



WORLD BANK GROUP

Right to Information

CASE STUDIES ON IMPLEMENTATION

Edited by Stephanie E. Trapnell

INFORMATION



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Project Leaders

Victoria Lemieux and Robert P. Beschel

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Right to Information Series

The Right to Information Series brings forward current and ongoing research on issues related to transparency and the right to information. It aims to provide a range of information on policy, practice, experience, and frontier issues related to public sector openness and transparency, including the underlying functions and outcomes of open government efforts.

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Right to Information: Case Studies on Implementation (2014), edited by Stephanie E. Trapnell

Right to Information: Requests and Appeals Data in RTI Systems (2014), by Jesse Worker with Carole Excell

Right to Information: Recent spread of RTI legislation (2014), by Toby Mendel

Right to Information: Identifying Drivers of Effectiveness in Implementation (2014), by Stephanie E. Trapnell

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Introduction to the Volume

Right to information (RTI) laws establish the right of citizens to access information about the functioning of their governments. The adoption of laws establishing the right to information (also referred to as access to information or freedom of information) has been extremely active in the past two decades. The number of countries that have passed RTI legislation has risen dramatically in the last two decades, from approximately 13 to over 95, including many countries in Eastern Europe, Asia, Latin America, and most recently, Africa and the Middle East.

Effective RTI legislation is an essential tool, empowering citizens to access information on public policy choices and decision-making processes, to understand entitlements regarding basic services, and to monitor government expenditures and performance, providing opportunities for more direct social accountability. Because a well-crafted RTI law provides citizens with the right to access government records without demonstrating any legal interest or standing, it can require a significant shift in the way state-society relationships are organized from need-to-know to right-to-know.

Right to information, as a right and a principle, entrenches the notion of transparency as part of good government. RTI systems are practical mechanisms of government administration that reflect commitment to the principle of transparency, and may serve to encourage, if not facilitate, participation and accountability. They aim to increase the transparency of government by providing regular and reliable information to the public and facilitating appropriate and relevant use of administrative information. Effective right to information systems require well-designed legal frameworks, stable institutional arrangements, and effective records and information management in order to support adequate response to public demand and to proactively disclose information of relevance to the public. Even with these components, however, no right to information system will function adequately without appropriate leadership and incentives to support its implementation. Monitoring the practices of these systems can identify whether problems are rooted in a lack of political will, or the capacity of an administration to implement the legal (or de facto) mandate for transparency. A lack of impact in transparency efforts may, in fact, be the result of flawed internal arrangements and processes that are supporting the right to information even when political support for right to information is strong.

The benefits of right to information in government have been celebrated without much systematic evidence of its effectiveness or outcomes, in part because the right to information is considered an intrinsic good, a human right that should be enjoyed by individuals regardless of its effect on economic growth or political stability. Assessment of RTI implementation—in terms of the formalization of practices, the quality and efficiency of those practices, and their effectiveness—has become of paramount importance in the last decade for policy-makers and development practitioners. But studies about how laws are being implemented are quite limited. Many countries are still focusing on developing new forms of regulation and guidance, with in-practice assessments yet to be considered and produced. The absence of information

has thwarted efforts at achieving a solid understanding of the implementation of RTI systems and these systems influence downstream development outcomes.

This volume of case studies is an attempt to better understand the factors that drive effectiveness in RTI implementation. It serves as the basis for a separate meta-analysis of these twelve country case studies that reveals recurring patterns, challenges, and resulting solutions in the implementation of RTI systems.



Implementing Right to Information

Part 1 Introduction

This first round of eight case studies was completed in 2012 under the direction of Anupama Dokeniya. Case studies were prepared examining the experience of a number of countries that have passed Right to Information (RTI) legislation within the last 15 years: Albania, India, Mexico, Moldova, Peru, Romania, Uganda, and the United Kingdom. Each country case study assesses four dimensions critical to the effective implementation of RTI legislation as follows:

1. The scope of the information that the law covers, which determines whether an RTI law can serve as the instrument of more transparent and accountable governance as envisaged by its advocates. For example, a law that leaves too many categories of information out of its purview, that does not adequately apply to all agencies impacting public welfare or using public resources, or that potentially contradicts with other regulations—like secrecy laws—will not be effective.
2. Issues related to public sector capacity and incentives, additional key functions and demands within the public sector created by RTI, entities responsible for these functions, and various organizational models for fulfilling these functions.
3. Mechanisms for appeals and effective enforcement against the denial of information (whether it be an independent commission or the judiciary); the relative independence, capacity, and scope of powers of the appeals agency, and the ease of the appeals process; and the application of sanctions in the face of unwarranted or mute refusals, providing a credible environment.
4. The capacity of civil society and media groups to apply the law to promote transparency and to monitor the application of the law, and a regulatory and political environment that enables these groups to operate effectively.

The in-depth research presented in these case studies was conducted to examine factors that promote the relative effectiveness of these four key dimensions when implementing RTI reforms, including institutional norms, political realities, and economic concerns. An analysis was conducted to determine which models have the potential to work in different contexts and what lessons can be drawn from these experiences to help countries currently in the process of setting up RTI regimes.



Implementing Right to Information A Case Study of Albania

Jolanda Trebicka and Gerti Shella



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Abbreviations and Acronyms

ACCAPP	Administrative Center for Coordination of Assistance and Public Participation
ACHR	Albanian Centre for Human Rights
AHRG	Albanian Human Rights Group
ASCS	Agency for the Support of Civil Society
ATI	access to information
BCC	Business Continuity Center
CAO	Citizens Advocacy Office
CDDI	Centre for Development and Democratization of Institutions
CEC	Central Electoral Commission
CPII	Center for Public Information Issues
CRCs	citizens' report cards
CTFI	Center for Transparency and Free Information
DCMs	Council of Ministers' decisions
EBRD	European Bank for Reconstruction and Development
EU	European Union
GDP	gross domestic product
HIDAA	High Inspectorate of Declaration and Audit of Assets
ICCPR	International Covenant on Civil and Political Rights
IPLS	Institute for Political and Legal Studies
IT	information technology
ITPA	Training Institute for Public Administration
LAN	local area network
MOES	Ministry of Education and Science
MOH	Ministry of Health
MOTPW	Ministry of Transport and Public Works
NAIS	National Agency for the Information Society,
NATO	North Atlantic Treaty Organization
NGOs	nongovernmental organizations
OECD	Organization for Economic Co-operation and Development
OSCE	Organization for Security and Cooperation in Europe
PIC	public information center
PIO	public information officer
PPA	Public Procurement Agency

RTI	right to information
SLA	service level agreement
USAID	United States Agency for International Development

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Implementing Right to Information

A Case Study of Albania

1. Introduction

There has been notable legislative and institutional progress toward securing the right to information (RTI) in Albania since it first emerged as a political issue 20 years ago, but significant weaknesses in the functioning of the system remain.¹ Requests for official information are now widely sought by various elements of society—journalists, the business community, civil society groups, and individual citizens, but access is still a challenge, and an administrative culture of secrecy and confidentiality persists.

In the past two decades, Albania has made impressive progress in developing new legislation according to international and European Union (EU) standards; it demonstrates a degree of regulation (through formal rules, as expressed by its percentile ranking in the World Bank's Doing Business database) consistent with other countries with similar gross domestic product (GDP) per capita.

However, implementation practices are below what is expected of a country at Albania's stage of development.² According to the last European Community (EC) progress report on Albania (November 2010), "proper implementation of the legal framework remains a concern...administrative capacity needs to be significantly reinforced, including filling the existing gaps, streamlining management of currently fragmented responsibilities, and ensuring proper horizontal and vertical coordination. "These gaps in the implementation and enforcement of existing laws and regulations, as observed by international partners like the EU, World Bank, Organization for Economic Co-operation and Development (OECD), and European Bank for Reconstruction and Development (EBRD), provide a partial explanation for why the country's socioeconomic development lags behind that of its neighbors.

The political instability of the past few years has not helped the situation. The government has changed several times since Law 8503 (Right to Information about Official Documents) was adopted in 1999, and each change has led to the reorganization or abolition of ministries and the redeployment or removal of senior public officials. Such instability affects the entire legal and administrative reform process and curtails the development of administrative capacity (including the setting up of systems and procedures and the training of officials) that would enable the effective application of the law as well as other reforms. This problem is accompanied by a lack of public awareness about the law at all levels of Albanian society—from the government to ordinary citizens.



Methodological Note. This case study combines a review of the legislation and secondary literature on the law (such as reports produced by national and international agencies) and interviews with public officials—including staff from the Ministry of Education and Science (MOES), Ministry of Health (MOH), and Ministry of Transport and Public Works (MOTPW); the institutions in charge with overseeing the implementation of the law; the People’s Advocate; stakeholders—civil society organizations who played a role in designing and monitoring the implementation of the law; donor representatives; members of Parliament; and experts who contributed to the development of the law.

The interviews were conducted in an effort to understand the implementation efforts and challenges since the passage of Law 8503. Detailed sector-based analyses show that implementation procedures and practices, including providing ATI through public relations, public awareness, legal rights of access, and other means, vary widely across the three central government ministries. A lack of coordination on this scale has a direct effect on citizens.

The case study assesses efforts in the three sectors in which the majority of government programs are being implemented: health, education, and transport and public works, and in the specific departments and implementing agencies that have dealings with the public, civil society, and media (especially those dealing with public information).³

2. Passage of the Law

Albania provides both constitutional and legal guarantees of the right to information. The current constitution, which became effective in November 1998,⁴ enshrined this right in Article 23. Seven months later, the People’s Assembly of Albania approved *Law 8503, the Right to Information about Official Documents*, becoming the first country in the region to adopt legislation securing RTI for citizens. Article 23/2 of the law states that “everyone has the right, in compliance with law, to get information about the activity of state organs, as well as of persons who exercise state functions.”

Efforts to establish a constitutional and legal framework for citizens to access information date back to the early 1990s⁵ during Albania’s transition from a Communist single-party system to a multi-party democratic system. In these years, citizens became free to demand freedom of expression and other rights previously suppressed. As with other political and democratic reforms undertaken during the initial stages of democratization, establishing the legal and institutional instruments to ensure citizen access to official information was an initiative of the political class who voiced a desire to support an open environment in the country.⁶ But pressures from the international community were also very important. The bureaucracy did not resist or try to block this initiative; in fact, the administration readily accepted all the legal changes proposed. RTI was something of a novelty at the time, often confused with freedom of expression.⁷

In the early period of constitutional development (1991–95), numerous drafts of the Constitution were produced, each seeking to incorporate universally accepted principles. In many cases, provisions of important international conventions were included verbatim; for example, Article 17 raises the European Convention on human rights to the level of a constitutional norm. The incorporation of RTI in the Constitution occurred in several stages throughout the 1990s. Article 8/1 of the Interim Constitution of 1991 recognized “the universally accepted norms and principles of the international law.” RTI was sanctioned for the first time by

Law 7692 (1993), which amended the Interim Constitution and abolished the old communist constitution of 1976. The name for Law No. 7692, amending Law No. 7491, is The Major Constitutional Provisions of the Republic of Albania (Fundamental Freedoms and Human Right).⁸

In response to the concerns of international community stakeholders working to support the new democratic state of Albania, the administration ratified the International Covenant on Civil and Political Rights (ICCPR) on October 4, 1991, which places an obligation on signatories to take positive steps to ensure that rights, including freedom of expression and information, are respected.⁹

Civil society was still at a nascent stage of development in the post-communist Albania of the early 1990s. Even as reforms to democratize institutions and establish instruments for protecting human rights were ongoing, civil society did not play an influential role in enshrining RTI when drafting the 1994 Constitution.¹⁰ The few established NGOs did not have the capacity to play an influential role. However, by the time of the drafting of the 1998 Constitution, a few NGO representatives were advocating for the inclusion of RTI.

The involvement of other stakeholders and interests groups was not a direct initiative of the political class, but occurred because the Organization for Security and Cooperation in Europe (OSCE) advised the Parliament to pay attention to civil society recommendations. However, only one legal expert from the Institute for Political and Legal Studies (IPLS) represented civil society on the drafting committee.¹¹ Only one consultation meeting with civil society stakeholders was organized by the Administrative Center for Coordination of Assistance and Public Participation (ACCAPP), an independent entity formed at the request of the government and sponsored by the OSCE. According to records (maintained in the archives of the People's Assembly) of the discussions held at the meeting of the Parliamentary Commission on the Preparation of the Draft Constitution, a group of NGOs presented the commission with proposals for amendments to the Constitution to strengthen the legal provisions that ensure RTI for citizens. These proposals were eventually incorporated into Article 9.¹²

These changes occurred after the civil unrest of 1997 when the ruling Socialist Party expressed its commitment to reform the entire legal system. During the first years of transition under the Democratic Party,¹³ there were several instances of the withholding of information and attacks on the media. Law 8503 was drafted quickly, in part because of international pressure on the political class to break with its communist past and to respond to the unrest of 1997. One clear indicator of the emergency nature of the process was that the draft law was prepared and introduced by one person—a co-chair of the Committee on Constitution Drafting. Because the constitutional provisions for the law already existed, the governing coalition had a good reason to put the law in place as soon as possible.¹⁴ The Albanian Parliament approved a set of information laws in July 1999, including Law 8503 itself and several others that restricted access under certain circumstances.

Even as the current constitution was enacted by referendum in 1998, many European countries, including the United Kingdom and Germany, were in the process of introducing laws on the right of access to official documents.¹⁵ Albania's Constitutional Commission (composed mainly of politicians) maintained an inclusive, open approach to international advice, and extensive consultations took place with other constitutional experts from a number of EU countries and the United States. The drafting process was also observed by the Venice Commission—an important Advisory Board of the Council of Europe. Albania, a member state of the Council of Europe, decided to elevate RTI as well as a number of human rights to constitutional rights. Article 48 (being especially relevant to the implementation of the Law on Access



to Official Documents) provides that everyone, individually or collectively, may direct requests, complaints, or comments to public bodies that are then obliged to answer within a specified time period and under conditions set by law. Thus, public bodies have a constitutional duty to reply to requests, including those seeking ATI.

In September 2004, the London advocacy group for Article 19 released a Memorandum on the Albanian Law, making several recommendations to amend Law 8503. In 2007, based on these recommendations, the Centre for Development and Democratization of Institutions (CDDI), in cooperation with the Justice Initiative of New York, started revising some aspects of the law (definitions, scope, limitations, and modalities) to present final amendments to Parliament. These proposals were made public in March 2007 during a Civil Society Forum meeting in Tirana. In July 2010, the Parliamentary Committee on Education and Public Information Devices discussed and approved two draft proposals for amending the law but left the final decision to the People's Assembly, which, for unknown reasons, never discussed or voted on them.

3. Clarity and Comprehensiveness of the Legal Environment

3.1. SCOPE OF COVERAGE

Law 8503 operationalizes Article 23/1 of the Albanian constitution, which states: *"The right to Information is guaranteed."* Further, Article 23/2 declares that, *"Everyone has the right, in compliance with law to get information about the activity of state organs, as well as of persons who exercise state functions."* Law 8503 applies to "public authorities" only;¹⁶ it does not apply to private companies that carry out public services. It covers all public authorities at the central and local levels. This is significant, because more and more privately owned companies are carrying out services formerly provided by the public sector. The term *public authorities* itself is also vague compared with terms in the legislation of other countries that either define or list *public authorities*; this is widely considered to be open to abuse. The vague and contested boundary between public and private commercial interests arguably constitutes a major shortcoming of Law 8503.

The ombudsman's¹⁷ proposal to address this shortcoming¹⁸ was not endorsed by the Council of Ministers. In 2007 the CDDI and the Justice Initiative proposed that not only public officials but also physical or legal persons who benefit from public funds and who carry out public or administrative functions (such as private companies that have concessions or monopolies in water supply, energy supply, and the like) should grant access to documents that relate to the use of public funds.

3.2. SCOPE OF EXEMPTIONS

Like all legislation addressing RTI, Law 8503 contains explicit exemptions. Information that is granted to one person may not be refused to any other person except when it consists of personal data about the person who was initially granted access. This exemption does not apply to the personal data of those exercising state functions or public services or that are preserved in an official document—as long as these data are related to the qualities requested by law or legal acts associated with the duties performed.

3.3. PROCEDURES FOR ACCESS

One shortcoming of the law is the time limits set out for public authorities to respond to a request. Public authorities must decide whether to respond to a request for information within 15 days, and if they decide to respond, information should be provided within 40 days from the admission of the request. This timeframe has posed a problem, especially for the media; journalists claim that such a delay in receiving information hinders their work; international organizations have also been critical of this timeframe. For example, an analysis of the law by the London advocacy group Article 19 states that the 15-day decision-making period is in line with international standards but “the 40-day deadline for supplying information represents an unacceptable lengthy delay to responding to applications for information and is hard to reconcile with the shorter decision-making period.”¹⁹ This timeline is also clearly inconsistent with EC Regulation 1049/2001, which specifies that 15 working days is the maximum time limit for either refusing or granting access to official information.

3.4. IMPLEMENTING RULES AND REGULATIONS

There are no common standards, regulations, or administrative guidelines followed across institutions to align their internal rules and procedures with the requirements of Law 8503; this is left to the discretion and willingness of the administration of each institution. Therefore, agencies have a degree of flexibility as to how they implement the law, such as in the appointing of information officers and assistant information officers. Some institutions have been trying to develop their own internal regulations. For instance, the MOH has developed and published guidelines on a time limit for answering or refusing requests;²⁰ the Ministry of Justice has done the same for accessing information on its Web site through the Public Information Office. The Department of Public Administration (DPA) and MOH²¹ have published some instructions on their Web sites on how to obtain information from public agencies. Overall, the effect of this lack of centralized coordination is not positive. Attempts made by the People’s Advocate²² in 2005 to draft implementing regulations defining the internal rules for information access (including procedures on how citizens can obtain information) failed because the Council of Ministers never approved it.

The United States Agency for International Development (USAID) has supported the oversight capacities of the law through direct assistance to the People’s Advocate in drafting new regulations; it has also recently supported NGOs²³ in monitoring ATI in courts. In 2010, as a result of this support, the Ministry of Justice approved the Regulation on the Relationship between the Judicial Authorities and the Public, which is based on Law 8503. All district and appeals courts must implement the regulation, which aims to regulate internal processes that guarantee public ATI on court procedures and disclosure of judicial information. The regulation distinguishes between documents subject to limited access and those subject to unlimited access—which include all court documents for which there is no legal limitation on public access.

3.5. BROADER LEGAL ENVIRONMENT

Law 8485 (December 5, 1999, the Code of Administrative Procedures)²⁴ also ensures the right to access information contained in official documents, even if the petitioner has no legitimate personal interest in the issue. In addition, the code outlines RTI²⁵ that applies only to



participants in “administrative dispute resolution proceedings” and only for documents used in the procedure in question.

This law and Law 8503 were preceded by a number of laws with specific purposes. Freedom of thought and expression is protected by the 1997 Law on the Press and the 1998 Law on Electronic Media, both passed before the current constitution was even approved. The availability of official information is ensured by Law 8502 (Establishing the State Publication Centre); the aim of this center is to make state bodies, other public administration institutions, and physical and juridical persons aware of the laws and international agreements ratified or adhered to; normative acts of the Council of Ministers and of ministers and directors of other central institutions; other important acts issued by state bodies and institutions; and relevant legal literature in order to protect their rights and interests and consolidate legal and constitutional order (article 1/3).

This is complemented by Article 29 of Law 9000 (Organization and Functioning of the Council of Ministers), which provides for the publication of all decisions taken by the institution in the *Official Gazette of the Republic of Albania*, regardless of whether their nature is normative or individual and regardless of the time and way they enter into force. The law also provides for explicit obligations on the publication of government ministers’ instructions in the *Official Gazette*.

A number of other important disclosure laws have also been adopted. Law 9049 on the Declaration and Control of Assets, Financial Obligations of Elected People and Some Public Officials stipulates that “data to be benefited from the declarations according to this law are made accessible to the public, in accordance with Law No. 8503.” Point 3 of Article 35 of Law No. 8652 on the Organization and Functioning of Local Government states that “public information in every commune and municipality is carried out in accordance with Law 8503 and rules set by the respective committee for this aim.”

There are also a number of laws that restrict public ATI. Law No. 8517 on the Protection of Personal Data (1999) allows individuals to access and correct their personal information held by public and private bodies, and is overseen by the ombudsman.

Law No. 8457 on Information Classified as State Secret regulates the creation and control of classified information. It was adopted to ensure compatibility with the standards of the North Atlantic Treaty Organization (NATO) and sets three levels of classification: top secret, secret, and confidential. Classified information can be left undisclosed for 10 years, but that period can be extended if it is believed that certain information should remain undisclosed. The law creates a Directorate for the Security of Classified Information to enforce security and safeguard rules. In May 2006, Parliament approved amendments to the law, creating a new category—*restricted*—that refers to information that if disclosed would “damage the normal state activity and the interests or effectiveness of state institutions.” Articles 294–296 of the Criminal Code penalize the release of state secrets by both officials and citizens with a penalty of up to 10 years for unauthorized release. Civil society groups and international organizations have strongly criticized these amendments.

Law No. 8839 on the Gathering, Administration, and Protection of Police Classified Information is relevant to all acts, official documents, audio-video recordings, computer-generated or stored data or documents, and/or any other material linked to police activity, specifically: public order and security, crime prevention, police organic structure and personnel, investigation techniques, and so on; and border surveillance service, public personalities, escorting, and other security protocols.

Unlike state secrets, these are considered to be professional secrets; the right to access such information is limited by law. Nevertheless, the limitations must be justified and, in the event of an appeal, the burden of proof falls upon the government.

4. Capacity

4.1. ORGANIZATIONAL ARRANGEMENTS

Law 8503 applies to all public agencies but does not provide for a single, centralized agency to coordinate the implementation of the law across agencies. A national conference organized by the People's Advocate (ombudsman) in December 2002 emphasized that, at the local and central level, functional information offices are not in place in most key institutions, nor have the institutions merged with other units.²⁶ Due to the continuing efforts of the People's Advocate to implement the law,²⁷ progress has been made across administrations, at the central and local level, to open Public Information Offices (PIOs) or public information centers (PICs) with the primary responsibility of offering information to the public.

The People's Advocate is tasked under Article 18 with overseeing Law No. 8503; the responsibilities of this office are also regulated by Law 8454 on the People's Advocate. The People's Advocate does not have the authority to order bodies to revise their decisions or to force them to answer citizen requests for information or services, but it has often reported deficiencies and violations of Law 8503 by public institutions to the People's Assembly. In cases in which citizens have addressed the ombudsman, it has asked the responsible public institution to respond directly to the citizen's request. But despite its interventions, the ombudsman seems to have had little positive impact on the implementation of the law. In 2007, the ombudsman, in cooperation with the IPLS and USAID, drafted a recommendation for approval by the Council of Ministers (Recommendation No. 177 of June 2006) to address citizen complaints. But despite pressure from the ombudsman and the USAID office, the council never passed the regulation.

4.2. BUDGET

The actual level of funds allocated to the implementation of Law 8503 has been arguably insufficient, especially in the ministries of education and health, where the need for active, ongoing communication with citizens is critical. It is difficult to accurately quantify how much has been allocated to ATI-related activities in total, whether at the central or ministry level; it is even harder to estimate at the regional (city) level. This is because of the way ministries and agencies prepare their budgets; that is, funds for ATI-relevant infrastructure and activities are allocated across programs rather than in their own category.

Because financial support comes in the form of grants from donors (for example, for training in information technology, or IT), many financial transactions related to donor contribution do not go through the treasury; it is, therefore, impossible for the treasury system to track this information. However, it seems reasonable to conclude that allocations for implementing the ATI law have increased somewhat over time: before 2004–05 there were no PIOs in place. Today they exist in all line ministries as staff positions and in organizational structures.

Law 8503 does not specifically oblige the state administration, Ministry of Finance, and/or public entities to allocate specific funds for its implementation. Still, there has been a trend



over recent years for ministries to seek and allocate funds for activities such as Web sites, conferences, workshops, public awareness campaigns, and other initiatives, to create an environment in which citizens have quicker access to more information. In 2011, for example, the MOES allocated around \$160,000 for public awareness activities; last year it spent around the same amount on the implementation of Law 8503. But an interview with the director of budgets at the Ministry of Finance revealed that the government does not prioritize these requests and the amount of funds that are allocated is relatively minor.

International donors are the major alternative sources of funding for ATI-related activities. To fulfill the development objectives of increased transparency, accountability, and ATI, donors are encouraging the implementation efforts of all the ministries and sectors involved.

The government has initiated a competitive grant of around \$500,000 for NGOs to develop projects that improve transparency, cooperation between the government and citizens, and government accountability. In the first call-for-proposals round, however, the Agency for the Support of Civil Society (ASCS)²⁸ did not support any project proposal that specifically promoted RTI in Albania (among 52 winning proposals, only one or two suggested an increase of transparency through civil society action and/or contribution).

4.3. STAFFING AND TRAINING

The number and quality of staff, their level of training, and the overall institutional capacity constitute significant challenges to the implementation of Law 8503 in Albania. In general, knowledge about the ATI law among civil servants is poor, although some supportive structures exist and some officials are trying to make more information available to the public.

At the local level, PIOs and PICs were originally established in the country's big municipalities. Different models were introduced to provide new practices of communication that would enable decentralization.²⁹ The slow rates of decentralization were reflected in a lack of transparency and poor quality of services. In general, PIOs and PICs provide information on services and departmental tasks (for example, decisions made by the municipal council) to the local media, business community, and general population. They also help citizens solve individual and collective problems, including assisting them in making requests for information and collect feedback from citizens on issues concerning community life and the quality of local government services.

At the central level, ministers prefer to use spokespersons to deliver information to the media rather than building the infrastructure and staff needed for the implementation of Law 8503. This attitude indicates a management culture that negates the equality principle of the law (that is, that the law should treat all users equally). Even in existing offices, most requests for information and complaints are handled informally through personal contacts within the public administration.³⁰

As table 1 shows, according to the interviews conducted for this study in 2010, the three ministries had different structures for enabling public ATI.

Although there are many similarities between the MOH and MOES in terms of their mission and objectives—and even the number of staff at the central and local level—table 1 shows that the MOES considers public communication important enough for the ministry to have established a separate office dedicated to handling it. By contrast, at the MOH, there is only one public communications specialist and in the Ministry of Transport and Public Works, there are two. The way these ministries are organized reflects the importance that political appointees

TABLE 1. Operational Units and Personnel Allocated to ATI Activities

Ministry	Directory	Sectors	Specialists	Total
Ministry of Education and Science	Public communication	Media and public affairs	2	6
		Publication and marketing	3	
Ministry of Health	Integration, foreign affairs, and public affairs	Integration	1	1
		External affairs		
		Public communication		
Ministry of Public Works, Transport, and Telecommunication		Public Information Office	2	2

Source: Interviews with PIOs in all three ministries.

give to public ATI. This is hardly surprising, given that the origins of the law lie in the political elite rather than pressure from the public or civil society organizations.

All ministries have a spokesperson appointed by the minister—a political appointee who handles most communications with the media and who is responsible for informing the public about a number of activities and issues. It is not clear whether or not these spokespeople were appointed as a direct result of Law 8503, but they are best understood as the voice of the minister rather than as facilitators of ATI. On the other hand, specialists, chiefs of sectors, and directors of public communication are civil service appointees approved by the DPA. Thus, there is a clear division between the functions of a spokesperson and a public communications specialist.³¹

The Albanian government has been allocating more budgetary and human resources to ICT; this is increasing ATI. Data provided by the DPA indicate that the Council of Ministers and ministries employ a total staff of 35 in public communication units and around 80 in IT departments at the director, chief of sector, and specialist levels, with each ministry employing an average of 6–7 IT staff members. The MOES is an outlier, with six staff persons dedicated to public communications.

Past surveys³² indicate that most civil servants do not consider Law 8503 relevant to their contact with citizens; only a few consider it as one of the top five laws they refer to when providing services. One reason may be that civil servants, particularly at the local level, do not have enough knowledge about the legal framework for citizen access and RTI or how it applies to their institution. For example, many public officials are unaware of the legal deadlines for answering citizen requests.

In 2002, the government decided to address this by making training on Law No. 8503 delivered by the Training Institute for Public Administration (ITPA) compulsory for every civil servant entering public administration before the end of his or her probation period. With contributions from international donors and support from the World Bank, EU, USAID, and other civil society groups, the ITPA has been organizing training courses on ATI since 2003. But even though this training is mandatory, our interviews and research suggest that most civil servants have not taken this course (only approximately 330 of 4,000 civil servants have).

Table 2 shows that a reasonable number of civil servants have attended ITPA courses, taking into account the relatively small number of relevant positions at the central and municipal



TABLE 2. ATI Courses Offered by the TIPA

2004	3 courses	72 participants
2005	3 courses	72 participants
2006	8 courses	72 participants
2008	1 course	72 participants
2009	4 courses	72 participants
Total	19 courses	332 participants

Source: Institute of Training of Public Administration.

tries examined earlier in this case study have received relatively little training. For the period 2004–09 (data for 2010 is not available), only eight members of the staff from the Ministry of Education and Science received ATI training: four from the MOH and five from the Ministry of Transport and Public Works, mainly because, while the cost of training is only US\$20 per person per day, the ITAP’s budget has been reduced over the last few years because of overall budgetary constraints, and ministries have been forced to pay for their own staff training. According to the approved ITAP strategy (2011–13), “financing of the new Training Program will be a challenge that needs to be addressed for ensuring successful delivery of the training courses. The budget funds are limited compared to the needs identified for delivery of several training courses across public administration.”

Understaffing and political appointments are hampering the implementation of the ATI law in Albania and merit is not always the basis on which civil service staff is recruited. The difficulties in civil service recruitment and staffing also affect the implementation of Law 8503. The organic law called *The Status of Civil Servants* was adopted in November 1999, but even as reforms are continued, much still remains to do before the goals of the original law are achieved. Frequent restructurings, especially in the MOES and MOH, have had a negative effect on public communication specialists. The politically motivated turnover of public employees has continued, intensifying since the formation of the new government in 2009; this has undermined the competitive recruitment procedures required under the Civil Service Law and perpetuated the politicization of the public administration.

4.4. RECORDS MANAGEMENT

Records management systems have not yet been fully developed in the line ministries. In general, the record management system is still paper-based; digitalization of records management system is in a very earlier stage of development.

The Law on Archives sets rules on how to record, retain, and conserve information in each institution. All public institutions must maintain regular registers and archives for storing documents up to a specific time period and should have an office and staff dedicated to this task. The National Archives has its own staff and facilities as well as legislation, but until now, the process of compiling and providing information has been solely paper-based. Because of the great amount of information requested, the Swiss government is now supporting the process of digitalization of the National Archives of Albania, making it necessary for standard rules regarding digital archives to be defined.

levels. Unfortunately, these capacity-building efforts have been difficult to sustain because of high staff turnover and continuous changes in both government administrations and specific ministries. But there are no available data to analyze the negative effect of these changes on training budgets and efforts.

Interestingly, one source of data that does exist—the TIPA’s own database—suggests that staff at the minis-

BOX 1. PUBLIC INFORMATION CENTER, MUNICIPALITY OF TIRANA

In 2003, the Public Information Center (PIC) was opened in the Municipality of Tirana. At the same time, the municipality issued citizen report cards (CRCs) to obtain citizen feedback on municipal services. Both the PIC and CRCs have improved the capacity of local stakeholders (Tirana citizens and NGOs) to monitor and evaluate the delivery of public services. Tirana citizens can register complaints about municipality services at the PIC, helping direct the municipal management's attention and intervention to areas of citizen concern. By helping the municipal management establish priorities for the annual municipal budget, the CRCs allow Tirana's citizens to participate in the city council's decision-making process.

The PIC has increased and improved the capacity of the municipality of Tirana to communicate with its citizens. Before its establishment, only about 300 citizens were able to contact the municipal staff; within one year that number had increased tenfold to approximately 4,000 people. The timeframe for providing information to citizens was shortened by 10–15 days (from 45 days to 30–35 days). Prior to the PIC's establishment, businesses and citizens would directly approach department staff in charge of providing licenses, certificates, and other documents, but with the new PIC structure, this contact has diminished, reducing the level of petty cash corruption.

Source: World Bank 2003.

Recently, the Council of Ministers approved a decree on the design, implementation, and operation of information systems (pursuant to paragraph 3 of article 21 of Law 10273 on Electronic Documents), which orders all institutions to provide a separate system for continuity of work (Business Continuity Center, BCC) and for information storage (backup) to provide 24-hour uninterrupted service. In addition, institutions developing new systems in the IT field must provide a system maintenance agreement (service-level agreement or SLA), as part of the investment for these systems.

4.5. INFORMATION TECHNOLOGY

Beginning in 2007, the government has taken serious steps to digitize many public services and develop an information society services system. Legislation is being prepared in line with the *acquis communautaire*.³³ The National Agency for the Information Society (NAIS), established in 2008, has been integrated into the Ministry for Innovation and Information and Communication Technology; it is responsible for information society reforms and their implementation. Other institutions in this field are the Agency for Electronic and Postal Communications, the Commissioner for Personal Data Protection, and the National Authority for Electronic Certification.

A "Cross-cutting Strategy on the Information Society 2008–13" is being developed based on European best practices that will take into account features of the Albanian economy and society. The growing use of IT is the cornerstone of a strategy to create an information society that places a special focus on the promotion of good governance through online



services—government-to-business, government-to-citizens, and government-to-government. The government portal³⁴ is highly instrumental in ensuring the implementation of this concept; it offers an access point for the three groups.

Under a Council of Ministers order, all ministries and central agencies must have branded Web sites; therefore, important public information is now available online, including strategies and sector-wide related documents. There is also now a unified standard applied across ministries about the provision of documents not published on the Internet. In some cases, specific regulations, decisions, ministerial instructions, or orders of public interest are only listed rather than made available online directly, but they must still be accessible to those wanting to obtain them. In 2006, in an effort to increase transparency and citizen scrutiny of the decision-making process, the Council of Ministers added a section to its Web site featuring council decrees published immediately after each meeting.

In addition, the needs of citizens and other information users need to be addressed. It seems that the information selected for publication on most ministry or agency Web sites is not based on any consultation with clients, public surveys, or on any assessment of information requests received by various users (citizens, media, civil society, or the business community). In other words, these agencies still need to publish more information about the activities that are of the most interest to the public.

Much has been achieved in the past three years, especially the improvement of services such as e-registration, e-licensing, e-tax, and e-procurement for the private sector and businesses. Reports prepared by the USAID, the main supporter of these IT initiatives, quote interviews in which respondents express an increased satisfaction level with the e-services.³⁵ Nevertheless, as the EU Progress Report of 2010 points out, there are shortcomings with regard to data retention, unsolicited communications, itemized billing, and conditional access.

BOX 2. THE NATIONAL ALBANIAN ARCHIVES MODERNIZATION PROJECT

The project will be implemented over a four-year period, creating infrastructure to install the Scope-Archives program with legal standards and to have international agreements in the archival realm (ISAD-G). The project will ensure that the hardware and software moves the process of digitalization forward, and that staff and users of the system will be trained. The following processes were completed in 2010:

- Installation of the local area network (LAN) for the General Directorate of Archives in two buildings;
- A database (Oracle) that includes 1.5 million records;
- Version 4.0 of Scope-__Archives, a program for inputting archival data; and
- The process of correcting inventories and the correcting and completing the cards is underway.

Source: National Archive Web site. www.albarchive.gov.al.

BOX 3. E-GOVERNMENT ASSESSMENT

The National Agency for the Information Society (NAIS) has carried out an evaluation of the existing IT infrastructure within the central administration and identified areas in need of improvement.

- Increased awareness and knowledge across the public administration about the importance of IT in information systems and for good governance.
- Improvement of IT infrastructure in the public administration.
- The creation of standard definitions aimed at increasing effectiveness and productivity and lowering operational costs.
- Increased IT capacities, human resources, and the continuous upgrading of skills.
- Appointment of dedicated staff to provide information, and making a clear distinction between the job description of PIOs and spokespeople.

The 2009 Law on Electronic Commerce needs to be amended to address the restrictions on providing information about social services that are focused on improving services through information technology. A broadband policy has not yet been developed, and investment in communication infrastructure is still poor.³⁶

4.6. MONITORING

By law, oversight of the implementation of the ATI law is tasked to the People's Advocate (the ombudsman), which reports its concerns annually to the Parliament. It does not, however, conduct systematic monitoring and evaluation of the law's implementation or the performance of institutions in making information available. Instead, it bases its facts on reports and complaints logged by citizens and organizations to which information is denied.

There is no system in place to monitor requests for information submitted to ministries and agencies (such as the number of requests received and replied to within a certain period of time). According to a public relations specialist at the MOH, there is no capacity for recording or categorizing public requests. Some officials keep records manually; while efforts are underway to introduce an electronic records and management system, it is not yet in place. Manual records are incomplete because they only cover requests handled by an individual rather than all those received by the ministry.

Interviews with officials from the MOH and MOES reveal that almost 90 percent of the requests are not of an investigative nature (such as how the budget of the ministry is being spent or if a particular type of service that was promised was delivered. Instead, people ask for basic information that is sometimes available online, such as where specific medications can be found, procedures for receiving diplomas, and deadlines for university applications.



5. Enforcement and Sanctions

5.1. APPEALS

When a request for information is refused, complaints are resolved according to the Code of Administrative Procedures, and when these are exhausted, through the courts under the Code of Civil Procedures. The right of a citizen to receive judicial review of a refusal to provide information has never been exercised. There could be several reasons for this, including (1) a lack of knowledge among citizens on RTI and on the obligations of government officials and institutions to provide the information requested; (2) the excessive time needed for administrative review; and (3) a lack of confidence in the judiciary because of its reputation for corruption and inefficiency.³⁷ The only known case of this kind is that of the Centre for Development and Democratization of the Institutions (CDDI) suing the central executive institutions for refusing to release information in violation of Law 8503. However, the CDDI lost both cases in court, one in 2005 and the other in 2009.

Long delays in responding to requests poses a problem, as previously noted, as does the lack of safeguard provisions like those for so-called whistle-blowers. Because of the length of the average judicial process and the lack of citizen confidence in the judiciary, only a few recorded court appeals for denials of ATI. In addition, systems that ensure an efficient record's maintenance and management are not well developed. Due to the lack of information and data on appeals heard by the courts for violations of RTI, and no studies or special reports on the subject, it is not possible to be more precise about the effectiveness of the appeals procedures.

The legislation governing the People's Advocate limits its powers to expressing opinions and making recommendations; it can start an investigation into a complaint presented by an entity or citizen and can recommend a criminal investigation, court action, or dismissal of officials for serious offenses, *but its decisions are not binding*.³⁸ Therefore the implementation of its recommendations depends on the agency manager's decision. Of the 325 complaints or requests that have been received by the People's Advocate, 118 cases have been addressed in favor of the citizens logging complaints.

5.2. SANCTIONS

One of the weaknesses of Law 8503 is the sanctions and compensation framework. Article 14 of Law 8503 indicates that the "sanctions applied in the case of failure to implement the law are defined according to the legislation in power for administrative offences." Provisions related to the execution of sanctions are generic. Article 17 states that "procedures...for compensation of the damage (caused by the violation of provisions of law) are regulated by law."

Sanctions applied in the case of an administrative infringement are defined by Law 7697 on Administrative Offences. The Administrative Procedures Code³⁹ defines RTI as a fundamental principle of the functioning of the Albanian public administration. If an entity denies or refuses to issue the required information, citizens have the right to sue in court and the court has the right to apply sanctions according to the legislation in effect.

There is no practice or administrative culture across Albania's institutions for applying sanctions against employees for not following general policies on public ATI. In fact, there has not been a single case in which an employee has been penalized for refusal to release information.

The law is also weak with its vague provisions stating that the Penal Code or Law 7697 on Administrative Infringements may apply in the case of violations, but it does not define the violations. Clarifying the definition of sanctions and the remuneration procedures would significantly improve the law's implementation process.

6. Compliance

Without written records, it is difficult to conduct a systematic analysis of Law 8503's implementation to determine what types of information people request or to identify issues and problems. The lack of official data is worsened by the fact that, even though some NGOs have taken steps to monitor the implementation of Law 8503, most civil society organizations have not addressed the broader issue of refusals, preferring to take their own requests up with higher authorities, the media or, in rare cases, the courts.

6.1. PROACTIVE DISCLOSURE

Although the publication of information is uneven across government ministries, several legal and sublegal acts are now published online. Until 2005, legal information—laws, decrees, or instructions—were published primarily in paper form, and there was no single source where information could be downloaded. With the support of the World Bank and EU, an electronic system for legal information was established at the State Publication Center.⁴⁰ The *Official Gazette* is now published on paper and electronically and in 2005, the government began publishing government decrees online after every meeting of the Council of Ministers, increasing transparency.

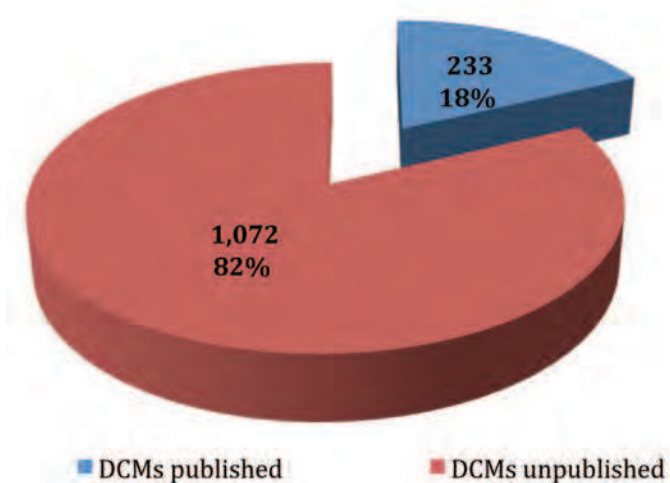
However, the information published often lacks consistency, especially with regard to secondary legislation. In 2009, the Center for Public Information Issues (CPII), supported by the Open Society Foundation in Albania, conducted a study to identify legal and administrative acts not published in the 2006, 2007, and 2008 *Official Gazettes*. The study was intended to assess the level of compliance by the two most important institutions—the Parliament and the Council of Ministers—with the legal requirements for the proactive publication of acts; it identified at least 465 decisions (both title and content) of the Council of Ministers not published in the *Official Gazette*.

In December 2010, the CPII released its second monitoring report on the three constitutional branches of power: the legislative, executive, and judiciary. The conclusions were disturbing: in 2009, 18 percent of the Council of Ministers (DCMs) issued decisions were not published in the *Official Gazette* (figure 1); only 5 out of 11 (45.4 percent) of the instructions issued by the Ministry of Public Works, Transport, and Telecommunications were published; and, according to the CPII's 2009 monitoring report, none of the administrative instructions issued by the MOH during 2006–09 were published.

Even more troubling, only 3 out of 41 instructions issued by the minister of education during 2009 were published in the *Official Gazette*; in other words, 73 percent were unpublished, according to the CPII report in 2010. Comparative data from this study (figure 2) show that this ministry rarely releases the minister's public instructions—only 7 percent were published in 2006 (93 percent unpublished), with only a little improvement in 2007. Though there was progress in 2008, when approximately half of the instructions appeared, the situation further



FIGURE 1. Publication of DCMs in the *Official Gazette*, 2009



deteriorated in 2009, illustrating how difficult it is for the public to access information—even on vital subjects like education. Businesses have faced similar problems with activities in the private education market.

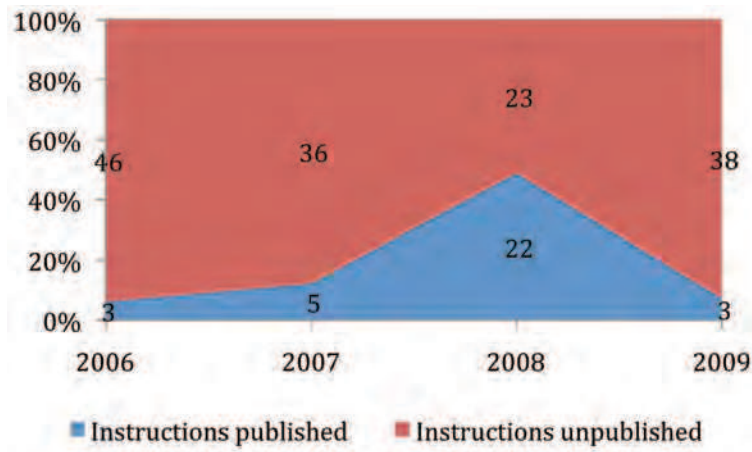
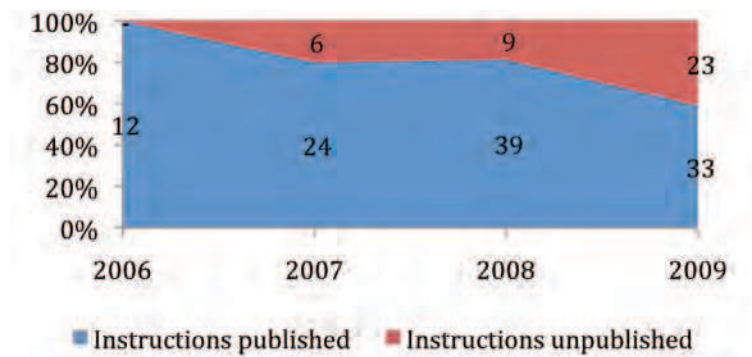
The Ministry of Finance displays a similar approach; all the instructions were published in the *Official Gazette* in 2006, but the situation has since deteriorated, year by year (figure 3). In 2009, 41 percent of instructions were un-published. According to the 2009 CPII Monitoring Report, the majority of the instructions of ministers in all 15 ministries were not published in the *Official Gazette* every year.

The publication of local government acts is even more rare. According to another study conducted by the CPII in June 2010, no municipality, except Tirana, published city council decisions on their official Web sites or in any local gazette.

Yet, there is one positive development to note. The State Publication Centre published an “extra” edition of 138 DCMs that were not published on time; this shows that pressure from civil society has a positive effect. In its 2007, 2008, and 2009 human rights reports, the U.S. State Department notes, “Most government ministries and agencies posted public information directly on their Web sites. However, businesses and citizens complained of a lack of transparency and the failure to publish regulations or legislation that should be basic public information.”

To increase the rate of publishing acts in the *Official Gazette*, the CPII recommended that the Ministry of Justice start a consultation process to consider adopting changes to Law 8502, including the introduction of online publications as a means to increase access to legislation and improve consistency across state publications as well as to avoid the delays and costs of *Official Gazette* publications. According to the CPII, the drafting process for new amendments to Law 8502 (ongoing since December 2009) is progressing satisfactorily.

Progress is also being made in areas like procurement, as observed in the 2010 EC Progress Report. Legislation was approved in January 2009 requiring contracting authorities to use electronic procurement and to publish all procurement notices and tender dossiers on the

FIGURE 2. Disclosure of the Minister of Education's Instructions to the Public**FIGURE 3.** Publication of Minister of Finance's instructions, by Year

Public Procurement Agency's (PPA's) Web site,⁴¹ a step that has improved ATI and reduced procedural costs.

In addition, information about legislation is open and published online through the State Publication Center's Web site,⁴² the use of e-governance systems is progressing, and more information is being made available to various target groups. For example:

The *business community* can access (1) the e-procurement system;⁴³ (2) the tax and customs systems;⁴⁴ and (3) the business registration system.⁴⁵

Farmers have an information system that provides prices for agricultural products—mainly fruits and vegetables—in some of the country's biggest markets, such as Tirana, Korce, and Fier. The data is processed and then uploaded onto the ministry's Web site.⁴⁶

Citizens can find information about (1) the education system;⁴⁷ (2) health services;⁴⁸ (3) labor and employment services;⁴⁹ and (4) the civil registry system.⁵⁰ Establishment of the government portal will ensure one access point for the three main categories.⁵¹



BOX 4. ACCESS TO INFORMATION AND ACCOUNTABILITY

Despite the concerns about accountability cited in various pieces of Albanian legislation, public officials who behave unprofessionally or who do not uphold their duty of serving citizens are rarely held accountable. Although there are disciplinary procedures for officials who act unethically or illegally in refusing to provide information to the public, the lack of a precedent for enforcing such measures, in addition to the absence of a clear system of appeals and a general lack of confidence in the judiciary, means that public confidence in the system of disciplining public officials is low.

There is no evidence that any public official has been disciplined for failing to comply with Law 8503, which led the People's Advocate to propose stronger disciplinary measures in 2005. In the absence of effective formal sanctions, individuals who are refused the right to obtain information by a specific agency address their concerns to the People's Advocate or report it to the media (the TV show "Fix Fare" is dedicated to investigating and reporting such cases).

Information disclosure has often been a sensitive issue which, given its negative impact on the Albanian process of European integration, has also impacted the overall political development of the country. The lack of electoral programs has become a major public concern in Albania as political parties fail to commit to transparency or to the better implementation of Law 8503. Despite pressure from the media, civil society, and international organizations, political parties fail to disclose information on campaign or party financing. Even the two main parties do not attempt to ensure open disclosure of this information. For example, G 99, a newly-emerging, left-wing political party, submitted an official request based on the provision of Law 8503 to the Central Electoral Commission (CEC) on January 28, 2010, for access to election materials (including ballots), referring to a similar case in the State of Florida in the United States during the 2005 U.S. presidential elections, but the request was rejected by the CEC.

Civil society organizations reacted to government decisions on the changes to the law on taxes immediately after they were published on the Council of Ministers' Web site. Another good example of civil society pressure on government to be more accountable to its own citizens was the reaction of the Albanian Helsinki Committee that, on February 9, 2006, sent a letter to the Speaker of the Parliament requesting her to stop approval of the government-proposed amendment on the law for access to official documents, which was to add more categories of "restricted information" to ensure "the effectiveness of government institutions," succeeding the stop approval of such amendments.

6.2. REQUESTS AND RESPONSIVENESS

Civil society groups monitor implementation, and several surveys have been conducted both at the central and local levels. The Soros foundation, EU, USAID, and other donors have financed NGOs in this area.⁵²

According to the CDDI and Citizens Advocacy Office (CAO)⁵³ surveys, many public requests for information, whether from individuals or civil society organizations, are treated carelessly and often ignored. There are numerous cases of administrative silence (that is, when the administration does not provide any response even when the time limit for providing information has been exceeded); this is more often than not motivated by political and personal interests rather than by structural weaknesses.⁵⁴

The CPII, supported by the Open Society Foundation in Albania, conducted a study to identify legislative acts not published in the *Official Gazette* since 2009.⁵⁵ Additionally, the Europartners Development Center measured the public perception of the level of ATI provided by municipalities and immovable property offices in five cities in 2009–10.⁵⁶

Although there is a lack of hard data measuring the implementation of the law, most surveys conclude that many citizens are unaware of the existence of the legal framework and most public officials (both at the central and local levels) are unwilling to implement the law. Interviews with specialists in all three ministries as well as civil society representatives support this; they suggest that usage is lower than might be expected. A CDDI survey found that 87 percent of public employees were unaware of the law's existence, and very few institutions had appointed PIOs.⁵⁷ Still, investment in IT in several areas—such as public procurement, tax services, and legislation—did improve the situation. The last human rights reports issued by the U.S. government (2009, 2010) stated that: “During the year public access to information improved greatly, in large part due to greater use of the Internet.”

