/institutes/phrge/publications/index.html.

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Introduction

Local water utilities' policies regarding access, pricing, payment schedules, shutoffs, and debt collection have significant impacts on the individuals and communities that these utilities serve. In recent years, a distinct legislative trend towards mandated water policy transparency has been gaining momentum across the country. Simultaneously, an international push for affordable water access has been spearheaded by the United Nations as part of its Sustainable Development Goals.

While these laws represent an important movement towards realization of the human right to water, they also work towards securing a less discussed human right: access to government-held information. This briefing paper examines U.S. initiatives to promote water policy transparency through the lens of this human right.

The Human Right to Information

At the very first session of the U.N. General Assembly in 1946, the members adopted a resolution calling for an international conference on the freedom of information, stating that "freedom of information is a fundamental human right and is the touchstone of all the freedoms to which the United Nations is consecrated."[1] The conference, held in Geneva two years later, led to the drafting of an article for inclusion in an international bill of rights which explicitly stated that "there shall be free and equal access to all sources of information both within and beyond the borders of the state."[2] That preliminary article would be edited slightly and adopted as Article 19 of the Universal Declaration of Human Rights in 1949, which outlines a right of all persons "to seek, receive and impart information and ideas through any media and regardless of frontiers."[3]

International scholarship on the nature of the right conceptualized in Article 19 has classified it as:

> [A] legal institution defined by four elements: A subjective right for any individual (1), without particular personal interest or standing (2), to compel disclosure of any information held by public authorities (3), limited only by exceptions explicitly stipulated by law and subjected to independent review (4); or, in short, an individual, positive, unconditional and justiciable right of access to official information.[4]

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[1] Michael Riegner, "Access to Information as a Human Right and Constitutional Guarantee. A Comparative Perspective." 50 *Verfassung und Recht in Übersee / Law and Politics in Africa, Asia and Latin America*, 332, 340 (2017).
[2] Draft Outline of International Bill of Rights, at 6, E/CN.4/AC.1/3 (June 4, 1947).
[3] Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. Mtg., U.N. Doc A/810 (Dec. 12, 1948).
[4] Michael Riegner, *supra* note 1, at 335.

Despite the UDHR's assurances and some scholarly interest, the right to receive information was largely ignored within international human rights law for decades. Only in 2006 did an international tribunal hold for the first time that there is a general right to access government-held information.[5] The ruling came from the Inter-American Court of Human Rights in the case of Claude Reyes and others vs. Chile, which stemmed from Chile's Foreign Investment Committee's refusal to provide environmental advocates with requested documents, without any justification offered.[6] The Court relied upon Article 13 of the American Convention on Human Rights, which provides in a near-verbatim restating of UDHR Article 19, that a human right to freedom of thought and expression includes the right to "seek, receive, and impart information and ideas of all kinds, regardless of frontiers."[7]

In 2011, the UN Human Rights Committee issued a guidance interpreting the International Covenant on Civil and Political Rights (ICCPR) affirming that a right to access information from the state was contained in paragraph two of Article 19 of the ICCPR, which contains language identical to the ACHR.[8] The guidance specifically included a call for State Parties to "proactively put in the public domain Government information of public interest" and "make every effort to ensure easy, prompt, effective and practical access to such information."[9]

Additionally, the Human Rights Committee guidance noted that Article 2 of the ICCPR had been previously interpreted by the committee to mean that all persons should receive information from the State regarding their covenant rights.[10] Just a year prior, in 2010, the UN General Assembly adopted a resolution unequivocally stating that water access is essential to the enjoyment of the right to life protected by numerous human rights instruments, including the ICCPR.[11] Thus, as water is a right protected by the ICCPR, there is a right to receive information about water policies from the state.

Currently, over 100 nations have adopted laws recognizing individual rights to government information, and over 60 nations have constitutional provisions guaranteeing a fundamental right to access such information, with large developing democracies such as India, Brazil, and South Africa among them.[12] The United States has ratified the ICCPR with no reservations related to Article 19, and as such is obligated to recognize the right to access information embodied within that section.[13]

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[5] Johnathan Klaaren, "The Human Right to Information and Transparency," in *Transparency in International Law*, ed. Andrea Bianchi and Anne Peters (Cambridge University Press, 2013), 223–38.
[6] *Id.*
[7] *Id.*
[8] U.N. Human Rights Committee, General Comment No. 34, 102nd Sess., CCPR/C/GC/34 (July 2011).
[9] *Id.* at para. 19.
[10] *Id.* at para. 18.
[11] Resolution A/RES/64/292. United Nations General Assembly, July 2010.
[12] Michael Riegner, *supra* note 1, at 337.
[13] United Nations Treaty Collection, https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&clang=_en&mtdsg_no=IV-4&src=IND#EndDec