Law 8503 provides that all requests to be treated equally, regardless of who is requesting the information. But it is well recognized—although there is no widespread evidence—that information is provided to journalists more freely than to ordinary citizens. But even journalists indicated during interviews that they often face difficulties in obtaining verbal or written information from government officials on specific topics during investigations of specific officials and institutions, behaviors and decisions against citizens, or the implementation of various policies or orders. This problem is also presented in a special edition of a private national television ToP Channel called “Fix Fare.”⁵⁸

Recognized as a cultural or social phenomena rather than an administrative one, personal connections are important in obtaining information from an institution quickly. Also, it is difficult for handicapped people to access information because of the lack of facilities at public institutions to ensure physical access.

Albanian legislation outlines no practice for publishing draft decisions or strategies online in order for the public to offer feedback. In the 2010 report issued by the European Commission, the EU raised concerns about this in sectors such as the environment, where information is limited and data unreliable: “Public awareness and participation in environmental decision-making and public access to environmental information remain weak.”⁵⁹

Requests were filed by the author to interview several public officials in the line ministries about fulfilling their obligations under the Stabilization and Association Process, and written requests were submitted to various departments within the line ministries as well as some subordinate agencies in order to determine the status of the implementation of specific actions. In some instances, the request was refused instantly and no information was provided (with the explanation that the officials were not allowed to provide information unless the permit was given by a minister or head of the institution), despite the fact that the request was accompanied by a “special authorization” issued by the head of the EU Delegation in Tirana, requiring all institutions to supply any information requested for this assignment.



BOX 5. INCOME AND ASSET DECLARATIONS

The High Inspectorate of Declaration and Audit of Assets (HIDAA) was created in 2003 to help reduce corruption in Albania's public sector. It audits all public officials and conducts investigations into conflicts of interest. Meanwhile, the Center for Transparency and Free Information (CTFI)—an NGO—monitors the activity and functioning of the HIDAA, particularly the level of transparency and the quality of information provided by the institution to the public, media, and other stakeholders. According to CTFI reports, the HIDAA has answered all submitted information requests in a “very satisfactory” manner. Until recently, the information was released based on some tariffs paid by those receiving the information. This practice has since been definitively abolished and the release of information is now free of charge. While the HIDAA's goal is to promote transparency, Law No. 9887 on the Protection of Personal Data, exercised by the new Commissioner for Personal Data Protection (created in 2008), defines the rules and procedures for the protection and treatment of personal data.

On February 5, 2010, the Inspector General of the HIDAA, and the Commissioner for Personal Data Protection signed a memorandum of understanding to formally establish ways the two institutions would collaborate. According to the CTFI, the legal restriction to release all information processed by the HIDAA has not decreased either the quality or the quantity of transparency regarding the declaration of assets administered by this institution. Progress has also been made in establishing PIOs/PICs at the central and local levels.

Source: Center for Transparency and Free Information.

7. Conclusion

The transition process to democracy, and subsequently, the processes of NATO and EU integration, created incentives for the political class and the bureaucracy in Albania to demonstrate a commitment to openness. But the implementation of the ATI framework has faced a number of challenges including a culture of secrecy and disincentives created by vested interests to hampering proper implementation of the ATI.

7.1. STAKEHOLDER ANALYSIS

Freedom of information and transparency were championed by the ruling coalition in both its programs following the 2005⁶⁰ and 2009⁶¹ elections. The establishment of the public information centers and the application of information technology for active communication by the public with the central institution of the government has been highlighted since the 2005 program. However, months after taking the government, the Prime Minister issued an order placing the obligation to release information to the public on the administration only if the permission was issued by the head of the institution, a minister, or an agency director. This order was opposed by civil society and the international community. In October 2006, Parliament, through a press statement of the Director of Public Affairs, announced that live transmissions of the development of the plenary sessions of the People's Assembly of Albania

were not permitted for private media. The Albanian Helsinki Committee (AHC) reacted against this decision as a violation of the right to ATI and called on Parliament to urgently restore the violated right to obtain information and to keep it transparent, not obscuring it with the drafting or adoption of formal procedures or administrative orders.

Despite problems in ensuring easy and open public ATI, adoption of the access laws have provided an opportunity to other stakeholders, particularly civil society and the business community, to participate and—to a certain extent—influence the policymaking process in Albania. It has also provided more opportunities to media to play its important investigative role in fostering further public debates on different issues of public interest.

The influence of civil society on the policymaking process is occurring in different forms, such as establishment of sectoral working groups that also regularly support the preparation and implementation of a given strategy⁶² or in the development and implementation of national strategies⁶³ or laws.⁶⁴ Recent experience shows that the legislative process is more effective when remarks and suggestions from public-private-civic consultations are adequately reflected in laws or other strategic documents. There were a series of public consultations for reviewing the draft National Strategy for Development and Integration (NSDI) from 2007 to 2013; during October–November 2007, serious remarks were addressed on several parts of the draft strategy. The government, in response to stakeholder demands to improve the document, withdrew the draft from the Council of Minister's meeting agenda.⁶⁵

The use of access laws and the right to access information from the government, the judiciary, and Parliament has frequently been used by civil society organizations to put pressure on government agencies, justice institutions, and Parliament to be more transparent.⁶⁶

Importance of public ATI related to EU integration process in Albania. Programming and implementation of the National Plan for Integration, Stabilization and Association Agreement (or NPISAA) is primarily a responsibility of Albanian stakeholders—the executive, legislative, and judicial branches of power. However, close cooperation with civil society and various interest groups is crucial for framing the approximation efforts into a sound process. This cooperation, followed by an intensive consultation and brainstorming process with relevant actors, is particularly important in the framework of approximating domestic legislation with the *acquis communautaire*. Increased access to strategic information related to policy development and participation of civil society, private actors, and other stakeholders into the policy development process contributes to the increasing quality of government strategies.

This level of advancement in the role of civil society and the influence of other nonpolitical actors (such as the business sector, media, and interest groups) on political processes as well as on the EU integration process continue to be factors for success. In fact, since the signature of the SAA and the entry into force of the Interim Agreement, not only are Albanian civic and private actors attempting to actively influence policy and decision-making processes, but they have often appeared very determined to criticize and influence EU-originating processes as well.⁶⁷

The role of civil society in lobbying for adopting or rejecting legal changes to the ATI framework has been also important; an example of this is the recommendations made to the government in 2008 to amend the Law No. 8503, For the Right to Information on Official Documents⁶⁸ in order to address deficiencies identified with its implementation; another example is when civil society took a critical position with regard to proposed amendments to Law No. 8457 of February 11, 1999 on Information Classified as a "State Secret."⁶⁹



Another important stakeholder is the business community. It has both benefited from the implementation of RTI and the access legal framework and at the same time used the right to pressure the government or Parliament when their interests are put at risk due to decisions that have been taken or are to be taken by the government. ATI related to conditions to be fulfilled by Albania in the framework of the Interim Agreement⁷⁰ have been important in making the business community aware of the competition they must face while the Albanian market is integrated into EU market. Although representatives of some economic sectors were actively consulted by the Albanian negotiating team, the general reaction of the business community has been one of concern and apprehension. Representatives of the business community are becoming increasingly involved in this process and they exert increased pressure on the government or show support according to their particular interests.⁷¹ There are two main institutionalized forums for consultation with business and other social groups: the Business Advisory Council, set up by the Ministry of Economy, which discusses all draft legislation affecting business (including regulatory reforms), and the National Labor Committee, which brings together representatives of the government, employers, and employees to discuss a wide range of social and economic issues. The former appears to be far more effective than the latter.

Recently, progress has been made regarding the introduction of ATI norms on private business activities. The World Bank *Doing Business 2010* report ranks Albania among 37 countries that stand out for having the strictest rules on disclosure of related party transactions as part of investor protection reforms in 2009.⁷²

Interviews with Albanian Construction Association representatives highlight that use of the ICT for enhancing public ATI has been important for establishing formal norms and practices that contribute toward increasing transparency on government information of interest to the business community while decreasing the power of official discretion for provision of information to the public. They confirm that information published in the Web site of the Ministry of Transport and Public Works, which is regularly updated, provides an opportunity for this businesses in this category to access on-time information related to investments projects that will be subject to upcoming bids. Additionally, the information published by the PPA through an e-procurement system is another avenue for the business community to get easy access to details on procedures, timing documents, and the like. Despite such progress, the use of ATI to increase the transparency of the government procurement process still must be improved in order to contribute to a further reduction in corruption.⁷³

Media is one of the most important information consumers; therefore, an ATI regime impacts the activity and quality of media of a country. The Albanian media currently, faces many challenges in fulfilling its mission of informing the public.⁷⁴

There are a number of structural barriers (Fuga 2010) that put limits on the quality and volume of information published, particularly those that are broadcast. A society that is highly dominated by politics is reflected in a media that is structured according to its political influences. Editorial pages have become more selective with facts based on political influences rather than by its relevance to the news and information of public interest.

During the election campaigns, the average citizen could easily classify the media according to political orientations. Public elections are a time when ordinary citizens have the opportunity to choose and to be informed about the platforms of various political parties and different candidates. As the fourth power, the role of media in informing the public and reviewing the activities of political parties is crucial for providing the public with balanced opinions

and information free from political influence. All of the organs of the print and electronic media should be fair and balanced so that all citizens have the opportunity to decide for themselves for whom they should vote. Having direct access to public activities is important for an independent media. Tapes recorded by the political parties that are broadcasted on television should include the clear statement that the information is prepared by the given political party and should be treated as a political material. This could help viewers differentiate between journalism and political propaganda.

The quality of information offered by the media is also related to the information offered by the government. Press conferences held by spokespersons of state institutions or political parties are held frequently and have become routine, becoming one of the main means of direct communication with the media and public at large. However, the Albanian experience shows that this important communication tool is not adequately considered as an event to direct contact of public institutions with the public at large with the scope to inform, explain, deny, or oppose a particular issue; rather it is more often used as a tool to negatively react or reject published facts, especially in cases where the head of the institution is affected.⁷⁵ Many press conferences do not fulfill their primary directive: to communicate with the public for the sake of transparency as a constitutional obligation; instead, they are often transformed into simple tools to show the work, to cover gaps, to respond to unfair accusations, and so on.

Despite a difficult and often unsupportive environment, investigative journalism is quickly developing in Albania. Investigative reporting permits members of the public to access a wide range of information; in turn, this allows for the necessary public debate of issues that affect the public. Investigative media—as opposed to media that always publish information approved for publication by the government—does not limit the publication of news and information of government interest, but it fulfills the goal of providing information that is in the public interest. There has been more written and television media coverage about cases of “office abuse,” corruption, and conflict of interest issues. Several cases have been presented to the public through the media, including the 2011 tendering scandal that led to the resignation of the Deputy Prime Minister. The resignation was also the result of pressure by the civil society after the scandal was made public.

7.2. FORMAL INSTITUTIONS AND INFORMAL NORMS

The decision-making process is highly centralized in Albania,⁷⁶ the delegation of power is not at a level that could contribute to further empowerment and accountability, and responsiveness towards the public. Despite the progress made so far, the government rules of procedures for ensuring full access of interested parties or civil society to the policy drafting process are not yet adequately developed.

No guidance has been provided to line ministries about how to create a participatory and consultation process, leaving its development to the discretion of each ministry on *ad hoc* basis. However, good examples exist nonetheless. As mentioned above, NSDI development was based on a consultation process at the sector and central levels. Town planning is also an open process. A good example of this is the initiative in Tirana Municipality to inform citizens about the master plan for the development of the city by making it accessible to the public through the municipality Web site⁷⁷ and by placing the architectural model in the main square of the city in a closed but transparent area, allowing citizens to see how the new center of the city will look.



At the center of government there are effective arrangements for communicating with the media and the public, including inter-ministry coordination. The Prime Minister's office has the capacity to disseminate the information to the public, organize press conferences with media, and liaison with both international and national media. The government Web site is regularly updated. The Integrated Planning System is a set of operating principles to ensure that government policy planning and monitoring as a whole takes place in the most efficient and harmonized way possible. IPS is the key national decision-making mechanism for determining strategic directions and allocation of resources. In order to better communicate IPS to all stakeholders, the Department for Strategic and Donors Coordination has published the Integrated Planning System Communication Guidelines 2010–2013⁷⁸ to provide guidelines for various stakeholders to work together harmoniously and to exchange information and knowledge on IPS processes, implementation, and accomplishments. Another new mechanism for transparency and ATI related to foreign assistance that was developed at the central government is the Donors Database, a joint effort of the donor community and government institutions. The database provides up-to-date information on all donor assistance provided to Albania, including information on the projects by specific sectors and financial data. The database is intended to increase coordination and reduce overlap among donors and to better orient external assistance to the country's needs, strategic priorities, and sectors.⁷⁹ Its publication on the government Web site provides open access to interested groups or citizens who would like to know more about foreign-financed projects in Albania.

While progress has been made to employ different mechanisms at the central level for ATI, the capacities in the line ministries still remain weak. There is no systematic process for developing a communications plan for each sector.

There are no comprehensive data on the total funds or budget allocations for the implementation of ATI at the government level. The strategy for e-government includes some data about the domestic budget and the donors fund committed for implementation of the e-government systems and investments in ICT, but these data are only for 2008–09. The budget planning process is decentralized at the ministry level, with the MEF providing the budget ceilings. Therefore, each line ministry and budgetary institution is responsible for specifying the ATI-related products, activities, and their related costs during the preparation of the Medium Term Budget Program (MTBP). The MTBP provides a mechanism that enables monitoring of commitment levels as well as the achievement of objectives for each ministry in implementing their own programs, including ATI and ITC systems. Although the budget planning is left to the line ministries, scarce budget resources provide a constraint to effective implementation of the ATI. All interviews in the line ministries confirm that ATI is not among the top priorities of the budget organizations; therefore, under competing priorities, budget allocations to such process are always limited. The e-government strategy is a good tool for ensuring that line ministries allocate sufficient resources for its implementation.

Despite the formal norms requiring the implementation of the right to ATI, informal norms contribute to its poor implementation, including the high degree of centralization with which the law is handled in the bureaucracy, a lack of awareness among citizens of their rights, and the pervasiveness of petty corruption in the relationships between bureaucrats and citizens. Although Law 8503 specifies a formal procedure for requesting information and deciding on requests, long-standing bureaucratic mentalities and practices favoring centralization of decision-making still persist. Requests from citizens are routinely channeled through the Minister or

Agency Head who then delegate the drafting of a response to the relevant departments based on the subject matter and nature of the reply. All interviews conducted for this case study confirmed two elements that are negatively impacting the outcomes of ATI laws: (1) decision-making on the release of information is quite centralized in the public service and as such, certain information can barely be accessed by beneficiaries and; (2) citizen tend to approach the heads of institutions directly because they only feel confident in the answer comes from this level.

But even in cases when information is submitted to the head of institution, information is denied or resistance is shown to release it. Civil society monitoring of the fulfillment of obligations in the framework of the SAA process began in 2008 with monitoring reports prepared by various representatives from civil society and supported by OSFA. The reports are also a good source of information for the commission structures to get independent opinions on progress made in various sectors, with emphasis on democracy and good governance.⁸⁰ However, the report emphasizes that the team who collected the information and conducted interviews faced difficulty in obtaining information from some public agencies, including the Ministry of European Integration. Another example provided during the interviews involved government debt toward a considerable number of construction companies that have paved national roads. The companies have not been reimbursed for certain services. In these circumstances, the Construction Association has made several attempts to obtain information on the debts, but they have not been able to obtain an accurate figure on the debt or the time when they can receive the money owed.

The behavior of officials in their direct interactions with citizens is often described as “not according to the ethical norms,”⁸¹ but rather based on “individual education or approach.” Different opinions are expressed regarding the behavior of officials working in private institutions like the banking system. According to interviews, the behavior of officials working at front desks or information points in private companies and institutions is more led by formal norms for the release of information and by ethical rules than is the public sector.

Even citizens who are aware of the law identify a range of problems with the way in which it is implemented. Interviews and contact surveys conducted by the CAO and municipal governments (for example, in the cities of Korca and Shkodra in 2004) indicated problems that include delays in answering requests, the need to wait in lines for hours, the lack of professionalism and poor ethical standards in communicating with and handling the needs of citizens, a lack of explanatory notices and orientation information, tardiness and absenteeism from work, irresponsibility, and disrespect for the law, among others. A survey conducted by EuroPartners Development⁸² in the same cities in 2010 determined that the same problems persisted, albeit with some slight improvements.

Difficulties in accessing information and the lack of proper structures for doing so, have historically been sources of petty corruption in Albania, and in some agencies that deal directly with the public, bribing officials in order to obtain a service or important information remains a problem. Lack of awareness of their rights to be provided with information on request has arguably contributed to citizens continuing to pay bribes without being explicitly asked for a “hidden payment” because they anticipate that doing so will allow them access to information that would otherwise be unavailable (this is often identified in citizen interactions with the courts, immovable property registration offices, and offices issuing permits).

A general conclusion related to implementation of the ATI and RTI in Albania is that good progress has been made in developing the legislation and institutional framework supporting



the implementation but the public information regime in place continues to have significant problems in its functioning. The reasons for this include problems with infrastructure, lack of sufficient political will expressed in the weakness of administrative capacity, and autocratic tendencies inherited from the administration; it is also conditioned by the shortcomings of the legal framework for RTI that has remained unchanged since 1999.

Albania has made progress in recent years in the establishment of an institutional framework and development of tools and mechanisms that ensure public ATI offices. The People's Advocate in the role of the ombudsman oversees the implementation of the law, but its capacities and power must be enhanced.

Political commitment to the implementation of ATI has increased during the years of the transition process, also imposed by requirements resulting from the of EU integration process. However, the centralized decision-making process and a lack of power delegation could undermine the proper implementation of the ATI framework.

Public Information Offices are established in different institutions at the central and local levels, and staff is in place to offer services to the public. Several training and capacity-building programs have been carried out within the administration, but there is still a concern about the weak capacities of the public administration to ensure proper implementation of the ATI regime. Ethical behavior and equal treatment remains a concern in the public sector compared with the most developed entities in the private sector.

Good practices are developed to ensure civil society and business participation into the decision-making process, but this process must be institutionalized to ensure sustainability and implementation across the public administration, and to avoid the use of discretion or consultation only on an *ad hoc* basis.

7.3. RECOMMENDATIONS

Albania is making progress building an information society and using ICT advantages for enhancing public ATI and transparency. However, low rates of using the Internet at the country level will slow the impact produced by use of the ICT in different sectors. Public Private Partnership initiatives could be developed for building proper IT infrastructure across the country.

The following steps must be undertaken to enhance the ATI:

Improvements to the law on the right of information to official documents. This remains the primary need. The law must be in compliance with the *acquis communautaire*. Possible changes to the law include:

- Widening the circle of entities that are obliged to provide information, including: natural or legal persons who serve public or administrative functions (for example, private companies that have monopolies or concessions for the water supply or electricity) and legal entities operating entirely or partially with public funds (for example, companies that are in the ownership or control of the state or profit or nonprofit companies owned by private persons that are subsidized by the state to a considerable extent);
- Adding exclusive criteria that provide an exhaustive list of criteria for withholding information;

- Reviewing deadlines for providing information and changing the term “working days” to “calendar days” for clarification; the use of the term “working days” has caused delays and extensions to deadlines far beyond what is provided by law;
- Developing information disclosure policies and rules for each institution and defining the list of documents that should be made available to the public;
- Developing specific mechanisms for disabled people have access to public information;
- Clarifying provisions that provide applicants with the right to obtain documents in their preferred format, including electronic, unless this presents considerable technical difficulties;
- Defining the costs to obtain for information in order to reduce the power of discretion among some entities that impose very high tariffs.

Harmonization of legal frameworks. All legislation intersecting with the Law on the Right of Information to Official Documents should be inventoried and harmonized to conform to the new law's procedural requirements. Alignment with the *acqui communautaire* should always be taken into consideration.

Develop mechanisms to assist citizens filling complaints when RTI requests are denied.

The potential to develop a citizens' support network to provide guidance on administrative appeals and request procedures should be explored.

Include municipalities under the e-governance program. Municipalities are closer to the citizens; as such, citizen access to city council decisions or investment programs will provide opportunities for participation in decision making and easy access to information about municipal services.

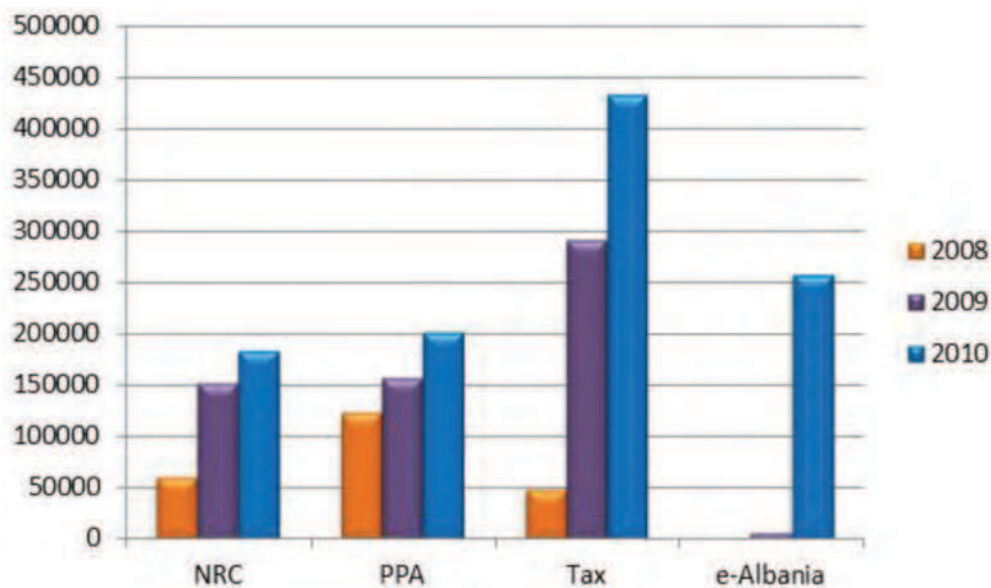
Strengthen mechanisms for monitoring of the implementation of the ATI framework.

Special research and polling should be done by specialized NGOs to help monitor and systematically test the implementation of the law by the government, both in quantitative and qualitative terms.

Intensify public education and awareness activities. Public education for individual citizens and for businesses is a prerequisite for further enforcement of the public information access regime. This should involve a combination of targeted press coverage, public education campaigns (with leaflets and brochures), and other types of information campaigns.

Annex

FIGURE A1. The Use of Information Technology in Accessing Information



Source: Presentation from Irena Maloni, director of National Information Agency, December 2010.

Note: NRC = National Registration Centre; PPA = public procurement agency; Tax = tax department; e-Albania = government portal.

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Notes

1. SIGMA 2010. "Assessment Albania," p. 19.
2. Country Economic Memorandum, November 2010, World Bank.
3. Albanian Centre for Human Rights.
4. The current Constitution of Albania was enacted by a referendum in 1998.
5. The early period of constitutional development (1991–95) was associated with the production of numerous drafts of constitutions, a process that is regarded by legal experts as having favoured the incorporation of numerous universally accepted principles. In many cases, provisions of important international conventions were included verbatim, such as Article 17, which raises the European Convention on Human Rights to the level of a constitutional norm. The entire process of drafting the Constitution in 1998 was observed by the Venice Commission, an important Advisory Board of the Council of Europe. The first draft of the post-communist Constitution was proposed during the time of the Democratic Party leadership; it was rejected by Albanians in a national referendum in 1994.
6. OSCE, "Constitutional Debate, Discussion at the Parliamentary Commission on the Drafting of the Constitution," volume 1, "Introduction."
7. According to the interview with G. Ibrahim.
8. Published in *Official Bulletin No. 4*, 145. Article 2 of this Chapter, which is broadly concerned with the right to freedom of expression, and which states: "*The right to information shall not be denied to anyone.*"
9. The ICCPR, a formally binding legal treaty, guarantees the right to freedom of opinion and expression in terms very similar to the Universal Declaration of Human Rights. By ratifying the ICCPR, state parties agree to refrain from interfering with the rights protected therein and to take positive steps to ensure that rights, including the freedom of expression and information, are respected. Pursuant to Article 2 of the ICCPR, states must "adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant." In other words, states must create an environment in which a diverse, vigorous, and independent media can flourish and provide effective guarantees for freedom of information, thereby satisfying the public's right to know.
10. Interview with Kozara Kati, executive director of the Albanian Centre for Human Rights (ACHR), the second NGO established in Albania (1991) after the fall of the communist regime, and Elsa Ballauri, the executive director of the Albanian Human Rights Group (AHRG).
11. According to an interview with Genti Ibrahim, executive director of the IPLS (a think tank civil society organization) who was the key legal expert during the drafting of Law 8503.
12. OSCE 2006, Constitutional Debate—Discussion at the Parliamentary Commission on the Drafting of the Constitution. Tirane.
13. The first years of the Democratic Party ruling the country include 1992–97.
14. The Council of Ministers, consistent with its constitutional obligation (Article 178, paragraph 2), started the process of drafting laws to implement the new constitutional right of access in 1998, the same year in which the Constitution itself was approved by referendum.
15. See constitutional debate, "Discussion at the Parliamentary Commission on the Drafting of the Constitution," Krenar Loloci, volume 1 "Introduction."
16. The law covers all public authorities at the central and local levels, including regional and local government units (that is, regions, municipalities, and communes).
17. The People's Advocate (ombudsman) is tasked under Article 18 with overseeing the law. The ombudsman's responsibilities in this regard are also regulated by Law 8454 of February 4, 1999, On the People's Advocate.

18. In 2007, the ombudsman, in cooperation with the IPLS and with USAID support, made an effort to draft a regulation for the approval by the Council of Ministers (Recommendation No. 177 of June 13, 2006) that sought to address the complaints it was receiving from citizens. Despite the pressure from the ombudsman and USAID office, the regulation was never approved by the Council of Ministers.
19. In September 2004, "Article 19" released the "Memorandum on the Albanian Law on the Right to Information about Official Documents." In chapter III of the memorandum, entitled "Analysis of the Law," several recommendations were made to amend the Law No. 8503.¹⁹
20. "Udhezimi mbi te drejten e informimit" (Albanian language).
21. See www.moh.gov.al/publiku%20PDF/udhezues%20per%20te%20drejten%20e%20informimit.pdf.
22. The draft regulation was prepared with the assistance of the Rule of Law project funded by the USAID.
23. IPLS, the Center for Public Information Issues, and the Center for Institution Development and Democratization are the NGOs being supported by the USAID.
24. The first draft of the post-communist Constitution was drafted at the time of the Democratic Party leadership, but it was rejected by Albanians in a national referendum in 1994.
25. OSCE established and financially supported the Administrative Center for Coordinating and Assisting Public Participation (ACCAPP; acronym in Albanian is QAKAP). On October 15, 1997, the ACCAPP opened in offices provided by the OSCE Presence in Tirana. The team of lawyers assembled by the Ministry of Institutional Reform designed ACCAPP. While it enjoyed the cooperation and support of both the Ministry and the OSCE, ACCAPP was designed as a quasi-nongovernmental organization administered by its directors and financially supported by various NGOs and foreign governments.
26. People's Advocate, 2002 Annual Report interview with the Director of DPA and the analyses of ministry structure.
27. The Council of Ministers, consistent with its constitutional obligation.
28. The ASCS was established on the basis of Law 10093 (2009); it works to encourage, through financial assistance, sustainable development of civil society and the creation of favorable conditions for civil initiatives to benefit the public, in conformity with Article 4 of the law and the priorities and strategies of the respective government programs.
29. The World Bank and Dutch Government, through a trust fund, supported the opening of the PIC at the Tirana Municipality (Tirana Transparency Project, 2001–03); the USAID-supported establishment of PIOs in several cities; and the OSFA Public Administration Program that has supported the creation of citizen information centers/offices in 14 municipalities—4 percent of the total municipalities in the country. The nature of these facilities is diverse. In the towns of Kucove, Gramsh, Rreshen, Lezhe, Permet, and Kelcyre the offices are modest. In Elbasan, the OSFA helped create a social services and information office, whereas in Kucova and Berat, the offices are more specialized to handle business-licensing procedures. In Durrës, Shkodër, Pogradec, Korçë, and Sarandë the offices represent integrated facilities offering a wide range of information.
30. SIGMA 2010.
31. The duties of the public information officers are to enable access to information for the public with regard to the activities and services of the ministries, demonstrating to and supporting citizens to better understand administrative dispositions. The main task of the spokesperson is to maintain contact with the media and to communicate through the media the information relating to ministry activity.
32. CAO surveys (2004).
33. The *acquis communautaire* is the accumulated legislation, legal acts, and court decisions that constitute the body of European Union law.
34. www.e-albania.al/.
35. Use of e-governance systems is progressing and more information is made available to different target groups (such as the business community) through: (1) an e-procurement system www.app.gov.al/; (2) a tax and customs systems through www.tatime.gov.al and www.dogana.gov.al/; (3) business registration system www.qkr.gov.al/; (4) electronic register for business related legislation www.rlb.gov.al/; and (5) for farmers, the establishment of an information system that provides prices for agricultural products, mainly fruits and vegetables, in some of the country's biggest markets, such as Tirana, Korce, and Fier, among others. Data is processed and then uploaded in the Web site of the ministry for citizens with

- information on (1) the education system www.mash.gov.al; (2) health services www.qsu.gov.al; (3) labor and employment services www.mpcs.gov.al/institucionet-e-varesise/22-sherbimi-kombetar-i-punesimit; and (4) the civil registry system www.dpshttr.gov.al. In the end establishment of the government portal will ensure access of all three main categories in at one access point www.e-albania.gov.al.
36. EU (2010).
 37. GTZ, USAID, and certain universities provided support for additional German and American constitutional scholars to assist in the process. Scott N. Carlson, "The Drafting Process for the 1998 Albanian Constitution," Administrative Center for Coordinating and Assisting Public Participation.
 38. SIGMA 2010.
 39. National Plan for the Implementation of the Stabilization Association from 2009 to 2014, LIGJ Nr.8485, May 12, 1999, p. 36. http://petani-lawfirm.com/www/foto/uploads/File/legjislacion/Kodi_Proc_Administrative_2009.pdf.
 40. www.qpz.org.al.
 41. The PPA was awarded second place in the 2010 United Nations Public Service Award in the category of "Improving Transparency, Accountability, and Responsiveness in the Public Service."
 42. www.qzp.gov.al.
 43. www.app.gov.al
 44. www.tatime.gov.al and www.dogana.gov.al
 45. www.qkr.gov.al
 46. www.mbumk.gov.al
 47. www.mash.gov.al
 48. www.qsu.gov.al
 49. www.mpcs.gov.al/institucionet-e-varesise/22-sherbimi-kombetar-i-punesimit
 50. www.dpshttr.gov.al
 51. www.e-albania.gov.al
 52. Some initiatives include: CAO, with support of USAID (2003), the Centre for Development and Democratization of the Institutions funded by SOROS/OSFA has monitored implementation of the access to information and most importantly in relation with the court system, 'EuroPartners Development with support of EU funds and SOROS/OSFA monitors the implementation of the law and access to information since 2009 for the municipality and Immovable Registration System, in 5 cities; the Center for Public Information Issues monitors citizens' access to legal information.
 53. CAO 2003.
 54. See Open Society Justice Initiative and Centre for Development and Democratization of the Institutions, "Proposals for Changes in the Albanian Law on the Right to Information," pp. 8–9, presented at the Civil Society Forum, Tirana, March 6, 2007.
 55. www.infocip.org/en/index.html.
 56. Cities of Shkodra, Korca, Fieri, Lushnja, and Puka; www.europartners.al/index.php?ep=pb_det&pbid=17&menu=pb.
 57. CDDI 2003.
 58. www.top-channel.tv/video.php?id=25014. FIKS FARE is a critical program that, through humor and satire, denounces negative aspects of Albanian life, including corruption, theft, violations of laws by officials, and violations of human rights. The show began airing in December 19, 2002, ; its format is entertaining: there is accompanying music and dancing during the entire show.
 59. EU 2010.
 60. See the government program (2005–09), page 9: "The Government considers that guaranteeing to individuals the highest standards of the fundamental freedom of information implies on one hand, a maximum transparency of the government through free and full access to the activity and data of public institutions, up to the personal records of officials, and one the other, a true and fair observance of freedom of media and freedom of opinion. The government declares its highest commitment and dedication, considering freedom of information and transparency as the key tool for good governance and the fight against corruption. The new majority guarantees none of its political officials will bring a penal or civil suit against journalists and the media. In no case, will the Media be treated in a discriminatory way in pursuit of political or other ends."

61. See the government program (2009–13): “The right to information, organization and expression will be implemented at higher level. Government is committed to a maximum transparency, respect for freedom of media, to a proactive process information and accountability, to support the activities of civil society while respecting its independence. Albania will continue to be country of unique standards in Europe and the world, where the administration can not file a civil suit or criminal to publish to the media despite what officials.” <http://km.gov.al/?fq=preprog/programi>
62. Walter Eberlei (May 2007), Social Development Papers. Participation and Civic Engagement Paper. Nr. 104.
63. The National Strategy for Development and Integration (NSDI) is a medium-to long-term document with a planning horizon covering the period 2007–13. It is the successor to the National Strategy for Socio-Economic Development (NSSED), which was presented by Albanian Government in 2001 and was the main government strategic document until 2006.
64. On May 18, 2010, The Ministry of Environment, Forestry, and Water Administration organized an open consultation with interest groups and civil society on the draft law on environment.
65. Approval was supposed to take place by the end of the year in 2007.
66. In October 2005, when the privatization of AlbTelecom was intensely investigated by the Parliament, the Centre for Development and Democratization of Institutions (QZHDH)—an NGO specializing in public information law—urged the concerned ministry to make available a copy of the offer of Turkish company “Calik Enerji, which was declared winner of the tender. An application made under the 8503 law for RTI, was rejected by the Ministry of Economy with the claim that the ministry had signed a confidentiality agreement with all firms tendering. However, the ministry refused to submit a copy of such agreement, and even the intervention of the ombudsman didn’t have any persuasive effect.
67. Albanian think tanks who opposed in December 2006 draft Law on State Police, prepared under the assistance of PAMECA Mission. In other cases representatives of the private sector have tried to influence various developments caused by the negotiation and implementation of the Interim Agreement, which might affect directly their activity.
68. A group of experts, selected by the OSFA and Centre for Development and Democratization of Institutions in 2008, worked together to prepare a number of amendments to Law No. 8503 (For the Right to Information on Official Documents. The proposed amendments were consistent with the most advanced standards of European legislation and beyond. The final draft was a product of a series of discussions in the six public open meetings with representatives of public administration, members of Parliament, interest groups, media, and civil society. Lobbying in Parliament was another important moment, which was conducted with individual and joint meetings with MPs of all political sides, representatives of the parliamentary committee on information and media, with heads of parliamentary groups and the Minister of Justice. Even though a group MPs from the ruling majority and opposition undertake the initiative to include the discussion on the new the draft agenda of Parliament, yet the change of law has not taken place.
69. The law sets three levels of classification: top secret, secret, and confidential. Information can be classified for ten years, but that period can be extended. In May 2006, Parliament approved amendments to the law, creating a new category called “restricted,” referring to information that if disclosed would “damage the normal state activity and the interests or effectiveness of state institutions.” These amendments were strongly criticized by civil society groups and international organizations.
70. Once this enters into force, Albania has to deal with EU market competition.
71. See Center for Enlargement Studies. “Relations of Albania with the EU.” Study prepared by Gjergji Vurmo, Institute for Democracy and Mediation. Paper prepared in the framework of the project, “Integration Perspectives, and Synergic Effects of European Transformation in the Countries Targeted by EU Enlargement and Neighborhood Policies,” June 2008. http://idmalbania.org/publications/en/Albania_EU_Relations_VURMO.pdf
72. Out of the 183 economies covered by *Doing Business*.
73. Only the government authorities can enrich the content of the law through by-laws and they can establish additional transparent procedures that eventually facilitate the access to information. The Construction’s Association has suggested to the General Directorate of Roads to publish the individual

offers to a bid, once the time of the submission is over. In this way all the process is very open and transparent to all construction companies, and the process would be less disputable and avoid any mislead of the bidding process. The GDR has not taken into consideration this request.

74. Artan Fuga (2010) "Obstacles in public information."
75. Gezim Tushi (2007). "Media's Instinct and Information of the Public." <http://www.gazeta-shqip.com/opinion/14c390a7cef09aa4d8bca19ed632c08a.html>
76. See "SiGMA Report 2010."¹¹
77. <http://www.tirana.gov.al/?cid=1,37>.
78. The aim of the document is to propagate information in a structured manner in order to communicate to all stakeholders on the IPS implementation status and make them understand that it is an integrated process, not a fragmented one, and that it is a two-way process for gathering as well as receiving information. The document contains general information about IPS processes and its institutional structures and makes an overview on IPS communication since its adoption by the Government of Albania in 2005. It intends to brief the government and stakeholders on past and current IPS-related communication activities. The document foresees and plans the IPS communication for the period 2010–13, which coincides with the new IPS implementing stage in all ministries, with an emphasis on securing technical assistance, organizational development, and improving ministry planning and budgeting capacity aimed at ensuring quality of implementation and further strengthening accountability mechanisms. See http://www.dsd.gov.al/dsd/Platforma_e_Komunikimit_te_SPL_se_118_1.php
79. http://www.dsd.gov.al/dsd/Donor_Database_33_2.php
80. See "Country Strategy Paper for Albania" Human Development Promotion Center and Euclid Network http://www.euclidnetwork.eu/data/files/country_strategy_albania.pdf
81. See EuroPartners Development (2010), "Public Perception on transparency at local level."
82. See the publication in the Europartners Development Web site: http://www.europartners.al/index.php?ep=pb_det&pbid=17&menu=pb



Implementing Right to Information A Case Study of India

Mandakini Devasher Surie with Yamini Aiyar



WORLD BANK GROUP

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Abbreviations and Acronyms

APIO	assistant public information officer
CIC	Central Information Commission
CPWD	Central Public Works Department
CSO	civil society organization
CVC	Central Vigilance Commission
CWG	Commonwealth Games
DOPT	Department of Personnel and Training
FOI Act	Freedom of Information Act 2002
HLRN	Housing and Land Rights Network
IAY	Indira Awas Yojana
IEC	Information, Education and Communication Division of the Department of Rural Development
GOI	Government of India
MGNREGS	Mahatma Gandhi National Rural Employment Guarantee Scheme
MKKS	MazdoorKisan Shakti Sangathan
NAC	National Advisory Council
NCPRI	National Campaign for People's Right to Information
NREGA	National Rural Employment Guarantee Act
NGO	nongovernmental organization
PCRf	Public Causes Research Foundation
PIO	public information officer
PM	prime minister
PMGSY	Pradhan Mantri Gram Sadhak Yojana
PwC	PricewaterhouseCoopers
RAAG	Right to Information Assessment and Analysis Group
RTI	right to information
RTI Act	Right to Information Act 2005
RTI-MIS	online request and appeals tracking system
SNS	SatarkNagarikSangathan
UPA	United Progressive Alliance



Implementing Right to Information

A Case Study of India

1. Introduction

On May 10, 2005, the Indian Parliament enacted the Right to Information Act 2005 (RTI Act), providing citizens with a legal right to access government information and records; establishing mechanisms of implementation, promotion, and enforcement to enable the exercise of this right; and, in effect, opening the official decision-making processes to public scrutiny. The recognition, by law, of citizens' right to access the information contained in hitherto secret documents marked a shift in the paradigm of governance—from one characterized by official discretion, secrecy, and control to one of openness and transparency. The significance of the law's passage was recognized by commentators who hailed the law as a "great and revolutionary law"¹ with the potential of "fundamentally altering the balance of power between the government and citizens"² in India.

The passage of the law was rooted in a strong grassroots movement that gained national momentum in the early 2000s, it was consequently embraced as a key platform by a major political party. India's civil society and media have also expressed high expectations of the RTI Act. The law was expected to usher in a new era of transparent and open governance and "merge with and strengthen the aspirations of people for participatory democracy."³

On paper, the law provides a way for citizens to access information and records held by public authorities at the central, state, and local government levels and establishes an independent grievance-redressal system to deal with complaints that arise from noncompliance.

In practice, the law's potential has been realized to a certain extent. Various studies have shown that citizens have responded to the RTI Act enthusiastically, filing information requests with government departments on a range of issues. In the two-and-a-half years after the RTI Act was passed, it was estimated that 2 million requests for information had been filed by citizens citing the legislation.⁴ Civil society, in particular, has popularized the law by mobilizing citizens to use it and by monitoring its implementation. For its scope and design,⁵ the Indian RTI Act is widely regarded as a model piece of legislation.⁶ This attention, as well as the tremendous popularity of the law, has prompted several countries around the world to draw up their own access-to-information legislation. At the same time, in some instances, information obtained through the RTI Act has been used by civil society groups and individuals to demand improvements in the provision of government services.



These are positive developments, but they only go so far. Reports also indicate that public officials, by and large, lack the skills and training needed to comply with the law, and in many ways, they continue to resist its implementation. Meanwhile, continued resistance to the RTI Act at various levels raises important questions about the government's willingness to create an enabling environment for citizens to exercise their right to information (RTI).

This case study builds on recent work on the subject and also draws from numerous interviews conducted with an array of stakeholders. It examines India's experience with the implementation of the RTI Act to date, focusing on both the implementation measures put in place by the government as well as the use of the law. It examines the role of three key stakeholders in particular—politicians, civil society actors, and bureaucrats—in the design and implementation of the law; in so doing, this study seeks to shed light on how the law has been put in practice.

An analysis of the various implementation measures enacted by the central government suggests that there has been procedural compliance with the basic provisions of the RTI Act. Specifically, rules and regulations regarding the payment of fees and the appeals process have been framed, information commissions have been set up, and officers have been designated to handle requests and appeals in various government departments. But recent assessments of the law's implementation indicate that there are key gaps in the RTI regime. A number of studies cite inadequate infrastructure and insufficient budgetary and human resources as key constraints on the performance of departments as well as information commissions. Public information officers (PIOs) in both the central and state governments have reported low levels of awareness, training, and capacity building as well as poor records management as the major reasons for delays in responding to requests for information.

The growing backlog of pending appeals and complaints with the information commissions—and the low number of penalties thus far imposed—have prompted civil society groups to question the efficacy of the enforcement mechanisms under the RTI Act. These implementation gaps suggest that while there has been procedural compliance, the government has only made limited efforts to ensure the systemic change required occurs. For example, internal rules and procedures have not been reviewed, and records management practices have not been improved to enable departments to disclose information more efficiently. The implementation of the RTI Act appears to have become a “check-the-box” procedure; its actual realization would require the substantial, internal reforms of the structures and processes of government departments.

1.1. METHODOLOGY

This case study is a combination of desk-based secondary research and primary data collection from interviews and TI requests, drawing on secondary literature on the genesis of the RTI Act in India as well as recent studies assessing the status of the law's implementation.

In order to understand the dynamics of RTI implementation, this case study analyzes the efforts of the nodal implementing agency—the Department of Personnel and Training (DOPT)—as well as three departments of the central government:⁷

- **Department of Rural Development.** This department, under the Ministry of Rural Development, formulates and oversees implementation of the government's flagship programs on livelihood generation, wage employment, rural housing, and rural connectivity.

These schemes are implemented across the country through state governments, district rural development agencies, and Panchayati Raj institutions.

- **Department of School Education and Literacy.** This department, under the Ministry of Human Resource Development, is responsible for the formulation and implementation of policies on elementary education, secondary education, literacy, and adult education.
- **Central Public Works Department (CPWD).** This department, under the Ministry of Urban Development, is the premier public works agency of the central government. It is responsible for the construction and maintenance of all central government works and assets.

Qualitative interviews were conducted with key officials in each of these four departments to understand departmental compliance with the RTI Act (assessed against the key obligations of public authorities under the RTI Act),⁸ challenges to its implementation, and the impact of the law on departmental functioning. Interviews were also conducted with civil society organizations (CSOs), activists, and the media. The study focused on the use of the RTI in three key sectors: rural development, education, and public works. The interviews helped to gauge perceptions of the RTI Act, understand ways in which the law is being used to demand information from the government, and evaluate how the law has changed or influenced the way that government departments are held accountable to the public.

To assess the readiness of the department to implement the law, RTI applications were filed in the three central government departments seeking information on the total number of RTI applications that were received, rejected, and fulfilled as well as the number of first appeals filed between 2008–10.

In addition, a literature review was undertaken. Although data assessing the status of RTI implementation in India are limited, there are several valuable studies on the subject. In 2008–09, the Government of India commissioned the private consultancy firm PricewaterhouseCoopers (PwC) to assess the implementation of the RTI Act. Simultaneously, civil society groups launched their own study under the umbrella of the Right to Information Assessment and Analysis Group (RAAG), a coalition of people's organizations and activists. Despite differences in scale and methodology, both studies contain similar findings.

On a positive note, these studies echo several others in suggesting that the institutional mechanisms for operationalizing the key provisions of the law have been set in place at various levels. Central and state governments have formulated rules to implement the law, government departments have designated information officers to handle requests and appeals, and information commissions have been set up across various states.⁹

However, the studies also cite low levels of awareness about the law among civil servants, limited training and capacity building among PIOs, inconsistent rules and procedures for accessing information, and poor records management.¹⁰

2. Adoption of the RTI Act, 2005

Public demand for the RTI Act, coupled with support from the Congress-led United Progressive Alliance (UPA) government, eventually led to its enactment in May 2005. It was preceded by a number of state RTI laws and, at the national level, by the less ambitious and ineffectual Freedom of Information Act 2002 (FOI Act). The pluralistic nature of the Indian state



as well as its highly vibrant and active civil society not only spurred the passage of the law but has also helped to maintain pressure on the government to effectively implement it.

An extensive body of literature chronicles the history of the RTI movement in India.¹¹ This movement is particularly significant because of its deep grassroots origins, unlike in many other countries where the impetus for reform was supplied by either reformist elements within governments or pressure from international donor organizations. Although the Constitution of India constitution does not explicitly recognize citizens' right to information, a series of progressive judgments by the Supreme Court of India has recognized this right as an extension of the fundamental right of freedom of speech and expression under Article 19 (1)(A).¹² But it was not until a powerful grassroots movement, championed by well-connected national advocacy groups, became aligned with the vision of the political class in the early 2000s, that a law to operationalize such judgments was adopted.

In the 1990s, a small grassroots organization in rural Rajasthan—the MazdoorKisan Shakti Sangathan (MKSS, Organization for the Empowerment of Workers and Peasants)—began to campaign for access to government records and documents as part of its broader struggle to secure minimum wages under the government's drought relief programs.¹³ For over a decade, the successes of this group in extracting information from the government sparked a nationwide campaign that culminated in the enactment of various state and national RTI laws.

In many ways, the MKSS campaign was unique. While sporadic demands for information had been articulated by people's organizations in other parts of the country, the MKSS created a mass support base of ordinary farmers and villagers for the movement.¹⁴ Inspired by the MKSS, people's groups and organizations throughout the country (including the National Alliance of People's Movements, Rural Workers' Campaign, and Dalit Sangharsh Samiti) realized the importance of RTI in their own work.¹⁵

The movement also drew support from human rights activists whose efforts against human rights violations and illegal detentions were frustrated by a lack of information; from environmental groups that had initially achieved some success in petitioning the Supreme Court for greater transparency on environmental issues;¹⁶ advocacy groups able to draw the support of opinion makers, such as the Lokayan, the Commonwealth Human Rights Initiative (CHRI), and the National Campaign for Advocacy Studies; prominent individuals, including retired bureaucrats, lawyers, senior journalists, and academics; and even officials from within the bureaucracy.¹⁷

In 1996, the National Campaign for People's Right to Information (NCPRI) was formed, a critical development in galvanizing on one platform disparate groups, including representatives of people's movements, activists, lawyers, journalists, academics, and retired bureaucrats. To build up mass support for its movement, the NCPRI adopted a strategy of reaching out to groups and organizations working on different issues across the country. The NCPRI prepared and submitted a draft RTI bill to the Press Council of India, which was forwarded to the government following a series of public consultations. A government committee (the H. D. Shourie Committee) was set up to review the draft bill, and within a few months, it submitted a diluted version of the bill to the government.¹⁸

At the national level, the government's response remained ambivalent. Other than some minor efforts—such as those under the V. P. Singh government in 1989 (scuttled by the bureaucracy) and an unfulfilled promise in the election manifesto of the National Democratic Alliance

government, which came to power in 1998¹⁹—the government had never quite espoused the RTI cause.

State governments, meanwhile, made more rapid progress; many enacted RTI laws in the 1990s,²⁰ responding to a diverse set of pressures. In some states, such as Tamil Nadu and Karnataka, the impetus for reform came from within the government.²¹ In others, such as Maharashtra, a grassroots campaign for greater transparency led by Anna Hazare, forced the government to repeal an ineffective law and replace it with a stronger state RTI law.

While these state laws varied in strength and application, they went a long way toward increasing awareness of citizens' right to information and thus prepared the ground for national legislation.²² But at the national level, while some public officials²³ supported RTI, others continued to resist the idea. This resistance, according to Singh (2010), emerged from a fear among the bureaucracy that the law would bind the government to set rules, leading to the "death of discretion."²⁴

Sharp divisions, even among the political class, came to the fore in 1999, when one cabinet minister unilaterally ordered the public disclosure of all records and papers in his ministry²⁵ and the prime minister (PM) rescinded the order. In response to a petition against the PM's order (filed by activists and lawyers in 2000), the Supreme Court ordered the government to provide for RTI, paving the way for the 2002 FOI Act.

However, the FOI Act was widely criticized for its weak and ineffectual clauses;²⁶ it wasn't even published in the *Official Gazette of India* and, therefore, never came into force.²⁷ In 2004, the newly-elected UPA government promised to make RTI "progressive, participatory and meaningful."²⁸ To monitor the implementation of the government's programs, the leader of the Congress Party, Sonia Gandhi, set up a National Advisory Council (NAC) that included key RTI advocates.²⁹ In August 2004 the NCPRI submitted a draft RTI bill to the NAC that essentially a series of amendments to the 2002 FOI Act. The amendments included renaming the law from the "Freedom of Information Act" to the "Right to Information Act." This was significant since it placed the demand for information in the context of a legally justifiable right rather than an abstract freedom.

Based on submissions from civil society groups including the NCPRI, the NAC submitted its recommendations to the government for amending the FOI Act 2002. In December 2004, based on these recommendations, the Right to Information Bill 2004 was tabled in Parliament. The bill, while better than the 2002 law, still excluded a number of key clauses recommended by civil society groups: it restricted RTI to the central government only and excluded penalties for noncompliance. Eventually, a parliamentary standing committee and a group of ministers were appointed to review the bill and, after a great deal of lobbying from civil society groups, a number of the original NCPRI-NAC recommendations were reinstituted.³⁰ The stronger legislation that resulted from this process—the RTI Act—received support from Sonia Gandhi and the NAC; it was finally passed by both houses of Parliament in May 2005, received presidential assent in June 2005, and came into formal force on October 13, 2005.³¹

From the outset, civil society groups were determined that the RTI Act should follow international best practices on access to information. They specifically pushed for the incorporation of the basic principles of maximum disclosure, minimum exemptions, independent appeals, penalties, and universal accessibility within the law. These principles found expression in the final text of the RTI Act.



3. The Clarity and Comprehensiveness of the Legal Environment

The RTI Act 2005, is widely regarded as a progressive law overriding all existing laws, including the Official Secrets Act 1923.³² It draws upon the provisions of international access-to-information laws, such as those from Canada, Jamaica, Mexico, and South Africa.³³ In effect, the law covers the whole country, except Jammu and Kashmir.³⁴

While sporadic attempts to introduce RTI legislation had been made by the government since the 1980s, it was really a massive push by groups such as the MKSS and NCPRI in the 1990s that paved the way for the reform. The national campaign for RTI strategically built partnerships with various stakeholder groups, including the media, lawyers, civil society groups, and people's movements across the country. In particular, the NCPRI organized workshops with groups working on issues as diverse as child labor, health, education, and human rights in order to highlight the cross-cutting nature of RTI.³⁵

The campaign also recognized the need to build support within the political establishment, and RTI activists drew upon their personal connections with senior bureaucrats and party leaders to gather support for the campaign. In the final weeks before the RTI Act's enactment, CSOs, including the NCPRI, CHRI, and others, lobbied Members of Parliament relentlessly with to ensure that the most progressive provisions were crafted into the legislation—such as extending the coverage of the law to the entire government (rather than only the central government, as was the case with the 2002 Act and an earlier draft of the 2005 law).

In many countries, expanding RTI is perceived as a neoliberal reform effort pushed by governments, but in India, since its inception, the RTI Act has been seen as linked to the realization of basic rights and entitlements and as a tool to combat corruption.³⁶ The MKSS campaign in rural Rajasthan demonstrated the potential of RTI in helping ordinary workers and farmers access their wages under the government's wage employment programs. In so doing, the MKSS developed a radical interpretation of the notion that citizens have a right to know how they are governed and to participate actively in the process of auditing their representatives.³⁷

3.1. THE SCOPE OF COVERAGE

The RTI Act brings under its purview public authorities that are established, constituted, owned, or substantially financed by central, state, or local government bodies as well as organizations substantially controlled or financed by government funds (directly or indirectly), including nongovernmental organizations (NGOs). It covers all courts, Parliament, legislative assemblies, and councils. Certain security and intelligence agencies established by the government are exempted from coverage,³⁸ but it is noteworthy that, if allegations of corruption or human rights violations are concerned, exemptions from information disclosure do not apply.

The law does not specifically cover private bodies, but it does enable citizens to access information about private bodies if such information can also be accessed by public authorities. For instance, in the case of a public private partnership, any information about the private company that is required to be submitted to the government is available to citizens under the RTI.

3.2. THE SCOPE OF EXCEPTIONS

The law defines 10 exemption clauses to protect information that is likely to affect the country's national interests, foreign relations, commercial and trade secrets, and the like.³⁹ These notwithstanding, information that can be provided to Parliament or to a state legislature can also be provided to citizens. Further, if the public interest in disclosing information outweighs the harm to protected interests, public authorities may disclose the information.⁴⁰

Civil society pressure resulted in the reinstitution of two important NAC recommendations in the RTI Act: (1) a provision for requiring the disclosure of information pertaining to corruption and human rights violations by intelligence agencies (which had been removed in the bill tabled in Parliament);⁴¹ and (2) the law was extended to cover all branches of government, including those at the state level. This is particularly critical to civil society groups, since information relevant to the urban and rural poor can only be accessed at the state-government level.⁴²

In 2006, soon after the law was enacted, the DOPT issued a notice on its Web site stating that “file notings” were not to be disclosed under the RTI Act.⁴³ Civil society groups and activists were quick to respond, challenging the notice before the central and state information commissions who supported the view that notings could be accessed under the law. Undeterred, the government prepared a draft RTI amendment bill, the main purpose of which was to exclude file notings from the purview of the law.⁴⁴ Civil society groups and leading RTI activists, rallying against the bill, launched a major campaign with the support of the media, successfully stalled the government from pushing the amendment through.⁴⁵

In 2009–10, in response to an RTI request, the government again confirmed that amendments to the RTI Act meant to improve the functioning of the law and prevent its misuse were being considered, including exemptions for frivolous and vexatious requests for information, discussions on policy decisions, and information from the office of the Chief Justice of India.⁴⁶

After civil society groups addressed letters to the PM and Sonia Gandhi protesting the potential amendments, the government decided to shelve them, assuring activists that they would be considered only after consultations with a range of stakeholders had taken place. In this way, civil society groups have played a crucial role—not only in the passage of the legislation, but also as watchdogs, remaining vigilant and responsive to any government push back on of the RTI Act.

3.3. PROCEDURES FOR ACCESS

The RTI Act clearly outlines the implementation roles and responsibilities of public authorities at various levels. Central and state governments are tasked with framing rules and guidelines to facilitate citizens' access to information, developing education programs for the public, promoting the timely dissemination of information by public authorities, conducting training and capacity building of public authorities, and so on.⁴⁷ Each public authority must appoint PIOs and assistant public officers (APIOs) within its administrative units and offices to receive and process requests for information. The law spells out the procedure to be followed by citizens in seeking information as well as the protocol to be followed by PIOs and APIOs in receiving and handling information requests.

Citizens can seek information under the law by submitting an application in writing, electronically, or orally in Hindi, English, or the official language of a given area. Applicants are not



required to state reasons for requesting information or provide any personal details beyond basic contact information.

The law prescribes the imposition of reasonable fees as well as the waiver of fees for citizens living below the poverty line. The RTI Act sets a time limit of 30 days for official responses to RTI applications. Where the information requested concerns a matter of life or liberty, information must be provided within 48 hours.

3.4. IMPLEMENTING RULES/REGULATIONS

Under the RTI Act, the central and state governments are required to frame rules to enable its provisions. These rules determine any fees and costs for the supply of information, the format of applications, modes of payment, procedures for accessing information, and the appeals process for information commissions. In addition, the legislatures, high courts, Supreme Court, and both houses of Parliament—can also frame rules as “competent authorities.” The RTI Regulation of Fee and Cost Rules, applicable to central government departments, came into effect on September 16, 2005. State governments have also formulated rules under the RTI Act.

The variations in the rules framed by the central and state governments have resulted in as many as 88 different RTI rules currently in operation in India.⁴⁸ In particular, inconsistent fee structures, restrictive formats, and varying procedures for accessing information have been cited by civil society groups as stumbling blocks to citizens’ efforts to use the law.⁴⁹

4. Capacity, Promotion, and Oversight

The RTI Act lays out a very detailed implementation framework for public authorities. In some countries, like the United Kingdom, the government had five years to fully operationalize the RTI law; in India, the time gap between the enactment of the RTI Act and its implementation was quite short: enacted in May 2005, the law came into full force on October 12, 2005. Public authorities were given 120 days within which to implement the law in its entirety. Some key provisions came into immediate effect, including the framing of rules by central and state governments, the appointment of PIOs by public authorities, and the establishment of the information commissions at the central and state government levels.

4.1. IMPLEMENTING ORGANIZATIONS

While the law does not specifically provide for the designation of a nodal implementing agency, institutional arrangements have been made with specific departments to lead implementation at the central and state government levels. At the central level, the DOPT in the Ministry of Personnel, Public Grievances, and Pensions has been designated as the nodal agency.⁵⁰ In this role, the department has the powers and responsibilities of the central government as outlined under the RTI Act.⁵¹ Notably, the DOPT was closely involved in the formulation and drafting of the RTI Act; it even presented the draft bill in Parliament. The department has a separate RTI division that deals with all RTI matters and the Central Information Commission (CIC).⁵² In most states, either a general administration department or department of administrative reforms has been designated as the primary RTI implementing agency.

The DOPT's role as the lead implementing agency reveals certain contradictions. As the department responsible for the formulation of personnel policies, senior staff appointments, and general administration in the central government, the DOPT has played an important role in setting the tone for implementation. It has issued detailed notifications and instructions to departments, organized trainings for officers relating to the RTI Act, conducted mass public awareness campaigns, clarified key provisions of the law, and issued specific orders to ministries to appoint PIOs, proactively disclose information, and to improve records management practices.⁵³

But on some issues concerning the disclosure of information by the bureaucracy, the department's interpretation of the law has been controversial. As previously mentioned, in 2006, the DOPT stated that file notings could not be disclosed under the law;⁵⁴ this led to a number of government departments refusing citizens access to information.⁵⁵ From a civil society perspective, access to file notings provides a critical insight into the deliberative process of government, and opens up to scrutiny the views, recommendations, and decision of officials on specific policy issues.⁵⁶ Civil society objections⁵⁷ forced the DOPT to backtrack on the issue,⁵⁸ but the controversy proved to be only the first in a series of attempts by the government to amend the RTI Act.⁵⁹ In subsequent years, the department has been frequently critiqued for its interpretation of the law's key provisions. Most recently, the department has mooted a series of amendments that, if introduced, would limit both the subject matter and word count of RTI applications.⁶⁰

As agencies on the frontlines, ministries and departments (at both the central and state levels) play critical roles on a day-to-day basis in determining how RTI is translated into a tangible right for citizens. Under the implementation framework outlined in the RTI Act, it is the responsibility of each line ministry—and the public authorities under them—to set in place systems and processes to enable citizens to access information under the law.

There are a total of 60 ministries under the central government, each with a number of departments and public authorities under its jurisdiction. Aggregate data on compliance with the RTI Act by these ministries are unavailable, but information from the government's national RTI portal suggests that a large number of ministries have complied with the basic provisions of the law, including appointing PIOs and appellate authorities and proactively disclosing information.⁶¹

Interviews with officials in the DOPT, Department of Rural Development, and CPWD shed light on the internal processes and procedures that departments have developed for RTI implementation.⁶² The nodal division or the RTI cell is generally responsible for coordinating the receipt, transfer, and disposal of RTI requests and ensuring that there is department-wide compliance with the provisions of the law. In their efforts to set in place systems and processes to facilitate RTI implementation, the DOPT and CPWD stand out. The CPWD has set up an RTI coordination cell to receive and redirect RTI requests to its relevant branches, divisions, and subdivisions. It is well staffed and well organized, with nine dedicated staff members and a separate office space with proper workstations, computers, and sufficient filing space. The DOPT has recently set up a dedicated RTI cell to streamline the disposal of RTI applications. Of the four departments, the DOPT is the only one that has issued detailed internal guidelines for the efficient handling of requests and appeals within the department.⁶³ In the Department of Rural Development, the Information, Education and Communication (IEC) Division handles all RTI-related matters. The Department of School Education and Literacy does not have a



dedicated cell or division; all matters related to RTI implementation are handled by another department in the Ministry of Human Resource Development.

It appears that the ways in which departments organize themselves to deal with RTI implementation reflects sector-specific characteristics. Policy-intensive departments such as the Department of Rural Development and Department of School Education and Literacy tend to have leaner RTI implementation structures, with fewer information officers and less infrastructure. This is primarily because most of their programs are implemented at the state and local government levels; therefore, requests for information are usually transferred to these levels. On the other hand, departments that are heavily engaged in the day-to-day implementation of programs, such as the CPWD, have more formalized systems, reflected in a higher number of information officers and a dedicated and well-staffed RTI cell, as examples. This difference in policy versus implementation is also reflected in the number of RTI requests received by departments: the CPWD receives a greater number of requests than the other two.

4.2. BUDGET

At the central and state government levels, there are no dedicated budgets for RTI implementation. Additional allocations have, however, been made to help governments set up information commissions.⁶⁴ In addition, in November 2008, the central government launched a centrally sponsored scheme⁶⁵—to the tune of Rs. 26.68 crores—for strengthening implementation, capacity building, and awareness generation under the RTI Act.⁶⁶ At the level of line ministries and departments, however, there have been no additional allocations. Expenditures related to the implementation of the RTI Act, including the designation of PIOs, APIOs, and appellate authorities, are charged to the overall administrative budgets of each ministry or department.⁶⁷ Interviews with officials from the CPWD, Department of Rural Development, and Department of School Education and Literacy confirmed that they do not have any dedicated budgets for RTI implementation.⁶⁸

This is a significant implementation issue. A subcommittee set up by the CIC in 2007 noted that public authorities, particularly at the lower levels of government, were constrained in their information provision by inadequate financial resources. The subcommittee recommended that central and state governments earmark a certain percentage of departmental budgets for the implementation of RTI programs—such as creating infrastructure, training, and capacity-building programs.⁶⁹ The inadequacy of budgets and infrastructure has also been cited as a key constraint by the PIOs and department heads at the central and state government levels.⁷⁰

4.3. STAFFING AND TRAINING

4.3.1. Staffing

The RTI Act provides for the designation of information officers in all administrative units or offices of a public authority.⁷¹ In October 2005, the DOPT issued a directive instructing public authorities to designate PIOs and APIOs. At the sub-divisional and sub-district levels, where public authorities do not have offices or administrative units, arrangements have been made with the Department of Posts to provide the services of APIOs.⁷²

Aggregate data on the total number of central government personnel employed to process RTI requests are not available. The number of information officers varies depending on the number of offices, branches, and administrative units within a given ministry or department

TABLE 1. Number of PIOs, APIOs, and AAs in Four Departments

Department	No. of PIOs	No. of APIOs	No. of AAs
Department of Personnel and Training (DOPT)	9	0	9
Department of Rural Development	21	0	8
Department of School Education and Literacy	25	0	14
Central Public Works Department (CPWD)	153	53	60

Source: Data on the Department of School Education and Literacy and CPWD obtained in response to RTIs. Data on the Department of Personnel and Training and Department of Rural Development from the information disclosed proactively on the departments' Web sites.

(as can be seen in the four departments analyzed in table 1). The jurisdiction of each PIO and AA has been clearly defined: officers process information requests and appeals related to the specific schemes or programs being handled by them.⁷³ This clear allocation of subject area benefits both the officers and citizens who can address queries to specific PIOs or AAs.

There seems to be a wide variation in the seniority levels of PIOs within the central government and across states. In many instances, junior officers have been designated as PIOs and AAs, which, according to a 2009 CIC subcommittee, is likely to have a detrimental effect on the quality of decisions.⁷⁴ In the DOPT and Department of School Education and Literacy, officers at the level of undersecretary have been designated as PIOs, whereas in the Department of Rural Development, PIOs are at the level of director or deputy secretary.⁷⁵ Civil society groups also highlight that in the years immediately following the passage of the RTI Act, senior officers (like joint secretaries) were designated as PIOs, but that junior officers who often lack the capacity to respond to RTI requests or interpret the true letter and spirit of the law are now being appointed.⁷⁶

While PIOs have been designated at various levels to handle requests and appeals, assessments of the RTI Act suggest that the infrastructure and human resources allocated for implementation at various levels are insufficient.⁷⁷ For example, 82 percent of the public authorities surveyed within the central government reported the need for additional infrastructure to implement the RTI Act; public authorities at the block and local levels of government lack basic infrastructure like photocopy machines and computers.⁷⁸ To facilitate the day-to-day handling of RTI requests, the DOPT has instructed departments with more than one PIO to designate a nodal officer to receive all requests and appeals.⁷⁹

4.3.2. Training

The RTI Act includes provisions for the training needs and capacity building of officers. Central and state governments, subject to the availability of resources, may conduct training programs for the PIOs of public authorities and produce training materials and manuals on the RTI Act.⁸⁰ The training division of the DOPT is the nodal agency in the government for formulating and implementing training policy.⁸¹ The training of government functionaries in processes relevant to the RTI Act is conducted regularly by the Institute of Secretariat and Management (ISTM), a training institute under the DOPT. Departments may nominate officers to take part in the ISTM courses, which include special modules for PIOs and AAs implementing the RTI Act.⁸²

At a national level, in 2005, the DOPT partnered with the United Nations Development Program to launch a five-year training effort for all RTI stakeholders. Implemented in two districts



each in 27 states, the project involved capacity building and the training of government officials at the central, state, and district levels; the training of trainers; and the development of training materials. Almost 100,000 stakeholders have been trained under the project, including 8,100 resource persons to train other officials in the RTI and other trainers.⁸³ The DOPT has also been experimenting with the use of information and communication technology in training, and in 2009, launched a 15-day online certification course⁸⁴ that targets PIOs, APIOs, AAs, public officials, citizens, CSOs, and other stakeholders.⁸⁵ To date, there have been 24 groups for this training course.⁸⁶

But, despite these training initiatives, studies and interviews with civil society groups have highlighted the need for greater training and capacity building among government officials on the provisions of the RTI Act. Approximately 60 percent of both rural and urban PIOs have not received any RTI training, and approximately 40 percent of PIOs cited this as a constraint on their capacities to supply information to RTI applicants.⁸⁷ The lack of training is reflected in the low levels of awareness about the law among PIOs; among the rural PIOs surveyed, 30 percent did not know the provisions of the RTI Act,⁸⁸ and civil society groups observe that most PIOs are not aware of their roles and responsibilities under it.⁸⁹ According to one activist, although most departments in the government have training centers where civil society and RTI experts are invited to train officers, for the most part these are not taken seriously since the training is not compulsory and the departments are required to nominate officers for training.⁹⁰

4.3.3. Human Resource Policies

The RTI Act mandates the designation of existing staff as PIOs and APIOs. Consequently, there are no formal rules or procedures that require changes in human resource policies to facilitate the disclosure of information under the RTI Act. In each of the four departments analyzed, PIOs handle other portfolios in addition to their responsibilities under the RTI Act. But responsiveness to RTI requests is not considered in the annual personnel performance appraisal of officials designated to perform RTI-related functions. Notably, there are no specific incentives that reward PIOs for good performance in discharging their RTI responsibilities, which is one reason for their lack of motivation.⁹¹ Over 10 percent of the PIOs surveyed cited a lack of financial and other incentives as reason for their reluctance to be PIOs. According to officials interviewed, though the RTI Act places certain obligations on government departments as a whole, the implementation of the RTI Act on a day-to-day basis is the responsibility of PIOs who face penalties if information is not provided on time. This has prompted resistance to the implementation of the law: over 30 percent of rural PIOs surveyed admitted that they did not want to be in their position.⁹²

4.4. RECORDS MANAGEMENT

Under the RTI Act, public authorities are required to take steps to index, categorize, and catalog their records in order to enable the efficient dissemination of information. Within the central government, records management is the responsibility of a sister department of the DOPT—the Department of Administrative Reforms and Public Grievances. Over the years, the department has undertaken a number of initiatives to improve government records management systems, including developing manuals on records management procedures and implementing a records-management e-learning module. But despite these initiatives, record-keeping practices across the central and state governments generally still remain quite poor.

In 2006, the Second Administrative Reforms Commission highlighted record keeping as the “weakest link” in the government’s information system. Noting that the “practice of cataloguing, indexing, and orderly storage” was absent at various government levels, the commission recommended the creation of a public records office and a one-time allocation of one percent of funds from flagship programs over five years to update records and improve infrastructure.⁹³ Despite these recommendations, efforts have been slow to align records management practices with the RTI Act.⁹⁴

Fifteen percent of rural PIOs and 25 percent of urban PIOs cited poor records management as a key constraint to the swift processing of RTI applications.⁹⁵ Similarly, 38 percent of PIOs (responding to the PwC study) reported ineffective records management as the reason for delays in processing requests. This problem was mentioned consistently in interviews with government officials and civil society representatives, who all attributed the problem to a lack of dedicated staff to handle government records. For their part, the DOPT and CIC have issued notifications to public authorities to improve their records management systems under the RTI Act,⁹⁶ but compliance with these orders has been slow. Records management practices in most states have not been revised in decades.⁹⁷ Officials mentioned that, in the past, government offices had dedicated record keepers (or *daftaris*) responsible for maintaining and managing records. The removal of this post has left a gap that has been, to date, unfilled.⁹⁸ The PwC study diagnoses the problem as the absence of an “institutional mechanism in public authorities” that focuses on the RTI Act and record-keeping guidelines.⁹⁹

In recent years, the Government of India has launched a number of high-profile initiatives aimed at promoting the use of information and communication technology in improving governance and service delivery. Notably, the government has set up an Office on Public Information Infrastructure and Innovations under the PM to develop IT infrastructure to improve the efficiency of public service-delivery systems.¹⁰⁰

While departments in some states have developed innovative IT solutions, these have been mostly limited to status tracking of RTI applications. For example, at the central government level, the DOPT has developed an online request and appeals tracking system (RTI-MIS) for ministries and departments that enables PIOs, AAs, and CIC officers to input information on requests, appeals, and complaints received from citizens under the RTI Act and to use the system to generate reports and alerts. But in most departments, RTI applications continue to be maintained in physical form, and efforts to computerize RTI records have been limited. Most departments do not have an electronic document management system, and most PIOs do not maintain an electronic list of RTI applications.¹⁰¹ Though officials in interviews spoke of the introduction of a new file-tracking system, it is not clear to what extent the system was being used.

4.5. MONITORING

The RTI Act requires each government ministry or department to compile information and data on the handling of RTI requests and to submit a detailed annual report to the information commissions. This report must detail the number of requests and appeals received by each public authority under its jurisdiction, the number of cases in which information was rejected, the exemptions used, fees and charges collected, and details of disciplinary action taken, and so on. The information commissions have to submit an annual report to the central and state governments (as the case may be) on the implementation of the law based on this report.



The central and state governments at the end of each year may table a copy of these reports before the houses of Parliament or the state legislature.¹⁰²

In the central government, the CIC has developed an online RTI annual returns system to which departments can upload information directly. Information on the number of public authorities that have submitted annual reports to the CIC in the past three years is not available.¹⁰³ According to data from the most recent CIC report (2007–08), 1,382 out of 1,597 public authorities submitted reports. The number of public authorities listed in the report also steadily increased from 938 in 2005–06 to 1,597 in 2007–08.¹⁰⁴

The DOPT, Department of Rural Development, Department of School Education and Literacy, and CPWD have been submitting reports to the CIC quite regularly. The annual reports for these departments can be accessed through the CIC's system, though there are doubts about the accuracy and reliability of the data provided. For example, for the year 2008–09, according to information received in response to an RTI request, the CPWD department received 2,830 RTI applications. For the same period, the annual returns of the Ministry of Urban Development—the parent ministry of the CPWD—reported a total of 2,731 cases, while data for 2008–09 from the CIC's annual returns system suggests 2,263. In other cases, departments submitted incomplete data. Detailed information would be available on the number of requests received by a department and the various public authorities under its jurisdiction for some years, but in other years, only data for the department itself (or possibly no data at all) would be available. Thus, getting concrete data and statistics is challenging and, in most cases, information is not even available on the departments' Web sites.

5. Enforcement and Sanctions

The RTI Act sets in place a two-stage appeals mechanism for denied requests. Internally, within public authorities, the law mandates the appointment of an appellate authority (a senior officer in a public authority) to process and handle appeals. A second appeal can be made to the central or state information commissions (whichever is relevant to the particular case) within 90 days of the decision of the appellate authority.

The information commissions are autonomous and independent government bodies set up at the central and state levels. Headed by a chief information commissioner who is assisted by up to 10 information commissioners, the commissions have broad powers and can hear appeals and complaints under the RTI Act, monitor the law's implementation, impose penalties on PIOs, recommend disciplinary action against erring officials, and award compensation to applicants for any loss or detriment suffered.¹⁰⁵

In addition, the information commissions have been empowered to order public authorities to fully comply with the provisions of the RTI Act. Specifically, they may order public authorities to appoint information officers, publish specific categories of information, make information available in a particular form, improve records management practices, and enhance the training of officials in the provisions of the RTI Act.¹⁰⁶ A major lacuna in the law is that it does not prescribe a time limit within which information commissions must process appeals and complaints. The draft RTI bill did set a time limit for processing applications, but in subsequent amendments to the bill, this clause was inadvertently omitted. Amending it would require parliamentary action and activists are concerned that this could open up a can of worms in terms

of allowing the introduction of other regressive amendments; further, there is no incentive for the government to reform the law in a way that would make things more difficult for it.

Unlike a number of other countries' RTI laws, the Indian RTI Act provides for a maximum penalty of Rs. 25,000 and disciplinary action against PIOs for noncompliance, enforceable by the information commissions.¹⁰⁷ The draft RTI bill that was originally submitted to the government by the NAC included an additional penalty of imprisonment, but this clause was removed in the final drafting stages to ensure that civil servants took the law in the right spirit and "did not see it as a draconian law for paralyzing the government."¹⁰⁸

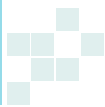
In total there are 28 information commissions—the CIC and 27 state information commissions. This case study focuses on the functioning of the CIC,¹⁰⁹ which was constituted by the central government on October 11, 2005. The procedures for deciding appeals and complaints are laid out in the CIC (Appeals) Procedure Rules 2005 that were published on October 28, 2005.¹¹⁰ Headquartered in New Delhi, the CIC has been set up under the Ministry of Personnel, Public Grievances, and Pensions and is currently headed by one chief information commissioner and five information commissioners.

The RTI Act enjoins central and state governments to provide information commissions with the officials and employees necessary to function efficiently.¹¹¹ The central government has sanctioned a total of 116 posts to the CIC, of which, as of March 2010, 51 were filled and 65 vacant. The commission is largely staffed by government officials, as reflected in the list of sanctioned posts (see table 2). In addition to its regular staff, certain administrative and data entry positions in the CIC have been outsourced. Information on the training and capacity building of CIC staff is not available.¹¹² The shortfall in staff has been said to be a key constraint on CIC's performance.¹¹³

RTI activists have also raised concerns about the selection and appointment of information commissioners. Under the law, individuals with experience in a diversity of fields (such as law, science, journalism, technology, management, or mass media) may be appointed as information commissioners. But studies suggest that most information commissioners are former bureaucrats. According to one study, of the 28 chief information commissioners initially appointed, 23 were retired bureaucrats.¹¹⁴ While former bureaucrats have stronger skills and experience in administrative matters than other citizens, this could be seen as perpetuating a bureaucratic culture within the enforcement agencies, potentially compromising objectivity.

The CIC is funded by the central government. Specifically, the demands for grants for the CIC are presented to the exchequer as part of the overall budget of the Ministry of Personnel, Public Grievances, and Pensions. The allocations of funds and approval of expenditures are subject to clearance from the ministry. Staff salaries are set according to government norms, and the commission does not have the authority to create new posts or fix staff salaries. Therefore, while the RTI Act gives the commission considerable autonomy,¹¹⁵ its dependence on the central or state government for the sanctioning of budgets and staff¹¹⁶ goes against the spirit of its autonomy. In its first annual report, the CIC noted that the independence and efficient functioning of the CIC could not be guaranteed unless it was provided with financial and administrative autonomy.¹¹⁷

RTI activists have recommended that the budgets of information commissions be delinked from any government department and be determined by the Parliament or the state assembly, as the case may be. Furthermore, they have recommended that information commissions should be autonomous and independent in their ability to create posts, hire staff, incur expenditures, and so on.¹¹⁸

**TABLE 2. List of Sanctioned Posts in the CIC**

Sl. No.	Posts	Sanctioned Post	As of March 2010	Vacant
1	Secretary (additional secretary to the Government of India (GOI))	01	01	Nil
2	Additional secretary (joint secretary to GOI)	01	01	Nil
3	Registrar	01	Nil	01
4	Joint secretary (director to GOI), deputy secretary	04	04	Nil
5	Senior PPS	10	07	03
6	Undersecretary	05	04	01
7	Section officer	02	02	Nil
8	PPS	01	Nil	01
9	OSD (protocol)	01	Nil	01
10	Court master	11	01	10
11	PS	04	04	Nil
12	Assistant	14	13	01
13	Librarian	01	Nil	01
14	Translators	02	Nil	02
15	Personal assistant (PA) (grade C)	14	02	12
16	Stene (grade D)	11	01	10
17	UDC	02	01	01
18	DEO	11	Nil	11
19	Driver	11	05	06
20	Peon	09	05	04
	Total	116	51	65

Source: Information received in response to an RTI filed with the CIC, Reply No.CIC/CP10/2010/1057

As per information received in response to an RTI request, the annual budget of the CIC in 2009–10 was Rs. 1,188 lakhs while the actual expenditure incurred was Rs.1,113.79 lakhs (see table 3).

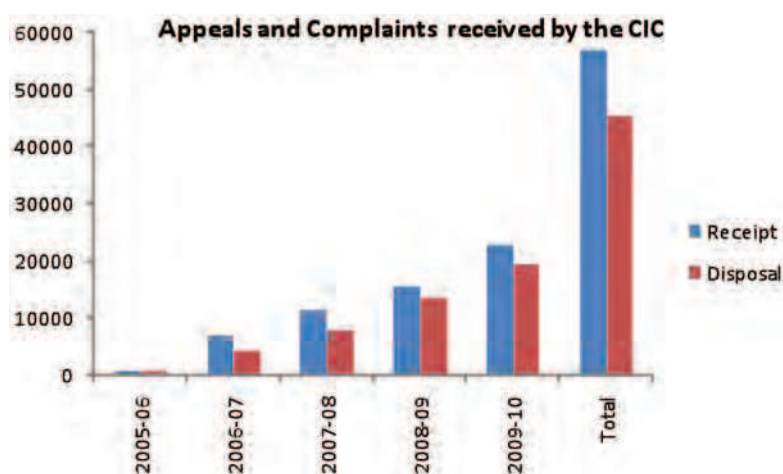
The CIC maintains a monthly record of the number of cases (both appeals and complaints) that are received and disposed. This number has been steadily increasing, from only 703 in 2005–06 to 22,818 in 2009–10 (see figure 1). In total, in the period 2005–10, the CIC received 57,046 appeals and complaints, 45,283 of which were disposed. On average, the CIC disposes of 9,056.6 cases per year. Detailed data on the time taken to respond to appeals and complaints are not available, but it has been estimated that the average waiting time is approximately 6.2 months.¹¹⁹

Data on the number of penalties imposed, disciplinary actions recommended, and compensation awarded since 2005 are not readily available, but studies suggest that information commissions across the country have imposed penalties in very small numbers. The RAAG study, based on an analysis of appeals and complaints at 19 information commissions across

TABLE 3. Annual Budget of the CIC

Year	Budget Estimates	Revised Estimates	Actuals (in lakhs)
2005–06	–	100.00	87.25
2006–07	500.00	622.00	150.56
2007–08	900.00	733.00	547.06
2008–09	1,340.00	1,234.00	819.03
2009–10	1,174.00	1,188.00	1,113.79

Source: RAAG 2009: 42.

FIGURE 1. Appeals and Complaints Received by the CIC

Source: Information received in response to an RTI filed with the CIC. No.CIC/CPI0/2010/1057, dated September 3, 2010.

the country, found that a total of 343 penalties had been imposed as of March 31, 2008. Of these, 74 penalties were imposed by the CIC (figure 2); as a percentage of cases, this is quite low. Civil society groups interviewed say this creates a culture of impunity for noncompliance with the law.

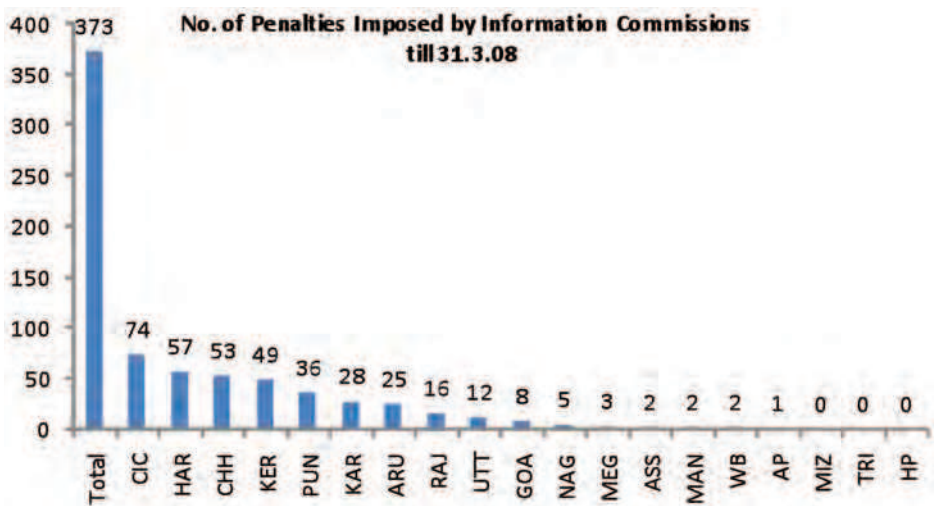
The 2008–09 RAAG study found that less than 2 percent of potential penalties under the RTI Act were actually imposed by the information commissions.¹²⁰ A more recent 2009–10 study by the Public Causes Research Foundation (PCRF) estimates that the failure to impose penalties has cost the Indian exchequer Rs. 86 crores. Based on its analysis of 76,813 orders passed by 87 information commissioners across 27 states, it was determined that penalties were imposed when information was delayed in only 1,896 out of 59,631 cases (3.17 percent).¹²¹

5.1. JUDICIAL APPEALS

The RTI Act bars lower court jurisdiction for hearing appeals and complaints related to the RTI Act because the framers of the law were keen to ensure that it did not fall prey to problems of delays and pendency characteristic of India's lower courts. Thus, an independent appeal



FIGURE 2. Number of Penalties Imposed by Information Commissions as of March 31, 2008



Source: RAAG 2009.

system was created. But because RTI is a constitutional right, interpreted by the courts as a fundamental right under Article 19 (1) of the Constitution, citizens can appeal to the High Court or Supreme Court in their writ jurisdiction if they believe their rights has been infringed. Consequently, the orders and decisions of the information commissions may be challenged in the High Courts and the Supreme Court. Detailed data on the number of first and second appeals that been challenged in the courts are not available.

Anecdotal evidence from newspaper and media reports, however, indicates that a number of public and private authorities-private schools, stock exchanges, sports associations, and other organizations-have challenged the decisions of the information commissions and its coverage under the law in court.¹²² Additionally, there have been instances in which government officials have challenged penalties imposed by the CIC; in some of these cases, the courts have either reduced or overturned penalties while staying the CIC's orders.¹²³

5.2. INFLUENCE OF STAKEHOLDERS

RTI activists and civil society groups in India have been vocal in their demand for strong and independent information commissions. Since 2006, a number of studies by CSOs have tracked the performance of information commissions in various states.¹²⁴ These studies have helped highlight the various implementation challenges faced by the commissions. Earlier studies tracking RTI in eight states (Andhra Pradesh, Gujarat, Haryana, Himachal Pradesh, Jharkhand, Madhya Pradesh, Uttar Pradesh, and Uttarakhand) found that state information commissions were constrained by the poor allocation of infrastructure, staff, and budgets.¹²⁵ These findings have been supported by more recent assessments. In response to a nationwide survey assessing the status of RTI implementation, 75 percent of information commissions reported that they were not financially independent, 85 percent felt that sanctioned staff were inadequate, and nearly 60 percent said they did not have sufficient infrastructure.¹²⁶ Civil society groups

BOX 1 PERFORMANCE ISSUES OF THE JUDICIARY AND INDEPENDENT AGENCIES

The data available suggest that information commissions are falling into a pattern of regular delays and poor enforcement characteristic of a number of other enforcement and grievance redress agencies—notably the judiciary. The growing backlog of appeals and complaints in information commissions has been flagged as a major problem in the implementation of the law.¹²⁷ A 2009 PCRF study of information commissions reports that, in some state information commissions, applications remain pending for more than a year. Activists fear that if remedial measures are not taken, information commissions will soon mirror the judiciary, where court cases remain pending for years.

In 1996, the Mallimath Committee report estimated that 28 million judicial cases were pending across the country. Since that time, the number of pending cases has increased to such an extent that, by one estimate, it would take the judiciary 320 years to clear the backlog of 31.28 million pending cases.¹²⁸ A series of government committees have cited shortage of staff, lack of training, and capacity building, and poor infrastructure as the major reasons for the delays. Judicial reforms to rectify the delays and high costs involved in the delivery of justice have been slow to materialize.¹²⁹

Vigilance and enforcement agencies like the Comptroller and Auditor General of India and the Central Vigilance Commission (CVC) have been characterized by similar stories of delays and poor enforcement measures.¹³⁰ Studies suggest huge delays in audits commissioned by the Comptroller and Auditor General. A lack of scrutiny and enforcement of audit recommendations by the legislature have also been flagged as a key issue. In the period 1998–99, out of a total of 1,478 audits, only 87 (5.88 percent) were selected for review; only 32 (2.18 percent) were finally reviewed by Parliament's financial committees. Within the CVC, delays in the investigation of anticorruption cases vary from six months to three years. The CVC's enforcement record is equally poor: in the period 1989–98, out of a total of 21,164 cases, the CVC recommended prosecution in only 517 (2 percent) cases.¹³¹ In total, only 606 government servants lost their jobs during a 10-year period.

In recent times, the judiciary and CVC have also been critiqued for a lack of transparency in the selection of staff; senior appointments in both organizations have been given to retired Indian Administrative Service officers. The appointment of these retired bureaucrats to leadership positions in institutions of accountability and enforcement is seen by some as a concerted government effort to subvert the institutions' autonomy. It has been argued that such posts act as "inter-temporal" incentives for retiring bureaucrats who—once in positions of authority—tow the government's line.¹³² Here again, similarities with information commissions that have been similarly criticized by civil society groups for their selection and appointment processes are evident.

In sum, the RTI Act appeals process is becoming an increasingly bureaucratic exercise because information commissions are unable to process appeals and complaints in a timely manner, reflecting a prevailing culture of delayed processing in many enforcement and grievance redress agencies (such as judiciary). This bureaucratic culture is also exacerbated by a tendency to appoint former civil servants as information commissioners. These practices, in addition to the low rate of imposed penalties, raise serious questions about the efficacy of information commissions in enforcing the RTI Act.



view the dependence of the commissions on government departments for the sanctioning of budgets and staff as a major impediment to their ability to function effectively.

Through their continued vigilance, civil society groups have ensured that critical gaps in the implementation of the RTI Act at various levels are highlighted and brought into public view. While the extent to which these efforts have been successful in pressuring the government to improve implementation is not directly evident, the existence of a strong counter pressure to the government has certainly been beneficial.

6. Compliance

6.1. PROACTIVE DISCLOSURE

Section 4 of the RTI Act mandates the proactive disclosure of information, but it has been poorly implemented. After the enactment of the law, departments did promptly upload Section 4 manuals on their Web sites, but efforts at routinely updating this information have been inadequate.

A physical and electronic audit of government departments at the central, state, and district levels found that most of the Section 4 information published was incomplete and out-dated. For example, while 65 percent of urban public authorities had published details about their respective their organizations on their Web sites, only 45 percent had published PIO information, and only 25 percent had published information on budgets and salaries.¹³³ Moreover, even PIOs were often unaware of their obligation to update and upload this information: 43 percent had no knowledge of the proactive disclosure provisions of the law. Overall, state government compliance with Section 4 is inadequate.¹³⁴

Smaller studies assessing the state of Section 4 compliance offer similar findings. For example, a 2009 survey of central and state government Web sites cited “abysmally low” compliance, varying from 28 percent among state governments, 44 percent among information commissions, and 58 percent among central government departments.¹³⁵ Compliance levels appear to be even worse at the local government level. A 2009 study assessing RTI Act compliance by government offices at the *taluka* (local) and district levels in the state of Gujarat noted that a lack of availability of Section 4 information is widespread. In 94 percent of the *taluka* offices, researchers had to file formal RTI requests to get this information; in 85 percent of the offices, researchers were required to pay application fees.¹³⁶

Though central government departments have generally performed better, gaps still remain. A study of five central government ministries conducted in 2009 found that compliance was limited, with researchers facing difficulties in extracting Section 4 information. Initial compliance with the law was motivated by euphoria or fear; subsequently, compliance has not been taken seriously.¹³⁷ Each of the four departments assessed under this study have separate RTI links on their Web sites that provide citizens with some basic information on the RTI Act, a listing of PIOs and AAs, fee payment modalities, and access to circulars and notifications that may have been issued by the department. But an analysis of the uploaded Section 4 data suggests that there are gaps in the availability of information:

- The Department of Rural Development has developed a complex management information system for disclosing information under some of its schemes, but the Section 4 information given is inadequate.¹³⁸

- The Section 4 manual uploaded by the Department of School Education and Literacy has not been reviewed since the RTI Act was passed. Only recently has the department issued a circular to officers requesting that they update Section 4 information.¹³⁹
- The CPWD has uploaded a three-page “manual” on its Web site that claims to provide information on Section 4, but the information is inadequate. An official in the RTI coordination cell acknowledged that, while the PIOs/AAs list was frequently updated online, very little work had been done relating to Section 4.

Basic information (the department’s functions, powers and duties of officers, acts and rules, and the PIOs/AAs list) has been uploaded to the DOPT Web site, but key information—such as the categories of documents held by the department, facilities available for public consultation, a list of boards and councils, and details of recipients of concessions—have not been made publicly available.

The poor implementation of Section 4 is attributed to various factors. The PwC study concludes that there has been inadequate planning among public authorities for implementing Section 4. Under the RTI Act, it is the responsibility of the public authority as a whole to proactively publish information, but at a departmental level there is no clarity about whether Section 4 is the responsibility of the heads of departments or the PIOs. This lack of ownership and of clearly defined roles and responsibilities for updating Section 4 information is considered one of the major reasons for poor performance.¹⁴⁰

Studies have recommended defining responsibilities within departments and incentivizing proactive disclosure through institutionalized awards and penalties.¹⁴¹ Some civil society groups have stated that unless there is pressure on departments from the CIC, there will be no real motive to implement this clause effectively; PIOs and heads of departments will continue to pass the responsibility back and forth to the other.¹⁴²

6.2. REQUESTS AND RESPONSIVENESS

Since 2005, an increasing number of citizens have filed requests for information with public authorities in the central and state governments. While concrete data on the total number of requests since 2005 are unavailable, the RAAG study estimates that approximately 2 million requests were filed in the first two-and-a-half years after the passage of the law (October 2005–March 2008).¹⁴³ The findings of the PwC study are roughly similar: there were an estimated 85,000 requests in 2008 alone.

Civil society groups think that these numbers are relatively small and reflect low levels of awareness among large segments of the population.¹⁴⁴ The RAAG study found that nearly 90 percent of rural applicants and 85 percent of urban applicants were male;¹⁴⁵ the PwC survey found that only 15 percent of the public is aware of the RTI Act.¹⁴⁶

Citizens aware of the law still face a number of difficulties, including a lack of information on filing RTI requests; an inability to find PIO contact information, particularly at district and local government levels; inconvenient submission and payment methods; and lack of assistance from PIOs in submitting requests.¹⁴⁷ Additionally, applicants often must make three or four visits to public authorities in order to file requests; the PwC study determined that over 26 percent of applicants had to make more than three visits.¹⁴⁸

The “fear factor” associated with seeking information through the RTI Act—particularly among weaker and more vulnerable sections of society—has also been identified as a major



constraint in several studies. This fear is born out of widespread reports of harassment of RTI applicants by officials, particularly in rural areas,¹⁴⁹ over 40 percent of rural and 15 percent of urban applicants surveyed by RAAG reported experiencing harassment and threats.¹⁵⁰ The problems in accessing information faced by citizens are a reflection of low levels of awareness and poor training and capacity building among PIOs.¹⁵¹ More broadly, these difficulties can be seen as an expression of the bureaucracy's unwillingness to part with information.¹⁵² According to PwC, encouraging access to information is "one of the major change management issues" faced by governments at various levels.¹⁵³

Information about types of requests the manner in which they are processed is limited. Most requests for information have been focused on state and local levels of government because the bulk of public services are provided by agencies at these levels.¹⁵⁴ In many cases, requests have been filed seeking improvements in the delivery of basic services (such as water, roads, electricity, and sanitation) and access to basic entitlements (such as ration cards, below-poverty-line cards, pensions, and wages).¹⁵⁵ Citizens and CSOs have also used the law to audit and monitor government schemes, the public distribution system,¹⁵⁶ and the government's flagship rural employment scheme—the Mahatma Gandhi National Rural Employment Guarantee Scheme (MGNREGS).¹⁵⁷

6.2.1. Responsiveness of Line Ministries

The RAAG study found that between 50 percent and 60 percent of information requested was actually received by applicants. When information was received, 40 percent of rural applicants and 60 percent of urban applicants reported that the information fully served the original reason for filing the application; 20 percent said it served the purpose in part. Sixty-five percent of respondents reported that the law had been useful in accessing government information and resolving basic problems.¹⁵⁸

Statistics on the central government compiled by the CIC suggest a steady increase in RTI applications—from 24,436 in 2005–06 to 263,261 in 2007–08 (see figure 3); a relatively small number of these applications were rejected.

But there are currently no data available on the types of information requests that have been rejected, and whether or not these rejections were legitimate. Overall, central government departments were quite responsive (based on RTI applications filed by the RAAG): the central government was successful in providing information in 81 percent of the cases.¹⁵⁹

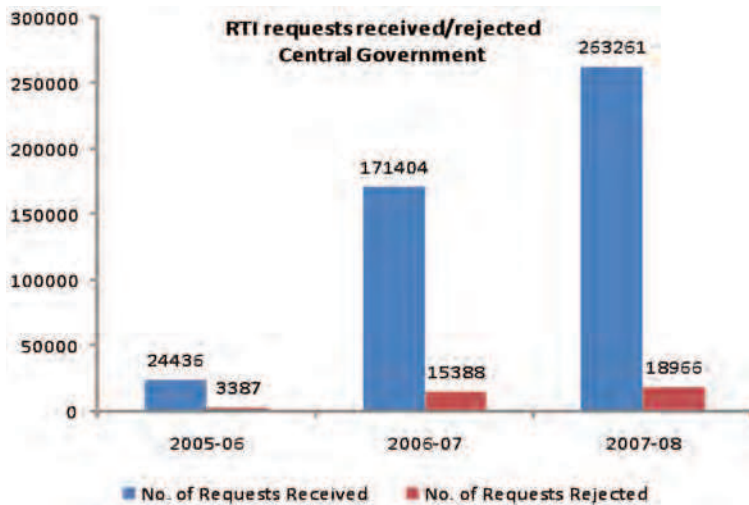
In all, of the four departments analyzed, the number of RTI requests initially received was quite small, but all of the departments have witnessed a subsequent spike.

6.2.2. Department of Personnel and Training

In 2009–10, the DOPT received 6,956 requests for information (see figure 4)¹⁶⁰ of which a very small number were rejected. On average, the department receives 8–10 RTI requests per day.¹⁶¹

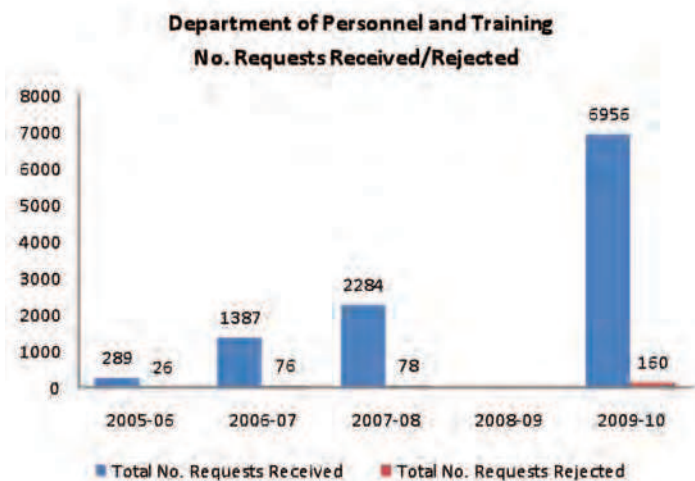
6.2.3. Department of Rural Development

Despite its size, the department does not receive a great volume of RTI requests (see figure 5).¹⁶² In 2005–06, the department received only eight RTI applications, and though that number rose to 350 by 2009–10, it remains lower than could be expected. Officials in the department confirmed

FIGURE 3. RTI Requests Received or Rejected by the Central Government

Source: Data compiled from the CIC Annual Reports for 2007–08, <http://cic.gov.in/AnnualReports/AR-2007-08/MainReport.pdf>.

Note: Data for subsequent years are not available since the CIC has not published any further annual reports.

FIGURE 4. RTI Requests Received or Rejected by the DOPT

Source: DOPT Annual Returns Reports to the CIC for the years 2005–06, 2006–07, 2007–08, and 2009–10. Annual returns were not filed by the department in 2008–09.

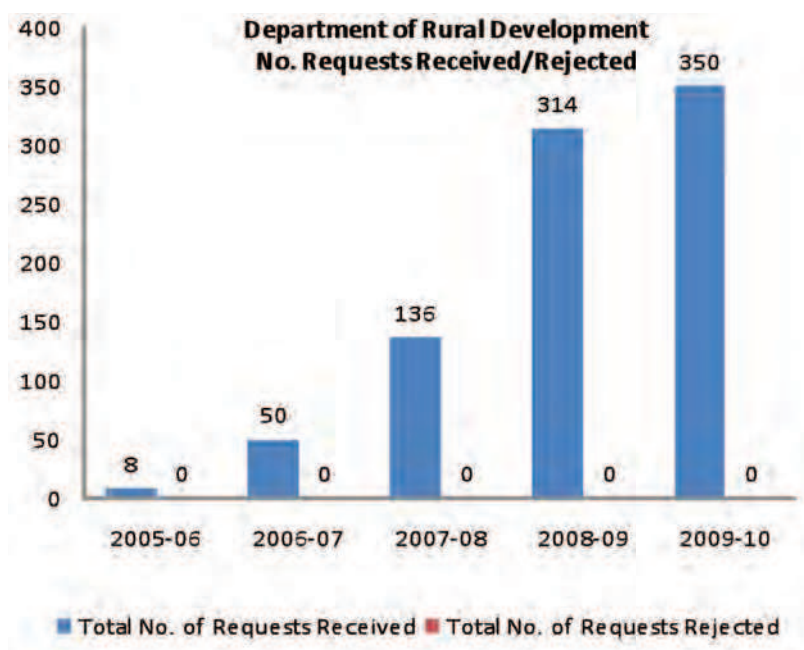
that 90 percent of requests that come to the department relate to programs or rural development schemes (such as the Pradhan Mantri Gram Sadhak Yojana [PMGSY], the Indira Awas Yojana [IAY], and the MGNREGS) that are being implemented at the state and district levels and that are therefore transferred to the relevant departments at these levels. According to



department officials, the MGNREGS division in the ministry receives the most RTI requests, especially ones related to the number of staff at different levels in the department, queries about salaries and benefits of officers, and so on. Available data also suggest that the department has not rejected a single request for information in the past five years.