Within the United States, the federal Freedom of Information Act passed in 1966 and subsequent state "sunshine" laws provide some general access to government-held information, but with several limitations that limit their impact. First, government is generally not obligated to affirmatively share information absent a specific request. Second, requestors can be charged for the cost of assembling and distributing the requested information, making large requests expensive. Third, the process of submitting requests can be time-consuming and complicated when seeking data from multiple sources or in different forms. Fourth, these requests are only of use when the government actually has the requested information contained in a shareable form, making laws mandating the collection of certain data essential complements to Freedom of Information acts. Finally, because such laws may be limited to public sector agencies, privatization of government services can significantly limit their reach, and special provisions may be required to extend their scope to include private utilities.[14]

The human right to information – vital to the recognition of every human's dignity and autonomy -- is more expansive. It obligates government to take positive actions to share information. It is also functionally necessary to the realization of many other human rights including the right to partake in public affairs, the rights to freedom of conscience and expression, and the right to equal protection of the law. All of these are encompassed in the ICCPR, which the U.S. ratified in 1992.

Recent Water Reporting Laws

Access to government-held information is often the only way to determine the presence of inequities and inadequacies in a government's support for human rights. Recently, pushes to increase the information collected by the government regarding racial and economic disparities have been instrumental in shining a light on areas needing improvement, including in the provision of affordable and reliable water.

Rising water costs, the Covid-19 pandemic, and the widening income gap in the U.S. have combined to spur a new legislative focus on water accessibility and affordability. Between 2010 and 2018, average monthly household water bills nationwide increased by almost 80%, with cities such as Tucson and Austin facing increases of 119% and 154%, respectively.[15] In response to CDC guidance during the pandemic, states and local governments issued moratoriums barring water utilities from terminating service for non-payment. As the moratoriums were lifted, water shut-offs returned, and utilities began collecting past-due bills accrued during the moratoriums. The effects of these policies were not felt evenly; for example, one study by the Pacific Institute found that Black households were twice as likely to have their water

[14] In 1978, the U.S. Supreme Court declined to recognize a constitutional right to government transparency under the First Amendment, relegating information access to the statutory level. *Houchins v. KQED, Inc.,* 438 U.S. 1 (1978).

[15] Nina Lakhani, Revealed: Millions of Americans can't afford water as bills rise 80% in a decade, The Guardian (June 23, 2020).

disconnected after receiving a notice than White households.[16] Amidst ongoing calls for government responses to racial inequities, some state legislatures began to introduce requirements aimed at collecting data to document the prevalence and geographic spread of service disconnections. As of February 2023, six state legislatures have considered legislation requiring data collection and public reporting by water utilities. Several of these initiatives have resulted in new laws requiring additional reporting and information-sharing with the public.

California

In 2018, California's Water Shutoff Protection Act mandated that all urban and community water systems, meaning those public water systems which supply over 200 residential connections, publish the annual number of disconnections for non-payment on their webpage. In October 2022, the California Attorney General's Office issued a legal alert informing covered systems that were not obeying the reporting requirement that they would be subject to monetary penalties. A bill introduced in 2023, SB 3, would, if passed, extend the reporting requirement to small community water systems which supply less than 200 connections.

Amendments to the California Health and Safety Code in 2019 introduced a requirement that *all* public water systems submit an electronic annual report to the State Water Resources Control Board which would include data on the number and duration of water service shut-offs for nonpayment, reconnection fees, and availability of customer assistance programs. Finally, from 2020 to 2022, the California Public Utilities Commission issued a series of decisions that require Class A investor-owned water utilities to make monthly reports on the number of payment-based disconnections and reconnections as well as the number of customers in arrears.