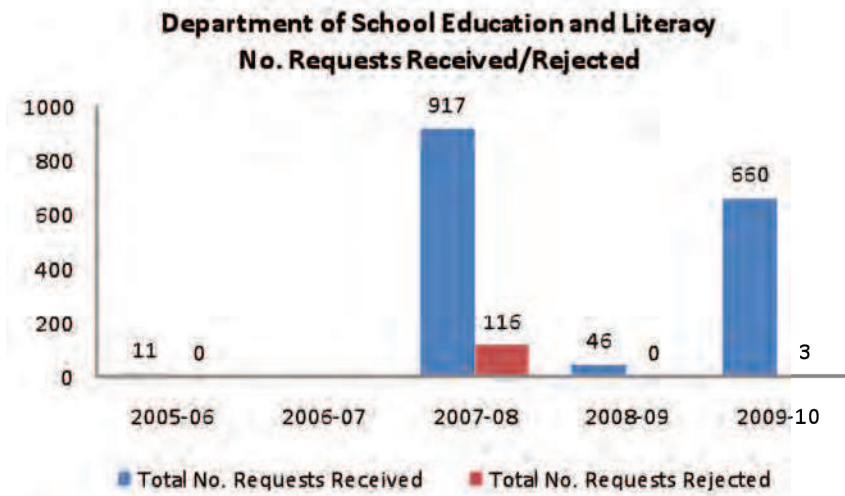
From the perspective of department officials, the RTI requests received are largely “unproductive,” noisome, and time-consuming, since that they usually involve the seeking of information related to local-level schemes.¹⁶³ Officials interviewed claimed that the RTI Act was principally being used by people to resolve individual grievances, to settle scores, and to harass government departments. They complained about the vague nature of requests and the low fees for filing RTIs. The officials suggested that frivolous requests for information should not be entertained under the law. 6.2.4. Department of School Education and Literacy Data submitted by this department to CIC provide an insight into the number of RTI requests received by it:¹⁶⁴ in 2009-10, a total of 660 RTI requests were received, of which only 3 were rejected (see figure 6).¹⁶⁵ These suggest that the RTI Act has been used to seek information on teacher salaries and recruitment and retirement policies, probe the functioning of government schools, and question school enrollment policies. Kabir, a CSO that works on spreading awareness about the RTI Act, has used the law to seek specific kinds of information from education departments in the central and Delhi government. For example, the organization has filed RTI requests with the Central Board of Secondary Education (which is under the Department of School Education and Literacy in the central government) seeking information on curriculum design.¹⁶⁶

FIGURE 5. RTI Requests Received/Rejected by the Department of Rural Development



Source: Department of Rural Development Annual Returns Reports to the CIC for the years 2005-06, 2006-07, 2007-08, and 2009-10. Annual returns were not filed by the department in 2008-09.

FIGURE 6. RTI Requests Received or Rejected by the Department of School Education and Literacy

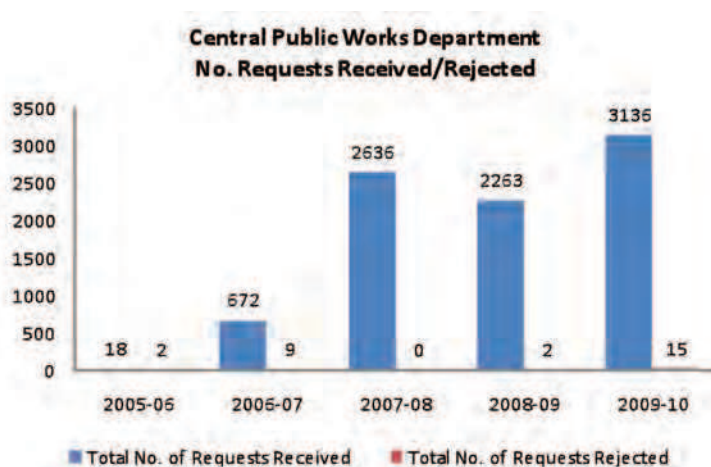


Source: Department of School Education and Literacy Annual Returns Reports to CIC for the years 2005–06, 2006–07, 2007–08, and 2009–10. Annual returns were not filed by the department in 2008–09. Data available at the CIC RTI Annual Returns System, <http://rtiar.nic.in/rtiar09/ARReportMenu.asp>.

6.2.4. Central Public Works Department

According to data submitted by the CPWD to the CIC, of the three line departments, the CPWD processes the highest volume of requests (see figure 7); since 2007, the department has consistently been receiving over 2,000 requests for information. It receives an average of 20–25 RTI applications per day,¹⁶⁷ in marked contrast to the Department of Rural Development,

FIGURE 7. RTI Requests Received/Rejected by the Central Public Works Department



Source: Ministry of Urban Development Annual Returns Reports to CIC for the years 2005–06, 2006–07, 2007–08, 2008–09, and 2009–10. Data available at the CIC RTI Annual Returns System, <http://rtiar.nic.in/rtiar09/ARReportMenu.asp>.



which receives only 6–7 requests.¹⁶⁸ This is not surprising, given that the CPWD provides a range of public services and, consequently, has greater interaction with the public. To respond to these requests, the CPWD has invested significant time and effort in building up the capacities of the department to handle RTI implementation.

To gauge the responsiveness of line ministries to the RTI, an information request was filed in the Department of Rural Development, Department of School Education and Literacy, and CPWD—three RTI requests in total; RTI requests were submitted by mail on the same date (see annex 1 for a sample of the RTI request). Responses were received from all three departments, but some responded sooner and more efficiently than others. The CPWD provided the speediest reply (7 days), followed by the Department of School Education and Literacy (26 days), and the Department of Rural Development (31 days). The quick response from the CPWD is a reflection the department's better management of RTI requests and applications.

With regard to the quality of information given: the CPWD and the Department of School Education and Literacy provided partial information; the Department of Rural Development provided incomplete information. The Department of Rural Development provided particularly poor-quality information, failing to respond to a number of questions on the application. While the small sample of RTI requests filed is insufficient to make comprehensive assessments of departmental responsiveness to the law, considered with other available data, it suggests that departments feel compelled to respond to requests, even if they do not fully. While the quality and timeliness of these responses may be critiqued, the responsiveness itself is indicative of some degree of institutional change.

7. The RTI Act and Accountability

There are high expectations for the RTI Act in India. It is frequently cited in government speeches as landmark legislation that testifies to the government's commitment to "promote transparency and accountability for fostering good governance and democracy."¹⁶⁹ The law, it is argued, grants citizens with a legal right to demand information and clarification from government officials for the first time and, in so doing, challenges longstanding relationships of power and patronage.¹⁷⁰ Prior to the RTI Act, citizens had few opportunities to hold the government accountable for its policies and actions; the law has given citizens a legal channel for doing this.¹⁷¹ The enactment of the RTI Act itself is perceived as a symbolic shift from a culture of secrecy to one of transparency and openness.

There is clear evidence to suggest that the RTI Act is being used by citizens across the country: there are over a million requests for information citing the law every year. Studies acknowledge that the law has been used most often in sectors where citizens have traditionally had to struggle to access their rights.¹⁷² For example, an analysis of over 1,500 RTI applications, filed by citizens in five villages as part of a village-level RTI campaign in 2006–07, found that most requests were filed with departments delivering basic social services (such as ration cards, pensions, and other benefits). A number of civil society groups and people's movements have also been actively using and promoting the law.¹⁷³

Since 2005, a number of case studies have documented and highlighted the use of the law in helping citizens access their basic entitlements, redress grievances related to the nonprovision of basic services, and even expose corruption in public services.¹⁷⁴ In many instances, the

very act of filing an RTI application has served as a deterrent, prompting government action to resolve the grievances of citizens.¹⁷⁵

Historically, social welfare and development programs in India have been associated with reports of corruption, pilferage, and mismanagement. In particular, rural employment programs have been vulnerable to loss of funds in this way, as collusion between private contractors and local politicians have led to inflated procurement bids and misappropriation of funds.¹⁷⁶ For example, a 2006 survey by the National Food for Work Program, conducted in six states, unearthed instances of false muster rolls, ghost entries on muster rolls, and massive discrepancies in the payment of minimum wages to workers.¹⁷⁷ The lack of information about how schemes were being implemented and how funds were being allocated and spent made it practically impossible for citizens to uncover and check corrupt practices.

7.1. THE NATIONAL RURAL EMPLOYMENT GUARANTEE ACT (NREGA)

For the first time, RTI has been institutionalized in the country's largest rural employment guarantee scheme—the MGNREGS, which provides rural households with 100 days guaranteed employment in public works at a minimum wage and which mandates compliance with the provisions of the RTI Act and the proactive disclosure of all scheme-related data and information. Specifically, information that must be disclosed includes demands for work received, workers registered, job cards issued, funds received and spent, wage payments, and work sanctioned.¹⁷⁸ The law also mandates regular social audits of work and expenditures under the scheme, including disclosure of government records and documents.¹⁷⁹ The RTI Act has been critical in the success of these audits, and although leakages in the scheme persist, it is widely acknowledged that the “insistence on transparency and access to records...has helped prevent pilferage.”¹⁸⁰

The RTI Act has proved to be a useful tool for citizens and civil society groups to legally demand information on the functioning of state-sponsored rural development and welfare programs. For example, in 2006, SabarEktaManch, an NGO in Gujarat, filed an RTI application seeking information on the minimum wage being paid to MGNREGS workers. The information revealed that these workers were being paid a paltry wage compared to what state mandates. Based on this, the SabarEktaManch filed an RTI request in the Gujarat High Court, seeking to fix irregularities in the wage payment system.¹⁸¹ The institutionalization of the law as well as the social audits within the MGNREGA have brought a greater focus to issues of transparency and accountability in the delivery of social-sector programs.

7.2. SUPPORTING THE EDUCATION OF THE POOR

Pardarshita, a Delhi-based NGO, has used the RTI Act to scrutinize the admissions process among New Delhi's elite public schools, many of which were allocated land at subsidized rates by the Delhi government on the condition that they reserve 25 percent of their seats for children from economically weaker segments of the population. In practice, few schools were adhering to this requirement.

In July 2004, on the petition of the NGO Social Jurist, the Delhi High Court issued an order requiring all schools that had been allotted government land to fulfill this condition. Pardarshita, the SatarkNagarikSangathan (SNS), and other groups filed a series of complaints on this issue with the Directorate of Education in the Delhi government and with schools, and



then used the RTI Act to follow up on the status of the complaints. In many instances, the filing of such applications alone led to swift action by the schools, resulting in several poorer students being able to gain admission. The group continues to monitor and pursue the implementation of this quota; today, most schools are complying with the quota as originally intended.¹⁸²

7.3. OPENING UP EXAMINATION RESULTS

JOSH, a Delhi-based NGO, has set up a youth task force that operates an RTI help-line for Delhi University students; it has been using the RTI Act to campaign for greater transparency at the university,¹⁸³ addressing issues including the internal assessment system and the functioning of college canteens, hostels, street lights, and roads.¹⁸⁴

In 2007, JOSH filed a number of RTI applications with colleges of the Delhi University, seeking updates on their compliance with the proactive disclosure provisions of the RTI Act. The lack of response spurred JOSH to take the matter up with the CIC. Under pressure from the CIC and JOSH, colleges were quick to disclose information through manuals on their Web sites.

The information received through the RTIs revealed that colleges were not following standard procedures for internal assessment, but after the initial disclosure of information by colleges, follow-up compliance by departments has been weak. From the perspective of groups involved in the campaign, departments cooperated initially because of pressure from the CIC, but as soon as the pressure eased, they returned to the *status quo*.¹⁸⁵

7.4. PUBLIC WORKS

In 2002, Parivartan, a Delhi-based CSO, sought information under the Delhi Right to Information Act 2001 for public works contracts in two East Delhi neighborhoods. A public hearing, or *jansunwai*, organized by Parivartan to audit the 68 contracts revealed massive corruption and embezzlement of funds in 64 of the local municipal corporation contracts (Municipal Corporation of Delhi).¹⁸⁶ The investigations revealed that out of a total Rs. 13 million that was officially sanctioned for improving civic amenities in these localities, approximately Rs. 7 million worth of items did not exist.¹⁸⁷

Following the public hearing, Parivartan petitioned the chief minister of Delhi. In May 2004, the Delhi High Court directed the Delhi police to investigate allegations of corruption,¹⁸⁸ prompting the local municipal councilor to offer full transparency in public works programs in the area. The Municipal Corporation of Delhi agreed to a series of corrective measures, which included proactively displaying information about public works projects at worksites, offices, and in local communities.¹⁸⁹ The court case proved less successful: the Delhi police failed to collect evidence years after the alleged corruption case. Parivartan has also campaigned for greater transparency and accountability in the management of the public distribution system in Delhi.¹⁹⁰

7.5. RATION SHOPS

The SNS, another Delhi-based NGO, runs an information center in New Delhi to educate and encourage local residents to use the RTI Act for a range of issues, including pensions, primary and secondary school education, housing, electricity, and water supply and sanitation.

Case studies documented by SNS track their successful record in using the law to demand basic entitlements for slum dwellers, including access to ration cards, regular water supplies, clean sanitation, and so on.¹⁹¹ In 2004, the SNS helped slum dwellers file applications under the Delhi Right to Information Act 2001 in order to access ration shop records; they revealed that shopkeepers were regularly siphoning rationed wheat, rice, and sugar and selling it to fictitious ration-card holders. Sustained pressure by the SNS and its volunteers has also led to significant improvements in the management of the public distribution system. More recently, the SNS has been using the law to access information about the performance of elected representatives.

Other groups, including the Hazards Centre (a New Delhi-based CSO that works primarily on issues of the urban poor), have filed RTI requests with the public works departments on behalf of the inhabitants of resettled and unauthorized colonies, seeking information on the provisioning of basic services in these areas.¹⁹²

7.6. COMMONWEALTH GAMES

Meanwhile, in a particularly high-profile case, the Housing and Land Rights Network (HLRN), another Delhi-based organization, used the RTI Act to access information on governmental expenditures for the 2010 Commonwealth Games (CWG).¹⁹³ Based on RTI responses from different departments, the HLRN found that social development funds earmarked for the poor—to the tune of Rs. 744 crores, or \$164 million—had been reallocated by the Delhi government for the CWG.¹⁹⁴ Following these findings, the group called for an audit and an investigation into the diversion of funds by the Delhi and central government authorities. While the chief minister of Delhi publicly denied that funds had been diverted,¹⁹⁵ the matter caught the attention of parliamentarians—not only in India (where the issue was raised in both the lower and upper houses)¹⁹⁶—but also in the United Kingdom, where a question on the diversion of funds was raised by a Member of Parliament in the House of Lords.¹⁹⁷ Following the disclosure of these and other expenditure-related discrepancies, the government ordered an official probe and investigation into the CWG expenditures.

7.7. MEDIA

In some instances, journalists have used the RTI as a tool to collect information. Shyamlal Yadav, an associate editor with the leading periodical *India Today*, has filed over 1,800 RTI applications to gather information for his investigative stories.¹⁹⁸ In 2008, Yadav used the RTI Act to seek details of the foreign trips made by ministers in the UPA government. Four months and 59 RTI applications later, Yadav found that 71 out of the 78 ministers of the UPA government had made a total of 786 foreign trips over a three-and-a-half year period—at government expense.¹⁹⁹ The article raised considerable public interest and gained a lot of media attention, eventually prompting the PM to write to the ministers asking them to curtail foreign travel expenditures.²⁰⁰

In the following year, *India Today* filed RTI applications with every central government ministry, seeking information on the foreign travel of bureaucrats, revealing that between January 2005 and April 2008, 1,576 officials of the rank of director and higher had travelled abroad for a total of 24,458 days, at a cost of more than Rs. 56.38 crores.²⁰¹

In 2006, the media house NDTV and several newspapers (including *The Hindu*, *The Telegraph*, and *Hindustan Times*) partnered with CSOs to launch the “Drive against Bribes



Campaign” and to combat corruption. The 15-day campaign sought to discourage people from taking bribes, using the RTI Act to access information from the government. Almost 1,500 trained volunteers assisted people at centers in 48 cities about the law. According to journalist Manish Sisodia, the campaign involved over 700 groups from across the country (including NGOs, resident welfare associations, students, and lawyers) and helped generate a buzz about RTI.²⁰²

These examples and other case studies suggest that the RTI Act has been used in an innovative way by individuals and citizen groups seeking a range of information on government schemes, development projects, benefits, and entitlements. Audits of the MGNREGS have helped expose corruption in the wage payments and construction projects. Groups such as Parivartan and SNS have used it as a tool for the redress of grievances and as an alternate mechanism for the poor to access their basic rights and entitlements to ration cards, pensions, electricity, water connections, and so on. Meanwhile, organizations like HLRN used the law to expose instances of poor administration (as with the diversion of social sector funds to pay for CWG).

But instances of information obtained through the RTI Act translating into direct action against corrupt and inefficient practices or resulting in punitive action against officials have been few in number. From the perspective of civil society, this is not as much a reflection of the law and its implementation as of the state’s weak mechanisms of horizontal accountability, evident in, for example, the unwillingness of judiciary bodies and law enforcement agencies to act on findings unearthed through the RTI Act.

8. Conclusion

The RAAG study concludes: “while the awareness of the importance of transparency has indeed increased manifold [in government], infrastructure needs to be built around it to allow it to work better.” Similarly, the PwC study notes a lack of adequate planning among public authorities to “proactively identify and address constraints in providing citizens with information.”²⁰³ The RAAG report also notes that “the key to increasing accountability of public authorities (vis-à-vis the RTI) lies in bringing about attitudinal changes” within the government at various levels.²⁰⁴

Since the enactment of the RTI Act, civil society groups have continued to push for its better and more stringent implementation, remaining vigilant against any attempts to amend or curb it. Studies have acknowledged the key roles played by CSOs in raising awareness and in training and assisting the public in filing requests.²⁰⁵ Because of civil society’s continued engagement with the RTI campaign, India did not face the problem seen in other countries where RTI laws were passed but rarely used.

The Indian media were early supporters of RTI, with senior journalists lending strong support to the movement.²⁰⁶ They have also served as watchdogs: in 2006, when rumors of a possible government amendment to the law opposed by the media began to circulate, the media opposed it. Since its passage, national newspapers have regularly featured articles relevant to the RTI Act. The RAAG survey of over 60 publications in English, Hindi, and other regional languages found that, on average, 65 news items per publication per year deal with RTI.²⁰⁷ Another key finding of the RAAG survey, however, is that the Indian media rarely use the law to unearth stories and investigate issues.²⁰⁸

Although the RTI campaign did receive some support from progressive bureaucrats (notably, N. C. Saxena and Harsh Mander, among others), the bureaucracy's overall response to the law has been ambivalent.²⁰⁹ Specifically, this resistance was manifest in repeated attempts to amend the law and a lack of effort at improving the internal capacities of departments to supply information.

In 2010, an all-India perceptions survey of over 4,000 civil servants revealed that they view the law with trepidation. The RTI Act is perceived as curbing the discretion of government officials who now fear recording their views on file in the event that an RTI request reveals that these views are contrary to official rules and procedures.²¹⁰ There have even been some reports of officials recording their views on Post-It® notes rather than on files.²¹¹ Some also fear that the law will be used to harass and blackmail them.²¹²

Another common concern is that departments will be inundated with a huge volume of requests, bringing the government to a standstill. In interviews conducted with the DOPT, Department of Rural Development, and CPWD, officials consistently made reference to frivolous, vexatious, and voluminous requests for information. In 2009–10, attempts were made by the bureaucracy to amend the RTI Act to exempt such requests. More recently, in December 2010, the DOPT mooted an amendment to restrict the number of words that could be used in drafting an application.²¹³

On a day-to-day basis, resistance from government officials creates obstacles to citizens accessing information under the law. Respondents to the 2008–09 RAAG and PwC studies (particularly those belonging to economically weaker segments of society) reported that they had been harassed and intimidated by government officials. In some instances, this harassment became violent, with a number of RTI activists being assaulted and even murdered in the past few years.²¹⁴ Puddephatt observes that a major challenge to the implementation of the RTI Act is this “mindset of resistance” within public institutions, concluding that while “a moment of political will and a concerted push by civil society” allowed for the RTI Act to pass, it is not clear, given this resistance, the extent to which political will has translated into improved implementation outcomes.²¹⁵

It has been observed that the perpetuation of colonial laws, including the Official Secrets Act 1923, the Indian Evidence Act 1872, and the Civil Services Conduct Rules, have created an atmosphere in which government confidentiality is the norm and disclosure the exception. As early as 2006, the Second Administrative Reforms, in its second report on the RTI Act, acknowledged that the effective implementation of the law would depend on a shift from “the prevailing culture of secrecy to a new culture of openness.”²¹⁶ While a series of government committees, including the Fifth Pay Commission and the Second Administrative Reforms Commission, have recommended amending the Official Secrets Act and other rules and procedures that restrain the disclosure of information, this shift has not occurred because efforts to reform the internal structures and processes of the state—and thus facilitate the disclosure of information—remain weak.

Politically, the RTI Act, along with the NREGA, is perceived as a major achievement of the Congress-led UPA government. While a succession of non-Congress governments initiated efforts to introduce the RTI Act (notably the BJP-led United Front Government that introduced the FOI Act 2002), it was the Congress Party in 2004 that gave RTI a political impetus.²¹⁷ Since the enactment of the legislation, some political leaders, including Congress Chairperson Sonia Gandhi, have ardently supported the RTI Act and have resisted efforts to amend the law. But from time to time, serious questions have been raised by various factions within the political establishment about the applicability of the law to specific areas (if, for example,



the communications of the PM and President of India can be disclosed under the law²¹⁸ and whether or not the judiciary is covered under it.²¹⁹ Political actors have also been divided over the issue of RTI amendments, with some supporting them as necessary for the smooth implementation of the law and some resisting them.²²⁰

Citizens and the state have been said to share a client–patron relationship, in which citizens are perceived more as beneficiaries of state goods than as the bearers of rights. The RTI Act challenges this power dynamic by granting citizens the right to question the government and to seek information on its various activities. Alongside this shift comes an increasing focus on government performance evident in the development of outcome budgets and the introduction of a new performance management system in government. Yet, on a day-to-day basis, it seems that government bodies continue to be bound by rules and procedures. Given this focus on procedures rather than outcomes, it is not surprising that the implementation of the RTI Act has become, as previously noted, a “check-the-box” process. In other words, there has been procedural compliance, but little attention given to whether or not existing systems and processes are able to facilitate the efficient supply of information.

In sum, an analysis of the implementation of the RTI Act suggests mixed results. On one hand, there is evidence to suggest that, at various levels, the government has complied with the basic provisions of the law, including formulating rules and regulations, designating information officers, setting up information commissions, and establishing procedures for accessing information. Backed by civil rights groups, citizens are often using the law to demand a range of information from the government that has been used as the basis of campaigns demanding basic rights and entitlements, especially for the poor.

But the systemic changes needed are yet to be seen. For example, departments lack sufficient budgets, manpower, and infrastructure, and they are hampered by poor records management practices. Moreover, the institutions set up to uphold and promote the RTI regime, such as information commissions, have performed poorly, as seen in the growing number of appeals and complaints and in the low rates of penalties.

The RTI Act 2005 is groundbreaking legislation that commits the Indian government to an unprecedented degree of transparency. But research studies and our own analysis suggest that there have been gaps in the government’s efforts to implement the law, particularly with regard to bringing about systemic changes in the rules and procedures governing the disclosure of information. Discretionary practices remain, as does a bureaucratic focus on procedures over outcomes. Even so, the law’s impact on society is impossible to dismiss. Thanks to the continued and active presence of civil society groups who continue to press the government for more effective implementation of the law, it is estimated that approximately 1 million people per year, on average, are exercising their right to information.

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Notes

1. Lord Meghnad Desai speaking at the Fourth Annual Convention on the RTI, New Delhi, October 2009; quoted in Roberts 2010: 3.
2. V. Narayanaswamy, minister of state (Planning and Parliamentary Affairs), "Responsibility of Political Leadership in Promoting RTI," the Fifth Convention on The Right to Information Act, New Delhi, September 13, 2010; <http://cic.gov.in/convention-2010/Speeches/Narayanasamy.pdf>.
3. Roy and Dey undated: 18.
4. RAAG 2009: 7–8.
5. Drawing influences from access-to-information laws in Canada, Mexico, South Africa, and Jamaica.
6. In fact, the World Bank's access-to-information policy also draws from the Indian law.
7. These sectors were selected because departments within them are implementing major schemes and programs.
8. These obligations include the appointment of information officers, proactive disclosure of information by the department, setting up of internal systems and processes to facilitate the supply of information, and the submission of annual RTI reports to the Central Information Commission (CIC) at the end of each year.
9. See RAAG 2009; PwC 2009; PRIA 2007, 2008; Roberts 2010.
10. The PwC study assessed the implementation efforts of government departments in a sample of five states. The study was based on the feedback of over 2,000 RTI applicants and 200 information providers across public authorities in the central, state, and local levels and included feedback from 5,000 citizens. See <http://rti.gov.in/rticorner/studybypwc/index-study.htm>. The RAAG study was more extensive, covering public authorities in the central government, ten states, and the National Capital Territory of Delhi, with three districts in each state and eight villages in each district randomly selected. In total, as part of the study, 515 public authorities were surveyed across the country, 37,704 people interviewed, and over 800 RTI applications filed with different public authorities across the country. See http://rti-assessment.org/exe_summ_report.pdf.
11. For a rich and detailed history of the RTI campaign, see Singh (2007, 2009). Also see Jenkins and Goetz (1999); Mander and Joshi (1999); Goetz and Jenkins (1999); and Banisar (2006).
12. In 1975, the Supreme Court, in the case of *State of UP v. Raj Narain* (AIR 1975 SC 865), ruled that all citizens had the right to know how the government functions. A few years later, in 1982, in a case related to the disclosure of information about the transfer and nonappointment of judges, the Supreme Court recognized RTI as a fundamental right under the Constitution. For a detailed account of the constitutional development of RTI, see Mander and Joshi (1999).
13. The MKSS was founded by Aruna Roy, a retired Indian civil servant; Nikhil Dey, a lawyer who left his studies in the United States to take up rural activism; and Shankar Singh, an expert in rural communication. For a detailed history of the MKSS and its early work, see Mander and Joshi (1999) and Roy and Dey (2004).
14. In the late 1980s and early 1990s, people's organizations—particularly those working in the environmental field—began to make sporadic demands for information. Concerned about the social and environmental impacts of development works, groups campaigning against illegal forest use, large dams, and mining began to demand access to records and information on government projects. For example, in 1988, the Narmada Bachao Andolan (Save the Narmada Movement), a major antidam movement, demanded access to all government documents on the construction of the Narmada dam and in so doing challenged the Official Secrets Act (Baviskar 2006; Singh 2007; 2009).
15. Roy and Dey (undated), Facilitating People's Participation.
16. Singh 2010: 9–10.

17. For example, in 1996, Harsh Mander, a divisional commissioner in Bilaspur, Madhya Pradesh, passed a series of executive orders giving people the right to scrutinize government records. Bureaucrats in the LalBahadurShastri National Academy of Administration, Mussoorie, Uttarakhand—the premier training academy of the Indian Civil Services—also lent their support to the movement and helped organize a national workshop on RTI at the academy in 1995 (Roy and Dey undated: 13; Mander and Joshi 1999).
18. Singh 2007; 2010.
19. Led by the BharatiyaJanta Party (BJP).
20. Tamil Nadu (1997), Goa (1997), Rajasthan (2000), Karnataka (2000), Delhi (2001), Assam (2002), Maharashtra (2002), Madhya Pradesh (2003), and Jammu and Kashmir (2004). In May 1997, the need for a comprehensive RTI law was unanimously recognized at a conference of chief ministers held in New Delhi. It is not clear whether or not this conference acted as a catalyst for the enactment of RTI laws across other states.
21. In Tamil Nadu, there was no movement or civil society campaign for RTI, and the enactment of the law caught many civil society activists by surprise. In Karnataka the government expressed an interest in RTI and reached out to campaigners to seek their assistance in drafting the state law (Interview, Shekhar Singh, November 15, 2010).
22. For some background on the developments that led to the enactment of RTI laws in each state, see the Commonwealth Human Rights Initiative (CHRI) at www.humanrightsinitiative.org/index.php?option=com_content&view=article&id=62&Itemid=71.
23. Reformists such as N C Saxena, former bureaucrat and member of NAC (2010–).
24. Singh 2010: 11–12.
25. Ram Jethmalani, the then union minister for urban development, issued an order that enabled citizens to inspect files and get photocopies of files from the Ministry of Urban Development (Singh 2010: 12).
26. Specifically, the law excluded a number of security and intelligence agencies from RTI coverage, expanded the scope of exemptions, and did not include a mechanism for independent appeals or for penalties for noncompliance with the provisions of the law (see Singh 2007: 44).
27. Singh 2009: 13.
28. Congress Party Manifesto 2004 (www.congresssandesh.com/manifesto-2004/20.html).
29. Aruna Roy, N. C. Saxena, and Jean Dreze.
30. Singh 2010: 14–15.
31. Certain provisions of the law came into immediate effect.
32. Section 22, RTI Act 2005.
33. Civil society organizations such as the NCPRI and CHRI drew upon their connections with internal experts to provide input on the law.
34. The exclusion of the state of Jammu and Kashmir is due its special status under the Indian Constitution. The state, however, has its own RTI law known as the Jammu and Kashmir Right to Information Act 2009. With the enactment of the national RTI Act, state governments have a choice to retain or repeal their RTI laws. While some states, such as Maharashtra and Karnataka, have repealed their RTI laws, in other states, notably Delhi, both laws (national and state) coexist side by side. When there is conflict between laws, the national law prevails (NCPRI 2007: 10).
35. Singh 2010.
36. Puddephatt 2009: 22.
37. Jenkins 2007.
38. Section 24, RTI Act 2005. The second schedule of the RTI Act lists the names of security and intelligence agencies exempt from coverage under the law.
39. See sections 8 and 9 of the RTI Act 2005 for a full list of exemption clauses.
40. Section 8 (2), RTI Act 2005.
41. The NCPRI's (2004) comparative analysis of the RTI Bill 2004 against the FOI Act 2002 and the original NAC. [www.humanrightsinitiative.org/programs/ai/rti/india/national/rti a ct amendments tabulated ncpridec04.pdf](http://www.humanrightsinitiative.org/programs/ai/rti/india/national/rti%20act%20amendments%20tabulated%20ncpri%20dec04.pdf).
42. Singh 2010: 14.

43. File notings are essentially the opinions and notes of civil servants on government files that sum up the decisions taken on a particular matter. The draft RTI bill prepared by civil society groups included the term “file notings” in the definition of “information.” But this was deleted by the government while the bill was being finalized for Parliament. The unease with the disclosure of file notings appears to extend to the highest levels of government; even the president of India expressed concerns about it to the PM in a string of official correspondence (Singh 2010: 13).
44. Singh 2010: 13.
45. Outlook, “Protest against RTI Amendments Gaining Momentum,” August 8, 2006. <http://news.outlookindia.com/item.aspx?405250>. Also see CNN IBN, “Government Backs Off, Won’t Harm RTI Act,” 2006. <http://ibnlive.in.com/news/govt-to-drop-rti-amendment-act/19031-4.html>.
46. Venkatesan2010.<http://beta.thehindu.com/news/national/article451129.ece>.
47. Sections 26 and 27, RTI Act 2005.
48. PRIA 2008; RAAG 2009.
49. For example, while the central government has set a minimal fee of Rs. 10 for filing an RTI application, in other states the fees range from Rs. 50 in the state of Haryana to Rs. 100 in Sikkim. For a comparison of the RTI rules in different states see the CHRI (undated), Comparative Table on RTI Fee Rules: [www.humanrightsinitiative.org/programs/ai/rti/india/comparative table on the fee rules issued by central & state govt.pdf](http://www.humanrightsinitiative.org/programs/ai/rti/india/comparative%20table%20on%20the%20fee%20rules%20issued%20by%20central%20&%20state%20govt.pdf).
50. The term *nodal agency* refers to the department of the appropriate government tasked with providing administrative support for the implementation of the RTI Act. The DOPT is one of three departments in the Ministry of Personnel, Pensions, and Public Grievances, Government of India that coordinates all personnel matters in the central government.
51. Sections 26 and 27, RTI Act 2005.
52. Specifically, the RTI division handles all policies related to the implementation and amendment of the RTI Act and the framing of rules, guidelines, and orders related to its implementation. It is also responsible for developing public awareness programs on the RTI Act.
53. A compilation of notifications and circulars issued by the DOPT on the RTI Act is available on the department Web site at www.righttoinformation.gov.in/Circulars/CircularReportForRTI.asp.
54. HimanshiDhawan, “On DOPT Site, File Notings Not under RTI Act Purview,” *The Times of India*, June 28, 2006, <http://timesofindia.indiatimes.com/india/On-DoPT-site-file-notings-not-under-RTI-Act-purview/articleshow/1686539.cms>.
55. Zee News, “1 T Portal Misleads President’s Office on File Notings,” March 27, 2007, www.zeenews.com/news362460.html.
56. Notably, in drafting the RTI Act, RTI campaigners had specifically included “file notings” in the definition of “information.” This provision was later removed when the bill was tabled in Parliament (Singh 2010: 15–16).
57. Singh 2010: 15–16. See also coverage of the CIC’s decision at <http://right2information.wordpress.com/2006/08/23/more-fireworks-on-file-notings/>.
58. Government of India, Ministry of Personnel, Public Grievances and Pensions, Department of Personnel and Training, Office Memorandum No. 1/20/2009-IR, 2009. [http://persmin.gov.in/WriteReadData/RTI/1 20 2009 IR 1.pdf](http://persmin.gov.in/WriteReadData/RTI/1%202009%20IR%201.pdf).
59. Vidya Subhramaniam, “The Empire Strikes Back,” *The Hindu*, August 18, 2006, www.hindu.com/2006/08/25/stories/2006082504181100.htm
60. Government of India, Ministry of Personnel, Public Grievances and Pensions, Department of Personnel and Training, “Amendments to RTI Rules,” Office Memorandum No. 1/35/2008-IR, December 10, 2010. [http://persmin.gov.in/WriteReadData/RTI/RTI rules 01122010-1.pdf](http://persmin.gov.in/WriteReadData/RTI/RTI%20rules%2001222010-1.pdf).
61. The Government of India’s “Right to Information—Information Service Portal” provides citizens with access to information on the PIOs and appellate authorities appointed in various ministries in the central government. It also provides access to the Section 4 disclosure information by these ministries and links to the RTI Act on their Web sites. See www.rti.gov.in/.
62. When an RTI request is received, details of the request are manually entered into an RTI application register. Information regarding the name of the applicant, postal address, subject of the request, mode of payment, and date of receipt is recorded in the register. Once an application is thus noted, it is forwarded to the concerned PIO for further action. The CPWD has a very systematic procedure

for handling requests for information. Each RTI application is opened as a separate file and all correspondence including the original application, letter forwarding the request, reply of the PIO, and any further correspondence such as first appeal to the AA or second appeal to the CIC is recorded in the file.

63. Government of India, Ministry of Personnel, Public Grievances and Pensions, Department of Personnel and Training, Office Memorandum No. 2/10/2010-CR, July 9, 2010.
64. For example, the Ministry of Personnel, Public Grievances, and Pensions has been sanctioned additional funds for setting up the CIC. See Government of India, Ministry of Personnel, Public Grievances and Pensions and Union Public Services Commission, "Detailed Demands for Grants 2010–11." www.persmin.nic.in/.
65. Centrally sponsored schemes (CSSs) are special-purpose grants extended by the central government to states to encourage and motivate state governments to plan and implement programmes that help attain national goals and objectives.
66. Specifically, the scheme aims at strengthening state information commissions and state administrative training institutes, training various stakeholders, and spreading greater awareness about the RTI Act. See Government of India, Ministry of Personnel, Public Grievances and Pensions, Department of Personnel and Training, "Guidelines on Implementing Centrally Sponsored Schemes," 2007. http://persmin.gov.in/WriteReadData/RTI/1_38_2007-IR.pdf.
67. Government of India, Ministry of Personnel, Public Grievances and Pensions, Department of Personnel and Training, Office Memorandum F. No. 1/4/2006-IR, 2006. http://persmin.gov.in/WriteReadData/RTI/1_4_2006-IR.pdf.
68. Interviews with J. J. Meena, CPWD, September 3, 2010; Uday Morey, Department of Rural Development, September 7, 2010; and H. C. Bhatia, Department of School Education and Literacy, August 31, 2010.
69. Report of the National Subcommittee of Central Information Commission 2008: 45–46.
70. PwC 2009: 8; RAAG: 31.
71. Section 5 (1) and 5 (1) (2), RTI Act 2005.
72. Government of India, Ministry of Personnel Public Grievances and Pensions, Department of Personnel and Training, Office Memorandum No. 34012/13(S)/2005-Estt. (B), 2005. <http://persmin.gov.in/WriteReadData/CircularPortal/D2/D02rti/OM-e-mail RTI 13oct2005.pdf>.
73. See, for example, Government of India, Ministry of Rural Development, Department of Rural Development, Gazette Notification No. K-11018/03/2005-RTI, 2008. <http://rural.nic.in/rightinfo/division.htm>.
74. PwC 2009: 49; Subcommittee of CIC (2009): 14.
75. In the Government of India, the post of under secretary is a junior post, followed in ascending order by the posts of deputy secretary, director, joint secretary, additional secretary, secretary, and cabinet secretary.
76. Interviews with Anjali Bhardwaj, SNS, October 21, 2010; and Aheli Chaudhry, JOSH, September 20, 2010.
77. RAAG 2009.
78. PwC 2009: 48–49.
79. Government of India, Ministry of Personnel, Public Grievances and Pensions, Department of Personnel and Training, 2007, http://persmin.gov.in/WriteReadData/RTI/1_32_2007-IR.pdf.
80. Section 26 (1) (d), RTI Act 2005.
81. The training division of the DOPT is responsible for coordinating and implementing the Government of India's National Training Policy 1996. Specifically, the department conducts induction training for new recruits to the Indian Administrative Service and other all-India and central services. In addition, the department also sponsors training programs on a range of subjects for central and state government employees. For more information, see the department's Web site: http://persmin.nic.in/otraining/AboutUS/Activites_Trgdiv.pdf.
82. See, for example, ISTM 2011. <http://istm.nic.in/CourseCirculars/2011-12/Circular19012011.pdf>.
83. See United Nations Development Programme 2009. <http://data.undp.org.in/factsheets/dg/CBAI.pdf>.

84. Ministry of Personnel, Pensions and Public Grievances, "Huge Response to DOPT On-Line Training Course on RTI," PIB Press Release, September 7, 2009. <http://pib.nic.in/release/release.asp?relid=52442>.
85. RTI Online Certification Course (RTI OCC). <http://rtiocc.cgg.gov.in/login.do?jsessionid=D71EC0DB1B1F9AC5A7740C444D604DBA>.
86. RTI Online Certification Course, Batch Results. <http://rtiocc.cgg.gov.in/login.do?mode=showResults&actionMode=showbatchlist>.
87. RAAG 2009: 23–25.
88. RAAG 2009: 25.
89. Interview with Aheli Chaudhury, JOSH, September 20, 2010.
90. Interview with Manish Sisodia, Kabir, September 16, 2010.
91. PwC 2009: 49.
92. RAAG 2009: 24.
93. Second Administrative Reforms Commission 2006: 31–33.
94. PwC 2009: 47–48. The Government of India in its response to the Commission's report. <http://darpn.nic.in/darpgwebsitcms/Document/file/decision1.pdf>.
95. RAAG 2009: 25.
96. See, for example, Government of India, Ministry of Personnel, Public Grievances and Pensions, Department of Personnel and Training, Office Memorandum No. 1/18/2007/-IR, 2007. [http://persmin.gov.in/WriteReadData/CircularPortal/D2/D02rti/1 18 2007 IR.pdf](http://persmin.gov.in/WriteReadData/CircularPortal/D2/D02rti/1%202007%20IR.pdf). Other circulars regarding records management are available on the department's Web site: <http://www.persmin.nic.in/>.
97. PwC 2009: 47.
98. Interviews with H. C. Bhatia, Department of School Education and Literacy, August 31, 2010; and Anuradha Chagti, DOPT, August 17, 2010.
99. PwC 2009: 48.
100. Official Web site of the Office of Advisor to the PM, Public Information Infrastructure and Innovations. www.iii.gov.in/.
101. PwC 2009: 47–48.
102. Section 25, RTI Act 2005.
103. The CIC has not published an annual report since 2007–08.
104. CIC (Central Information Commission), Annual Report, 2007–08, p. 65. www.cic.gov.in/AnnualReports/AR-2007-08/MainReport.pdf.
105. Chapter III, IV, and V; RTI Act 2005.
106. Chapter V, RTI Act 2005.
107. Section 20, RTI Act 2005.
108. PM Manmohan Singh, "Lok Sabha Debates," 14th Series, Vol. X, 4th Session, Parliament of India, 2005/1927 (Saka). <http://164.100.47.132/LssNew/Debates/textofdebatedetail.aspx?sdate=05/11/2005>.
109. A more extensive study of information commissions across the country has been undertaken by the RAAG study, and this case study draws upon that data set.
110. See Government of India, Gazette Notification, Constitution of the Central Information Commission: [http://persmin.gov.in/WriteReadData/RTI/Notification CIC.pdf](http://persmin.gov.in/WriteReadData/RTI/Notification%20CIC.pdf) and Central Information Commission (Appeal Procedure) Rules, 2005: <http://persmin.gov.in/WriteReadData/RTI/appealrules.pdf>.
111. Section 13(6) and Section 16(6), RTI Act 2005.
112. Information on the training and capacity building of staff in the CIC was sought as part of an RTI application filed with the CIC. The official response received from the Commission was "that no such information is available" (Reply No.CIC/CPIO/2010/1057).
113. Rediff News, "Lack of Staff Reason for CIC's Under-Performance," February 24, 2009. www.rediff.com/news/2009/feb/24cic-poor-show-lack-of-staff-says-cic.htm.
114. Such concerns were raised as early as 2005, when the information commissions were first set up. On the eve of the RTI Act coming into force, the NCPRI issued a press statement questioning the Government of India's decision to fill CIC positions entirely with former bureaucrats. This was also to be the case with information commissions in other states. See Padmaparna Ghosh, "Employment Exchange," Down to Earth Magazine, December 31, 2005. www.downtoearth.org.in/node/10596.
115. Section 12 (4) and Section 15 (4), RTI Act 2005.

116. RaaG 2009: 21–22.
117. Central Information Commission 2005 Annual Report 2005–2006, p. 65. www.cic.gov.in/AnnualReports/AR-200506/MainReport.pdf.
118. RaaG 2009: 42.
119. The calculation is based on an assessment of RaaG (2009: 17).
120. RaaG 2009: 44.
121. Ruhi Tiwari, "Study Findings—RTI Penalties for Delay in Information Are Rarely Imposed," *Live Mint*, January 13, 2010, www.livemint.com/2011/01/13225141/RTI-penalties-for-delay-in-inf.html.
122. See, for example, "NGOs Getting Public Funds Come under RTI Purview," *Outlook India*, April 20, 2010, <http://news.outlookindia.com/item.aspx?679883>; "Private Schools Come under RTI Too, Rules CIC," *The Times of India*, August 5, 2010, <http://timesofindia.indiatimes.com/india/Pvtschools-come-under-RTI-too-rules-CIC/articleshow/6257780.cms>.
123. NiveditaKhandekar, "Activists Lament Courts Going Soft on RTI Offenders," *The Hindustan Times*, November 2, 2010, www.hindustantimes.com/Activists-lament-courts-going-soft-on-RTI-offenders/Article1-620907.aspx.
124. PRIA 2007, 2008; RAAG 2009; PCRF 2009, 2010.
125. PRIA 2007: 21.
126. RAAG 2009: 21–22.
127. RaaG 2009; PCRF 2009.
128. Press Trust of India, "Courts Will Take 320 Years to Clear Backlog Cases: Justice Rao," *The Times of India*, March 6, 2010, <http://timesofindia.indiatimes.com/india/Courts-will-take-320-years-to-clear-backlog-cases-Justice-Rao/articleshow/5651782.cms>.
129. Nandita Rao, "The Courts Not in Order," *The Asian Age*, December 29, 2010, www.asianage.com/columnists/court%E2%80%99s-not-order-755.
130. Aiyar and Posani 2009.
131. Das 2005: 134–147.
132. Das 2005: 146.
133. RAAG 2009: 11–12.
134. PwC 2009: 8, 49–50.
135. A study conducted by the Public Affairs Centre analyzed the Web sites of 500 public authorities. In total the assessment covered 12 central government ministries, 16 departments of each state government (except Jammu and Kashmir), 16 departments of the Union Territories, and Web sites of the CIC and state information commissions (PAC 2009).
136. In total the study assessed 95 offices at the taluka(local) and district levels in Panchmahal's district in Gujarat. See CHRI (2009: 4–5, 49–51).
137. ISTM 2009.
138. Official Web site, Ministry of Rural Development, Department of Rural Development, <http://rural.nic.in/rightinfo/division.htm>. Click on individual program divisions to view Section 4 information.
139. Ministry of Human Resource Development, Department of School Education and Literacy, RTI response, September 7, 2010.
140. Interview with AnuradhaChagti, DOPT, August 17, 2010.
141. PAC 2009: 8.
142. Interview with AheliChaudhry, JOSH.
143. RAAG 2009: 7–8.
144. Roberts 2010: 6.
145. RAAG 2009: 8.
146. PwC 2009: 38.
147. PwC 2009: 38–42; RAAG 2009: 10–11; PRIA 2008: 73–91; Roberts 2010: 8–12.
148. PwC 2009: 6.
149. Ibid.
150. RAAG 2009: 10.
151. PwC 2009: 44.
152. Roberts 2010: 12.
153. PwC 2009: 7.

154. Roberts 2010: 6.
155. PRIA 2008: 74–91; PwC 2009: 30; Roberts 2010: 7; RAAG 2009: 14–15.
156. Pande 2008.
157. Aiyar and Samji 2009; Aiyar and Posani 2009. See also MKSS (undated), “Transparency and Accountability; Using Peoples Right to Information for Proper Implementation of NREGA,” www.righttofoodindia.org.
158. RAAG 2009: 7–14.
159. RAAG 2009: 13.
160. These statistics refer only to the requests received directly by the DOPT and do not include statistics for affiliated bodies/organizations.
161. Interview with Giridhar, PIO, DOPT, August 17, 2010.
162. These data refer only to the RTI requests received directly by the Department of Rural Development and not the public authorities affiliated with it for which returns are also filed by the department.
163. Interviews with Uday Morey, Director, IEC Division; S. P. Arya, Under Secretary, IEC Division; S. B. Pandey, Section Officer, IEC and RTI; and Dwarka Prasad Yadav, RTI Counter, September 7, 2010.
164. These data refer only to the RTI requests received by the Department of School Education and Literacy and not the public authorities affiliated with it for which returns are also filed by the department.
165. Interviews could not be secured with officials in the department, and so information on the kinds of requests processed has been ascertained from secondary sources and interviews.
166. Interview with Manish Sisodia, Kabir, September 16, 2010.
167. Interview with J. J. Meena, PIO Coordination, CPWD, September 3, 2010.
168. Interviews with J. J. Meena, CPWD, and Uday Morey and others, Department of Rural Development.
169. Minister of State for Personnel, Public Grievances and Pensions, ShriPrithvirajChavan speaking at the Third Annual RTI Convention, November 2008, cited in CIC 2010: 30.
170. Singh 2010: 21.
171. Interviews with AheliChaudhury, JOSH; ManojRai, PRIA; and ShivaniChaudhry, HLRN.
172. PwC 2009: 29.
173. Singh 2007: 19–20.
174. See, for example, PwC 2009: 29–34; RAAG 2009: 14–15; Naib 2011: 33–38.
175. Naib 2011: 33.
176. Aiyar and Samji 2009. www.accountabilityindia.in/article/working-paper/787-transparency-and-accountability-nrega-case-study-andhra-pradesh.
177. Dreze2005. <http://timesofindia.indiatimes.com/home/opinion/edit-page/Loot-For-Work-Programme/articleshow/1157838.cms>.
178. Ministry of Rural Development 2008: 56–57.
179. A social audit is “the process of reviewing official records and determining whether state reported expenditures reflect the actual monies spent on the ground” (see Aiyar and Samji 2009: 9).
180. Roy and Udupa 2010. www.himalmag.com/The-mass-job-guarantee_nw4749.html.
181. Sulaimani 2006. www.indianexpress.com/news/paid-just-rs-4-per-day-under-rural-job-scheme-widow-moves-gujarat-hc/6515/.
182. See Pardarshita’s Web site, <http://pardarshita.blogspot.com/>.
183. www.indiaedunews.net/Delhi/Now_queries_just_a_call_away_for_DU_students_10343/.
184. Interview with AheliChaudhury, JOSH, September 20, 2010.
185. Interview with AheliChaudhury, JOSH, September 20, 2010.
186. Goetz and Jenkins 2005: 94–95; Singh 2007: 34–38.
187. CHRI 2006: 4.
188. Indian Express, “MCD Funds Drain: Police Told to File Report,” May 25, 2004, <http://cities.expressindia.com/fullstory.php?newsid=85526>.
189. Singh 2007: 37–38, 50–51.
190. McCall and Wilde 2007: 122–23.
191. SNS 2007.
192. Interview with Shabnam Sultana, Hazards Centre, August 26, 2010.

193. Interview with Shivani Chaudhry, HLRN, August 31, 2010. See also HLRN (2010), *The 2010 Commonwealth Games: Whose Wealth? Whose Commons?* [www.hic-sarp.org/documents/Whose%20Wealth Whose%20Commons.pdf](http://www.hic-sarp.org/documents/Whose%20Wealth%20Whose%20Commons.pdf).
194. Chris Morris, "India Diverts Funds for Poor for Delhi Games," BBC News, May 14, 2010. <http://news.bbc.co.uk/2/hi/8683412.stm>.
195. *Asian Age*, "No SC/ST Funds Diverted to CWG: Sheila," August 3, 2010. www.asianage.com/india/no-scsst-funds-diverted-cwg-sheila-dikshit-844.
196. *Indian Express*, "Uproar in Parl over Diversion of SC/ST Funds for CWG," August 3, 2010, www.expressindia.com/latest-news/Uproar-in-Parl-over-diversion-of-SC-ST-funds-for-CWG/655419/.
197. www.parliament.uk/deposits/depositedpapers/2010/DEP2010-1585.pdf.
198. Interview with Shyamlal Yadav, September 21, 2010.
199. Shyamlal Yadav, "Flying Cabinet," *India Today Magazine*, February 18, 2008.
200. Interview with Shyamlal Yadav, September 21, 2010.
201. Shyamlal Yadav, "Babus Flights of Fancy," *India Today Magazine*, September 15, 2008; *India Today*, "India Today's Shyamlal Yadav Wins National RTI Award," November 30, 2009. <http://indiatoday.in/indiatoday.in/site/Story/73001/Top%20Stories/India+Today%27s+Shyamlal+Yadav+wins+National+RTI+Award.html>. Interview with Shyamlal Yadav, September 21, 2010.
202. Interview with Manish Sisodia, September 16, 2010.
203. PwC 2009: 49.
204. RAAG 2009: 32.
205. PwC 2009; RAAG 2009.
206. Ajit Bhattacharjee was the founder of the Press Institute of India and also a founder member of the NCPRI. During the campaign for RTI, the Press Institute published a number of pamphlets and bulletins on the campaign, including *Aar Paar* and the Transparency Bulletin. In addition, the press contacts of Aruna Roy and other NCPRI members ensured that the RTI campaign received frequent coverage in the newspapers.
207. The study found that, on average, English language publications printed up to two times more RTI articles than Hindi or vernacular language publications. At a national level, RTI coverage was found to be more focused on developments around the law, whereas state newspapers tended to highlight citizen efforts to access information. Of particular interest to the media were stories of how the RTI was being used by citizens to access information from the government. In addition, important decisions issued by the information commissions were highlighted in the papers from time to time.
208. RAAG 2009.
209. Second Administrative Reforms Commission 2006.
210. Government of India, Ministry of Personnel, Public Grievances and Pensions, Department of Administrative Reforms (2010), *Civil Services—A Survey*, pp. 114, [www.cgg.gov.in/CIVIL/sogr/Civil%20Services%20-%20Final\(160410\).pdf](http://www.cgg.gov.in/CIVIL/sogr/Civil%20Services%20-%20Final(160410).pdf).
211. *The Times of India*, "Post-it Notes Help Babus Cover Their Tracks in Case of RTI Query," September 10, 2010, <http://timesofindia.indiatimes.com/city/hyderabad/Post-it-notes-help-babus-cover-tracks-in-case-of-RTI-query/articleshow/6482800.cms>.
212. Government of India, Ministry of Personnel, Public Grievances and Pensions (2010), *Civil Service—A Survey*, pp. 114.
213. *The Times of India*, "Limit RTI Applications to 250 Words: DOPT," December 12, 2010, <http://timesofindia.indiatimes.com/india/Limit-RTI-applications-to-250-words-DoPT/articleshow/7087358.cms#ixzz18ABFnC3y>.
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215. Puddephatt 2009: 28.
216. Second Administrative Reforms Commission 2006: 56.
217. It has also been noted that in the late 1990s and early 2000s, the Congress Party took the lead in enacting RTI laws in the states where it was in power (Singh 2010: 9).
218. Press Trust of India, "President's Office Claims Immunity," December 29, 2010, www.deccanherald.com/content/124642/presidents-office-claims-immunity-rti.html.

219. Ironically, despite being an early supporter of the RTI movement, the judiciary has shown particular resistance to the RTI Act. A number of high courts across the country, most notably the Supreme Court, have resisted efforts to bring the judiciary under the purview of the law. In particular, there has been resistance to disclosing information pertaining to judges' assets. Most recently, the former Supreme Court chief justice has come out in support of amendments to the law, stating the need to "protect the independence of the judiciary." See V. Venkatesan 2009: www.hindu.com/fline/fl2624/stories/20091204262403300.htm. Press Trust of India, "RTI Act Needs Changes to Protect the Judiciary," *The Hindustan Times*, October 29, 2010, www.hindustantimes.com/RTI-Act-needs-changes-to-protect-judiciary-Balakrishnan/Article1-619412.aspx.
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Implementing Right to Information A Case Study of Mexico

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Abbreviations and Acronyms

ASF	Auditoria Superior de la Federacion (Supreme Audit Institution)
ATI	access to information
CIDE	Centro de Investigacion y Docencia Economica
CITCC	Comision Intersecretarial para la Transparencia y el Combate a la Corrupcion (Interministerial Committee Against Corruption)
CNDH	National Human Rights Commission
CSOs	civil society organizations
FDI	foreign direct investment
GDP	gross domestic product
IFAI	Federal Institute for Access to Information
IFE	Instituto Federal Electoral (Federal Electoral Institute)
MPs	members of parliament
OGP	Open Government Partnership
PAN	Partido Accion Nacional
PEMEX	Petroleos Mexicanos
POT	Portal de Transparencia (Transparency Portal)
PRD	Partido de la Revolucion Democratica
PRI	Partido Revolucionario Institucional
SECODAM	Secretaria de Contraloria y Desarrollo Administrativo
SFP	Secretaria de la Funcion Publica (Secretary of Public Function)
SISI	Sistema Informatizado de Solicitudes de Informacion
UNAM	National University

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Implementing Right to Information A Case Study of Mexico

1. Introduction and Background

In June 2002, President Vicente Fox (2000–06) signed a landmark transparency bill into law. The Federal Transparency and Access to Public Government Information law (hereafter called the access to information, or ATI, law), which is considered one of the most important reforms of his administration, came into effect a year later. Article 4 of the law explicitly states that the purposes of the law are to “increase transparency...and accountability so that citizens can evaluate the performance of government authorities...[and to] contribute to the democratization of Mexican society and the strengthening of the rule of law.”¹

Since then, the right of access to public information has been regulated, and a comprehensive information access regime has taken shape. Federal government agencies regularly publish information on their official Web sites. The number of requests for public information has increased consistently since 2003. Although records management remains an issue, some federal agencies have made significant improvements in their archive systems.

The ATI law passed in Mexico, and its implementation, offer several important lessons to be learned for nations seeking to increase government transparency and accountability. Nearly a decade since the implementation of the ATI law, Mexicans have access to public information that was simply not available before.² There is widespread recognition among scholars and development practitioners that the Mexican ATI law is among the most advanced of its kind in the world. Meanwhile, the establishment of the Federal Institute for Access to Information (IFAI, a federal agency responsible for safeguarding the right to public information and ruling on citizens’ appeals of denied information requests) is a milestone. At the time, almost no other country had established a similar institution to implement the right to access public information.³ Today, the IFAI is a well-established institution, and is widely recognized by most citizens.⁴ In addition, in 2007, a reform amending Article 6 of the Constitution explicitly guaranteed the right of access to information and established a minimum benchmark that federal and state governments needed to follow in their own ATI legislation.

In more recent years, as unemployment and public security issues have become important,⁵ the focus and priority to transparency has declined.⁶ Several key public agencies have received complaints for non-compliance with the IFAI’s decisions to release information (Fox and Haight 2010b), and there have been attempts to overrule IFAI’s decisions, which are final



by law.⁷ But IFAI still maintains independence and resolves most information disputes in favor of information requesters.⁸

1.1. METHODOLOGY

The purpose of this paper is to examine the transparency reform and its implementation in Mexico, which might provide lessons to other countries embarking on similar endeavors and contribute to expanding the knowledge base for ATI practitioners and development partners. This paper is mainly based on personal interviews with multiple stakeholders and a desk review of primary and secondary sources, and official IFAI data. A full list of individual sources consulted for this paper is in annex 1.

As part of a larger study on the implementation of ATI laws in eight countries around the world, this document follows a common methodology to provide an overall assessment of key implementation measures and outputs from the ATI regime—in terms of proactive disclosure, responsiveness to requests for information, and shifts in accountability relationships. The paper looks at implementation in three sectors: social development, education, and public works (which in Mexico fall under the Secretary of Communication and Transport). These sectors were selected because they deliver important public services to large numbers of citizens and because, in most countries, they are vulnerable to corrupt practices due to the size of their budgets, high volume of procurements, and large number of beneficiaries.

Additionally, the study examines the institutional arrangements within the executive branch. Unlike the cases of Chile, Canada, and India,⁹ there is no “nodal” ATI agency (that is, an agency responsible for the implementation of the law and its coordination throughout the government) in Mexico. Instead, a specialized and semi-autonomous federal agency (the IFAI) was created to oversee the implementation of the law. But the role of the Secretary of Public Function (SFP) is also examined in this study because it is responsible for public administration issues and for the internal control systems of the federal administration. In that capacity, the SFP is the federal agency responsible for the sanctioning of public officials who do not comply with information disclosure provisions. The SFP is also the entity in charge of the federal government’s overall transparency agenda, including the implementation of international anticorruption conventions.

1.2. STRUCTURE OF THIS PAPER

Following this introduction, section II of this paper examines the passage and some provisions of the Mexican ATI law. It analyzes how the law came into effect, which stakeholders—both within government and within civil society—championed the law, and the context surrounding the law’s approval in 2002. The section also describes the main provisions of the law.

Section III analyzes the operation of the law. It examines the organizational structure and new implementing measures that were introduced by the federal administration to comply with the law, including budgetary allocations, use of technology, records management, and monitoring and evaluation systems. It also analyzes in greater depth the role of the IFAI, a critical element of the law, both for its regulatory and oversight functions. Then, it examines how the law has been operationalized within selected federal agencies, as mandated by the law. Using IFAI data, section IV analyzes achievements in the implementation of the law since 2003, including in usage and compliance. Section V examines the relationship between transparency and accountability by discussing four illustrative cases.

Finally, section VI examines the response of federal agencies to the law after several years of implementation. The concluding section highlights the key aspects of the Mexican experience while drawing some lessons learned.

2. Passage and Provisions of the Law

As is the case in other countries that have introduced access to information (ATI) legislation, in Mexico the extent and scope of the law were significantly influenced by the events leading to the passage of the legislation as well as the interplay among different stakeholders.

In general, politicians, bureaucrats, and civil society leaders and organizations, including the media, are the most significant stakeholders involved in the discussion and approval of ATI laws. Although they all have different interests and incentives, when political conditions allow for the collaboration of these stakeholders, laws tend to be broad in scope, effectively balancing confidentiality and disclosure provisions.

In Mexico the political transition during the early 2000s and the arrival of a new generation of public officials to the federal government, some of them coming from the same “epistemic community”¹⁰ as civil society advocates of transparency and accountability, created a favorable environment for the introduction of access to public information legislation. This legislation, while progressive in scope, included important provisions to minimize potential bureaucratic resistance.

2.1. PASSAGE OF LEGISLATION

Mexico’s political transition represented an extraordinary opportunity to introduce innovative governance reforms.

The election of President Vicente Fox in 2000 represented a turning point in Mexican politics. For the first time in more than seventy years, the Partido Revolucionario Institucional (PRI), which had held the presidency without interruption since 1929, lost the election to an opposition party, the Partido Accion Nacional (PAN), by a margin of 7 percent and with the participation of 70 percent of the electorate.¹¹ Capitalizing on his high levels of political support, newly elected President Fox had strong incentives to undertake bold initiatives that would distinguish his presidency from previous administrations and demonstrate tangible results early on.

In contrast to the “hyperpresidentialism” that had characterized governance in Mexico for decades, President Fox came to office with weaker executive powers.¹² He did not have control over the lower or upper houses of Congress, and even faced strong opposition within his own party. President Fox could not single-handedly pass legislation, or dictate public policy.

As opposition parties began to win elections at the local and state levels in the 1990s, the press also began to adopt a more independent and assertive position vis-à-vis the government: journalists and media executives were increasingly unwilling to acquiesce to government pressures or to refrain from criticizing top government officials. Paradoxically, this political context of weaker executive powers provided the president with an unparalleled opportunity to introduce an ATI law.¹³

Several factors help explain the passing of the law during the Fox administration. First, this law was able to generate wide agreement across party lines; no political party could afford to



oppose legislation promoting transparency and access to information. Second, the ATI law offered the president an opportunity to demonstrate his leadership skills and his commitment to governance issues. Third, the arrival of new actors to the federal government generated new and innovative channels of communication and dialogue between the government and civil society.¹⁴ Finally, the law also provided an opportunity to leave a lasting and symbolic legacy of this first PAN presidency.

As we will discuss further below, leaders of civil society organizations (CSOs), some media executives, and academics had been strongly advocating in favor of regulating the right to information since the mid-1970s. But it was President Fox who seized the initiative and moved quickly to draft a bill soon after coming into office.

In 2001 the government's draft bill was leaked to the press,¹⁵ sparking a debate among the academics, media practitioners, and CSOs who had been advocating for right to information legislation. In May 2001, a number of media executives, journalists, and academics formed a loose coalition—known as the Grupo Oaxaca¹⁶—that critiqued the government's bill and drafted an alternative transparency bill, lobbied members of Congress, negotiated with government officials, and organized conferences and public forums to disseminate information about the law and generate stronger bases of support, placing the topic on the public agenda. According to analysts, the group was able to play a prominent role because it moved away from mere criticism of the government's bill and adopted a more proactive position (Luna Pla 2009: 86).

This level of political engagement by CSOs, academics, and the media was not completely unprecedented in Mexico. In fact, Mexico had a strong network of CSOs that, since the 1970s, had been advocating for free elections, and which played a critical role in the adoption of a series of electoral reforms (Middlebrook, Cook, and Molinar 1994). After the first major electoral reform in 1977, successive reforms eventually led to the establishment of an autonomous federal electoral institution in 1990—the Federal Electoral Institute (Instituto Federal Electoral, IFE)¹⁷—and to the organization of free and transparent elections. Indeed, the IFE became an important precedent and model for the establishment of the Federal Institute for Access to Information (IFAI) in 2002.

In the case of the ATI law, the political context generated a favorable environment not only for the collaboration of government officials and civil society, but also for cooperation between the media and academics in the promotion of an ATI law.¹⁸ In fact, the bill that the executive finally presented to Congress included many of the changes proposed by the Grupo Oaxaca.¹⁹ Since legislators wanted to discuss other changes before voting on the law, they invited several members of the Grupo Oaxaca to participate in the legislative discussion of the bill.²⁰ Once the Fox administration took the initiative in formulating a law, together with key technical experts from government, the legislators and Grupo Oaxaca became key actors in the final drafting and passing of the ATI law. In April 2002 Congress approved the bill unanimously. A few months later, the Grupo Oaxaca decided to dissolve.

The law was able to amalgamate a diverse coalition of support. While it was not the result of a broad-based social movement as in the case of India (Fox, García Jiménez, and Haight 2009) it was backed by a diverse coalition of actors. For the first time in decades, different—and competing—political groups (PAN, Partido de la Revolución Democrática [PRD], and PRI) that held divergent positions and had not been able to agree on major public policy reforms in the past, came together to promote greater transparency and access to public information. For the Fox administration, the transparency law promised to be a powerful tool to reveal past

mismanagement and corruption cases; for the opposition parties, on the other hand, the law promised to be an important mechanism for scrutinizing public officials and keeping the new government in check.

For the academic community, pushing for a strong law was an opportunity to overcome ideological differences and to collaborate with a diverse array of national and international CSOs, all sharing a common interest in being better informed about government decisions and actions.²¹ And for the media, particularly the two leading national newspapers that championed the law—*Reforma* and *El Universal*—support of the ATI law was motivated by the need to assert a more independent position (Michener 2010: 22). Furthermore, by supporting a broader coalition in support of ATI reform, these two newspapers were able to demonstrate that ATI went far and beyond being a mere “media issue.” Finally, support for the law also offered an unprecedented opportunity to shed the press’s traditional reputation of submissiveness toward the government (Bertoni 2011: 11).

The passage of the ATI law indeed represents a distinctive moment in Mexican politics. Over the past decade, no other reform initiative has been able to gather the level of political support achieved by this law.²²

2.2. KEY PROVISIONS OF THE LAW

Strong consensus exists among scholars and development practitioners that the Mexican transparency law is well formulated and includes progressive provisions (Doyle 2002; Sobel and others 2006) that serve as models for similar legislation the world over. The Grupo Oaxaca played a critical role in shaping the text of the law, and helping eliminate a series of loopholes and exemptions included in previous draft bills.

Article 2 of the law states that information in possession of the state is public and that the government should follow the standard of “maximum disclosure” when responding to information requests. In Mexico, these provisions were indeed groundbreaking.

Like any other law, the ATI law was the product of negotiation among different stakeholders with particular incentives and interests. While the Fox administration championed the law, support for it was not homogeneous within the administration. The greatest concerns, according to government officials interviewed for this study, came from the armed forces, attorney general’s office, and secretary of finance. The law thus included provisions to reserve information based on national security concerns to prevent opposition, if not to gain support, from the armed forces. The secretary of finance raised concerns about the costs of implementation. To address this issue, a transitory article was introduced in the law stipulating that no additional resources would be assigned to federal agencies. The final version of the law embodies what was politically possible at the time it was introduced, and reflects the bargaining power and interests of different stakeholders.

The most important provisions of the law include:

- **Procedures for accessing information.** The law guarantees (Article 40) universal access by explicitly stating that “any person,” regardless of citizenship, can request public information without any requirement to either reveal his or her identity or justify the reason for the request.²³ Information requests are free; the government may only charge citizens the costs of document reproduction and shipment. The government has 20 days to respond to a public information request and the deadline can be extended for another 20 days in exceptional cases.



- **Proactive disclosure.** Article 7 establishes a list of relevant and useful information that federal government agencies need to proactively release to the public, including information about their functions and services; salaries of public officials; budget allocations; and concessions, subsidies, permits, procurement contracts, and results of audit reports. The law also establishes that the questions most frequently asked by the public should be considered in the list of relevant public information to be disclosed proactively. It also establishes that information should be disclosed in a timely fashion, and that information should be reliable, truthful, and presented in a manner that is easy to comprehend.²⁴
- **Exemptions.** The law establishes that information in possession of the state is public; it can be reserved for a maximum of 12 years. This deadline can be extended as many times as needed provided the persistence of the causes that account for the classification of information in the first place. Classification requires proof of potential harm, and the law leaves the onus of proof on the government body that denies the requested information. Information related to human rights violations cannot be reserved. Partial disclosure is allowed.
- **Scope of coverage.** The transparency law applies to all three branches of government—the executive, legislative, and judiciary—as well as to the so-called “constitutional autonomous agencies” such as the IFE, Bank of Mexico, National University (UNAM), and National Human Rights Commission (CNDH). Yet, only federal executive agencies are bound by the law’s implementation mechanisms and thus fall within the IFAI’s jurisdiction. The congress, the judiciary, and the constitutional autonomous agencies are compelled by the law to design their own internal regulations and mechanisms to respond to information requests and to comply with the law.

The law excludes unions, political parties, and subnational governments from the transparency law. Parties and unions are national publicly funded organizations that are not explicitly subjected to the law. This exclusion appears to be a major concession given to legislators in exchange of supporting and passing the law within the government’s time limits. Another important limitation is the definition of the law as a federal—rather than general—law, which would have had wider implementation implications for all levels of government. The ATI law only binds government entities at the federal level. According to the Mexican federal system, States are responsible for passing their own ATI laws. Indeed, the biggest challenges to transparency and access to information in Mexico today are found at the state level.²⁵

- **Appeals mechanism and oversight institution.** The most innovative provision in the ATI law is the creation of the IFAI, an institution designed to serve as an intermediary between citizens and government agencies and tasked with guaranteeing the right of access to public information.²⁶

The IFAI acts as an administrative court and oversees the ATI law procedures. Citizens can appeal a federal agency’s decision not to release public information or a response considered incomplete and/or unsatisfactory. The IFAI’s decisions are binding and definitive for all federal agencies covered under the law. Federal officials cannot appeal the IFAI’s rulings. Citizens, however, can resort to the federal courts to appeal an IFAI decision. The IFAI has 50 days to issue a resolution to an appeal.

Unlike other countries where information disputes are resolved in the courts, in Mexico, where the justice system is perceived as slow and costly, the establishment of the IFAI provided an alternative and more expedient mechanism to solve ATI disputes.²⁷ The appeals

process is straightforward; citizens do not need to hire lawyers to appeal a federal agency's decision.

There are precedents for establishing specialized autonomous institutions to arbitrate in sensitive matters in Mexico, such as elections and human rights. For example, in 1990, as opposition to the ruling PRI strengthened and demand for clean elections increased, the IFE was established as a constitutionally autonomous body responsible for organizing elections and guaranteeing they were conducted freely and fairly.²⁸ Since the IFAI's establishment in 2002, two former IFE commissioners have been appointed to serve as commissioners to the IFAI, and several former IFE staff members have also served in key IFAI positions.

- **Enforcement mechanism.** While the IFAI's decisions are binding, it does not have sanctioning powers, and thus, it has limited enforcement capacity. In the event a federal agency does not comply with a resolution by the IFAI, the most the IFAI can do is to inform the SFP, the entity responsible for disciplining the federal public servants. The lack of sanctioning powers is considered to be one of the major weaknesses of the IFAI.²⁹

3. How Operational is the Law? Organizational Structure and Established Implementation Measures

This section focuses on the implementation of the law. First, it examines the supply side of implementation through an analysis of the formal institutions and the mechanisms that were established for requesting information. It then examines the demand side of implementation through an analysis of the use of the law.

3.1. IMPLEMENTING RULES AND STRUCTURES

Title II of the law established, in general terms, the mechanisms that needed to be set up inside each federal agency to respond to information requests and to help the public seeking assistance, including guidance on how to refine a request for information or where to direct a specific request. More specific and detailed implementation provisions were defined in the law's implementing regulations, drafted by the Federal Commission for Regulatory Reform (Comisión Federal de Mejora Regulatoria) in 2003.

Both the law and the implementing regulations direct each federal agency to set up a liaison unit (*unidad de enlace*, which is responsible for handling information requests and for uploading public information on the agencies' Web sites), and an information committee (*Comité de Información*, a collegial body responsible for reviewing decisions about classification of information inside each agency as well as reviewing the agency's responses to information requests, including those related to nonexistent information).

While each federal agency is responsible for appointing as many staff as it deems necessary to the liaison units, the information committees have to be integrated with at least three public officials: the head of the liaison unit, another official named by the head of the agency, and the internal control officer, who is functionally accountable to the Secretary of the Public Function (SFP) due to its internal control role within federal public administration.



In addition, the implementing regulations also mandate federal agencies to provide a physical space inside their agencies, and assign personnel to help citizens requesting assistance on how to search the agency's Web site and/or make a public information request.

A transitory clause in the law allowed federal agencies to take six months to establish the required infrastructure to comply with the law. Citizens could only begin to place information requests starting in 2003, a full year after the law was signed by President Fox. This provision, however, also explicitly stated that the "conformation of these structures...had to be conducted with the existing material, human and financial resources" and that no additional resources would be allocated for this purpose.

Setting up these structures across over 200 federal agencies involved the training of thousands of federal public officials. The Federal Institute for Access to Information (IFAI), together with the SFP, became the two main entities at the federal level responsible for training.

3.2. COMMUNICATIONS AND OUTREACH

Right after the IFAI's commissioners were appointed—and before mid-June 2003, when citizens could begin to make information requests—the IFAI identified key areas for the implementation of the law, including a communications and public outreach component to explain the contents of the law, communicate its relevance, generate public support, and minimize resistance to its effective implementation within different government agencies.

The IFAI's initial work plan had four main pillars: (i) to promote the law within all government agencies, persuade federal officials of the benefits of the law, and provide training; (ii) to work at the state level to disseminate information about the law throughout the country and persuade governors to pass similar laws in their states; (iii) to work with the media and civil society organizations (CSOs) and to disseminate information about the law and encourage citizens to make information requests; and (iv) to promote Mexico's experience in the international arena.

Since 2002, the IFAI has continued to play a key role in communicating and publishing information about the law; collaborating with media, academia, and civil society in awareness raising and research; and organizing forums and international conferences to disseminate information about the Mexican experience and exchange knowledge on international good practices and lessons learned.

3.3. SPECIALIZED AGENCY OVERSEEING COMPLIANCE WITH THE ATI LAW

As argued above, the most important mechanism established in the law was the creation of a separate federal agency—the Federal Institute for Access to Information (IFAI)—with operational independence and responsible for overseeing the law. The IFAI is a collegial body with collective decision-making structures that entail debate and deliberation among commissioners.³⁰ It is led by five commissioners named by the president, subject to no-objection by the senate. The commissioners serve for a period of seven years and are appointed in a staggered manner. One of the commissioners is designated as the IFAI's president by his or her peers for a two-year period.³¹

Article 37 of the Federal Transparency and Access to Public Government Information law (here called the access to information, or ATI, law) establishes the IFAI's responsibilities.

The main responsibilities include: promoting and disseminating the right of access to public information, resolving public information denials by federal government agencies, protecting personal data in control of the government, and overseeing the federal government's compliance with the ATI law.

The law assigns the IFAI other functions, too,³² which some experts interviewed for this study consider too demanding for the institute's budget and personnel.³³ For instance, it has a regulatory function, establishing and revising classification criteria and protecting personal data; a training function, enhancing the capacity of public officials to comply with the law and use information technology to receive and respond to information requests; and an education function, elaborating and publishing studies on the implementation of the law, organizing public forums for the discussion of topics related to ATI, and collaborating with other government and academic institutions to promote the right of access to public information.

In 2010 after the passage of the Federal Law of Personal Data Protection held by Private Entities, the IFAI's functions further expanded, giving the institute the responsibility to guarantee and oversee compliance with the new law, provide guidelines for the protection of personal data held by private entities, and resolve disputes about personal data protection within the entire national territory.³⁴

From the outset, the IFAI was provided with sufficient financial resources³⁵ (see budget section below). Although the IFAI does not enjoy constitutional autonomy like the Human Rights Commission or the Federal Electoral Institute (IFE)—and thus, it does not negotiate its budget directly with Congress, but rather presents it to the finance secretary, which in turn presents the federal budget to Congress—it does have budgetary and operational autonomy.

As part of its semi-autonomy, the IFAI was granted full authority and independence in its internal organizational structure and operation procedures, including its employment and personnel management policies.

The IFAI's personnel policy has been of particular importance for its effective functioning. It has granted the IFAI greater independence in hiring its own personnel, which has precluded its early bureaucratization.³⁶ Since 2003 the IFAI has been able to recruit a highly competent technical staff—most with college degrees. Despite some rotation of the IFAI's officials, well-trained and technically sophisticated staff continues in the agency. This has given the IFAI sufficient institutional continuity and stability to operate, despite disagreements among commissioners or controversies over some of its rulings.³⁷

In addition to allocating adequate financial resources and granting the institute autonomy over its operations, the independence of the IFAI was guaranteed through the appointment of qualified commissioners.³⁸ Some recent appointments have been criticized in the media, leading to calls for a stronger system of checks and balances over the appointment process.³⁹ Disagreements between Commissioners on issues such as the nature of the relationship with government officials and CSOs have also been challenging for IFAI. As the number of appeals to IFAI increase, effectiveness and efficiency might also become challenging.⁴⁰

IFAI has tended to rely on informal contacts with government to ensure greater collaboration, particularly useful since IFAI lacks the enforcement powers to sanction officials who do not comply with its resolutions. Once the IFAI determines that the information in question should be released, it will try to work directly with the agency to "encourage compliance with the mandate, using the informal powers of persuasion" (Fox and Haight 2010b: 153).



3.4. ORGANIZATIONAL ARRANGEMENTS WITHIN THE EXECUTIVE BRANCH

The Secretaría de la Función Pública (Secretary of Public Function, SFP) is the federal agency responsible for coordinating the government's internal control systems throughout the federal administration. As part of this responsibility, the SFP has the sole authority to investigate and discipline federal public officials for violation of administrative procedures. In cases of corruption or other criminal behavior, the SFP is obliged to turn the case over to the attorney general's office for a criminal investigation and/or prosecution. Public officials who refuse to comply with the IFAI's resolutions can only be disciplined and/or sanctioned by the SFP.

The SFP is also the federal agency in charge of "formulating and guiding the federal government's policy on transparency and accountability." Unlike other countries in the region, in Mexico there is no anticorruption commission or agency.⁴¹ The SFP is the institution responsible for anticorruption policies and regulations throughout the federal administration. It is in this general area of transparency and accountability that the responsibilities and functions of the IFAI and SFP intersect and, in some cases, even overlap.

A good working relationship between the IFAI and SFP is crucial for the effective implementation of the transparency law. When public officials refuse to comply with the IFAI's resolutions, the institute's attributions are limited to reporting these officials to the SFP and to recommending that they be sanctioned. The effectiveness of this measure depends on the readiness of the SFP to effectively sanction non-complying officials. Yet, the IFAI uses this measure only as a last resort, preferring instead to negotiate with government authorities and persuade them to comply.

During the first years after the establishment of the IFAI, the institute and SFP had a collaborative working relationship.⁴² IFAI's commissioners worked with the SFP's staff to develop an electronic information request and response platform (the SISI or Sistema Informatizado de Solicitudes de Información). This electronic system was highly instrumental in the effective implementation of the new law. By 2005 the SFP's secretary decided to hand over to the IFAI the management and operation of SISI.

SFP also helped set up liaison units and information committees within all federal agencies, and internal control officers in each federal agency, who are part of the agency's information committee, report to the SFP, rather than to the head of the agency where they work. The inclusion of the internal control officer in the information committee was purposely designed to increase the incentives of federal officials to comply with the law, as the internal control officer is the one responsible for supervising the compliance of federal public officials.

The arrangements, however, show that the lack of clear guidelines can be challenging. The SFP, for example, published a "Transparency Manual" for the federal administration that appears to overlap with the IFAI's transparency guidelines previously issued to all federal agencies. Although SFP has taken several measures to promote the law, it has also faced appeals for non-compliance to information requests.

Over the past few years, the relationship between the IFAI and SFP has changed. According to Fox and Haight, notably the SFP itself is one of the agencies against which most complaints for noncompliance with the IFAI resolutions have been filed (Fox and Haight 2010b: 153).

3.5. IMPLEMENTING AGENCIES: SELECTED LINE MINISTRIES

As stated above, each federal agency is required to establish a liaison unit and an information committee to handle information requests. Depending on the number of requests each agency receives, it can appoint as many staff as needed to its liaison unit. For instance, the Instituto Mexicano del Seguro Social (Social Security Institute, the federal agency with the highest number of information requests—many of which are requests for personal data), has appointed a significant number of officials to its liaison unit and made substantial improvements in its own records management system to respond to the volume of information requests.

To date, no in-depth studies exist on the operationalization of the ATI law within particular federal government agencies. But interviews with staff of the liaison units and information committees in three federal agencies included in this study shed some light on the organizational arrangements for the implementation of the law.

Once a request is received, the liaison unit coordinates the search for the requested information. First, it contacts the head of the unit responsible for that issue. If the head of the unit states that the information should not be disclosed, it directs the request to the agency's information committee. The committee then reviews the request and decides—following the IFAI's guidelines for classification of information—whether or not the information is public and should be disclosed. That decision goes back to the head of the unit and its liaison unit, who post the agency's response on the e-platform system (previously known as SISI, and now called INFOMEX—see section III.I)

In practice though, there is variation in the agencies' actual handling of information requests, including the extent of involvement of the head of the agency in decisions over the disclosure of information. There is also variation in the agencies' proclivity to disclose information and to comply with proactive disclosure provisions. That depends, in large part, on the agency's own leadership and organizational culture.⁴³ Both the IFAI and SFP are quite limited in their direct capacity to influence the performance of liaison units and information committees, and no network exists to allow liaison units in different agencies to share their experiences and learn from one another.

In the case of the secretary of education, the secretary of social development, and the secretary of communication and transportation, which are examined in this study, there is important variation in the management and processing of information requests. The number of personnel, their background, and resources assigned to the liaison units and information committees vary across these three federal agencies.

In the secretary of education, an agency that receives one of the largest numbers of information requests per year, the liaison unit has a total of less than 10 staff members. But as education in Mexico is decentralized, a large proportion of public information is managed at the state level, beyond the IFAI's reach. The secretary of communication and transportation, on the other hand, is a centralized agency with over 10 staff working in its liaison unit. Finally, the secretary of social development has only four staff members in its liaison unit, yet has a liaison unit for each of its programs. The conditional cash-transfer program Oportunidades, for instance, not only has its own liaison unit, but a specific citizen attention window through which most of the information requests and complaints are managed (Fox and Haight 2010b: 157; Hevia and Gruenberg 2010. Fox, Haight, and Palmer-Rubin 2011). This could explain why this



secretary is among the federal agencies with the smallest number of information requests even though it manages important social programs that benefit millions of citizens.

Beyond the number of personnel assigned to each liaison unit, leadership commitment can be evaluated by the profile that liaison units are given within the agency, the reporting lines of authority inside the agency (to whom liaison units report), and the engagement of high-level officials in the liaison units and information committees. For example, in the secretary of education, the secretary⁴⁴ appointed one of his closest collaborators and a high-ranking official to the information committee. Moreover, according to the agency's head of the liaison unit, the secretary has devoted important resources to train the secretary's large bureaucracy (the secretary of education is one of the largest federal agencies in the country). Similarly, in the secretary of social development, the agency's general counsel is a member of the information committee. In contrast, in the secretary of communication and transportation, the liaison unit appears to be far removed from the agency's top leadership. This is a subtle yet telling indicator of the importance given to ATI and transparency within the agency.⁴⁵

3.6. BUDGET

The level of government commitment to ATI legislation can be analyzed by examining the amount of resources devoted to its implementation. In Mexico, the effective implementation of the ATI law required the allocation of sufficient financial resources. Specifically, it entailed the funding of three distinct functions: (i) responding to information requests and appeals, (ii) complying with proactive disclosure provisions, and (iii) setting up and managing the IFAI. But the law only acknowledged—and did not guarantee—funding for the IFAI; all federal agencies were obliged to comply with the law using existing resources and personnel.

The IFAI has to submit its budget through the secretary of finance every year, and while no guarantees exist that it will be adequately funded every year, the IFAI has indeed received sufficient financial resources to operate since its creation in 2002.

In 2003 the IFAI was allocated \$17.9 million; in 2009 its budget increased to \$22.4 million, and in 2011 to \$38.1 million,⁴⁶ a substantial increase to allow the institute to comply with its additional responsibilities resulting from the 2010 Federal Law on the Protection of Personal Data held by Private Entities. Thus the IFAI is mandated with the protection and safeguarding of personal data, whether these data are managed by public or private entities.

According to the IFAI's data, on average, close to 65 percent of the IFAI's budget is allocated to personnel compensation and benefits. By 2010 the IFAI had a staff of 256 employees. As a result of the Law of Personal Data Protection held by Private Entities, the IFAI estimated that it would need to increase its staff to 430 by 2012 to fulfill the institute's new responsibilities.⁴⁷ Of the budget, 13.5 percent is allocated to general services (rental payments, operation and maintenance of technical equipment, and postal and utility services); 6.8 percent to advisory services and research assistance; 5.6 percent to public communication; 3.8 percent to information technology; and the rest to conferences, publications, travel, office furniture, and materials.⁴⁸

Aside from the budgetary allocations to the IFAI, it is difficult to estimate the actual costs of implementing the ATI law in Mexico, since there are no specific line items devoted to it in the federal budget. Each federal agency devotes different amounts of resources and personnel to comply with the law, depending in large part on the volume of information requests received.

TABLE 1. Expenditures of Federal Pro-accountability Institutions

Institution	Percentage (%)
Judicial branch	52.5
Legislative branch	13.9
Supreme audit institution	1.6
National Human Rights Commission	1.6
Federal Electoral Institute (IFE)	26.7
Secretary of Public Function (SFP)	3.0
IFAI	0.53
Total	100

Source: Cejudo and Sour 2007.

To date, few studies exist that estimate the actual costs of implementation of the law at the federal level. One study has resorted to interviews and surveys in order to collect data on costs (Hernández-Valdéz 2009). According to this study, the biggest expense for all federal agencies is personnel. Most agencies assign different types of personnel to respond to information requests and appeals. Aside from personnel, federal agencies' budgets are only minimally affected by complying with the law. "For most agencies, imple-

menting an ATI law is possible by diverting existing assets, and as such, is a matter of people, not equipment" (Hernández-Valdéz 2009: 18). Moreover, the study also reveals that relatively few additional personnel are required to respond to information requests.

According to Alfonso Hernández Valdéz report, in 2007, in small agencies it took only one full-time staff member to respond to all information requests received, on average; in medium-sized agencies, the number rose to 2.5 full-time personnel; and in large agencies the number was 25 (it must be noted that these agencies employ thousands of employees). When the total costs (personnel and equipment) are taken into consideration, the costs of implementing the ATI law are negligible compared to what governments spend on publicizing their activities (Hernández-Valdéz 2009: 31). In sum, implementing ATI legislation does not appear to be that costly after all. This conclusion is shared by a study examining budgetary allocations for all federal proaccountability institutions (Cejudo and Sour 2007). This study demonstrates that the IFAI accounts for only 0.012 percent of all federal expenditures. More importantly, in 2006, the IFAI accounted for only 0.53 percent of all expenditures of the institutions responsible for accountability at the federal level. The IFE, in contrast, accounted for 26.7 percent of all expenditures.⁴⁹

3.7. TRAINING

The IFAI trains federal government officials on a routine basis to ensure adequate knowledge of the law and relevant tools. Such training is especially important given the high levels of staff rotation in federal agencies' liaison units. Between 2003 and 2011, the IFAI trained over 83,000 federal government officials,⁵⁰ from which 61,483 were trained through e-FAI, between 2006 and 2011.⁵¹ e-FAI is an online course developed by the IFAI for all federal government officials in 2006.

The training course consists of seven modules on transparency and access to information, including modules on the law and its implementing regulations; access to and protection of personal data; organization and conservation of archives; INFOMEX; and how to assist citizens who approach the agency to request information.



Finally, some federal agencies have also trained their own personnel, as they have designed their own internal mechanisms to more efficiently handle information requests, including by reorganization their data storage and records management systems.⁵²

3.8. RECORDS MANAGEMENT

The most significant organizational challenge throughout the federal public administration is the absence of an adequate and reliable infrastructure for managing, processing, and storing information. Public servants are not used to keeping records, sharing information, coordinating among different units, or even documenting their activities. Furthermore, Mexico lacks adequately trained personnel in archival development.⁵³

Article 32 of the ATI law establishes that “the National Archive, in collaboration with the IFAI, will define criteria for cataloging, classifying and preserving administrative documents.” The same article also states that these two institutions will issue guidelines for the organization of archives in all federal government agencies, following international standards and good practices.

Coordination and collaboration between the National Archives and IFAI has faced challenges, in large part because the lines of responsibility of each entity have not been clearly defined, and because the National Archives is still governed by dated regulation that refers to the preservation of historic records, not the management of administrative documents. Nonetheless, since the approval of the ATI law in 2002, some regulations have been issued for the preservation and management of administrative records, and a new records law was adopted in 2012.⁵⁴

In 2004, the IFAI and the National Archives issued the “General Guidelines for the Organization and Conservation of Archives in Federal Government Agencies.” In 2007 the Constitutional amendment of Article 6 further mandated each of the three levels of government (federal, state, and local) “to preserve its documents in updated administrative archives” (Cejudo 2009). This constitutional mandate is vital to the principle of maximum disclosure contained in the ATI law: without updated and reliable records, there is no guarantee that citizens can effectively gain access to public information.

Yet, in most government agencies, existing information is still dispersed and/or incomplete. One office might not have access to information developed by another office within the same agency and, frequently, information simply does not exist. Because responding to information requests requires—first and foremost—that one possesses the requested information, the absence of records actually gives government officials with limited commitment to transparency and access to information an excuse to deny information requests. As shown in table 2, throughout the years of implementation, a recurrent reason for denying information requests is that the information does not exist. Out of the total number of responses, the absence of information grew from 4.2 percent in 2006, to 6.1 percent in 2011, peaking in 2008, when it reached 8 percent.⁵⁵

While records management continues to be a weakness, some important efforts have already been introduced to organize public records in the federal government, particularly in those agencies that receive the largest number of information requests per year. The reorganization effort began with the most current records, and priority was given to those documents that were most frequently requested.

TABLE 2. Percentage of Denials of Information Requests Based on Claims of Nonexistent Information

Year	Requests		Responses Based on Claims of Nonexistent Information	Percentage
	Entered	Processed		
2003–06	172,169	166,970	7,020	4.2
2007	94,723	92,494	4,222	4.5
2008	105,250	103,100	8,208	8.0
2009	117,597	116,247	8,289	7.1
2010	122,138	121,603	8,758	7.2
2011	123,293	124,670	7,621	6.1
Total	735,170	725,084	44,118	6.0

Source: IFAI, “Informe de Labores 2011”, 46.

While much remains to be done in this area, one of the main lessons from the Mexican experience is that it is not necessary to have a full records management infrastructure before implementing an ATI law; much can be accomplished with a sustained incremental approach. In other words, lack of records management systems should be no excuse for preventing the adoption and implementation of access to information laws. Despite records management system constraints, the administration saw an opportunity for passing the law in 2002, and felt that the law could, in fact, become an incentive to motivate federal officials to introduce modern information management systems.⁵⁶

3.9. INFORMATION TECHNOLOGY

The development of an e-platform—the SISI, System for Information Requests—to handle information requests was one of the key innovations introduced by the IFAI.⁵⁷ This e-platform (the expanded version of which was renamed INFOMEX) both facilitated users’ ability to make information requests, and allowed the IFAI to keep track of government agencies’ responses to information requests and supervise their compliance with the law.⁵⁸

The Constitutional Amendment of Article 6 further required all government entities and municipalities larger than 70,000 inhabitants to install electronic systems so that all citizens could place information requests.⁵⁹

Requests to federal agencies can be placed electronically, and responses can also be provided electronically. The current system allows government officials to communicate with the user, clarify the request, or assist the user in refining his or her search. Users not satisfied with the official response can—through INFOMEX—turn to the IFAI for an appeal of their request.

The IFAI also developed a search engine called ZOOM that allows commissioners, government officials, and users to find resolutions by topic, agency, or date. This systematization of rulings enables the IFAI to develop interpretative guidelines based on precedent, using previous rulings as examples in similar cases. Similarly, users and government agencies can use the search engine to build their cases.



INFOMEX, ZOOM, and the Transparency Portal (more information on this portal in section III.J) have been successfully introduced and internalized by all federal agencies. In terms of technological infrastructure, the federal government's capacity to respond to information requests is well established.

Use of electronic requests and introduction of innovative information technologies has been largely responsible for the successful implementation of the law in Mexico. It allows individuals making requests to communicate with the government on a regular basis, and the oversight agency to supervise and keep track of agencies' performance and compliance with the law.

3.10. PROACTIVE DISCLOSURE

The transparency law includes extensive proactive disclosure provisions. These meet an emerging international minimum standard on the types of information that should be included in proactive disclosure provisions.⁶⁰ Article 7 lists the information that federal government agencies are required to post on their Web sites. To comply with these provisions and make the formats for posting information uniform, the IFAI designed a central Web portal called Portal de Transparencia or POT (Transparency Portal). Each government agency is required to set a Web link to the POT on their Web sites. Although some government officials complain that uploading information can be sometimes challenging, and some civil society practitioners argue that POT is not always user friendly, it has significantly helped in the verification of compliance with proactive disclosure provisions.

To monitor federal agencies' compliance with proactive disclosure provisions, the IFAI had designed a methodology to evaluate the federal agencies' Web-based Transparency Portals. According to the IFAI, in 2004 federal government agencies scored, on average, 63 percent on their rate of compliance with proactive disclosure provisions. By 2011 this rate increased substantially, reaching an average of more than 85 percent.⁶¹

In 2011, the compliance rates of the federal agencies studied more closely in this report were as follows: the secretary of social development had a 78.58 percent compliance rate;⁶² the secretary of education, 90.2 percent; the secretary of public function, 80.5 percent; and the secretary of communications and transport, 77.8 percent.⁶³

3.11. MONITORING AND EVALUATION

The IFAI evaluates periodically the extent to which federal agencies comply with the obligations of the ATI Law. INFOMEX, ZOOM, and POT have generated an impressive volume of statistical information that not only allows the IFAI to keep track of all federal agencies' compliance, but also to analyze data, evaluate trends, and make recommendations to improve federal agencies' performance.

Federal agencies have incentives to comply with the transparency law because their response to information requests is permanently monitored by the IFAI. Through INFOMEX, the IFAI keeps track of all information requests received by each agency, the time the agency takes to respond, and the number of requests that are appealed to the IFAI. Moreover, heads of agencies have an incentive to be well evaluated, as the IFAI's evaluations are public. No agency wants to be listed as a poor performer.

The IFAI has developed monitoring indicators to assess the extent to which federal agencies fulfill the procedures established in the law and provide responses to information

requests, as well as to evaluate the effectiveness of the classification of information. Different methodologies are used to assess compliance and analyze the state of access to information in Mexico.⁶⁴ For example, quantitative and qualitative analyses have been conducted on the responses provided through INFOMEX and the quality of services provided by the liaison units. Another strategy consists in cross-checking information obtained from POT against other electronic systems such as Compranet (an e-procurement platform). The IFAI also relies on the “mystery shopping” methodology (*usuario simulado*) to monitor and assess the quality of the services provided by liaison units to individuals that make information requests.

Official figures on the extent to which public agencies provide information in response to individuals’ requests show an overall positive response rate. But these figures have some caveats (Fox, Haight, and Palmer-Rubin 2011: 8, 15). First, federal agencies themselves are responsible for categorizing their responses as positive or negative. Second, the official data do not address the quality of the information response (for example, sometimes the information provided is incomplete or presented in a complex technical language). Given these limitations, in 2008, the IFAI conducted a pilot monitoring exercise to assess the consistency, opportunity, reliability, and completeness of more than 11,000 information requests. The study found that 83 percent of positive responses were satisfactory and approximately half of the responses provided by federal agencies were positive.

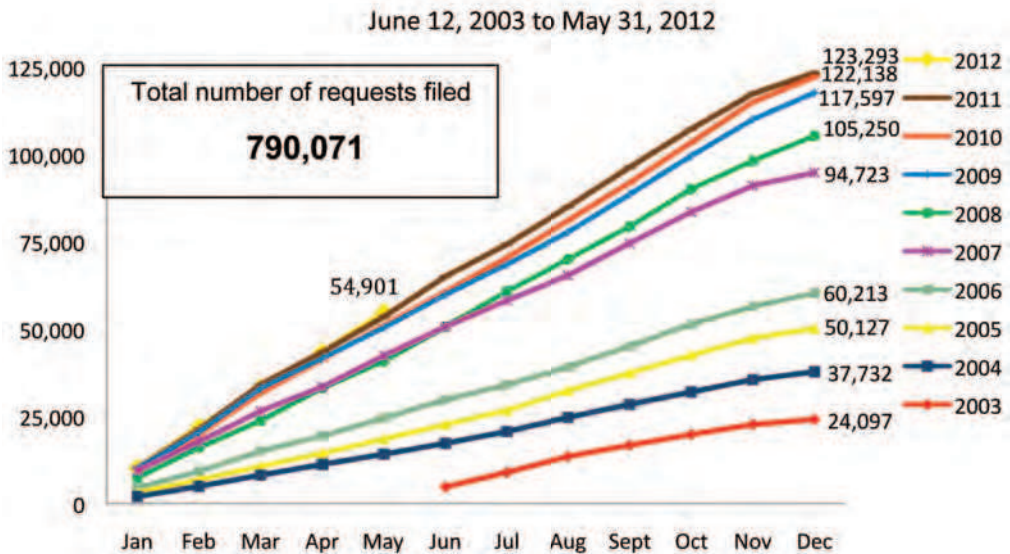
The IFAI also monitors individuals’ appeals, and has recently started to monitor the process through which the IFAI mandates a federal agency to disclose information following an appeal to a denial of information. This new monitoring system assesses the delays of federal agencies in acting upon the IFAI’s resolutions, as well as whether the agency actually provides a response to the requester. This will help have a more comprehensive assessment of compliance.

A few independent evaluations have been conducted, although there is no overall external assessment of the ATI regime yet (Fox, Haight, and Palmer-Rubin 2011: 14–26, 43–46). Independent evaluations of the responses provided by federal agencies to information requests confirm the high level of satisfaction of requests, although the number of positive responses is lower than the official figures.⁶⁵

4. Use of the Law and Government Responsiveness

From a purely statistical perspective, the volume of requests for information and the rates of government’s response to these requests have been remarkable. In 2003, the first year the law came into effect, more than 8,000 users submitted information requests. As figure 1 shows, since 2003 the number of information requests received by the federal government increased consistently. From 2003 to 2012 (May), the federal government has received a total of 790,071 information requests.⁶⁶

According to the IFAI, 95.9 percent of all requests were received electronically.⁶⁷ Of the total information requests received by the federal government, up until December 2011, 91.5 percent received a positive response: either the information was provided or the requestor was directed to where the information could be found.⁶⁸ By way of comparison,

FIGURE 1. Total Number of Information Requests

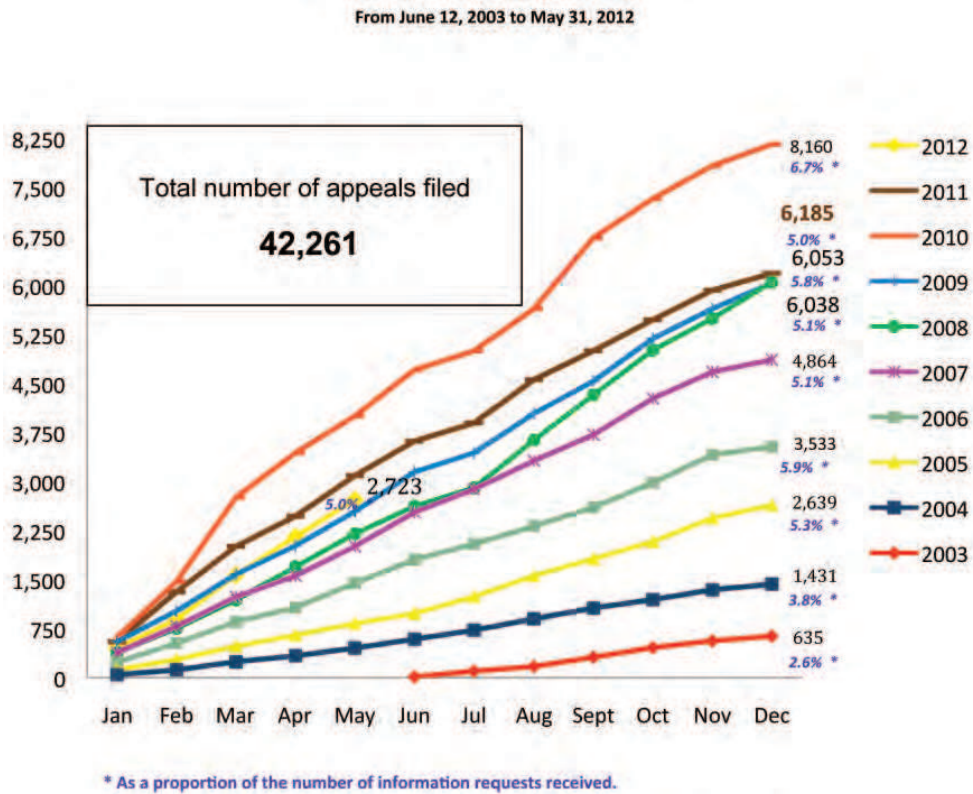
Source: IFAI/DGCV.

in Australia, during 2004–05, the government received 39,265 information requests but only responded to 67.2 percent of them. Indeed, the volume of information requests and responses in Mexico are proportional to those received by the U.S. government, which has greater capacity and resources to respond to public information requests (Ackerman 2007: 18). As John Ackerman notes, compared with other countries that have implemented their access to information (ATI) laws, these numbers are highly positive (Ackerman 2007: 18).