Illinois

The state of Illinois amended its Public Utilities Act in 2021 to mandate monthly and annual reporting by investor-owned water utilities.[17] The law, 220 ILCS 5/8-201.10, requires these utilities to make publicly available annual reports on the number of disconnections for nonpayment and reconnections, organized by zip code.[18] It also requires monthly reports on 22 data points related to customer payment and termination of services.[19] An online portal created by the Illinois Commerce Commission visualizes the reported data to show variations in the indicators between zip codes.[20] While the disclosure requirements are impressive, the law is only applicable to the nine investor-owned water utilities in the state, which serve just eight

[16] Michael Claiborne, Water Shutoff Reporting Requirements in California (and Why They Matter), Webinar hosted by River Network (Jan. 19, 2023).
[17] 220 ILL. COMP. STAT. 5/8-201.10 (2021).
[18] *Id.*
[19] *Id.*
[20] Illinois Commerce Commission, Credit, Collections, and Arrearages Reports Monthly Dashboard, https://www.icc.illinois.gov/industry-reports/credit-collections-and-arrearages-reports/monthly-dashboard .

percent of the state's water customers.[21] Public utilities, such as those maintained by municipalities, are not covered by the reporting requirements.[22]

New Jersey

In 2022, New Jersey expanded on Illinois' lead and enacted new transparency requirements for water utilities requiring monthly reporting of zip code level information on rates, shutoffs, reconnections, and liens for nonpayment.[23] Unlike Illinois and California, the New Jersey law applies to both private investor-owned utilities and public utilities of any size, making it the most expansive reporting requirement enacted in the country to date. [24]

New York

While New Jersey was successfully enacting the strongest water utility transparency measure in the nation, their neighbor New York was also attempting to enact legislation requiring publication of county-level utility affordability data. The New York bill was proposed as a response to the financial toll of the Covid-19 pandemic and was promoted as a necessary follow-up step to the lifting of the state moratorium on water shutoffs.[25] It passed both the Senate and State Assembly but was ultimately vetoed by Governor Hochul, despite the advocacy of many NGOs urging the Governor to sign the bill into law.[26]

Massachusetts

A bill modeled on New Jersey's approach was introduced in both houses of the Massachusetts state legislature in January 2023. The bill would require quarterly zip code level reporting of eleven data points from both public and private utilities.[27] The data to be reported would include the total number of customers serviced, the number of disconnections for non-payment and reconnections, the number of liens for nonpayment, and the amount of customer assistance provided as well as the number of customers denied assistance.[28] The bill has already received wide support from local and national NGOs including the Natural Resources Defense Council, Lawyers for Civil Rights, GreenRoots, Inc., the Sierra Club, and the National Consumer Law Center.

[21] 220 ILL. COMP. STAT. 5/8-201.10 (2021).
[22] *Id.*
[23] Dana DeFilippo, "New law aims to improve water, utility affordability in requiring public reporting," New Jersey Monitor (September 20, 2022).
[24] *Id.*
[25] N.Y. Senate Bill S5451C (2022).
[26] Sign-on Letter to Gov. Kathy Hochul (July 11, 2022).
[27] S. 2177, 133rd Gen. Ct., Reg. Sess. (Mass. 2023).
[28] *Id.*

Maryland

A water utility reporting bill is currently pending in Maryland, with Senate Bill 513 introduced in February 2023.[29] If enacted, the Act would require all public and private water utilities within the state to report data on fifty-five separate variables to the state Department of the Environment, to be publicized online.[30] The variables reported on would include metrics on the number of disconnections, liens, customer payment assistance programs, and reconnection costs, among others.[31]

Summary of Water Utility Data Laws

	Zip-code level?	Who is covered?	Status
California	No	Public utilities; private utilities serving over 200 households	Enacted
Illinois	Yes	Private utilities	Enacted
New Jersey	Yes	Public & Private utilities	Enacted
New York	No	Public & private utilities	Vetoed
Massachusetts	Yes	Public & Private utilities	Pending
Maryland	Yes	Public & private utilities	Pending

In addition to the legislative reporting requirements noted above, at least one state, North Carolina, included monthly utility shut-off reporting requirements in its executive orders and public service commission orders modifying its Covid-19 moratorium.[32] While this provides more aggregate level data on the total number of shut-offs for nonpayment by private utilities, the public data provides no information about the consumers who are facing this deprivation. This prevents any meaningful analysis of the disparities present in water access throughout the state. Additionally, the ad hoc, COVID-driven nature of these requirements means they are only temporary.

Conclusion

The introduction and implementation of water utility reporting laws represents an important shift towards greater recognition of the human right to access information, but there is more to be done. If the promise contained in the UDHR and ICCPR of a right to access information is to be fully realized within the United States, then governments at the federal, state, and local levels must take steps to proactively make critical information available. The enactment of more, and more robust, water utility reporting requirements will ensure that recent progress continues while at the same time further ensuring realization of the human right to water.

[29] SB0513, 2023 Leg. (Md. 2023).
[30] *Id.*
[31] *Id.*
[32] N.C. Executive Order No. 142 (2020).