In terms of effectiveness, the federal government responded to public information requests in 13.6 days on average,⁶⁹ well below the limit of 20 days established by the law. Furthermore, from 2003 to 2011, the government denied information requests on the grounds that the information did not exist in only 6 percent of cases⁷⁰ (see table 2).

Since the law came into effect, the number of appeals received by the IFAI also grew consistently. As figure 2 shows, from 2003 to May 2012, the IFAI received a total of 42,261 appeals, which represent around 5.3 percent of the total number of requests. In only 23.4 percent of those cases, the IFAI confirmed the decision of the federal agency—that is, it ruled against the requestor and in favor of the government (see table 3).⁷¹

According to the IFAI's data, most information requests are filed by new users (see figure 3). Yet the majority of requests are concentrated, both regionally and professionally. Most users (more than 50 percent) are concentrated in Mexico City's metropolitan area; 74.6 percent of users have college degrees or postgraduate degrees.⁷² Although users are not required to identify themselves, some do. According to official data, the majority of users are academics (31.4 percent), business people (17.9 percent), government officials (11.5 percent), and journalists (8.2 percent). The remaining requests are made by civil society activists and other unspecified users.⁷³ These data reveal that a relatively small percentage of users place most of the information requests.

FIGURE 2. Total Number of Appeals to the IFAI

Source: IFAI DGCV.

TABLE 3. Resolution of Appeals (June 2003–May 2012)

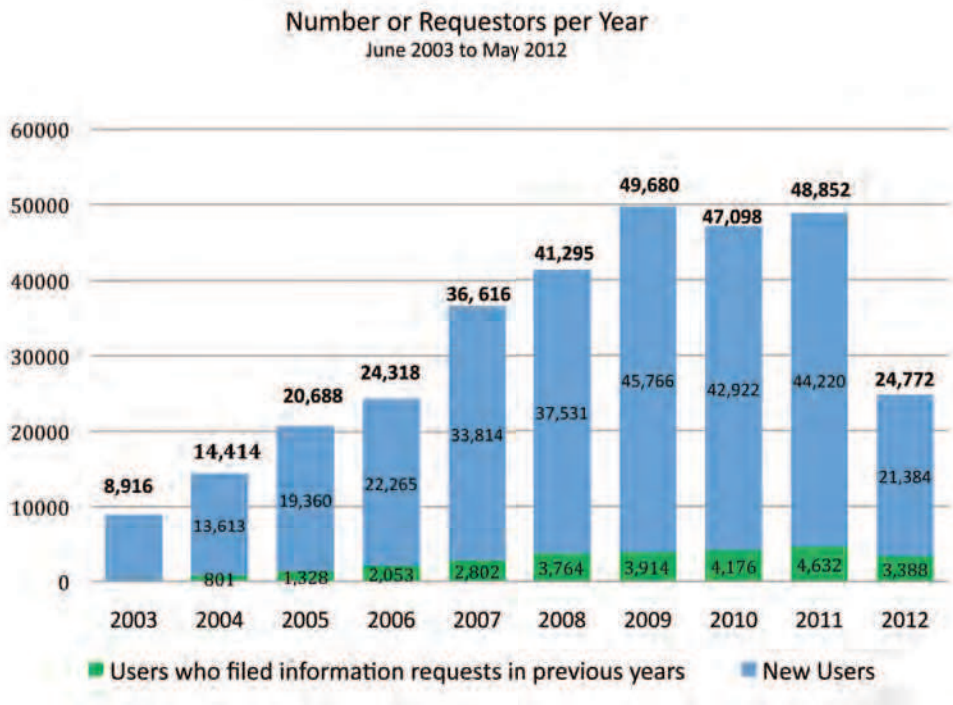
Confirms	Modifies	Revokes	Admitted and Dismissed (Conflict Resolved)	Dismissed	In Process	Total of Appeals
8,062	8,213	5,529	5,094	14,355	1,008	
(19.%)	(19.4%)	(13.%)	(12.%)	(34.%)	(2.4%)	42,261

Source: IFAI, DGCV June 2012.

In 2011, the largest percentage of requests (27.7 percent) involves information generated by the agencies themselves, such as legal procedures, statistics, and results of opinion surveys; 19.6 percent of requests refer to personal data, and another 12.7 percent refer to information about the agency's activities, such as work plans and project results. Requests about procurement information represent 10.7 percent of total requests. Only 4 percent of total requests refer to the remuneration of public officials and another 3.6 percent to the agencies' subsidy

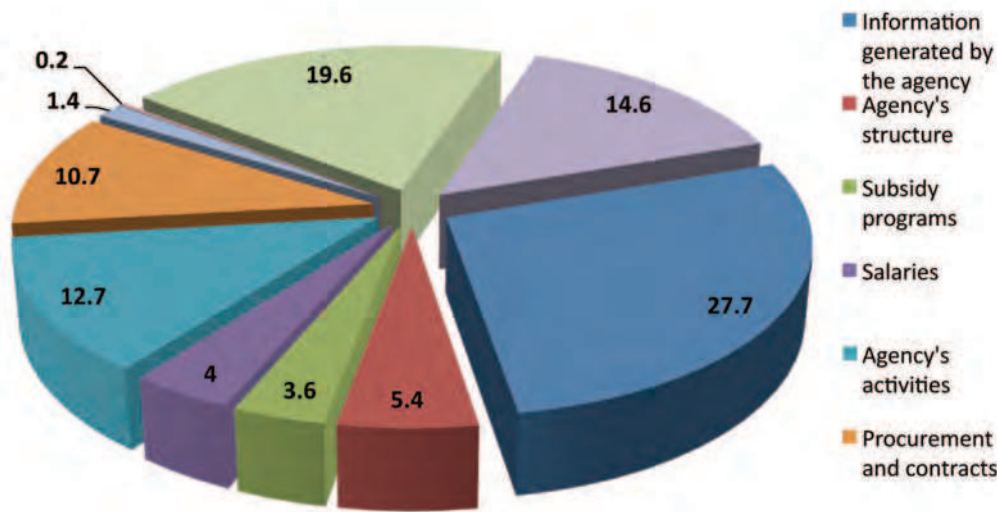


FIGURE 3. Total Number of Requests, by New Users



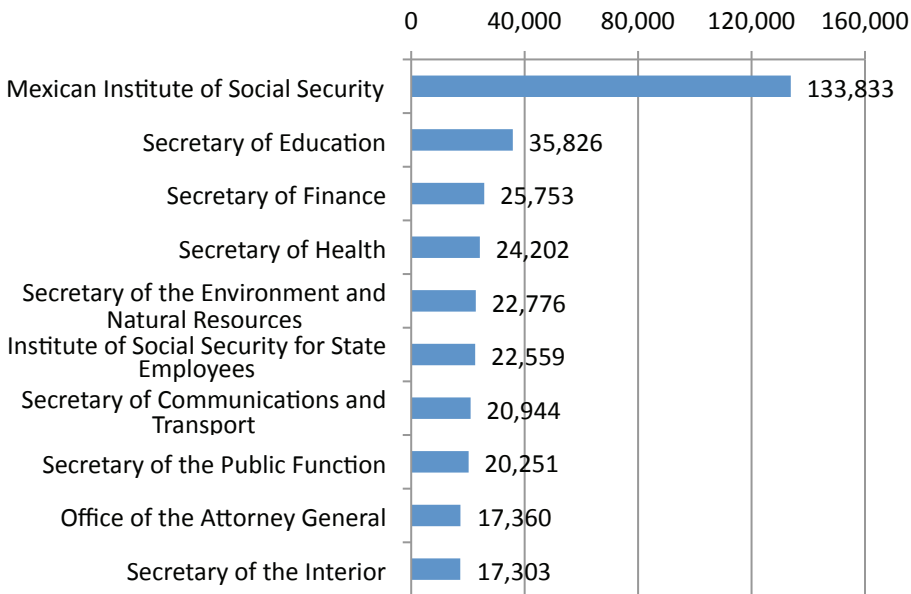
Source: IFAI.

FIGURE 4. Information Requested, by General Topic in 2011



Source: IFAI.

FIGURE 5. The Ten Federal Public Administration Agencies that Receive the Most Requests for Information (June 2003 to May 2012)



Source: IFAI.

programs, such as list of beneficiaries, eligibility requirements, and information about results of these programs (see figure 4).⁷⁴ As mentioned earlier, the low volume of requests related to information about social programs is in large part due to the existence of grievance-redress mechanisms, such as the Citizen Attention Windows in Oportunidades that provide beneficiaries this information. For the most part, individuals do not request information about social programs through the ATI law.

When analyzing the IFAI resolutions, it becomes clear that the IFAI tends to rule in favor of the requester more often than in favor of the government. On average, from 2003 to May 2012, the IFAI confirmed the federal government—that is, ruled that the government's information denial should be upheld—in only 19 percent of cases. The rest of the resolutions were either to revoke the government's initial denial or to modify the government's response (32.5 percent of cases). The remaining 48.5 percent of the IFAI resolutions were either dismissed⁷⁵ or admitted and then dismissed as the conflict was resolved (table 3).

An indicator of federal agencies' level of compliance with the law is the number of requests they receive and the proportion of responses that are appealed to the IFAI. A higher proportion of complaints indicate that agencies are reluctant to provide the requested information, or citizens are not satisfied with the response received. Conversely, a lower proportion of complaints relative to the number of information requests might indicate that citizens are satisfied with the responses given. Of course, citizens may be unsatisfied and yet refuse to complain due to lack of confidence that their grievance will be redressed.

The federal agencies that receive the highest number of information requests since the law came into effect are listed in figure 5. The Social Security Institute is, by far, the federal agency



TABLE 4. The Ten Federal Agencies Receiving the Highest Number of Appeals Decisions by the IFAI (2003–2012)

Agency	Resolved Appeals	Appeals Decisions as Percentage of Total Information Requests to Each Agency	Appeals as Percentage of Aggregate Total Number of Appeals to All Federal Agencies
Mexican Social Security Institute	5,787	4.3	13.7
Secretary of Public Function	1,819	9.0	4.3
Secretary of Education	1,694	4.7	4.0
Office of the Attorney General	1,433	8.2	3.4
Secretary of Finance	1,275	4.9	3.0
Institute of Social Security and Service for Public Employees	1,265	5.6	3.0
National Cancer Institute	1,222	36.4	2.9
Secretary of Communications and Transportation	1,209	5.8	2.9
Secretary of Health	1,164	4.8	2.8
Tax Administration Service	1,010	7.2	2.4

Source: Fox and Haight 2010b: 151; updated with data provided by IFAI.

TABLE 5. The Ten Federal Agencies with the Highest Number of Complaints for not Complying with IFAI's Resolutions to Disclose Information (2004–2008)

Agency	Total Accumulated Complaints	Total IFAI Resolutions with Instructions	IFAI Resolutions with Instructions that Result in Complaints as a Percentage of IFAI Total Resolutions
Secretary of Education	46	357	12.9
Office of the Attorney General	34	249	13.7
Mexican Institute of Social Security	30	420	7.1
Secretary of Public Function	29	251	11.6
Secretary of Foreign Affairs	24	185	13.0
Secretary of Finances	22	233	9.4
Office of the Presidency	19	227	8.4
Pemex, Exploration and Production	19	122	15.6
Secretary of Communications and Transport	18	232	7.8
National Water Commission	17	125	11.6

Source: Fox, Jonathan, Libby Haight, and Brian Palmer-Rubin (2011): 41.

with the largest number of requests, many of them on personal data. Three of the four federal agencies closely analyzed in this paper are included in this list: the secretary of education (second place), secretary of communications and transport (seventh place), and secretary of public function (SFP, eighth place).

In terms of requests that result in appeals to the IFAI, the 10 federal agencies with the largest number of appeals between 2003–12 are listed in table 4. Not surprisingly, the Social Security Institute tops the list of federal agencies with the highest numbers of requests that result in appeals to the IFAI. But in proportion to the total number of information requests received by the agencies, the SFP—the very agency responsible for the enforcement of the IFAI's decisions—is at the top of the list, with 9.0 percent of requests resulting in appeals. The secretary of communications and transport, and secretary of education are also included in this list, with a rate of 5.8 percent and 4.7 percent respectively.⁷⁶

While this information sheds light on users' demand for public information and rates of government compliance with the law, there are some limits to what statistics can reveal. Statistical information does not show the informal mechanisms often used by the IFAI officials to try to persuade government agencies to disclose the information the IFAI considers to be public.

It also does not reveal about the quality of data. Agencies might often reply to information requests by issuing information that is difficult—if not impossible—to interpret as it is published in PDF format and therefore difficult to reuse. Or, they might respond with pages and pages of legalistic argumentation that is virtually impossible to decipher.⁷⁷ This method of evading a proper reply is possible because the law establishes that information needs to be disclosed “in the format in which it exists.” In such cases, when agencies comply with the terms of the law but not with its spirit, disclosure does not necessarily lead to greater transparency.

It is important to note that, as will be discussed in more detail below, the disclosure of information, and the revelation of corruption or mismanagement does not necessarily lead to proper investigations or sanctions.

5. Broader Impact of ATI

The law has increased transparency in the country, and information that was impossible to obtain 10 years ago is now available. For instance, disclosures about officials' expenditures on per diems have led to significant reductions in these types of spending. But having more information does not necessarily mean greater accountability, unless disclosure translates into sanctions or policy changes, as the cases below illustrate.

Greater transparency is only the first link in the accountability chain (Fox 2007b: 663–71). Advancing from transparency to greater accountability requires the involvement and effective coordination of several accountability institutions.⁷⁸

5.1. CASES STUDIES

A few illustrative cases reveal the challenges of increasing accountability, even when a legal ATI framework exists, information is disclosed, and civil society organizations (CSOs) are effective. While civil society pressure (including from the media) has triggered corrective actions in some cases, sanctions need to be enforced to ensure government accountability.



5.1.1 Health Programs for HIV/AIDs: The Case of Pro-Vida

In 2002 the Chamber of Deputies approved an increase of 600 million pesos to the Secretary of Health's budget for health programs. The head of the Budget Committee arbitrarily changed the approved budget and allocated resources that were earmarked for the purchase of retro-viral medications for patients suffering from HIV/AIDS to an anti-abortion nongovernmental organization (NGO, Pro-Vida).

FUNDAR, a think tank/NGO in Mexico, conducted an investigation into the transfer of these funds. Along with a coalition of six other CSOs, FUNDAR requested information on all the financial reports Pro-Vida had submitted to the secretary of health. The secretary released all the information requested. The investigation showed numerous irregularities in the use of funds, such as payments to fictitious organizations, disbursement not related to health programs (such as purchases of Mont Blanc pens), and excessive expenditures on publicity campaigns. The NGOs then turned to the press and began a media campaign to demand an official investigation into this case and the eventual sanctioning of all public officials involved in the case.

As a result of this campaign, and the strong social pressure that resulted as many other civil society organizations and newspapers joined the campaign, Pro-Vida was requested to return all the transfers received from the secretary of health. In addition, the secretary of health cancelled all future transfers already approved to this organization, and Pro-Vida was banned from receiving public resources. The SFP charged the head of Pro-Vida a fine of 13 million pesos, but no public official was investigated or sanctioned.⁷⁹

5.1.2 The Health Rights Campaign of the Women's Network for the Common Good⁸⁰

In Mexico most information requests are made by a small number of individuals, heavily concentrated in urban areas. But in Guerrero, a poor southern state characterized by strong social capital, rural organizations have used ATI rights to improve the living conditions of low-income rural citizens.

In 2007, in Guerrero, a peasant women's health rights campaign, the Women's Network for the Common Good, affiliated with the Union of Communities of Eastern Coyuca de Benítez and Western Acapulco (Unión de Pueblos, or UP), decided to organize a campaign to hold the federal government accountable for provision of health services through the government's conditional cash-transfer program, Oportunidades. This program is controlled directly by the federal government, even when services are provided at the local level. Program recipients are entitled to receive regular cash payments upon children's attendance to school, regular preventative health check-ups, and lectures. Oportunidades is one of the most carefully monitored and evaluated social programs in the country, and it includes several mechanisms to increase transparency and facilitate social oversight. But by using their ATI law, rural organizations were able to identify some limitations.

In the communities of Eastern Coyuca de Benítez and Western Acapulco, Oportunidades recipients were confronting problems with public health services. In particular, women complained about a lack of medicines and supplies in rural health centers, the frequent absence of doctors and nurses, and the fees requested for any prescription and basic supplies. Additionally, community leaders reported that Oportunidades beneficiaries were asked to make "voluntary contributions" to cover the costs of health centers' electricity, gas, potable water, and basic maintenance.

The Women's Network presented a request for information. They wanted to know the rules governing basic public health services in rural communities, which services were supposed to be provided, and whether or not they required any fees. They also requested information on the list of medicines and supplies that health centers were supposed to have in stock, and the number of doctors and nurses that needed to be present at the health centers. Finally, they wanted to know how health centers spent the resources transferred from the federal government.

The federal government provided the information requested, including a series of health-related laws, ministry regulations, and program operating procedures that clearly defined the basic health services to which rural communities were entitled. This included lists of specific medicines, supplies, and services that health centers were mandated to provide free of charge. But the federal government could not provide information on the administration of resources in specific health centers in the Coyuca region, because the state government manages those centers (although funding comes from federal sources). In contrast to federal officials, state health officials were more reluctant to disclose financial information and refused to provide the necessary data on funds earmarked for basic maintenance and supplies.

The campaign involved hundreds of women. A substantial volume of information was duly provided to the community, although it had only a marginal impact on the quality of public health services or the management of health centers at the local level.

5.1.3 The Customs Department Trust Fund

In Mexico public trust funds (*fideicomisos*) are among the mechanisms used by some public officials to keep public funds out of the public eye. Traditionally, trust funds are among the institutions most resistant to disclosing information about their financial operations. According to a study (Sandoval 2008), 589 public trust funds were operating in Mexico by 2007. They managed a significant amount of resources—close to 3 percent of Mexico's gross domestic product (GDP). Managers of public trust funds resort to the argument that technically they are not public institutions and thus are protected by Mexico's "bank secrecy laws." In practice, most of these trust funds do not have sufficient control mechanisms and have escaped public oversight.

In 2004 Congress passed an important reform granting the country's Supreme Audit Institution (*Auditoría Superior de la Federación*, ASF) legal attribution to audit trust funds, as this is an institution that manages public funds.⁸¹ But trust fund managers continued to allege their rights to secrecy.

By 2005 the ASF had identified significant deviation of resources in financial transfers made to some trust funds related to the Customs Department (an entity within the secretary of finance). The secretary refused to reveal financial information on such transfers, alleging that the trust funds were private entities and thus protected by bank secrecy laws. In 2005 the IFAI received an appeal to review the secretary's decision to withhold the information. The IFAI ruled that the information was public and therefore had to be released because the origin of the resources was public, even if invested in a "private" trust fund.

The secretary of finance released the requested information. The information revealed that the trust fund managed resources in a discretionary manner and that a significant amount of resources could not be accounted for. The ASF issued a series of recommendations to the secretary of finance, including the reposition of those resources, while the SFP began an investigation.



Although the issue was publicized in the national press, there were no sanctions. IFAI and several NGOs, academics, and legislators led advocacy to mandate the disclosure of trust funds' financial reports, whenever these trust funds receive public resources.

5.1.4 Farm Subsidies: The Case of PROCAMPO

In 2007 the Mexican NGO FUNDAR requested information from the Ministry of Agriculture on the list of recipients of PROCAMPO, the largest federal farm subsidy program in the country, designed to increase agricultural productivity, support the poorest farmers, and reduce the high levels of inequality in Mexico's rural sector.

The Ministry of Agriculture responded to this information request, but the information was incomplete and delivered in unreadable formats. The NGO appealed to the IFAI, which resolved in favor of the NGO and directed the Ministry of Agriculture to release the complete list of recipients and provide the documents in a machine-readable format.

The deficiencies of PROCAMPO have been thoroughly analyzed and discussed in various academic forums and publications. As a Centro de Investigacion y Docencia Economica (CIDE) researcher points out, although the federal government spent significant resources on farm subsidies, these subsidies did not bring about greater competitiveness in the country's agricultural sector, a sustainable increase in the production of basic grains, or improvements in the living conditions of the poorest farmers (Merino 2010a: 53, 75). Even the ASF claimed in 2006 that it was difficult to conclude that the farm subsidy program had fulfilled its objectives. In its audit of PROCAMPO, the ASF recognized that farm subsidies were heavily concentrated in the richest northern states, and that 53 percent of PROCAMPO subsidies had been distributed to farmers who owned more than 5 hectares of land, while the smallest landholders (those who own less than 1 hectare) had only received 0.6 percent of all subsidies during that year.⁸²

After obtaining the information from the Ministry of Agriculture, FUNDAR—along with other NGOs and academics—launched a project called “Farm Subsidy in Mexico,” which systematized and ordered the information and posted it online in an easily searchable format (www.subsidiosalcampo.org.mx). The Web site database, publicly launched in 2008, allows citizens to search the list of beneficiaries of farm subsidies over the past 15 years and to compare payments and distributional patterns across states (Fox and Haight 2010a: 141).

This information confirmed that the bulk of farm subsidies had not been allocated to the country's poorest and smallest farmers, as the program originally intended, but to the wealthiest farmers in the country (Merino 2010a: 53). Moreover, an analysis of the list of recipients revealed that beneficiaries did not always meet the recipients' selection criteria. The news intensified the pressure on the Ministry of Agriculture to revise the program's operating rules and to clean up its list of recipients.

Soon after the scandal broke, the president and the minister of agriculture acknowledged that “it was imperative to review the list of beneficiaries and to allocate farm subsidies more strategically, to those farmers who needed the subsidies the most” (Merino 2010b).

In February 2010 another investigation led by a group of academics revealed further irregularities in the list of beneficiaries (*El Diario de los Mochis*, April 1, 2011). Again a high-level official resigned, and the government announced a review and reform of PROCAMPO's rules of operation. The government established a minimum of 1,300 pesos (\$100) and a ceiling of 100,000 pesos (\$8,000) per farmer per harvest cycle. But the government did not introduce incentives to ensure compliance with the new operating rules of PROCAMPO (Fox and Haight 2010a: 140). Neither were sanctioning mechanisms introduced (*El Universal*, February 15, 2010).

In this regards, the ASF has continued to issue recommendations to the Ministry of Agriculture. In 2009 the ASF found that 577 public officials from the Ministry of Agriculture had received PROCAMPO subsidies and “requested from these officials to return the funds that were allocated to them” (*El Diario de los Mochis*, April 1, 2011).

Although the accountability impact of transparency reforms depends on the institutional setting and the effectiveness of check-and-balances and accountability agencies, these cases suggest that transparency can have a significant impact on the daily life of the citizens and communities that exercise their right of access to information. In this regards, an effective ATI law can unleash a powerful movement of bottom-up accountability, as well as trigger formal oversight institutions to take action.

6. A Culture of Openness

As the cases discussed above demonstrate, the implementation of the access to information (ATI) law has been effective in disclosing valuable information to the public. But success has also generated resistance on the part of some federal government agencies and officials. Transparency reforms demand a cultural shift in society, and changes in bureaucratic culture take time.

A survey of midlevel federal public officials commissioned by the Federal Institute for Access to Information (IFAI) in early 2007 revealed mixed results. Sixty percent of public officials interviewed acknowledge that “officials in some units within their agencies believe they own the information they generate and do not share it, even with other units in the same agency.” Seventy-eight percent of public officials also recognized that Mexico’s bureaucratic culture needed to change. While the majority of officials interviewed in the survey (59 percent) believed the transparency law contributed to increasing transparency and access to information, only 30 percent considered it contributed to modernizing the administration and 7 percent to reducing corruption. The vast majority of public officials (77 percent) complained that public information requests are not well formulated (Probabilistica 2007).

The implementation of ATI legislation may generate resistance on the part of public officials, especially as they become more aware of the potential risks of information disclosure. Moreover, although official data indicate that federal agencies have received more than hundreds of thousands of information requests and that the vast majority of these have been duly processed, looking at the number of requests that are processed or the complaints that are ruled in favor of the requestor says little about the smaller number of requests that are denied. A single refusal to comply can be more significant than thousands of routine information requests that obtain a positive response.

7. Conclusions

The Mexican law has been recognized by experts and practitioners around the world as one of the strongest information laws. Moreover, the Federal Institute for Access to Information (IFAI) has been recognized as an example of good practice for ensuring compliance with the law and ruling on individuals’ appeals to government denials of information requests. Indeed, since 2003, other countries in Latin America, including Honduras and Chile, have created similar specialized access to information (ATI) oversight agencies.



Individuals have more opportunities to access information about the operations and management of government agencies. Civil society organizations (CSOs) such as those of the *Colectivo por la Transparencia* have played a key role and made significant inroads in using the ATI law, obtaining valuable information about the operation and financial management of important government programs. They have used this information to demand greater accountability. Looking at the past 9 years of implementation, and notwithstanding the resistance of some government agencies to disclose information, the implementation record of the Access to Information and Transparency Law at the federal level is a positive one. The number of information requests has increased consistently, and most of these requests receive positive replies. Similarly, most of the appeals to the IFAI are resolved in favor of the requester.

The overall conclusion from the Mexican case, however, is that greater information is not necessarily synonymous with better accountability. Information, while critical, is only the first link in the complex chain of accountability. Effective accountability requires the disclosure of information to generate effective administrative reforms, corrective actions, and actual sanctioning of public officials who abuse their power.

Aside from political will and commitment on the part of public authorities, government accountability heavily relies on the constant and unyielding demand of civil society. Continuous exercise of the right to access information and the use of disclosed information to advocate for greater accountability are critical for maintaining the pressure for greater transparency and accountability. For that, capacity building among potential users and other demand side actors, especially vulnerable groups and poor communities is very important. Stable democracies rely on trust between government and civil society, but some level of distrust is healthy for accountability relationships to exist.

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Notes

1. Article 4 of the law states six objectives:
 - Allow any citizen to obtain public information through simple and expedient procedures.
 - Increase government transparency by disseminating information generated by the federal administration.
 - Guarantee the protection of personal information managed by federal government entities.
 - Increase accountability so that citizens can evaluate government performance of the federal administration.
 - Improve the organization, classification, and management of public records.
 - Contribute to the democratization of Mexican society and to the enforcement of the rule of law.
2. Salient examples include the publicity of police files related to federal investigations into crimes committed during the 1970s, disclosure of public trust funds previously classified as bank secrets, institutional e-mails, and so on. The law covers only federal agencies, not local and state government agencies. See Bookman and Guerrero (2009); and Fox and others (2006).
3. Tom Blanton, director of the National Security Archive at George Washington University in Washington, DC (one of the leading organizations advocating for ATI), has recognized that Mexico has been a leading example “in crafting an ATI law that can be successfully implemented.” This is in large part the result of the creation of the IFAI, a landmark institution that has become a model of good practice around the world (*El Universal*, Mexico, September 29, 2010).
4. A survey conducted by the IFAI in 2008 revealed that 66 percent of Mexican citizens know about the ATI law and 33 percent of citizens trust the IFAI, making it one of the most highly trusted institutions in the country (IFAI, 6 Informe de Labores al H. Congreso de la Unión 2008, June 2009).
5. Subsequent events, at both the international and national levels, have had repercussions for the ATI regime. By 2007 the Mexican economy was facing challenging conditions: its exports and foreign direct investment (FDI) were negatively impacted by the economic crisis in the United States, and violence linked to organized crime and drug trafficking was on the rise.
6. See, for example, the IFAI’s president statement during an interview: “Transparency is no longer a priority of the government. The current administration has not yet issued a clear statement towards transparency” (*El Clarín Veracruzano*, Mexico, September 28, 2010).
7. In late 2008, after Congress approved a reform of the Criminal Procedures Code that classified all criminal investigations, the IFAI president criticized this reform and stated that “this is the first retrocession in matters of transparency” (*La Jornada*, December 18, 2008). See, also, an interview with Jacqueline Peschard, president of the IFAI: “What worries us at IFAI is that the authority of IFAI has been questioned. According to the Transparency and Access to Public Information Law, IFAI’s resolutions are final. However, on several occasions, the Attorney General’s Office has attempted to overrule these decisions by turning to the Administrative and Fiscal Federal Tribunal to review IFAI’s decision, something neither the Transparency Law does nor the Constitution provides for in relation to transparency decisions” (*Revista Etcétera*, May 1, 2009). See also Bookman and Guerrero (2009: 47).
8. For an overview of the current state of the ATI system in Mexico, see Fox and Haight (2010b: 135).
9. In India, the nodal agency is the Department of Personnel and Training; in Canada, the Treasury Board Secretariat; and in Chile, the Comisión de Probidad del Ministerio de la Secretaría de la Presidencia. These agencies coordinate the implementation of the law at the central or federal government level.
10. This concept was used by Gregory Michener (2010: Chapter 2, “Surrendering Secrecy in Mexico”).
11. According to the Federal Electoral Institute (IFE), the PAN obtained 42 percent of the vote and the PRI 35 percent in the presidential elections (www.ife.org).
12. See Starr (2006). For an analysis of the (informal/extraconstitutional) powers of Mexican presidents, see Whitehead (1995) and Weldon (1997).

13. For an analysis of the role the media played in the creation of a strong law in Mexico, see Michener (2010). See also Bertoni (2011).
14. For a discussion of this point and an examination of the context that led to the adoption and passage of the law, see Michener (2005).
15. For a comprehensive overview and analysis of the formulation and approval of the ATI law in Mexico, see Luna Pla (2009: 61).
16. The name was given by a reporter from *The New York Times* to refer to the group of lawyers, academics, and activists that met in the City of Oaxaca, Oaxaca State, in 2001 (*The New York Times*, New York, October 12, 2001).
17. In 1996 the IFE acquired full independence from the executive branch.
18. Since 1977, when major electoral reforms were first introduced in the country, there were several attempts to regulate the right to information in Mexico. But these efforts had not prospered. Some argue that the media at that time heavily depended on subsidies and other forms of control from the government. After 2000 the media and the academic community began to collaborate in efforts to distance the media from their reputation of subjection and lack of independence from government controls. See also Bertoni (2011: 11).
19. Luna Pla (2009: 119). The bill included some aspects of a previous bill that had been presented in 2001 by the left-leaning opposition party, Partido de la Revolución Democrática (PRD). According to Luna, the PRD's bill was more limited in scope than that of the Grupo Oaxaca. Eventually, during the drafting of the final bill that was approved by Congress, the Grupo Oaxaca collaborated with the PRD (and PRI) legislators that had authored the original bill in 2001 (Luna Pla 2009: 96).
20. This was quite unprecedented in Mexico, where civil society is formally not entitled to participate in the bill-making process. Unlike other countries, Mexico does not have a law of citizen participation in law making. In Mexico citizens can be consulted, but they are not invited to participate in drafting bills.
21. Academics from different universities were able to work together advocating for a strong transparency and access law. Members of the Grupo Oaxaca also collaborated with international organizations such as Article 19 and the Konrad Adenauer Foundation. See Escobedo (2002) and Ramírez Sáiz (2006).
22. Actually, President Fox's administration faced major political deadlocks and legislative stalemates on important reform issues, such as energy, education, and labor. For a discussion of this topic see, Wise and Pastor (2005: 135–60) and Delal Baer (2004: 101–13).
23. This condition, combined with the Internet-based system of requests, in practice protects the requesters and virtually ensures anonymity. For an analysis of the main contents of the law see Luna Pla (2009); Bookman and Guerrero (2009); Banisar (2006); and Mendel (2009).
24. For a comparative analysis of the proactive disclosure provisions of several ATI laws, see Darbishire (2010).
25. The governors of the states of Aguascalientes, Chihuahua, and Zacatecas, representing the three political parties, championed the constitutional reforms of 2007. But some states have actually sponsored ATI and transparency laws in their own states, which do not meet minimum transparency standards. For a comprehensive analysis of all state ATI and transparency laws, see Díaz Iturbe (2007).
26. Bookman and Guerrero consider that the creation of the IFAI is by far one of the most novel aspects of the law (Bookman and Guerrero 2009: 26). This institutional design has been replicated in other parts of the world, as in Chile in 2009.
27. For an analysis of the justice system in Mexico, see Domingo (2000: 705–35); Buscaglia (2003); and Buscaglia (2007).
28. An independent electoral tribunal—the Federal Electoral Tribunal—was also established to resolve electoral disputes. While the IFAI's decisions are definitive and binding, unlike the IFE and the Federal Electoral Tribunal, the IFAI does not have sanctioning powers.
29. See interview with the IFAI commissioner María Elena Pérez-Jaen, who admitted that the IFAI “lacks teeth to sanction government officials who do not comply with IFAI's resolutions” (interview with MVS Noticias, September 2010, www.noticiasmvs.com). In 2010 an executive decree gave the IFAI the power to sanction individuals who misuse the IFAI's personal databases. Yet, it still does not have the power to sanction public officials who do not comply with the IFAI's decisions. See Abel Barajas, *Reforma*, Mexico, July 6, 2010.

30. The commissioners' rulings are taken to a (public) plenary session, where they are resolved by a majority of votes. At least three commissioners must be present to pass a resolution. See the IFAI's internal regulation (Reglamento Interno), Art. 7; Art. 9.
31. The IFAI president, together with the Secretaría de Acuerdos, (Resolutions Secretariat) is responsible for turning cases over to the commissioners. These cases are assigned in a random fashion, as they are received. Commissioners have technical staff to support them in their rulings, and they are entitled to request an audience with government authorities and/or requestors.
32. Art. 37 lists all of the IFAI's functions.
33. Interview with Juan Pablo Guerrero, former IFAI commissioner, Mexico City, August 2010.
34. See Ley Federal de Protección de Datos Personales en Posesión de los Particulares, Chapter VI, Article 38.
35. Before the 2003 budget was allocated, the commissioners threatened to resign if Congress did not allocate sufficient funds to allow the IFAI to operate. In 2003 the IFAI was allocated close to \$18 million. This budget increased minimally over the years.
36. The unionization of the IFAI employees was precluded by paying high salaries, above the minimum wage. Agencies that pay their personnel minimum salaries are compelled to form a union.
37. But some criticisms have also been raised against the IFAI's hiring policies. According to John Ackerman, these policies stray from the ideal of a truly professionalized career civil service, particularly because new candidates to job postings are not subjected to an open competition, but are rather evaluated by ad-hoc committees where the immediate supervisor retains high discretionary power (Ackerman 2007: 44).
38. For an analysis of the challenges involved in the process of selecting candidates for autonomous regulatory bodies, see Sanchez Andrade (2009) and Ackerman.
39. IFAI commissioners are appointed by the president, subject to the senate's lack of objection. The senate can veto nominations within 30 days; otherwise, it is understood that the nominee is accepted. Despite the senate's veto power, the president has strong leverage in the selection process of the IFAI commissioners. Moreover, the president is not obliged to disclose the list of potential candidates before they are turned over to the senate for confirmation.
40. In recent years, the IFAI developed a new electronic tool called ZOOM to allow users to search previous information requests, government responses, and the IFAI's resolutions. This tool allows not only users but also commissioners to identify precedents in previous rulings, thus making their rulings faster and more efficient.
41. There is an interministerial committee against corruption (Comision Intersecretarial para la Transparencia y el Combate a la Corrupcion, CITCC), yet it does not have the scope and powers of an independent commission against corruption (for further information, see www.programaanti corrupcion.gob.mx/). Nonetheless, Mexico has shown its commitment to curb corruption by advancing anticorruption mechanisms and initiatives both at national and international levels. For example, Mexico is one of the founding members of the Open Government Partnership (OGP).
42. The SFP—which at that time was called SECODAM—was first headed by Francisco Barrio, former governor of the state of Chihuahua. He was elected governor in 1992, in a state that had become one of PAN's bastions. After Barrio resigned to run for congressional office in 2003, his deputy, Eduardo Romero, became minister. Romero had served as Chihuahua's interior minister during the Barrio administration.
43. For an analysis of how leadership and organizational culture impact government performance, see Thomas (2010).
44. The secretary of education had served as the IFAI's president. This could largely explain the level of interest for transparency and access to information in the secretary.
45. Some interviewees argued that including the counsel general in the agency's information committee can risk making the response to information requests overly legalistic and bureaucratic, leading to major delays.
46. IFAI, Recursos Humanos y Presupuesto, March 2011 (document provided by the IFAI).
47. Data provided by the IFAI, Direccion General de Administracion, Mexico City, September 2010.
48. Ibid.

49. But it must be taken into account that, in 2006, the scope of the IFAI and IFE's competencies was dissimilar—the IFAI's competencies were federal while the IFE's mandate was national. After 2010 the IFAI's mandate regarding the protection of personal data held by private entities became national.
50. Data provided by the IFAI, Dirección General de Coordinación y Vigilancia de la Administración Pública Federal, June 2012.
51. Data provided by the IFAI, Dirección General de Coordinación y Vigilancia de la Administración Pública Federal, June 2012.
52. The IFAI distributes a template to all agencies so that they can report all the measures they have adopted to guarantee citizens' right to public information and improve their performance (IFAI "Informe de Labores 2009").
53. See Flores Padilla 2005.
54. Ley Federal de Archivos, 2012 (available at <http://www.diputados.gob.mx/LeyesBiblio/pdf/LFA.pdf>).
55. Calculated from the IFAI "Informe de Labores 2011."
56. Personal interviews with members of Grupo Oaxaca, legislators, and former government officials responsible for drafting the law, Mexico City, September 2010.
57. In 2007 this electronic system was recognized as one of the top 20 programs of the IBM Innovations Award in Transforming Government, administered by the Ash Institute for Democratic Governance and Innovation at the John F. Kennedy School of Government, Harvard University.
58. Users can also make their requests in writing or by mail, but the mail is not always reliable in Mexico. When requests are presented personally in writing, in the liaison units, staff transfer those requests into the e-platform so that they can be registered by the system. If the requester wants the information to be delivered on paper, he/she needs to pay the reproduction costs.
59. See Article 6 of the Constitution, chapter V. This constitutional mandate has encouraged states and municipalities to adopt the INFOMEX system and the IFAI has been sought to provide training, even when the mandate of the Institute is confined to the federal level.
60. According to Helen Darbishire's study on proactive disclosure provisions, a standard on minimum disclosure provisions is emerging for ATI legislation. These provisions include: institutional information; organizational information; operational information; decisions and acts; public services information; budget information; open meetings information; decision making and public participation; subsidies information; public procurement information; lists, databases, registers; information about information held; publications information; and information about the right to information (Darbishire 2010: 21).
61. IFAI, "9 Informe de Labores 2011": 60–61.
62. It is interesting to note that the two previous years, Sedesol's compliance rate had been at least 10 points higher. However, in 2011, Sedesol scored low (below 60%) in the financial part of the transparency obligations. Indeed, IFAI considered that in 2011 Sedesol did not publish adequately information related to salaries, subsidies and procurement. (Data provided by the IFAI, Dirección General de Coordinación y Vigilancia de la Administración Pública Federal, August 2012).
63. Data provided by the IFAI, Dirección General de Coordinación y Vigilancia de la Administración Pública Federal, June 2012.
64. Minutes of the videoconference meeting held between the IFAI and Chile's Council for Transparency (CPLT) on March 30, 2011, as part of the Knowledge Exchange Pilot Project between the IFAI and CPLT supported by the World Bank Institute.
65. In addition the National Transparency Survey, developed by Centro de Investigación y Docencia Económica (CIDE), allows for assessment of each Mexican state and ATI oversight body at the state level, the quality of the respective ATI legislation, the fulfillment of the obligations of the state law, and the institutional capacity and competencies of each oversight body.
66. Information provided by the IFAI. The government, by law, is asked to assist requestors in formulating their requests so that they are less vague and therefore have more chances of receiving a positive response. This provision is called *suplencia de la deficiencia de la petición* ("improving the deficiencies of the request").
67. The rest are received by phone or in person.
68. IFAI, "9 Informe de Labores 2011." :20 It is important to note that a negative response—that is, a denial of the information request—also counts in this statistic as a response.
69. IFAI, "9 Informe de Labores 2011": 20.

70. Ibid.: 46.
71. Data provided by the IFAI., As mentioned above, appeals to the IFAI are straightforward; users do not need to hire lawyers. Yet, some users interviewed for this paper complain that they often need to resort to legal assistance to write their appeals to the IFAI, because in complex cases, the government tends to give lengthy and complicated answers to justify denials of information requests.
72. Data from the IFAI, "9 Informe de Labores 2011"
73. Often journalists prefer not to identify themselves because they believe this will increase their chances of obtaining the information requested. According to Jonathan Fox and Libby Haight, many journalists report that identifying themselves as journalists leads agencies to resist the request. The consequence of this is that official IFAI data on the number of journalists' requests may be underrepresented. See Fox and Haight (2010b: 144).
74. IFAI, "9o Informe de Labores 2011": 23.
75. Many of the so-called admitted and dismissed cases or *sobreseimientos*, as they are called in Spanish, result when the government decides to disclose the information being requested *before* the IFAI issues a resolution.
76. This list comes from data collected by Fox and Haight (2010b: 151), and it has been updated with information provided by the IFAI. It should be noted that in 2011 this list included for the first time the National Cancer Institute, with 36.4 percent of requests resulting in appeals. This is the result of an atypical situation in which one single requester, using two different names, filed more than one thousand appeals and a similar number of requests in a three month period, which paralyzed the access to information system in the National Cancer Institute. IFAI learned that the requests and appeals had been filed by a National Cancer Institute former employee, who was resentful with the Institute. Acknowledging the facts, IFAI's plenum determined that its was a case of an abusive use of the right to access information. (This information was provided by José Luis Marzal, Director of Coordination and Oversight at IFAI. E-mail, August 22, 2012)
77. Interview with a leader of a civil society who has made numerous requests for public information, Mexico City, September 2010.
78. Fox 2007a; for an analysis of the institutional architecture for accountability at the federal level in Mexico, see Merino, López Ayllón, and Cejudo (2011).
79. See Gozzo (2006).
80. This case is extracted from Fox, García Jiménez, and Haight (2009).
81. The ASF reports to Congress; it is the equivalent of the United States General Accounting Office (GAO).
82. ASF 2008: tomo IV. The ASF instructed the Ministry of Agriculture to review PROCAMPO's rules of operation to correct the program and revert the concentration of farm subsidies in the country.



Implementing Right to Information A Case Study of Moldova

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WORLD BANK GROUP

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Abbreviations and Acronyms

ATI	Access to information
CIS	Commonwealth of Independent States
EU	European Union
FOIA	Freedom of Information Act
IPP	Institute for Public Policy
MPs	members of parliament
NGOs	nongovernmental organizations
OSCE	Organization for Security and Cooperation in Europe
USSR	Union of Soviet Socialist Republics



Implementing Right to Information

A Case Study of Moldova

1. Introduction

Moldova passed the Law of Access to Information (982) (henceforth RTI law) in 2000. This came at the end of a turbulent decade that saw the disintegration of the Soviet system. Pressure from journalists and civil society organizations was important, and they also contributed substantially to its drafting.¹

This paper discusses the implementation of the RTI law in Moldova. It is part of a larger comparative study looking at implementation across a range of countries. It is fair to say that for much of the time since its passage, the existence of a Moldovan RTI law has made little difference to the socio-political reality of the country. The lack of official data on implementation makes it difficult to judge to what extent the letter and spirit of the law are being followed. Based on civil society assessments, it appears that the rate of explicit and mute refusals to information requests and nonresponses to RTI requests have been quite high. A few institutions have created internal norms for making information available, but many have not done even this (especially at the local level).

2. Adoption & Provisions

2.1. PASSAGE OF THE LAW

The drafting and passage of FOIA occurred in a very unstable and turbulent period for Moldova. Corruption was perceived by most of the population as a primary cause of the country's political, economic, and social problems. Despite of the fact that 1998 has been declared by a presidential decree the year of fighting corruption, there were no prosecutions of governmental officials at the national or local level.² According to Transparency International CPI, in 1999 Moldova was rated 75 out of the 99 countries assessed, registering a score of 2.6 points (10—highly clean; 0—highly corrupt).³ State capture turned out to be closely related to phenomenon of grand corruption where firms were shaping and influencing the rules of the game through politicians and public officials.⁴



A window of opportunity for reform emerged after parliamentary elections held on March 22, 1998—the second electoral competition of this kind after the declaration of independence. The Communist Party (CP) participated for the first time in parliamentary elections since Moldova achieved independence. Unlike the previous parliament which was clearly dominated by the Agrarian Democratic Party (ADP), the new parliament was fragmented. Four parties emerged—Communist Party with 30 percent of the seats, Democratic Convention with 19 percent, Movement for a Democratic and Prosperous Moldova with 18 percent, and Party of Democratic Forces with 8.8 percent. Although the Communist Party obtained 40 seats it was pushed into opposition by a coalition of the other three parties.

Between 1998 and 2001, when early parliamentary elections were called, Moldova experienced a phase of government instability caused by a twofold political crisis: clear cut disagreements inside the coalition and a conflict between the legislature and the presidency. Three cabinets alternated in office during this parliamentary cycle, with an average ruling duration of about 11 months. The most reformist one, led by Ion Sturza, which started to implement radical reforms stayed in office less than 9 months, and was dismissed in November 1999 through a no-confidence vote.⁵ An ensuing political struggle between the president and parliament resulted in a Constitutional amendment in July 2000, which curtailed the President's powers.⁶ Early parliamentary elections were held in February 2001.

The Freedom of information Act was drafted under these circumstances, and few saw it as really important. The focus was on other areas such as privatization of big state enterprises and sectors, like tobacco and wine industries, and other economic reforms. Nevertheless, several factors contributed to the passage of the law:

- First, parliament rejected a market oriented policy package, and voted out the reformist Sturza government. As a result, the image and credibility of Moldova was severely damaged internationally. They had to compensate the negative effects of the policy turn by promoting other reforms.
- Second, the legislature as an institution had to prove its efficiency in the face of increasing acrimony, given the president's allegations about the legislature's inefficiency and incapacity to promote democratic reforms.
- Third, political rivalries in an uncertain environment drove political leaders to seek the political dividends that support for RTI could provide.
- Fourth, several former journalists were members of parliament (MPs), and supported the law.
- Finally, there was no focus on what implementation would entail, or its consequences for state institutions, and hence RTI might not have been seen as particularly threatening or burdensome.

The unanimous adoption of the law in the Parliament in 2000 was preceded by heated debates and a series of 44 amendments, formulated after the law was adopted in a first reading. The first parliamentary debates centered on a draft that focused on both ATI and the media. Momentum was generated by MPs, some of whom were also journalists.⁷ The initial draft was revised following suggestions by international experts, who suggested splitting the proposal into two different law—one for RTI and the other for freedom of expression and freedom of the media. The final draft addressed these concerns.⁸

2.2. SCOPE OF COVERAGE

The Law applies to:

- All the central authorities of the state: the parliament, the presidency, the executive, its subordinated institutions, and the judiciary.
- Local authorities (*rayons*, municipalities) and their subordinate institutions.
- All organizations founded and financed by the state, at the central and local level, with non-commercial or sociocultural purposes.
- Private bodies—under contract with a public authority to provide public services—that collect, manage, and store official information.

Information can be requested by non-citizens of Moldova as well—access to information is guaranteed in the same circumstances to foreign nationals who are temporary residents.

2.3. SCOPE OF EXEMPTIONS

The law attempts to cover virtually all information in the possession of state authorities or agents (including private ones) and restricts access only in a number of specified cases. Two principles represent a basis for denying access to information: (i) the protection of individual data, personal rights, and reputation; and (ii) the protection of national security, public order, public health, and public morality. The interpretation of these principles in each individual case is left to the judiciary. Article 7 offers a more precise list of information that may be exempted from the general rule of transparency (such as state secrets, commercial patents, the disclosure of which may damage the legitimate interests of economic agents, personal data, information on cases being investigated, and information related to scientific/technological research protected by intellectual property or similar legislation).

However, providers must disclose the portions of the document that do not contain such information, and indicate explicitly the classification of the rest of the document. The providers must also demonstrate that the potential damage done by disclosure is higher than the benefit (to the public) of access.

2.4. REQUEST PROCEDURES

Entities covered by the law have the obligation to develop the necessary infrastructure to facilitate access to information, such as creating appropriate spaces for documentation and consultation of public documents, and job descriptions and training for the civil servants in charge of implementation,

The claimant of public information does not have to prove a direct interest or justify its claim to public information in any way. If the information requested is highly complex, and requires additional effort to collect and analyze, the entity might charge a fee, which should not be higher than the reasonable costs of producing, copying, or delivering the information requested. The entity might respond to the request verbally, or issuing copies of the existing documents and data, or mailing or e-mailing copies. When the institution appealed to does not possess the information requested, or when another institution can satisfy the request for disclosure better, the claim should be redirected accordingly.



The law provides that the information must be disclosed as soon as it is available in the requested format, but no later than 15 working days from the time the claim is submitted. The interval could be 20 working days if the volume of information is large or additional interaction with the claimant is necessary to clarify the request, in which situation, the claimant must be informed.

2.5. BROADER LEGAL ENVIRONMENT

Several other pieces of legislation are germane to the functioning of the RTI regime. The contradictions between these laws give civil servants substantial discretionary power, and allow for a large degree of administrative intervention. Requests for information can be denied using different pieces of legislation.

The Law on Transparent Decision Making⁹ requires involving citizens and interest groups in the public decision-making process, particularly in drafting regulations. Though NGO reports (Association for Participative Democracy 2010) have shown shortcomings in the implementation of the law, it is considered by the government as a proof of its transparency, and the government has invested considerable effort in making it work.

The Law on State Secrets:¹⁰ The first law on state secrets was adopted in 1994,¹¹ and gave public institutions much room to restrict access to information much. In 2005 the Moldovan authorities drafted two pieces of legislation that severely limited access to information: one on state and service secrets, and a new law on access to information. Media and NGOs were vocal in opposing the new draft.¹² They were joined by international community experts, many from the Organization for Security and Cooperation in Europe (OSCE) (Banisar, 2005). Subsequently, both drafts were withdrawn from the Parliament's agenda.

A new law on state secrets adopted in November 2008 (Access-Info 2008b; 2009a) retained a number of restrictive provisions from the previous law (Banisar 2008). The new law sought to extend the definition of a state secret, as well as of types of information that may be protected, lacked any provisions for whistle-blowers, extended deadlines for protecting secret information were too extensive, and left little room for parliamentary control. As the law does not contain any provision regarding a potential conflict with the RTI act, the secrecy of public institutions continues. Another factor that favors nondisclosure was the introduction, in 2006, of bonuses for civil servants who handle secret information in the course of their official duties.¹³

The Law on Commercial Secrets:¹⁴ The law regulating commercial secrets dates back to 1994, and later amendments have not improved its wording significantly. Journalists have frequently been refused information by the citing of this law.¹⁵ According to the journalists and NGO representatives interviewed, this law was frequently used by public institutions to restrict access to public information.¹⁶

The Law on the Protection of Personal Data¹⁷ establishes mechanisms for protecting personal information and setting up a National Center¹⁸ mandated to ensure that appropriate protection is granted by all entities that handle personal data. Personal data are defined by law as information that refers to any identified or identifiable person. This definition has caused difficulties in practice, as most information can probably be linked with an identified or identifiable person. For example, according to the RTI act, information from ID cards is not excluded

from free access by citizens, but according to the personal data law this information should not be accessible to citizens. There is a lack of clear procedures to sanction breaches of data protection legislation, including for unlawful use of data for personal interests.¹⁹

The legislation on personal data protection can be invoked against journalists when they seek out information about politicians. Access to wealth statements (defined by law as public information) is denied on the basis of the personal data protection legislation. Answers to such requests often depend on the goodwill of the civil servant who handles the request, as the law allows for significant administrative discretion.²⁰

Freedom of Expression and Media Rights: Laws such as Combating Extremist Activity²¹ have also limited freedom of expression. The 2008 Code of Conduct for Civil Servants²² bans all public servants, except those authorized to contact and communicate with mass media on the behalf of the institution they represent.

There are a series of provisions from Civil Code Criminal Code and Code of Contraventions which restrict the access to information and the freedom of expression. Nevertheless, some advances have been made to adjust legal and institutional framework to European standards. One example is the adoption of Broadcasting Code²³ a complex document which has to ensure the protection of consumers' rights to receive correct and objective information.

3. Implementation Experience

The law contains sufficiently comprehensive provisions on implementation to facilitate access. The law requires all public entities to facilitate citizens' access to information, appoint and train information officers, and amends internal regulations to reflect RTI procedures (such as the duties of the civil servants in charge of ATI implementation).²⁴ The law also provides for the obligation of civil servants to assist citizens in identifying and accessing registers where public information is stored.²⁵

In practice, little effort has been made to create mechanisms to ensure implementation across public institutions or to monitor compliance. Regulations on how the law should be implemented have not been issued, so individual institutions are left to decide if and how supplementary regulations should be adopted (some did, most did not). There are no officially centralized statistics in RTI implementation except some studies that originate from NGOs, such as Access-Info, which specialize in promoting access to information. A few NGOs use it systematically. But their capacity and resources are insufficient to put enough pressure on authorities.

There is no dedicated budget allocated for the implementation of the law. Most ministerial accounting departments have no tradition of such collecting fees from requesters and consider the extra trouble of collecting fees not worth its potential benefits. Big institutions such as ministries or agencies regard the possibility as more of a nuisance as it would imply complex arrangements between PR offices, the RTI system, and the accounting department. There are no central guidelines or a consistent judicial practice of interpretation of limitations on collecting fees. Hence, revenues from this source are insignificant.

Overall, there is little ownership of the law by political leaders.²⁶ The issue of the implementation of the RTI law has been at the margins of the public agenda.²⁷ The political crisis that followed



the adoption of the law contributed to undermining the chances of its effective implementation. Implementation of RTI has been at odds with the political agenda of the post-2001 government.

3.1. PERSONNEL AND TRAINING

Significant differences exist among institutions regarding the appointment of an information officer, and only a few public bodies prepare regular reports, publish their budgets, or give out data about their public procurements (Access-Info 2009b: 80–90). A monitoring report by a local NGO, which looked at 95 public bodies—64 central and 31 local—shows the lack of awareness among civil servants about the law’s main provisions and the significant level of confusion on the difference between petitions and proper information requests. Procedural norms have not been included in the internal regulations to facilitate implementation (Cozonac, Guja, and Munteanu 2004).

Preparing an answer for an RTI request usually involves several persons in any public institution. The first point of contact for a request is usually the officials working in the department of public relations, who handle many other tasks. When a request is submitted, it is usually forwarded to the minister or senior officials, who decide which department is competent to answer the applicant. The response has to get approved by all department heads, the legal department, and the minister. The answers to requests are usually signed by the heads of institutions or other top management officials, which shows the existence of multiple filters in the provision of information and the lack of autonomy of public servants responsible for this task.²⁸

Data on ATI requests in many state institutions are still not separated from those of individual petitions. It is usually up to the individual who first receives the document to qualify it as either a petition or a request for information. Progressive public entities try to differentiate between the two not only because the deadlines and procedures for response are different,²⁹ but also because such institutions have interacted more frequently with their international counterparts, and, as a result, have become more aware about higher standards of transparency.

3.2. RECORDS MANAGEMENT

Each public institution is responsible for administering and keeping records of the information it works with, drawing resources from their general budget. Recent documents might be available in electronic format, while older documents are usually in paper format.³⁰

Overall records management is the responsibility of the Secretariat Administrative Service (SAS). A step forward was made with the adoption in 1997 of law on registers.³¹ A better system of record management was put in place through the enactment in 2004 of the law on electronic document and digital signature, which establishes a legal framework for the creation, recording, circulation and storage of electronic documents, as well as terms of using digital signature.³² An integrated system of electronic documents has also been introduced.³³ The government has launched an initiative for “Government without paper,” to migrate to a full-fledged electronically-driven system.

3.3. OPEN DATA INITIATIVE

In 2011 a new government initiative to promote open governance was initiated, with the help of international partners and political buy-in from the highest level of government. The initia-

tive seeks to involve citizens in the decision-making process and improve its interaction with businesses and the public.

A special Web portal was set up (<http://data.gov.md>), and the Center for Electronic Governance was entrusted with operating it. Line ministries and other public bodies were required to identify, publish, and update datasets of interest for citizens and businesses.³⁴ The center had to draft the methodology and technical standards for posting this public information, and offer technical support to all public entities. Two persons with management positions were designated as counterparts in each institution.³⁵ As the center operates under the umbrella of the State Chancellery, the weight attached to the e-government agenda is significant.³⁶ The Chancellery is the main body coordinating government policies and thus has direct access to line ministries and other public institutions.

4. Appeals & Enforcement

Administrative appeal and action in court against the denial of information or mute refusals can be initiated in the following cases:

- The refusal to receive and register a request officially;
- The refusal to offer access to existing documents, which are by default public;
- Undue classification of information as state or commercial secret or personal data; or
- Imposition of disproportionate fees for RTI services.

There is no independent information Commission. The law provides two types of remedies:

- Administrative appeal to a senior official or committee within the entity from whom the information is requested. This must be done within 30 days from the moment when the denial of access occurred or when an unsatisfactory answer was received. The appellate person/body has five working days to examine the case and inform the claimant about the solution.
- Action in and administrative court if the solution to the appeal is considered unsatisfactory, or if the entity does not have internal appeals procedures. This action must be initiated no later than 30 days from the end of the previous procedure.

Systematic data on appeals and adjudication were not available, but interviews suggested that the Courts are burdened by a heavy caseload, and poor capacity.

The judiciary has problems of capacity, integrity, and politicization, as the European evaluation missions attest³⁷—a combination of poor material conditions in courts, overburdened staff, and a lack of exposure to international legal thinking, especially in new areas such as modern commercial law, human rights, or freedom of speech. Judges are poorly prepared to rule on the few ATI-related cases that come before them. Moreover, judges tend to stand with public institutions.

In principle, the administrative judge is entitled to impose penalties in proportion to the damage caused by the denial of access to public information. In practice—and in the context of an unreformed judiciary with little training and track record on such modern legislation—this can lead to divergent interpretations. In some courts “utilitarian” logic seems to prevail: they take into account only the direct material damage to the plaintiff as a person, not the broader



social interest in higher transparency. In potentially landmark cases involving opaque institutions brought before courts by activists or journalists (who act on behalf of the public's "right to know"), the institutions are administered very lenient penalties.

5. Compliance

5.1. PROACTIVE DISCLOSURE

The law specifies information that must be published ex officio. This includes:

- The mission, organization chart, and types of activities of the institution;
- The working hours and contacts of the main divisions as well as of the civil servants in charge with implementing the RTI law; and
- The most important decisions and documents of the institution.
- Synopses of the main documents and decisions of the budget and the main activities carried out.

Other laws also require the publication of documents such as those related to public budgets. But while basic data (address, hours) is available on many institutions' websites, this is attributable to the gradual penetration of the Internet into society over the past decade.

Under the new open government initiative, all state bodies are required to set up and update their web pages and also approved a regulation about publishing information on these websites.³⁸ The Ministry of Information Technology and the Security and Information Service is charged with creating the standards for official websites. All public entities are required to include a specific line for the operation of these sites in their annual budgets. The regulation also included a comprehensive list of information that should be accessible through the websites.³⁹ The government's data portal also provides citizens easy and direct access to information held by public bodies in one place. The BOOST project is making databases on public expenditures available.⁴⁰

However, proactive disclosure should not imply less attention to request-based disclosure. For instance, in response to a request by the author, a ministry official suggested that this was not necessary as long as all public information is available on its website.⁴¹

5.2. REQUESTS AND RESPONSIVENESS

Although several ministries claim that there is a database on RTI requests, in response to requests, they have either stated that they cannot provide the requested information,⁴² or not responded.

Several ministries pointed out that most of requests are received by phone and e-mail, but they are not registered.⁴³ Only those requests that cannot be solved on the spot and are docked in a written form, are in fact registered as ATI requests and counted in the formal statistics.⁴⁴ This can be particularly mis-leading at the local level, where much of the interaction that happens between local authorities (who are the main service providers for citizens) and their clients is verbal and informal. Central bodies are more bureaucratic in their relations with citizens; therefore, for them the data presented above is more likely to be closer to the reality on the field. However, even here the conflation of petitions and RTI requests creates a further layer of inaccuracy.⁴⁵

There are a few private initiatives to monitor and produce quantitative data on the RTI's implementation. The most complete is that carried out in 2008–09 by Access-Info, a civil society organization. This was a survey of RTI requests by citizens, journalists, and NGOs to public sector institutions.

These studies suggest that there is low awareness about RTI among citizens, and as a consequence, a low number of requests. The reports also show little progress in the receptiveness of public institutions to citizens' requests (Access-Info 2011b). Though some improvement was seen between 2007 and 2010 (an increase in responses received from 20.3 percent in 2007 to 34.6 percent in 2010), the overall rate of response remains quite low. More details on this data are provided in Annex 1.

There are also significant differences between central and local institutions: central institutions are more responsive to requests, both in terms of the number and quality of answers. Central institutions also tend to be more aware of the provisions of the law, or simply to have the means to deal more effectively with requests. But the majority of requests are made at the local level and the unresponsiveness of local authorities plays an important role in the public's perception of this issue. The *rayon*-level and de-concentrated bodies, which are at an intermediary tier of governance, range between the national and the local institutions in terms of responsiveness.

The courts and prosecutors' offices as well as the police also tend to be more non-responsive, invoking the need to maintain secrecy of investigations as a reason.⁴⁶

Responsiveness to media is seen to be higher, even though they request more "sensitive" information, potentially because the media tend to be more persistent in their demands.

6. Conclusion

After almost a decade, the RTI system has been very inadequately institutionalized. According to the stakeholders interviewed, this situation has its roots in weak political ownership (and, as a result, visibility), and a passive judiciary that is unwilling to create a coherent practice in this area. Soon after the passage of the law, the Party of Moldovan Communists (PCM) won power in 2001—the first post-Soviet state where a non-reformed Communist Party returned to power. The fragmentation of the liberal opposition helped consolidate its power. In the subsequent years, Moldova's record on democracy, electoral practices, civil society, independence of the media, and independence of the judiciary worsened. The Parliamentary Assembly of the Council of Europe (PACE) commented that although the Communist Party came to power in a democratic way, "it has changed overnight...democratic institutions and violated human rights." The Council of Europe (COE) also pointed to a "continuous worsening and radicalization of the political climate."⁴⁷

In the March 2005 elections, the PCM lost its constitutional majority. It was able to reelect its leader, Vladimir Voronin, as the President only after an agreement with the opposition⁴⁸ in which some potentially important democratization measures were promised and partly implemented.⁴⁹ These included measures to ensure independence of the media, independence of the judiciary, decentralization of local government, greater parliamentary oversight of law enforcement agencies, reform of the electoral authorities, reform of the Communist Party, and his resignation as Communist Party chairman. Moldova's efforts to come closer to the EU also generated some reform.⁵⁰ In this political climate, there was little space for implementation or exercise of the right to information.



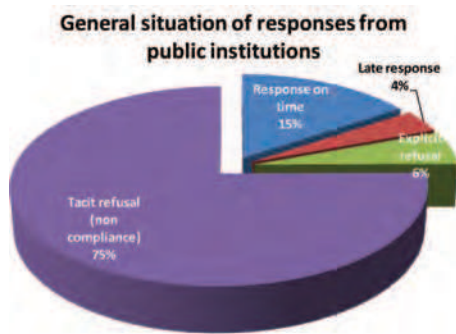
After the 2001 elections, the space for civil action also shrunk considerably. CSO efforts focused on monitoring and assessment projects in most cases, and less direct action against a specific institution in a flagship case, or strategic litigation. There are more than 3000 NGOs registered in Moldova. But only a small number are active and skilled. The civil society sector is very weak, generally lacking in institutional capacity and, often, basic equipment, and dependent on international financing. Media has also been polarized, with its independence called into question. The priority in civil society development efforts in Moldova is to invest in capacity building and the institutional development of NGOs, and continue to expand the space for media freedom.

In the past two years, increased pluralism and political competition has resulted in more details about public affairs put into the public domain, and requests for sensitive information have also gone up. Following the dissolution of Parliament, elections in July 2009 transferred power from the Communist Party of the Republic of Moldova (PCRM), which had ruled the country since 2001, to a coalition of four social-democratic and liberal parties calling themselves the Alliance for European Integration (AIE). Led by Prime Minister Vlad Filat and Acting President Mihai Ghimpu, the ruling AIE coalition pursued an active reform agenda throughout 2010, addressing long-standing deficits in the areas of free press, engagement of civil society, and judicial reform. A new window of opportunity emerged. The space for public debate is now larger and more diverse.⁵¹ The open government initiative has boosted Moldova's profile in the international arena,⁵² and is a potential tool to improve the implementation of the RTI law and the law on transparency in decision making.⁵³

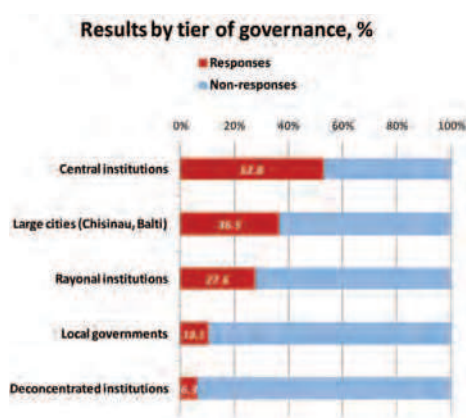
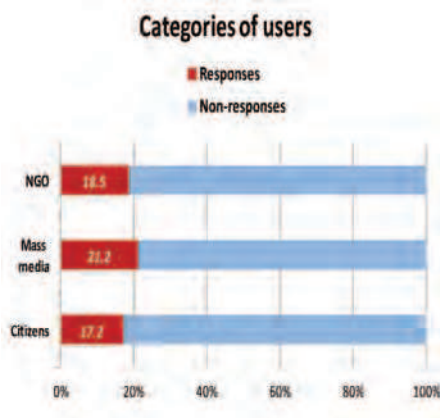
Annex 1

6.1. GENERAL SITUATION OF RESPONSES FROM PUBLIC INSTITUTIONS

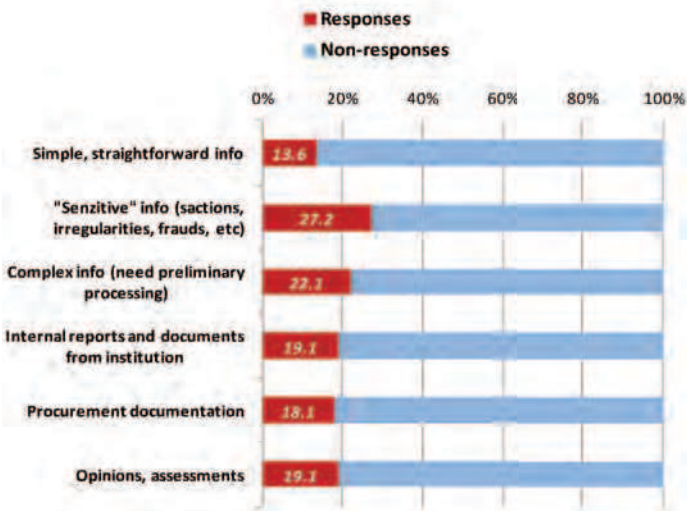
Source: Access-Info 2008c.



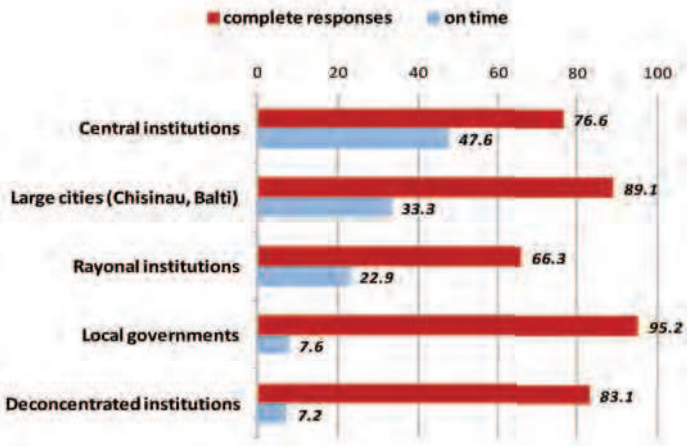
Source: Access-Info 2008c.



The type of requests and responses given



...of which, the quality of responses given, %



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Notes

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24. Law No. 982 from May 11, 2000, on free access to information published on July 28, 2000, in the Official Gazette No. 88–90, Art. No. 664, Art. No. 11/2, <http://lex.justice.md/index.php?action=view&view=doc&lang=1&id=311759>.
25. Ibid.
26. Due to an unusual constitutional provision, the president of the republic must be elected with absolute majority in Parliament. When no such majority exists, which happens more often than not with the current political fragmentation, two failed attempts to elect the head of state automatically trigger fresh national elections, though the coalition government may be otherwise quite stable.
27. The only NGO that continuously implemented and monitored the ATI law was Access-Info. Some NGOs, such as Transparency International, conducted studies on the ATI requests sent to public bodies and measured the responsiveness to such requests. Media NGOs promoted freedom of information within the bigger context of the freedom of media and freedom of expression to improve the context in which journalists operate.
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30. Interview with representatives of the Ministry of Justice on its premises on August 3, 2011.
31. Law on registers no. 1320 of 25.09.1997, Official Gazette of 27.11.1997 nr.77-78/639.
32. Law on electronic document and digital signature no. 264 of 15.07.2004, Official Gazette of 06.08.2004, no. 132-137/710. Date of entry into force: 06.11.2004.
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39. Article 9 of the decision includes a list of 19 paragraphs on official information which has to be published on Web sites ranging from general information about the institution to budgetary information and statistical data, <http://lex.justice.md/index.php?action=view&view=doc&lang=1&id=316361>.
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42. Official answer of Ministry of Justice to solicitation regarding the number and topics of ATI requests. September, 14, 2011.
43. Official answer of Ministry of Labor, Social Protection and Family to solicitation regarding the number and topics of ATI requests. September, 21, 2011.
44. Interview with the Center for Combat of Economic Crime and Corruption on its premises on August 4, 2011.
45. *Center for Combating Economic Crimes and Corruption*: Informative Note on petitions' examination (2010).
46. In accordance with the monitoring and evaluation methodology used by Access-Info, the following public bodies fall within the category of law enforcement and control bodies: the Constitutional Court, Supreme Court, Prosecutor's General Office, Information and Security Service, Centre for Combat of Economic Crime and Corruption, Economic Court of Appeal, Court of Accounts, Fiscal Inspectorate, and Customs, and Border Police. See Access-Info (2009c: 9).
47. Freedom House.
48. Christian Democratic People's Party (CDPP), the Social-Liberal Party (SLP), and the Democratic Party (DP).
49. Freedom House.
50. Ibid.
51. Private, running perpetually at a loss, and probably on air as long as their (foreign) investors keep the funds flowing in exchange for political influence.
52. Moldova is among the first 16 countries in the world to ensure access to government data, <http://data.gov.md/república-moldova-este-de-azi-printre-primele-16-tari-ale-lumii-care-asigura-acces-la-datele-guvernamentale-cu-caracter-public/>.
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Implementing Right to Information A Case Study of Peru

Roberto Pereria Chumbe



WORLD BANK GROUP

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Abbreviations and Acronyms

CAD	Informed Citizens (Ciudadanos al Día)
CCD	Democratic Constituent Congress
CGR	Office of the Comptroller General
CPP	Peruvian Press Council
DAR	Rights, Environment, and Natural Resources
DINI	National Intelligence Directorate
FONAFE	Financing of Government Business Activity
IDL	Legal Defense Institute (Instituto de Defensa Legal)
IPYS	Press and Society Institute (Instituto Prensa and Sociedad)
LPPD	Law on the Protection of Personal Data
LTAIP	Law on Transparency and Access to Public Information (Ley de Transparencia y Acceso a la Información Pública)
NM-C90	Nueva Mayoría–Cambio 90
OBSERVA	Social Oversight Observatory
OCI	Institutional Control Offices
ONGEI	National Government Office of Electronics and Computing
ONA	National Anticorruption Office
ONP	Office of Normalization of Social Benefits
OSCE	Agency for Oversight of Government Contracts
PCM	Office of the President of the Ministerial Cabinet
PLANMED	Office of Strategic Planning and Educational Quality Measurement
PROPUESTA	Citizen Proposal Group (Grupo Propuesta Ciudadana)
PSH	social empowerment programs
PUCP	Pontificia Universidad Católica del Perú
RLTAIP	LTAIP modified by Law N° 27927, adopted through Supreme Decree N° 043-2003-PCM, and regulated by Supreme Decree N° 072-2003-PCM.
RTI	right to information
RUB	Single Registry of Beneficiaries
SC	Coordination Secretariat
SEACE	Electronic System for Government Procurement and Contracts
SERVIR	National Civil Service Authority
SGP	Public Administration Secretariat
SIAF	Integrated Financial Administration System
SINA	Law of the National Intelligence System

SIS	Comprehensive Health Insurance System
TUPA	Single Ordered Text for Administrative Procedures
TUO	Single Modified Text
UMC	Ministry's Education Quality Unit

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Implementing Right to Information

A Case Study of Peru

1. Introduction

The formal or express defense of the right to information (RTI) is relatively recent in Peru. It was first acknowledged as an autonomous fundamental right in the 1993 Constitution.¹ Almost a decade passed before this basic right was regulated by Law No. 27806 of August 3, 2002, the Law on Transparency and Access to Public Information or *Ley de Transparencia y Acceso a la Información Pública* (LTAIP) that went into effect in January 2003.

The law was then modified by Law No. 27927 on February 4, 2003, systematized through a single revised text, adopted through Supreme Decree No. 043-2003-PCM of April 24, 2003, and later developed through regulations set forth in Supreme Decree No. 072-2003-PCM on August 7, 2003 (RLTAIP). In addition, transparency and respect for RTI form part of the 29th governmental policy of the National Accord that was signed in July 2002 by representatives of the government, leading political groups, and civil society.²

More than eight years after the passage of LTAIP and its modifications, Peru has the legal framework and government political will, formally expressed in the National Accord, to guarantee the full exercise of RTI. A reasonable amount of time has passed, enabling the evaluation of the impact of this legislation in achieving increased transparency in government. It is not a question of establishing simple targets, because lack of government transparency and difficulties in exercising RTI are associated with broader cultural processes that go beyond problems related to the development and application of laws. The idea is to eliminate the *culture of secrecy*: the notion that government affairs should take place in secret without citizen involvement; this notion is based on the idea of a relationship between the state and citizens in which the citizens are viewed as passive subjects who do not have the potential to participate in the government decision-making process except during elections. Although the law mandates transparent government action and upholds RTI, the practices of public entities tend to conflict with this.

The purpose of this report is to analyze, as broadly as possible, the different factors that favor or hinder the implementation of transparency and access to public information. This study attempts to provide a dynamic vision of the state of transparency and RTI in Peru by examining the legal framework and its application by public officials responsible for fulfilling the different obligations as set forth in the laws that regulate this fundamental right as well as individuals exercising this right, with an emphasis on results or impact achieved.



This study examines legal data, including laws, regulations, directives, and jurisprudence as well as literature on the subject, including press and academic articles, reports, working documents, and other sources. To complement this information, the author interviewed current and former officials and public servants as well as members of nongovernmental organizations that work in this area.

This report presents an overview of the key factors and trends that influence the effective implementation of RTI. It is divided into five sections. The second section reviews the process of adopting RTI legislation. The third section examines core issues in the discussion of legislation on RTI and transparency. The fourth part of the report looks at key actions adopted by the government to implement and comply with the legislation. Finally, the fifth section offers an analysis of the effective exercise of RTI.

2. Review of Legislation on Access to Public Information

The 1979 Peruvian Constitution did not expressly mention RTI; because of this, the right had to be inferred from the law recognizing the right to freedom of expression, and, specifically, to seek and receive information. Nevertheless, there were other legal references to RTI during the effective period of the 1979 Constitution, although they were insufficient, unsystematic, and limited to specific areas or topics.

One of these laws was the 1984 Organic Law of Municipalities, which regulated the participation of citizens in local government. In so doing, it established that one way to achieve participation was through the use of information that should make available by municipalities.³ The regulations for the Law on Administrative Simplification, adopted by Supreme Decree No. 070-89-PCM on September 2, 1989, established that users had the right to access information about the public activities of government bodies that they were obligated to provide.⁴

Subsection (5) of Article 2 of the 1993 Constitution recognized RTI for the first time as an autonomous, fundamental right.⁵ The initiative came from the official government party, Nueva Mayoría–Cambio 90 (NM-C90) and received support from other political groups represented in the Democratic Constituent Congress (CCD), particularly members its constitutional committee.

It is ironic that the political movement of the government responsible for the self-coup of April 1992 would be the one to propose the incorporation of RTI as an autonomous, fundamental right. One plausible explanation for this is that the government needed a constitution that would serve to legitimize the new administration and that responded in large measure to pressure from the Organization of American States.⁶ The absence of legislation on RTI during the 1990s, at a time when the public administration was characterized by serious acts of corruption,⁷ suggests that the government included RTI in the 1993 Constitution solely for cosmetic reasons. The first bill to regulate RTI (draft bill of Law No. 3903-98-CR, submitted August 21, 1998) was not debated much.⁸

After the 1993 Constitution went into effect, another important piece of legislation adopted was the Single Modified Text of the Law on General Standards of Administrative Procedures. It was adopted by Supreme Decree No. 02-94.JUS on January 31, 1994; it circumscribed access to information contained in records on administrative procedures. Along these

same lines was Law No. 27245, the Law on Fiscal Prudence and Transparency, adopted on December 27, 1999, which required full disclosure by government bodies of information associated with government fiscal policy; it also provided access to macroeconomic information.

Supreme Decree No. 018-2001-PCM was adopted on February 27, 2001 during the interim government⁹ led by President Valentín Paniagua Corazao. The law regulated obligations for transparency and delivery of information by the government bodies mentioned in Legislative Decree No. 757. Basically, this new law established the obligation of these public entities to establish a special procedure to guarantee RTI. In March 2001, also during the Paniagua administration, Urgent Decree No. 035-2001 was enacted, establishing a series of rules to permit access of individuals to public financial information.

In April 2001, Law No. 27444, the Law on General Administrative Procedure, was adopted. Article 110 regulated the *right to petition* or the power of individuals to request information held by government bodies. In May 2001, the Paniagua administration enacted Supreme Decree No. 060-2001-PCM, which created the *Portal of the Government of Peru*, a Web-based tool designed to develop an interactive information system for citizens and which provides access to consolidated information on services and procedures of government entities. The *Portal of the Government of Peru* was the immediate predecessor of institutional Web sites for the publication of the proactive public disclosure obligations stipulated in LTAIP, such as the *Standard Transparency Portal*. These tools are discussed later in this report.

Another important norm is Law No. 27482, adopted on June 15, 2001, which regulates the publication of the Sworn Declaration of Income, Assets, and Revenue for government officials. Supreme Decree No. 080-2001-PCM of July 8, 2001, established regulations for the law, defining standard formats for declarations. These laws regulate Articles 40 and 41 of the Constitution, which establish proactive public disclosure obligations with respect to sworn declarations of assets and revenues for officials and public servants. Furthermore, through Supreme Decree No. 031-2002-PCM of May 8, 2002, the "General Policy Guidelines for the Development of the Electronic System for Government Procurement and Contracts" was adopted, establishing guidelines for the electronic system for government procurement and contracts (SEACE); this enabled access to information generated during government contracting procedures.

Despite the fact that it was formally recognized in the 1993 Constitution, Congress did not regulate RTI until 2002. Several factors contributed to the adoption of LTAIP (Law No. 27806, the Law on Transparency and Access to Public Information). The Peruvian Press Council (CPP)¹⁰ and the Ombudsman's Office¹¹ played key roles by signing an inter-institutional agreement, joining forces to promote the adoption of an information-access law. The CPP, with technical support from the Ombudsman's Office and in the framework of its Access to Government Information Project that began in June 2000, organized a series of meetings to develop guidelines for drafting a law on access to public information and government transparency.¹²

Journalists and media directors, government opposition leaders, and public servants in general were invited to these meetings. The CPP had the support of the British Council and the international NGO Article 19, helping to finance many of the activities and the participation of national and international experts. A key result from these meetings was the *Lima Principles* document of November 2000, which listed 10 principles of transparency and access to public information to guide legislation and government policies. In an effort to give the *Lima Principles* more institutional support, the document was signed by the OAS Special Rapporteur for Freedom of Expression at the time, Santiago Cantón, as well as by the former UN Special Rapporteur for Freedom of Expression, Abid Hussain.



While the CPP and the Ombudsman's Office brought together representatives of the armed forces and the national police to participate in several work meetings, officials from both institutions were especially resistant to the idea of exercising RTI in the context of *national defense* and *domestic order*, respectively. For this reason, in April 2002, an addendum to the eighth principle of the *Lima Principles* was signed that developed the contents of the exception of national security in military, domestic order, intelligence, and government foreign affairs contexts.

Since its establishment, the Ombudsman's Office has implemented, through its Bureau of Constitutional Affairs, the promotion and defense of freedom of expression and RTI. For example, in November 2000, in Ombudsman Report No. 48, the Ombudsman's Office urged the Congress to pass a law to regulate RTI, as recognized in Subsection 5 of Article 2 of the Constitution, and proposed a set of guidelines to that end.¹³ Also of note is the support provided by the Press and Society Institute (Instituto Prensa and Sociedad, IPYS—an organization of journalists) as well as by the Legal Defense Institute (Instituto de Defensa Legal, IDL—whose representatives actively participated in the preparation of the addendum to the *Lima Principles*). Both organizations contributed by sharing their opinions and proposals at several of the work meetings.

A second factor that facilitated the adoption of Law No. 27806 was the context of recovery of democratic institutions and the fight against corruption that began in late 2000. A video made public on September 14, 2000, showed a top Fujimori advisor bribing a congressman of the opposition to persuade him to join the government party. This proved fertile ground for the development of several initiatives enacted after 2000 to improve government transparency and guarantee RTI, as the previously mentioned laws indicate. These laws were the immediate predecessors of Law No. 27806.¹⁴ Legislators of diverse political viewpoints supported RTI.¹⁵

Most of the draft legislation was submitted by representatives of the new government administration of the Perú Posible party (2001–06), which had made campaign promises to fight corruption. This objective was shared with the other Fujimori opposition groups, such as the APRA party, whose representatives developed draft bills. A multiparty group called the Congressional Working Group on Transparency of Government Action and Citizen Participation was formed in 2002.¹⁶ This group reviewed and analyzed draft bills and prepared substitution text. In addition to the participation of the CPP and the Ombudsman's Office, the working group convened the IPYS. The Ombudsman's Office stated about the law:

"...it was the result of a unique effort of the Congress since it received and accepted suggestions for its preparation from a variety of institutions. At the level of civil society, for example, the Peruvian Press Council and the Press and Society Institute made key contributions. Likewise, the Ombudsman's Office provided several reports and opinions on this issue to the Congress. All of this contributed to a law to promote citizen access to information and transparency in public bodies. To this end, many of its provisions attempted to go into great detail since the goal was to impede the culture of secrecy from being able to take refuge in vague and imprecise laws."¹⁷

The chairwoman of the Working Group, Ana Elena Townsend, demonstrated her commitment to the issue and encouraged broad-based participation of organizations interested in promoting the law. The working group took into account the consensus achieved at the work meetings organized by the CPP and incorporated many areas of agreement in the draft

legislation that eventually became the LTAIP. After being approved by the Congressional Committee on the Constitution, Regulations and Constitutional Accusations, the bill was passed by Congress, becoming Law 27806, the Law on Transparency and Access to Public Information (LTAIP), on August 3, 2002; it went into effect in January 2003.

Although this law incorporated many of the criteria proposed by the CPP, IPYS, and the Ombudsman's Office as well as the agreements achieved by the Congressional Working Group on Transparency of Government Action, at the end of the legislative process, some restrictions were introduced that limited RTI. For example, a special procedure was established for requesting information from the armed forces and national police, and limitations were incorporated in the exceptions concerning national security. In September 2003, in response to this situation, the Ombudsman's Office filed a petition of unconstitutionality against those provisions. The Congress subsequently repealed them through Law No. 27927 of February 4, 2003. In March 2003, this action led the Constitutional Tribunal to declare that it had no grounds to issue a ruling in the case. As a result of this modification and in an effort to consolidate in a single text the reforms of Law No. 27927, the executive branch adopted, through Supreme Decree No. 043-2003-PCM of April 24, 2003, the Single Modified Text (TULO) of Law No. 27806.¹⁸ On August 7, 2003, the regulations of the TULO of Law No. 27806 were adopted through Supreme Decree No. 072-2003-PCM in accordance with the mandate established in the first of the Transitory, Complementary and Final Provisions of the TULO of Law No. 27806.¹⁹

3. Key Issues Surrounding the Debate on Law No. 27806

This section briefly examines some of the issues raised during the debates about the passage of LTAIP. These issues continue to be subjects of discussion and disagreement.²⁰ The main content of LTAIP is provided in Annex 1.

3.1. LEGAL PROVISIONS ON EXCEPTIONS, PARTICULARLY THOSE ASSOCIATED WITH NATIONAL SECURITY

A key aspect of all laws that attempt to recognize, develop, or guarantee RTI is the regime of exceptions that define the limits of the exercise of this fundamental right. An initial controversy emerged concerning the types or categories of exceptions that should be established. In the functioning of public bodies, several categories of exceptions existed, although there were no clear criteria for their existence. The following were often cited, among others: *secret*, *reserved*, *confidential*, *top secret*, and *highly confidential*. In some cases, these categories were recognized in sector regulations (in other words, by the same bodies that applied them).

There were early discussions about whether the number of categories should be maintained or reduced. It was finally decided that the categories should be reduced to the minimum possible because they limit the exercise of a fundamental right and the principle of transparency. It was agreed that only the following categories would remain: *secret*, *reserved*, and *confidential*.

Another area of discussion concerned the specific contents of each category. Initially, members of the armed forces and the national police rejected the idea that access would be



permitted to information associated with any aspect of national security and domestic order. After several meetings organized by the CPP, members of the armed forces and national police were persuaded that they needed to demonstrate a willingness to be transparent in light of their negative public image that resulted from high-ranking officials from these institutions the participating in the Fujimori government, and specifically, in cases of corruption.

This process led to the signing of an addendum to the eighth principle of the *Lima Principles* in April 2002; it included the exception of *national security* in the context of the military, domestic order, intelligence, and foreign affairs. The CPP, in cooperation with the Ombudsman's Office and IDL, made important contributions to this effort.

3.2. TIME LIMITS FOR RESPONDING TO REQUESTS FOR INFORMATION

Specialists, representatives of the Ombudsman's Office, and journalists who participated in the meetings organized by the CPP defended the establishment of short time limits for responding to requests to access information. But, in general, public officials preferred longer time limits, like the 30-work day deadline for concluding administrative procedures, in accordance with Law No. 27444, the Law of General Administrative Procedure.

Officials argued in favor of this last option, citing the difficulties involved in locating certain information in the institutional archives or in requesting the information from other areas; they also cited the large number of requests to be processed. In response to these arguments, representatives of the Ombudsman's Office and journalists claimed that delivering information long after it was requested could render it useless or untimely for those soliciting it. For this reason, they argued, short time limits should be established. They also pointed out that short deadlines could serve as positive incentives for improving information storage and organization as well as for improving internal information-flow procedures. They asserted that every request should be evaluated to determine if an extension to the time limit was justified and that this potential situation could be regulated. The final bill set the regular deadline for responding to requests at seven working days; an exceptional deadline was established that provided five additional working days for cases requiring more time, as long as the individual requesting the information was notified before the regular deadline.

3.3. COST OF INFORMATION REQUESTS

The cost of requests to access information was another disputed issue. Public servants participating at the meetings convened by the CPP defended the inclusion of items like paper for photocopying requested documents, the salaries of individuals assigned to respond to information requests, and, all general costs directly or indirectly related to reproducing requested information. There were two reasons given for this position: (1) it would discourage "excessive" or numerous requests; and (2) it would transfer the costs of requests to users. The government, it was asserted, while it was obligated to deliver information, was not obligated to finance requests for information from citizens; the Constitution should have stipulated that individuals requesting information would have to cover these costs.

For their part, experts, Public Ombudsman representatives and journalists argued that the disproportionate costs of these information requests would, in practice, impede or discourage the exercise of this fundamental right, transforming it into only a symbolic right. Therefore, the "cost" of the request that, in accordance with Article 2, Subsection 5 of the Constitution,

should be assumed by the user, should also be restrictively interpreted. The cost should be limited to “cost of reproduction” of the information; it should not include other expenses normally assumed by the government, like salaries and infrastructure, as examples. Eventually, these criteria were adopted in LTAIP and its regulations.

3.4. INCLUSION OF PRIVATE COMPANIES PROVIDING PUBLIC SERVICES IN LTAIP

Another controversial issue was whether or not LTAIP should apply to private companies providing public services or specifically, if public information held by a company could be requested by the government bodies that regulate their activity (in other words, in an indirect manner). This led to a technical discussion about which methods were legally appropriate and which would result in the fewest future legal problems. Ultimately, it was decided that LTAIP should apply to these companies, but the exercise of RTI was limited to aspects of the company associated with the public services it provided, their rates, and their administrative operations. a reasonable limitation since it only refers to the areas of public interest that these private companies manage.

3.5. THE CAPACITY TO FULFILL PROACTIVE PUBLIC DISCLOSURE OBLIGATIONS THROUGH WEB SITES

The limited development of Web-based technology in local governments (the country has more than 1,800 local government administrations) led to a discussion regarding the pertinence of establishing a set of proactive disclosure obligations that had to be fulfilled through institutional Web sites. There was a problem both with a lack of Internet service and limited technical capabilities of staff to administer institutional Web sites. In response, it was proposed that public disclosure obligations via institutional portals should only be applicable to provincial governments (there are approximately 195 countrywide). However, it was decided that the obligation would apply to all local governments, although it was stipulated that the Web sites could be developed progressively.

Finally, a discussion ensued on the possibility of creating an oversight authority to ensure compliance with Law No. 27806, but this idea was discarded rapidly because citizens tend to reject the creation of new government institutions, concerned that they expand government bureaucracy. To avoid a lengthy debate that could endanger the adoption of LTAIP, it was decided not to make this measure a priority.

4. Implementation of Legislation on Transparency and Access to Public Information

This section examines the process for implementing legislation on transparency and access to public information. It first looks at the norms that complement the regime for access to information established in LTAIP. This section reviews the functions and duties of the different public entities that have responsibilities related to information access. Third, it examines the technical and organizational capacity of public bodies to manage information. Finally, this section discusses some key considerations for implementing the legislation, such as training of public servants.



4.1. COMPLEMENTARY NORMS FOR COMPLIANCE WITH LTAIP

Complementary norms of LTAIP include both legal rules and regulations. Some of the main complementary norms are discussed in the two subsections below. More detailed information on these norms appears in Annex 2.

4.1.1. Legal Rules

The first rules of note are compiled in the Code of Constitutional Procedure, adopted through Law No. 28237 of May 31, 2004, and which went into effect in December 2004. The Code of Constitutional Procedure regulates the action of *habeas data* to defend RTI in the justice system.²¹ When an entity subject to LTAIP faces a RTI violation, the only administrative requirement to begin the review procedure is a written information request that includes a specific date and the refusal of the entity to provide the information or the lack of response to the request within the time limit established by law. Additionally, the Code of Constitutional Procedure establishes a single time limit of 10 workdays to respond to information requests. Thus, it extends the regular deadline stipulated in LTAIP by three workdays but eliminates the extraordinary deadline of an additional five workdays. However, despite the definition of this new time limit, the regular and extraordinary deadlines established in LTAIP are still frequently applied. In many cases, this is because the public servants responsible for responding to requests for information are unfamiliar with the Code of Constitutional Procedure.

Finally, one provision of the Code of Constitutional Procedure has not generated in practice the beneficial effects for the protection of RTI that were expected. In the case of *habeas data* proceedings, the provision calls for the elimination of mandatory legal representation. This norm was intended to help individuals whose RTI had not been respected by a government body defend their right of access in the justice system.

But, in practice, this has not occurred. According to IPYS, which has extensive experience making requests to and filing complaints against the government, filing an action of *habeas data* without a legal defense hurts the plaintiffs. This is because litigation requires a certain level of specialization in the application of procedural norms. Further, judges tend to require excessively bureaucratic procedures that are not common knowledge among citizens. Finally, government bodies are defended by public prosecutors, thereby generating a technical imbalance in the litigation, to the detriment of plaintiffs.²²

Another important norm is Law No. 28664, Law of the National Intelligence System (SINA) along with the National Intelligence Directorate (DINI), adopted on January 4, 2006. One negative aspect of this law is that it establishes longer time limits than LTAIP for the declassification of information: 20 years for *secret* information, 15 years for *reserved* information, and 10 years for *confidential* information. According to LTAIP, *secret* information is declassified after five years; *reserved* and *confidential* information are declassified after the reasons for their classification no longer exist. Therefore, intelligence information classified as *secret* can be made public only after four presidential terms have passed; information classified as *reserved* or *confidential* can be kept from public access even after the reasons for their classification cease to exist, for 15 and 10 years, respectively. This is clearly a setback in terms of transparency of the military sector and represents a return to the inclination toward secrecy that has traditionally been present in this sector. The five-year time limit for categorizing information as *secret* in LTAIP does not prevent the extension of this exception past the deadline, as long as it is deemed justified; therefore, there is no reason for having modified this regime.²³

A third key norm is Law No. 29091 of September 26, 2007 that modified Paragraph 38.3, Article 38 of Law No. 27444 (Law on General Administrative Procedure). It reiterates the proactive public disclosure obligations of entities subject to the law by mandating that public bodies must publish their management tools, guidelines, directives, and regulations on the *Portal of the Government of Peru* and on their own institutional Web sites, and they must specify that the information is of an official nature and worth. It also establishes that responsibility for publishing the information rests with the public servant in charge of the transparency portal. Moreover, it states that not fulfilling these functions is a serious offense punishable by dismissal. The law mandates that the Comptroller General of the Republic is responsible for the timely control over due compliance with public disclosure obligations.

Fourth is Legislative Decree No. 1031 of June 24, 2008, which aims to improve the efficiency of government business activities. The fifth of its Complementary, Transitory and Modifying Provisions regulates the concept of *trade secret*. According to Subsection 2 of Article 17 of the decree, a *trade secret* is a valid exception to RTI, which is covered by *confidential information*. While *trade secret* is defined in a law that regulates government business activity, it can also be applied to protect trade secrets of private companies, in accordance with LTAIP.

Finally, Law No. 29733, the Law on the Protection of Personal Data (LPPD), adopted on July 3, 2011, also deserves mentioning. Although this law refers to the fundamental right to protect personal data recognized by the Constitution, it contains provisions that should be harmonized with LTAIP. For example, the income of public officials is considered *public* information in LTAIP but is *sensitive* information in LPPD. This difference has already generated discrepancies among government bodies as to whether or not the salaries of public servants are public information. In addition, the LPPD created the National Authority for the Protection of Personal Data, which has several functions associated with the implementation of and compliance with the law. The fact that no such mechanism exists for RTI could lead to the predominance of the right to protect information over RTI.

4.1.2. Regulatory Norms

This subsection describes key general regulatory norms; in other words, ones that are applicable to all bodies subject to LTAIP. Many public entities have issued regulations and directives, but these are procedural or organic provisions about the general obligations of each entity. General regulatory norms include the following:

- Regulations of Law No. 29091, adopted through Supreme Decree No. 004-2008-PCM of January 18, 2008. This norm develops some aspects of the law that establish the obligation of government bodies to publish a variety of legal provisions on the Portal of the Government of Peru and on institutional Web sites.
- Regulatory norms adopted by the Office of the President of the Ministerial Cabinet (PCM).
- Ministerial Resolution No. 398-2008 of December 2, 2008, which adopted Directive No. 004-2008-PCM/SGP, *Guidelines for the Standardization of the Content of Transparency Portals of Public Entities*. This norm contributes by establishing guidelines to ensure that transparency portals are developed and made available to citizens using standard formats and contents in order to eliminate the differences that existed that did not favor public access.
- Ministerial Resolution No. 126-2009-PCM of March 25, 2009, which adopted *Guidelines for the Accessibility of Web Sites and Applications for Mobile Telephony*. This technical norm was designed to improve the accessibility of the Web sites of government bodies.



- Supreme Decree No. 063-2010-PCM of June 3, 2010, which approved the implementation of the *Standard Transparency Portal*.
- Ministerial Resolution No. 200-2010-PCM of June 24, 2010, which adopted Directive No. 001-2010-PCM/SGP, "*Guidelines for the Implementation of the Standard Transparency Portal in Public Entities.*"

These regulatory norms favor RTI in that they contribute to the increase in compliance with the proactive public disclosure obligations for entities subject to LTAIP. They also promote access to information through institutional Web sites.

Also of note is Ministerial Resolution No. 301-2009-PCM of July 9, 2009, which adopted Directive No. 003-2009-PCM/SGP, *Guidelines for the Report on Requests for Access to Information to Be Submitted to the Office of the President of the Ministerial Cabinet*. These guidelines seek to improve the collection and quality of information from government bodies to the PCM on processed and unprocessed requests to access information. This information serves as input for the executive branch office's annual report, which is submitted to Congress in accordance with Article 22.

Finally, there are two specific, complementary regimes for applying the general principles of transparency and the list of exceptions. The first, a special regime regulated by Law No. 27482, adopted on June 15, 2001, calls for public disclosure of sworn declarations of income, assets, and revenues of public servants as well as access to these declarations. Furthermore, the regime of transparency and access to information on government contracts and procurement, established by Supreme Decree No. 031-2002-PCM (May 8, 2002), set guidelines for the development of SEACE (an electronic system of government procurement and contracts) and by Legislative Decree No. 1017, which adopted the Law on Government Contracts.

4.2. ENTITIES AND OFFICIALS RESPONSIBLE FOR COMPLYING WITH LTAIP

This subsection identifies the public officials and entities responsible for complying with the provisions of LTAIP and complementary norms, or those that, without having explicit legal responsibilities, have assumed this responsibility as part of their overall functions. Table 1 lists these entities and their functions.

4.2.1. Responsible Parties within the Entities Subject to LTAIP

LTAIP establishes various levels of responsibility:

- Individuals responsible for adopting the measures necessary to guarantee the exercise of the RTI as part of their duties. This is the responsibility of the highest ranking official of the entity [RLTAIP paragraph (a), Article 3].
- Three employees²⁴ designated by the director of the entity [paragraphs (b) and (c) of Articles 3 and 5 of the RLTAIP] will be responsible for:
 - Providing information [in other words, for responding to requests to access public information (Article 8 of LTAIP)].
 - Resolving first appeals when the possibility of this is provided for and when the individual requesting information chooses this mechanism [RLTAIP, paragraph (e), Article 5].
 - Managing portals [in other words, the employees responsible for fulfilling the proactive disclosure obligations of the entities (Article 5 of LTAIP)].

TABLE 1. Entities and Officials Responsible for Ensuring Compliance with RTI Legislation

Entities	Official/s Responsible	Functions
Entity subject to LTAIP	Director of the entity	Adopts the measures necessary to guarantee the exercise of RTI in the entity.
	Three employees designated by the entity director (in the case of entities with decentralized offices, public servants can be appointed at each branch)	An employee responds to information requests. Another employee resolves the petitions for appeal when provided and in the case the party requesting the information chooses this mechanism. Another employee is responsible for the portal.
Office of the President of the Ministerial Cabinet	Public Administration Secretariat	Formulates, coordinates, supervises, and evaluates policies of access to public information, promotes government ethics, transparency, and citizen oversight.
	Coordination Secretariat	Collects from all public entities data on processed and unprocessed information requests, in accordance with LTAIP. Prepares the annual report to be submitted to Congress.
Ombudsman's Office	Bureau of Constitutional Affairs	Establishes institutional lines of action with respect to transparency and access to public information.
	Decentralization and Good Governance Program Program of Public Ethics, Corruption Prevention, and Public Policies Public Ombudsman's branch offices nationwide	Establishes institutional guidelines for responding to complaints concerning RTI. Prepares reports on transparency and RTI legislation. Raises awareness of and trains public servants and civil society in transparency and access to public information. Provides coaching and oversight in the decentralization process, with an emphasis on the incorporation of best governance practices in regional and municipal government administrations, including transparency and respect for RTI. Publishes periodic reports on compliance with proactive disclosure obligations of regional governments via their Web sites. Raises awareness of and trains public servants and civil society on transparency and access to public information. Monitors public policy and promotes ethics and the prevention of corruption in the public administration. Responds to complaints and consultations of citizens with respect to RTI. Raises awareness of and trains civil society and public servants.
Comptroller General of the Republic	Institutional control offices	Ensures compliance with the obligations established by LTAIP in accordance with the Annual Oversight Plan. Promotes the establishment of disciplinary measures against officials who fail to fulfill these obligations.

Source: Prepared by the author.



In accordance with the organization of each entity, the duties of the responsible parties stipulated by LTAIP include:²⁵

- Receiving requests (physically, via the web, or both).
- Forwarding requests to pertinent parties, sending to the corresponding area, and searching for the information in the central archive or in external storage areas.
- Following up with requests (for example, with a computer notification system, by e-mail, or by telephone).
- Conduct pertinent consultations with the legal area if necessary.
- Delivering information to individuals requesting it (physically or through the web).
- Overseeing and updating the Web site.

As discussed at the Third National Conference on Access to Public Information (October 2010), most government bodies do not have internal policies to ensure compliance with the obligations stipulated in LTAIP for each entity (for example, a regime of internal responsibilities to respond to information requests). Internal policies are important because they help ensure that the obligations of the legislation on access to public information are adapted to the characteristics of each entity and promote their compliance within entities.

Although LTAIP stipulates that noncompliance with its contents constitutes a serious offense and may result in a criminal charge of abuse of authority, compliance ultimately depends on the director of the entity. An example of this is Mayoral Resolution No. 1364-2010-MPT of December 16, 2010, by which the Mayor of the Provincial Municipality of Trujillo suspended a municipal official for 30 days without pay for failing to respond in a timely fashion to a request of access to public information.²⁶

Failure to comply with the obligations may result in different types of sanctions. Criminal sanctions have included the sentence handed down on September 17, 2008, by the Criminal Court of the Superior Court of Justice of Moquegua-Ilo (File No. 2007-328—Acum. 2007-398). The court ruled that two officials of the Provincial Municipality of Ilo were criminally responsible for committing the offense of omission and delay of functions against the public administration, as defined in Article 377 of the Criminal Code,²⁷ for having responded to a request for information after the deadline and for having failed to deliver part of the information requested. However, the court ruled for a one-year suspended sentence, during which time the defendants had to abide by rules of conduct. The court also awarded civil damages to the plaintiff—the individual who requested the information—in the amount of 1,500 nuevos soles.²⁸ The ruling referred to the crime of omission, refusal, or delay of functions rather than to the crime of abuse of authority defined in Article 376 of the Criminal Code,²⁹ which Article 4 of LTAIP expressly stipulates is the applicable offense in the case of noncompliance with the obligations established in that law.

Administrative and criminal sanctions for RTI violations are not rules, however. Citizens affected by noncompliance have three channels for demanding restitution of their RTI (notwithstanding the administrative appeal which, after the Code of Constitutional Procedure went into effect, became optional for the affected party): (1) appeal to a superior of the employee that did not respond to the request; (2) file a complaint with the Ombudsman's Office; and/or (3) file a legal suit through a constitutional action of *habeas data*. However, this requires reporting the incident and maintaining the complaint over time, which is generally an onerous task, especially in the case of the first two options. At any rate, even if these claims are accepted,

their resolution will be limited to the parties involved and will not be applied as a general rule except in the case of legal proceedings that reach the Constitutional Tribunal and after this entity declares that its ruling is binding.

Moreover, in the case of an action of *habeas data*, an individual can only claim that his or her RTI was affected because his or her request for information had not been resolved. To lodge a complaint of noncompliance with proactive public disclosure obligations requires filing out a compliance petition, the processing of which implies a higher level of specialization than the *habeas data* action, given that the requirements of this constitutional procedure, in addition to those of the Constitution and the Code of Constitutional Procedure, were developed by the jurisprudence of the Constitutional Tribunal.

4.2.2. Office of the President of the Ministerial Cabinet

PCM is the ministry responsible for coordinating the national and sectoral policies of the executive branch. It coordinates with the other branches of government, constitutional entities, regional governments, local governments, and civil society. The PCM's Public Administration Secretariat and Coordination Secretariat have RTI and proactive public disclosure obligations. Both secretariats report to the General Secretariat and are organized in technical teams to perform their assigned duties.

The main mission of the Public Administration Secretariat (SGP) is to coordinate and oversee the process of modernizing the public administration. Its tasks are related to the functioning and organization of the state, administrative simplification, ethics, and transparency in accordance with the norms of government modernization, rationalization, decentralization, internal control, and the government code of ethics. To fulfill these functions, it is divided into 12 thematic areas. The SGP is organized into four work groups or technical components: (1) modernization; (2) structure and operations; (3) administrative simplification; and (4) ethics and transparency.

The SGP inherited the ethics and transparency functions from the former National Anti-corruption Office (ONA). The ONA was created through the Supreme Decree No. 085-2007-PCM of October 19, 2007. Its anticorruption functions included "developing measures to prevent corruption that especially affects access to public information, transparency, and citizen oversight."

The ONA was short-lived, closed through Supreme Decree No. 057-2008-PCM on August 15, 2008.³⁰ This decree modified the Regulations for the Organization and Functions of the PCM, specifically the articles that regulate the functions of the Public Administration Secretariat. The SGP was charged with: "proposing norms and adopting directives on government functioning and organization, ethics, and transparency."

The SGP exercised this function in the framework of its *Ethics and Transparency* technical component. Specific SGP resources allocated to activities in transparency and access to information are very limited. From 2008–10, ethics and transparency functions were assigned to two SGP employees.³¹ Their work focused on the promotion of regulatory norms on specific issues related to the proactive public disclosure obligations of the entities subject to LTAIP.³²

The SGP, with technical assistance from the PCM's National Government Office of Electronics and Computing (ONGEI), developed the *Standard Transparency Portal*.³³ This portal is designed to resolve the problem of diverse formats, inadequate content, duplicate information, and outdated data on the institutional portals referred to in LTAIP. This is an effort



to facilitate the ordered, rapid, and friendly access to the information that public entities are obligated to publish. The portal is an important tool for citizen access to a large volume of relevant information. Because the resources for this work were limited, the German cooperation agency, GTZ provided financial support for the design and development of the portal. The *Standard Transparency Portal* was designed based on the following criteria:

- Use of friendly, informative icons
- Use of clear language that can be easily understood by users
- Presentation of budget information with statistical graphs
- Inclusion of comprehensive information on government contracting
- Listing of government suppliers
- Inclusion of information on investment projects of government bodies³⁴

The *Standard Transparency Portal* was implemented in two phases.³⁵ The SGP organized a program for the implementation of the *Standard Transparency Portal* to provide technical assistance to government bodies nationwide.³⁶ To this end, through October 2010, four technical assistance meetings were held in central government offices to train 376 participants. Regional technical assistance meetings were also held in Cajamarca, Cañete, Ica, Lambayeque, La Libertad, Huancavelica, Junín, Moquegua, Tacna, Pasco, Huánuco, Piura, Tumbes, Amazonas, San Martín, Loreto, and Arequipa with a total of 633 participants. By October 2010, 13 ministries, 32 decentralized public agencies, 12 programs, 2 projects, 9 regional governments, and 8 local governments had implemented institutional Web sites.³⁷

Although significant progress was made in achieving the objectives of the first phase, the implementation of the *Standard Transparency Portal* is now experiencing some difficulties.³⁸ In 2011, the change in municipal, regional, and central government officials affected the continuation of this process. Many local and regional government officials trained in the implementation of this tool are no longer in office.³⁹ Moreover, the two officials who launched and coached the implementation of this tool in the SGP are no longer employed at the PCM. Some experts interviewed for this report have identified problems with the integration and updating of some of the databases that provide input for the *Standard Transparency Portal*. Basically, a few government bodies are unwilling to share their databases or to permit other entities to use them.

The difficulties mentioned, in addition to others, like the lack of updated information on portals, largely reflect the lack of political will to implement the *Standard Transparency Portal*. In many cases, economic resources are not needed; what is lacking is a decision by the highest-ranking officials in each government body to fulfill the objectives that justified the creation of the institutional portals.

In addition to providing technical assistance with the *Standard Transparency Portal*, between 2009–10, the SGP attempted to train the national officials responsible and to build their RTI capacities. There are few available resources for these activities, however, for which reason the entities requesting the training had to cover the costs themselves, as was the case for the Puno regional government.

The PCM's Coordination Secretariat (SC) is responsible for all functions associated with multisectoral action and relations with other government agencies. It is organized into four teams: (1) national policies; (2) multisectoral commissions; (3) regulations; and (4) transparency. This last team is responsible for "collecting information from all entities of the public administration on resolved and unresolved requests for information, in accordance with the Law

on Transparency and Access to Public Information, and for preparing the annual report to be submitted to Congress.”

To this end, it requires information on resolved and unresolved requests from all entities subject to LTAIP. This Secretariat is responsible for preparing the annual report that the PCM submits to Congress, in accordance with Article 22 of LTAIP. A later section of this document discusses these reports and other data to evaluate the exercise of RTI.

It is evident that neither the SGP nor the SC have the specific authority to oversee the level of governmental respect for RTI. Each exercises only limited functions in this regard: the establishment of technical standards through directives or guidelines; coordination, training, or coaching; and consultative functions, mostly regarding proactive public disclosure obligations. Moreover, these are third-level offices in the hierarchy of institutions that implement these (along with many other) activities in the context of limited human and economic resources available for achieving desired results.

4.2.3. The Ombudsman’s Office

Since its founding, the Ombudsman’s Office has worked to promote transparency and access to public information in the framework of its constitutional functions. The Ombudsman’s Office played a key role in the preparation and adoption of LTAIP. In accordance with Articles 161 and 162 of the Constitution, and Article 1 of Law No. 26520 (Organic Law of the Ombudsman’s Office), this institution is an autonomous constitutional body of persuasive control; in other words, its authority does not involve the use of coercion. Instead, it operates as a magistracy of persuasion. The Ombudsman’s Office has three broad areas of responsibility: (1) the defense of constitutional and fundamental rights of the individual and the community; (2) oversight of compliance with the functions of the government administration; and (3) adequate delivery of public services. To exercise these responsibilities, the Ombudsman’s Office is organized into seven specialized bureaus⁴⁰ and seven thematic programs.⁴¹ The Ombudsman’s Office exercises these functions nationwide through 28 public defense offices and 10 service modules.

The Ombudsman’s Office has several areas of responsibility, one of which is associated with RTI and government transparency implemented mainly through the Bureau of Constitutional Affairs; the Government Administration Bureau’s Decentralization and Good Governance Program; and the Program for Public Ethics, Corruption Prevention, and Public Policies. In this area, the Ombudsman’s Office performs the following functions:

- Receives citizen complaints of RTI violations.
- Publishes reports on specific aspects of legislation on transparency and access to information.⁴²
- Prepares periodic reports on compliance with proactive public disclosure obligations by regional governments through their portals. These reports have been produced since January 2004 and, beginning in 2008, have included the supervision of the Web sites of local governments located in departmental capitals.⁴³
- Raises awareness of and trains public servants and civil society in transparency and access to public information.⁴⁴
- Monitors public policies on transparency and access to information, promotion of ethics in government, and prevention of government corruption.



While all of these activities significantly contribute to the upholding of RTI and proactive public disclosure obligations, the capacity of this institution to ensure ongoing compliance with LTAIP is inadequate for the following reasons: (1) it has several areas of responsibility and activities in addition to those associated with RTI and transparency; (2) activities in the area of access to information and transparency focus on specific aspects of these issues and do not address them as a whole; (3) the maintenance, expansion, or strengthening of this work area depends on institutional priorities and/or the will of its directors, making them subject to change with new management; and (4) the office issues recommendations but does not have direct coercive authority even though it is authorized to promote constitutional proceedings.

Despite these limitations, the Ombudsman's Office has significant institutional advantages for promoting the implementation of and effective compliance with LTAIP. First, it enjoys a high level of legitimacy and credibility, enables it to convene broad sectors of the population as well as to form strategic partnerships with social organizations to defend rights and ensure that government bodies fulfill their duties.⁴⁵ In addition, the Ombudsman's Office operates in a decentralized manner in provincial offices and mobile units. This enables the institution to obtain information from the areas under its jurisdiction and to extend the impact of its activities throughout the country.

Finally, the successful exercise of persuasive authority (the *magistracy of persuasion*) by the Ombudsman's Office has enabled it to exercise leadership that is reflected in high levels of social acceptance. The persuasive, noncoercive nature of its decisions, far from being a disadvantage, significantly contribute to the achievement of its institutional objectives because they allow the office to exercise its influence in a variety of ways (through public declarations or reports, for example) in its efforts to promote good government practices and respect for fundamental rights.⁴⁶ Given these strengths, the Ombudsman's Office is called upon to play a key role in the implementation of and compliance with LTAIP.

4.2.4. Office of the Comptroller General

The Office of the Comptroller General (CGR) is the highest-ranking body of the National System for Government Control, which is responsible for overseeing the legality of the implementation of the public budget, public debt operations, and the acts of the government bodies under its jurisdiction. Each public body has an institutional control office that reports to the CGR and that normally conducts government monitoring activities. The CGR oversees compliance with obligations derived from legislation on RTI and transparency in the Annual Control Plan.⁴⁷ The CGR attempts to balance its obligations to oversee transparency and RTI with its other legal obligations.⁴⁸

Law No. 29091 mandates government bodies publish a series of management tools on their institutional Web sites and stipulates that the CGR is the institution responsible for supervising and controlling the *due* and *timely* compliance with the law. The law reinforces and defines proactive disclosure obligations, many of which were previously mentioned in LTAIP. This law is innovative in that it expressly appointed the CGR as the oversight body over compliance with these obligations. Based on this law, some experts on access to information and transparency have recommended that the CGR be assigned the function of monitoring or supervising compliance of government bodies with LTAIP. They understand that compliance with LTAIP directly contributes to the prevention of corruption and to the adequate use of public resources that, in accordance with the principle of legality, the CGR is responsible for overseeing. Thus, the CGR, through its institutional control offices (OCIs), oversees compliance

of the obligations established by LTAIP and promotes the application of disciplinary measures against public servants who fail to comply with these obligations.

Nevertheless, there are two reasons why it is not plausible for the CGR to become the guarantor institution for compliance with LTAIP. First, the CGR focuses its institutional efforts on fulfilling its constitutional and legal mandate (on monitoring the legality of public spending). Second, through its OCIs, the CGR monitors government institutions that have limited human and material resources; therefore, the scope and intensity of monitoring mostly depends on the capabilities and resources of each OCI. If the CGR were to monitor compliance with LTAIP obligations, it would not have enough time or resources to fulfill its legal and constitutional mandate.

Further, many LTAIP obligations require periodic compliance and should be monitored accordingly. The CGR must also fulfill its supervisory obligations in Law No. 29091 and other oversight obligations established in laws that do not necessarily take into account its institutional capabilities. For example, Article 8 of Law No. 29060, the Law on Administrative Silence, establishes that the OCI of public bodies must oversee compliance with deadlines, requirements, and procedures to ensure that they are implemented in accordance with the corresponding Single Ordered Text for Administrative Procedures (TUPA). Likewise, the OCI are required to prepare and submit to the entity director a monthly report on the status of compliance with administrative procedures as well as on responsibilities identified for non-compliance with the Law on General Administrative Procedure, the Law on Administrative Silence, and on those associated with complaints by citizens. It is evident that fulfilling this obligation as well as those originating from RTI legislation would be beyond OCI capabilities.

In sum, although the CGR can contribute to efforts at ensuring compliance with LTAIP obligations, it can only continue to partially do so in a way that is subordinate to the fulfillment of core CGR functions. In addition, OCI human and material resource capabilities must be taken into account when planning annual oversight actions and activities.

4.2.5. Debate on the Need for an Independent Administrative Authority to Oversee Compliance with LTAIP Obligations

The capability restraints for collecting, administering, and disseminating information associated with the limitations of the archive system as well as the absence of an institution with the capacity or authority to ensure ongoing, full compliance with LTAIP obligations, affect the level of implementation and exercise of RTI.

Civil society leaders and experts participating in the Third National Conference on Access to Public Information⁴⁹ organized by the IPYS in October 2010 concluded that: "An autonomous/independent technical body is needed to promote and guarantee government transparency and the right of access to public information. This body will also exercise advisory functions in the government."⁵⁰

During the Fourth National Conference on Access to Public Information (September 21–22, 2011), Dr. Eduardo Vega Luna, the Interim Ombudsman, called for the creation of an independent authority to guarantee and monitor compliance with LTAIP obligations. This proposal was well received at the conference during a thematic roundtable organized to discuss the proposal.⁵¹ Roundtable participants justified the proposal based on the following considerations:

- This issue is a priority in the region (Mexico and Chile have made advances in this area)
- The PCM reports are inadequate
- Information management is poor



This authority should have the following characteristics:

- Autonomy, independence
- Technical specialization

This authority would have the following functions:

- Conduct research to improve public policy
- Supervise and ensure compliance with LTAIP
- Provide training in and promotion of RTI
- Resolve citizen complaints in administrative proceedings (to avoid taking the complaint to the justice system)
- Resolve consultations concerned with contradictions in the law
- Issue rulings in administrative proceedings
- Support archive management and administration

Participants also mentioned some challenges in achieving the objectives of the proposal. These included the need to generate the political will to create the authority, to have an adequate budget, and to determine the most appropriate institutional design (for example, whether it should be a collegiate body or a single office and what level of autonomy it should have) and its institutional position within the government structure. This debate demonstrates how the experience of implementing a law can build consensus concerning its modification with a view to improving levels of compliance. While forming a specific oversight body for LTAIP was almost unanimously rejected during the debate prior to the law's adoption, there now appears to be significant agreement with respect to the advantages of an institution of this type.

4.3. TECHNICAL AND ORGANIZATIONAL CAPABILITY FOR INFORMATION COLLECTION AND MANAGEMENT (ARCHIVES)

A professionally-managed archive system in all government bodies is essential for guaranteeing access of individuals to public information and compliance with proactive disclosure obligations. This system enables the systematic collection of information, its safe storage, and adequate management. It also ensures its accessibility by both government bodies and the public following established procedures and schedules.

To that end, LTAIP (Article 3) states that "Officials responsible for releasing information in their jurisdiction should plan for an adequate infrastructure as well as for the organization, systematization, and publishing of information referred to in this law."

Along these lines, the RLTAIP (Paragraph e) of Article 6 establishes that the official that creates, obtains, holds, or controls the information should "keep a continually updated, systematized archive of public information, in accordance with the time limits established by internal regulations of each body on the subject..." LTAIP (Article 19) expressly mandates the obligation of the government to "...create and maintain professional public records to ensure that the right to information can be exercised fully."

The National Archive System is composed of the General Archive of the Nation, the Regional Archives, and the Public Archives.⁵² In accordance with legislation,⁵³ the bodies of the National Archive System are interconnected (with regional and public archive systems) in

an effort to structurally, legally, and operationally integrate the archives of existing government bodies nationwide. This system, which was created in 1991 prior to RTI legislation, brings together public bodies and institutions responsible for the defense, conservation, organization, and services of the “the Nation’s Documental Heritage” by applying archive principles, standards, and techniques.

Paradoxically, despite the existence of archive standards and institutions, in practice, there is no archive system that meets LTAIP requirements. According to a top official of the National Archive System:

“The archives are the main input of government activity. To the extent that these are organized, they make this information accessible to citizens. Unfortunately, most of the archives of the institutions are simply document or paper warehouses, where information is stored together without prior selection and is exposed to flooding, neglect and loss. They do not take into account that archives hold the memory of the country and each institution in particular” (...)

The situation is almost chaotic. In this scenario, it is very difficult to fully comply with the law” (...)

The work of the archives is practically invisible for the government. The prevailing disorder is the ideal breeding ground for corruption. This policy of abandoning the archives raises suspicions about authorities who have no interest in maintaining an organized system since it allows them to avoid control and being held accountable. We should promote the reassessment of the task of archiving.”⁵⁴

Two cases reported by the press dramatically illustrate the words of this official of the General Archive of the Nation. In January 2009, more than 800 boxes containing some 41,000 documents from the Ministry of Health’s central archive “disappeared.”⁵⁵ In addition, the press reported on the destruction of credit information (5,000 credit portfolios) belonging to the government-run development bank (Banco de Fomento— BANMAT) in a sanitary landfill of Lima⁵⁶ at the end of the government of former President Alan García.

The General Archive of the Nation issued a public statement concerning the latter case, citing archive legislation and announcing that it will launch an investigation.⁵⁷ As the IPYS stated in a public declaration on the BANMAT case, “...similar acts are recurring in the context of the change from one administration to another, at the different levels of government.”⁵⁸ These cases reveal the absence of the professionally-managed archive system mandated by the law.

In a context such as the one described above, it is difficult to collect, manage, and disseminate information. This undoubtedly affects the capacity of public bodies to provide timely information, especially information produced or generated during previous government administrations.

There are several reasons for this situation. First, public servants do not have an *archive* culture; rather, they have a *storage* culture with respect to government information. In addition, given the limited resources allocated to the General Archive of the Nation to conduct its oversight and technical training duties, it has a limited capacity to comply with legislation concerning archives.



This situation should be addressed and efforts should be made to adequately implement institutional archives in all public bodies. This requires the modification or adoption of archive standards to respond to the current needs and characteristics of the Peruvian government, given that many of the standards regulating the National Archive System were drafted before LTAIP went into effect. This effort also requires the adaptation or harmonization of legislation on archives with the legislation on transparency and access to public information. One conclusion of the aforementioned conference was that “the strengthening of the National Archive System is encouraged so that it can function effectively as a specialized administrative system throughout the government.”⁵⁹

Another factor is that the digitization of information, which increases the capacity for its conservation and dissemination, is limited to specific institutions and contexts. The government has little experience in the delivery of digitalized information. The lack of technical assistance on the topic and the costs entailed in undertaking a technological process of that magnitude largely explain this deficit.

While the initiative of some government bodies to digitize information is positive, this process also involves certain risks if it is not done in an organized and/or coordinated manner throughout the government. For example, there is a risk of not selecting a technology that ensures the possibility of accessing the information in the future because of technological changes in the field. Additionally, there is a risk that each government body will choose different and therefore incompatible technologies. For this reason, these entities should take better advantage of new information technologies for transparency and for upholding RTI.⁶⁰

This section presents some key considerations for the effective implementation of legislation on access to information, such as the promotion of the effective exercise of RTI, the appointment and training of the officials responsible, and the allocation of specific budget funds. Additionally, it briefly examines the implementation of legislation on information access in the education, health and social development sectors,⁶¹ as well as in government contracting. The analysis of this implementation process uncovers many of the pending challenges for the effective exercise of RTI in Peru.

4.3.1. Mass Dissemination of the Contents of LTAIP and Promotion of the Exercise of the Right to Information

LTAIP went into effect in a government and social context characterized by a culture of secrecy and after a political regime opposed to public disclosure of its actions and public access to information on governmental management or political control issues.

Raising public awareness about the contents of LTAIP and broadly promoting the exercise of RTI are ways for the government to support a process to implement this law. Nevertheless, since went into effect, no national campaign has been launched to disseminate its contents. This affects the implementation of LTAIP to the extent that there is considerable ignorance about the law and a lack of awareness of the scope of RTI. In the conclusions of the First National Conference on Access to Public Information, this problem was already noted:

“In society, the problem is similar. Lacking a national policy to promote transparency, civil organizations have tried to assume this task, with the limitations that this entails. In the conference discussion, it became clear that only a small group of professionals and journalists have used Law 27806, although with only relative success.”⁶²

It is telling that a similar conclusion was made two years later at the Third National Conference on Access to Public Information, although on this occasion participants specified that these efforts should include both citizens and public servants:

“Training/dissemination on the content, scope and limits of the right of access to public information are needed, both for all public servants (not only the officials responsible) and for citizens (requests that are not considered in the exercise of the right of access to information or voluminous requests).”⁶³

This situation is inconsistent with the inclusion of transparency and RTI as the 29th government policy of the National Accord, as mentioned earlier in this report. It is also inconsistent with Subsection 2 of Article 3 of LTAIP, according to which “the government shall adopt basic measures that guarantee and promote transparency in the actions of public entities.”

In this context, the efforts of the Ombudsman’s Office deserve special mention. Despite its limited resources, the office has disseminated information on the contents, scope, and limits of RTI as well as government public disclosure obligations among the population and public servants.⁶⁴ The annual reports of the Ombudsman’s Office to Congress describe these information campaigns, work meetings, workshops, and other dissemination activities to promote RTI.⁶⁵ While commendable, these efforts by the Ombudsman’s Office are still insufficient.

4.3.2. Training of the Public Officials Responsible

LTAIP establishes the designation of a public official responsible for responding to requests for information and another to comply with proactive disclosure obligations through institutional portals. The goal of appointing these public servants is not only for citizens to have a visible interlocutor in government bodies for the exercise of their RTI but also to have officials with a certain level of specialization in the content, scope, and limits of RTI.

Clearly, this implied that the officials responsible would receive training on RTI to guarantee—or at least create the conditions for—the adequate exercise of their functions. In addition, the second Complementary Provision of the RLTAIP defines this obligation by establishing that: “the entities will promote the dissemination of the application of the Law and of these Regulations among personnel with a view to optimizing their implementation.”

However, just as in the area of dissemination and promotion, the government lacks a policy for training the officials responsible for complying with LTAIP obligations. At the First National Conference of Access to Public Information, this issue was emphasized when it was concluded that: “The event served to bring to light the demand of public servants of every government entity, or from a coordinating agency of the government, to design and implement a standardized, effective and ongoing training strategy for all levels of personnel, to enable them to learn about and comply with constitutional and legal mandates to promote transparency.”⁶⁶

At the Second National Conference on Access to Public Information, participants again stressed the need to train the responsible officials of government companies as well as all public servants who possess public information: “The standards pertaining to public servants should be publicized. In addition to those responsible for providing access to information, all public servants holding this information should be trained; there is often resistance at these levels and this negatively affects [meeting] deadlines.”⁶⁷ All public servants should receive training in the management of LTAIP obligations since they refer to basic requirements for the exercise of all public functions. However, the focus, intensity, and specialization of training should be differentiated.



The National Civil Service Authority (SERVIR), through its Office of Capacities and Performance, could play a key role in training public servants in the implementation of and compliance with LTAIP, but this has yet to occur.⁶⁸ In practice, training has been developed and funded by public bodies on only a few occasions. One example of this is SGP training in 2009 and 2010 based on the directive associated with the required formats for delivering information to the PCM for the preparation of the annual report to Congress. Some regional governments use their own resources to finance training of their officials, as in the case of the regional government of Cerro de Pasco.

In general, training of public servants is an initiative of the Ombudsman's Office or of civil society organizations like the IPYS or the CPP. Training sessions provided by the Ombudsman's Office are reported in the annual reports submitted to Congress.⁶⁹ Another example is the training offered to first-instance and appellate court judges by the IPYS between 2003–04, in coordination with the Ombudsman's Office and the Magistrate Academy, on the scope of RTI and its protection through actions of *habeas data*.⁷⁰

A noteworthy effort of the CPP is the *Transparent Municipalities Project*, implemented since 2002 in five regions of the country. The project trains public servants of regional, local, provincial, and district governments. This project works in partnership with the Integrated Financial Administration System (SIAF) of the Ministry of the Economy and Finance, the Ombudsman's Office, the Public Window of the Pontificia Universidad Católica del Perú, and the newspapers *La Industria*, *Ahora*, *El Comercio*, and *El Tiempo*.⁷¹

All of these initiatives are extremely important given that they attempt to remedy government deficits. However, they tend to be very specific and depend on the funds these organizations can obtain. In summary, there is no general policy, financed and sustained over time, for training public servants in the obligations of LTAIP.

4.3.3. Specific Budget Allocations

All norms designed to transform the government culture and to instill the principle of transparency and RTI involve profound changes that require adequate budget allocations. Among the activities that require funding are; the dissemination of the scope of the right and the promotion of its exercise, training of public servants, implementation of Web sites, and professional archives and digitized records. To this end, Subsection 2 of Article 3 of LTAIP establishes that: The government shall adopt basic measures that guarantee and promote transparency in the actions of public entities."

Along these lines, Paragraph a of Article 3 of the RLTAIP states that the top-ranking official of an entity subject to LTAIP has the obligation to: "Adopt the measures necessary to guarantee the exercise of the right of access to public information as part of his or her job duties."

The obligations of LTAIP and the RLTAIP require a specific budget allocation because without these funds it would be difficult to adequately guarantee RTI and government transparency. Unfortunately, the Peruvian government did not allocate these funds; because of this the participants of the Third National Conference on Access to Public Information concluded that, "It is essential for public entities to receive specific resources (economic and human) for the functions of transparency and access to public information derived from the Single Ordered Text of Law No. 27806."

The problem is that directors of the entities subject to LTAIP have no incentive to incorporate indicators for targets of compliance with LTAIP and RLTAIP obligations in their annual

operating plans that would enable them to allocate budget funds to achieve these objectives. Without these funds, entities must attempt to comply with LTAIP obligations using general budget allocations.

There are notable exceptions, such as the Ministry of Health, which has incorporated as an internal policy, in the annual operating plans of its units, compliance with LTAIP obligations in order to ensure budget funds for the development of the activities necessary to achieve this objective.⁷² This is a case in which a government entity made transparency and respect for RTI a priority. Health Minister Pilar Mazzetti (2004–06) first established this priority; subsequent health ministers have respected and upheld it.⁷³

4.3.4. Appointment of the Officials Responsible

LTAIP mandates the designation of public servants responsible for responding to requests for access to public information in an effort to facilitate the exercise of RTI. This ensures that citizens will have specific public servants in all public entities to process their information requests. The law also attempts to achieve some level of specialization in compliance with LTAIP obligations. To this end, the public servants responsible are required to meet a specific profile: they must be very familiar with the institution, hold higher-ranking positions, have the capacity to influence and change institutional attitudes, and have the capacity to propose institutional policies and changes to the entity based on their experience in the fulfillment of their functions.

Although designating the officials responsible has not been difficult, the fact that there are no standard profiles or criteria for appointing them is problematic. Profiles of individuals assigned to the promotion of RTI and compliance with LTAIP obligations vary widely. The following public servants have been assigned the task of responding to or processing requests for access to information:

- Secretary general of a government body
- Head of the communications and public relations unit
- Head of the general administrative office
- Head of the executive office
- Heads of each unit

In some cases, the designation of the official responsible in each body is in accordance with LTAIP, which stipulates that this function is the responsibility of the Secretary General who can delegate this function or form a team with personnel from the area. In other cases, the official is appointed because of his or her training (for example, lawyers with judicial knowledge), the official manages the archive, because his or her job is related to the different areas in which information is requested, because he or she is the communication official, or because the official is responsible for computer services. Exceptionally, the official is designated based on his or her experience and contacts in the ministry.⁷⁴

With respect to personnel responsible for publishing information on institutional Web sites, the job profile is less problematic because this task is generally assigned to individuals involved with the entity's computer unit. However, in these cases, a problem may arise in terms of the updating of information in accordance with time periods established by law. Computer personnel often do not have the authority to order officials who produce or hold the information that needs to be published to send it in time for processing and publication.



Another problem concerns the designation of officials responsible for the decentralization process in regional governments. Peru is currently transferring national government functions to regional governments in several areas, including health, education, and agriculture. Managing these new functions requires regional governments to create regional directorates, management units, and other bureaucratic offices. Consequently, all activities are not managed from the regional government headquarters where the president works, but rather from these regional directorates and/or management offices that are frequently established in different and distant locations. As a result, the following situations can occur with respect to the officials responsible:

- a single official is responsible for the entire regional government;
- an official is designated for the regional government's presidential office but there is no official responsible for the other offices;
- an official is designated for the regional government's presidential office but since there are no officials designated for the other offices, he or she has *de facto* responsibility for those offices; or
- officials are designated for the regional government's presidential office, regional directorates, and/or management offices and projects.

This diversity in the designation of responsible officials can generate problems with regard to the performance of job functions. When the designated official does not hold a high-ranking position, he or she may have little influence within the institution to be able to adequately respond to information requests (for example, to ensure timely delivery of the information to comply with established response times) or to impose his or her criteria to overrule a unit's refusal to provide the information. Another problem is that officials often focus on their regular job duties because many already have several other responsibilities in addition to being assigned this task.

The absence of directives within the entities to guarantee and adapt the obligations of laws on transparency and access to public information frequently causes the designated personnel to fail to adequately comply with the assigned functions.

For these reasons, participants at the Third National Conference on Access to Public Information concluded that: "It is advisable to prepare guidelines to define the profile and develop the functions of the officials responsible for access to information. This is a key rather than a secondary function that should be assigned to a high-ranking individual."⁷⁵

In effect, although all officials responsible are not expected to be equal, especially since there should be some reasonable differences given the nature of the institutions and their functions, it is necessary to establish some common criteria or profiles in an effort to guarantee RTI.

4.4. PROMOTION OF THE RIGHT TO INFORMATION IN HEALTH, EDUCATION, SOCIAL DEVELOPMENT, AND GOVERNMENT CONTRACTING

No in-depth studies exist on the implementation of LTAIP in specific government sectors or entities. This section briefly examines transparency and access to information in two selected institutions of the executive branch (the Ministry of Health and the Ministry of Education) as well as in the implementation of social programs and government contracting procedures. In

general, the effective compliance with public disclosure obligations and RTI largely appears to depend on the leadership and organizational culture of each entity.

4.4.1. The Experience of the Ministry of Health

This institution made transparency a management indicator beginning in 2004. The experience began with INFOSALUD, which is a free, national 24-hour phone service that provides information, guidance, and advice on health issues and that receives complaints from health service users.

The Ministry of Health also redesigned its institutional Web site to better comply with proactive public disclosure obligations and uphold RTI. The Web site was no longer simply a link within the portal devoted to transparency and access to information; rather, the Web site was designed to serve as a channel for access to information for all types of users of health systems or services. Thus, the Web became the main communication mechanism between the Ministry and the users of its services. For example, a system was implemented to submit and respond to requests for access to information through the Web site. This involved using *simple language* to facilitate access to information by the average user and digitizing information, a task that began in 2005. A highlight in this process was the publication, for the first time on the Web site, of the entire *reverse auctions*⁷⁶ process for purchasing medicines. Another important achievement is that, at this writing, approximately 80 percent of requests for access to public information are processed electronically.

Throughout this process, the Ministry of Health focused on interaction with users' and other organizations that promote transparency and access to information. Thus, associations of people living with tuberculosis or HIV/AIDS, which actively seek information on health services, participate in the decision-making process associated with their treatments or access to services and needed medicines. In 2005, the IPYS and the Ministry of Health signed an agreement to build capacity to respond to requests for access to public information in the General Health Directorate, specifically the General Directorate of Medications, Supplies, and Drugs.

These advances in the Ministry of Health reflect this institution's political will to incorporate transparency and access to information as management indicators. Each unit has incorporated transparency and access-to-information targets in their operating plans, thereby ensuring the necessary budget funds to achieve these targets. Since 2009, the Ministry of Health has had efficiency indicators for transparency and access to public information.⁷⁷ As a result, the Health Ombudsman's Office, which is responsible for INFOSALUD; the General Communications Office, which is responsible for the institutional Web site; and the General Statistics Office, which provides technical support, all have targets, indicators, and a budget (for example, the modified 2011 budget for the Health Ombudsman's Office is approximately 250,000 nuevos soles).

Some statistics highlight the advantages of this institutional policy. In 2004, the Ministry of Health received approximately 12,000 requests for access to public information; by 2010, this figure had dropped to approximately 2,500 requests. This trend contrasts with the number of visits to the institutional Web site.⁷⁸ In 2009, it received 46,037,552 visits, whereas the number of visits rose to 40,207,013 in 2010. From January 1 to August 31, 2011, approximately 35,488,185 visits were registered, suggesting that the number of visitors in future years will exceed those in 2010. The most frequented sites on the Ministry of Health's Web site (from the most frequented to least) are: (1) The virtual health library of Peru (BVS Perú); (2) press releases;



(3) transparency; (4) health campaigns; and (5) employment opportunities. Most requests are for: (1) information on legislation; (2) information on health investment projects; and (3) information on Ministry of Health personnel (salaries, contracts, functions, and so on).

4.4.2. The Experience of the Ministry of Education

In the case of the Ministry of Education, transparency and access to information are analyzed in terms of education quality. This is the responsibility of the Ministry's Education Quality Unit (UMC). The UMC forms part of the Office of Strategic Planning and Educational Quality Measurement (PLANMED), an agency of the Strategic Planning Secretariat of the Ministry of Education.

The UMC produces information of significant public interest, especially for users of education services (in other words, education quality statistics). The UMC publishes the results of these sample and census evaluations on education quality on the Ministry of Education's Web site. However, this effort is not necessarily part of an institutional policy on transparency and RTI, nor does it respond to the desire to strictly comply with LTAIP. Public disclosure of this information is part of the UMC's institutional mission: "To offer relevant, reliable information on the results of student evaluations and their associated factors to contribute to decision-making in the different offices, with a view to improving the quality of the education system."

This is information on global or general results, which is for both internal and public use. Specific or detailed information on each education center is not included in this public disclosure regime. This specific information is sent to the education centers and managed by pertinent agencies of the Ministry of Education. In exceptional cases, requests for access to this information are accepted, delivered under the commitment for its good use due to concerns that the results could be misinterpreted or only partially disseminated. This concept of access to public information violates Subsection 5 of Article 2 of the Constitution and Article 7 of LTAIP, which expressly stipulates that it is illegal to condition the delivery of the information on the explanation of the reasons for the request, its destination, or its use. The possibility that the information will be improperly used is not a valid argument for conditioning its delivery because this would give a wide margin of discretion to public entities to deny access to public information, introducing arbitrariness. The individual who disseminates the information obtained through the exercise of his or her RTI is responsible for the effects it may cause.

In general, individuals who request this information are specialized users who are conducting research or consultancies. Other users include academic researchers and mining companies, which, in the context of their corporate social responsibility policy, implement social programs to support schools in their area of influence. On average, the UMC receives approximately 10 requests for information per week from these types of users. Requests for information from nonspecialized users are infrequent. In the first half of 2011, five requests were received, many with deficiencies (for example, they were not specific with respect to the information required or the requested information the UMC does not possess).

These requests are made through the official responsible for delivering information, whereas the requests made by specialized individuals or institutions are made directly to the UMC. This arrangement was most likely set up because the specialized users know what information the UMC holds.

4.4.3. Transparency and Access to Information in Social Programs

Social programs are particularly important, sensitive government activities since they are designed to alleviate serious problems of inequality and social fragmentation that are expressed in situations of unequal rights. To this end, the government allocates a large amount of public funds, whose implementation should be transparent, both for program beneficiaries and the general public. In the framework of its constitutional duties to oversee fulfillment of the functions of public entities and to defend fundamental human rights, the Ombudsman's Office opted to monitor social programs designed to develop human capacities, also known as *social empowerment programs* (PSH).

The Ombudsman's Office identified three reasons for concentrating its oversight duties on the PSH: (1) these programs are designed to uphold a large number of rights associated with the life plans of individuals and the conditions for the exercise of other fundamental rights; (2) these projects concentrate the largest share of public resources allocated to social programs;⁷⁹ and (3) the Ombudsman's Office received the most complaints about this group of projects regarding alleged acts of corruption and violations of public ethics.⁸⁰

The insufficient level of compliance with public disclosure and information access obligations was one reason the Ombudsman's Office chose to supervise the PSH. Between January 2009 and December 2010, the Ombudsman's Office received 432 complaints concerning the PSH nationwide, 219 of which were declared admissible. Only one of these complaints involved a violation of RTI (File N° 0450-2009-000620, reported to the Puno Ombudsman's Office). The principal of a school in Puno, in the country's southern highlands, did not respond to a request for information associated with the provision of dairy products and other foods for school breakfasts in the framework of the Comprehensive Nutrition Program.⁸¹

To evaluate the level of compliance with proactive public disclosure obligations in the PSH, the Ombudsman's Office assessed the publication of information on institutional Web sites. In September 2010, the Ombudsman's Office evaluated PSH portals to determine the percentage of compliance with the proactive obligations set forth in LTAIP (Web site, budget, contracts and procurement, personnel, planning, and institutional information).⁸² Only the Comprehensive Health Insurance System (SIS) earned a high score. The Integral Improvement of Neighborhoods program, the Street in my Neighborhood program, and the Comprehensive Nutrition Program recorded the lowest levels of compliance (17 percent each). Only three social programs (SIS, Juntos, and the Wawa Wasi programs) had compliance rates over 50 percent.⁸³

An initial conclusion of this assessment is that most PSHs did not have their own Web sites, but rather published their information in a section of the institutional Web site of their sector or implementing agency. The Ombudsman's Office stated that this hindered access to PSH information given that individuals had to locate, amid all the data on the Web site, the concrete information they needed, which not only involves a significant amount of time, but also requires special knowledge in navigating Web sites.

The Glass of Milk Program, which is a PSH of special social significance, does not have a Web site that provides consolidated information on its implementation. Access to information on this program is fragmented because the program is implemented by local governments that have administrative, economic, and political autonomy. Therefore, if a citizen requires aggregate information on the Glass of Milk Program, he or she must search each of the Web sites of the implementing government, or send individual information requests to each.



In addition, the Single Registry of Beneficiaries (RUB) of social programs, which includes identity data of beneficiaries as well as their place of residence, cannot be accessed by the public. While the Ombudsman's Office facilitates public disclosure of RUB to enable citizen control over access to social programs (to determine if individuals qualified as beneficiaries have access to these programs), it also cautions that information that could affect personal or family privacy should be confidential.⁸⁴ Because the RUB is a beneficiary database, its public disclosure should be considered, as long as the provisions of Law No. 29733 (Law on Protection of Personal Information) are taken into account.⁸⁵

Although the Ombudsman's Office has only received one complaint of violation of RTI in a PSH over the past two years, noncompliance with proactive public disclosure obligations suggest that similar problems affect response to requests for access to public information. The lack of complaints may indicate that the exercise of RTI with respect to PSH is limited, or that violations of RTI in PSH are not reported by citizens. Therefore, it is difficult to clearly determine the state of the effective exercise of RTI in the framework of PSH.

4.4.4. Transparency and Access to Information in Government Contracts

Transparency and access to public information in government contracts are regulated by a specific complementary legal regime of LTAIP. Specific mechanisms for transparency and access to public information were first implemented in early 2001 during the political transition. Although Law No. 26850 (Law on Government Contracts and Procurement) already established the possibility of using electronic support for government contracts, the creation of SEACE through Supreme Decree No. 031-2002-PCM on May 8, 2002, marked a milestone in this area. SEACE was progressively developed and incorporated in Legislative Decree No. 1017, which adopted the Law on Government Contracts currently in effect.

All public entities subject to the Law on Government Contracts must publish all activities involved in their selection processes, contracts signed (regardless of the legal regime or source of funding), and their implementation in SEACE. Moreover, they must publish their annual contracting plans, tender documents, consultations resolved, pronouncements associated with contracting processes, bid documents, comparison table and/or minutes used to select the winning bid, resolutions to resolve petitions to appeal, and resolutions of appeals for review. The information published in SEACE is identical to the final documents issued in the processes of selection, contracting, and implementation of contracts. SEACE is an electronic information registry of public access that is administered by the Agency for Oversight of Government Contracts (OSCE).⁸⁶ If an individual requests information, in accordance with LTAIP, the response is to give directions to them on how to locate the information on the SEACE Web site; otherwise physical information already published on the Web site will be delivered to the requester. If there is a request for information that is not published on SEACE (for example, resolutions of contracting procedures), LTAIP will apply.

Transparency and access to information on contracts through SEACE are complemented with the following:⁸⁷

- *National registry of suppliers:* All individuals and corporations interested in becoming government suppliers must register with this registry.
- *Ineligibility to become a contractor:* All high-ranking officials are prohibited from being contracted by the government for a period of 12 months after they leave their position.⁸⁸

- *Annual government contract plan:* All public entities must prepare and publish on SEACE their annual contracting plan, which contains all goods, services, and works they plan to contract out during the year, including the estimated amounts and contracting procedures to be followed.
- *Prohibition of fractioning:* Contract amounts for the same goods cannot be fractioned in an attempt to avoid following the pertinent selection procedure. Therefore, it is not possible to procure the same goods more than once during the same fiscal period.

Notwithstanding the positive aspects of SEACE, the information produced during contracting procedures is difficult for many citizens to understand. Therefore, SEACE should include windows at which it provides reader-friendly information on contracting procedures.

4.5. THE ROLE OF CIVIL SOCIETY IN THE IMPLEMENTATION OF LTAIP

Civil society organizations have contributed to the implementation of LTAIP through different initiatives. Some of the main activities of these organizations are listed below.

The CPP and the IPYS, which played important roles in the passage of LTAIP, have consolidated their work concerning LTAIP, exercising leadership in this area. In 2004, the CPP launched a media campaign to disseminate RTI and LTAIP. The organization also monitors compliance with proactive public disclosure obligations on transparency portals and the regular dissemination of results in the mass media.⁸⁹ Since 2002, the CPP has implemented the Transparent Municipalities Project, designed to promote the implementation of LTAIP in the municipalities of Lambayeque, San Martín, Cusco, Piura, and Arequipa. The project includes activities in training, dissemination, and coaching of public officials and civil society representatives to improve levels of access to information and transparency.⁹⁰

The IPYS has implemented several projects on access to public information, such as the pilot project carried out with the Lambayeque regional government to implement LTAIP. It has also developed projects to train public officials and civil society representatives (for example, district judges in the provinces and journalists).⁹¹ Four years ago, the IPYS launched the project, Strengthening the Right of Access to Public Information in Peru, which organizes the National Conference on Access to Public Information, evaluates annual reports prepared by the PCM, contributes to the exercise of RTI through requests for access to information (in Lima and the country's interior) and engages in strategic litigation.

In 2005, Informed Citizens (Ciudadanos al Día, CAD) published the consultation document, *Access to Government Information. Legal Framework and Best Practices*. CAD has conducted research on advances and setbacks with respect to transparency and RTI; it publishes the results in newsletters and reports.⁹² Since 2005, with support from the Ombudsman's Office, CAD has awarded the Best Practices in Public Administration Prize, which includes a category on best practices in complying with LTAIP.

The Citizen Proposal Group (Grupo Propuesta Ciudadana, PROPUESTA) oversees compliance with the proactive public disclosure obligations of LTAIP through the Web sites of regional governments.⁹³ Through *Vigila Perú*, PROPUESTA's system for citizen oversight of the decentralization process, it monitors transparency of mining companies. Although this is not government information in the strictest sense, it is an interesting case involving information of public interest associated with the corporate social responsibility of companies that exploit natural resources.⁹⁴



Also noteworthy is the work of Suma Ciudadana to promote transparency in the management of development cooperation resources, sworn declarations of income, and curricula of public officials. Suma Ciudadana has developed a database (*Justicia y Transparencia*) of the rulings of the Constitutional Tribunal in *habeas data* proceedings for the defense of RTI.⁹⁵

Although it closed in March 2011, another important mechanism was the Social Oversight Observatory (OBSERVA). This was a platform of several organizations⁹⁶ to encourage transparency and access to public information in regional governments through training and the promotion of best practices among officials responsible for providing information.

Two initiatives stand out at the sectoral level. Between 2008 and 2009, Universidad Coherente⁹⁷ developed a project to train 250 university students in the promotion of transparency and access to public information. Since 2010, Universidad Coherente has been carrying out a project to measure the levels of implementation of transparency and access to public information in 35 public universities in Peru.⁹⁸ Rights, Environment, and Natural Resources (DAR) is an organization that promotes sustainable development in Peru. As part of its activities, DAR implements the Promoting Transparency in the Forestry Sector project,⁹⁹ which publishes annual reports on transparency for this sector.¹⁰⁰

As is evident, media organizations were the first to promote and support the implementation of LTAIP. Since LTAIP went into effect, an increasing number of civil society organizations have incorporated lines of action to promote and uphold RTI and compliance with LTAIP. In some cases, new organizations, such as Suma Ciudadana, OBSERVA, or Universidad Coherente, have incorporated individuals who were associated with pioneering organizations like the IPYS. This demonstrates the formative role that civil society organizations have played in supporting the application of LTAIP since it went into effect.

The efforts of these organizations are diverse or specialized, focusing on different aspects of LTAIP. In some cases, activities concentrate on promoting the exercise of the right and its administrative and judicial defense (IPYS); in other cases, organizations may focus on compliance with proactive obligations through Web sites (CPP and PROPUESTA); prioritize a specific group of entities subject to LTAIP (Universidad Coherente); or focus on specific sectors of activity (DAR). Nevertheless, with few exceptions, the organizations do not link RTI with the exercise or defense of other rights.¹⁰¹ Moreover, civil society organizations in the country's interior do not usually work in the area of compliance with LTAIP or in defense of the exercise of RTI.

5. Has Access to Public Information Increased with the Adoption and Implementation of Law No. 27806?

Almost eight years after LTAIP went into effect, citizens have more possibilities for accessing public information. However, it is difficult to determine if they have more *real* access to public information. The problem lies in identifying information or tools to measure the level of access as well as the reliability of that information.

There are three tools to evaluate the exercise of RTI. First is the annual report that the PCM submits to the Congress. Second are the complaints of RTI violations reported to the Ombudsman's Office. Finally, there are the *habeas data* rulings issued by the judicial branch and the Constitutional Tribunal. Although the CGR oversees compliance with some aspects of LTAIP, there is no report or document that provides information on the results of oversight activities. The section below examines the information produced by each of these mechanisms.

5.1. THE ANNUAL REPORT OF THE OFFICE OF THE PRESIDENT OF THE MINISTERIAL CABINET TO THE CONGRESS

In accordance with Article 22 of LTAIP and Article 22 of the RLTAIP, all designated government entities must submit to the PCM information concerning processed and unprocessed requests for access to public information during the year. With this information, the PCM prepares an annual report that it submits to Congress before March 31 of each year.

The submission of information on processed and unprocessed requests for information takes place in accordance with a timetable prepared by the PCM. In entities that fail to comply with this obligation, the Secretary General of the entity is held responsible. This is the only mechanism mandated by LTAIP to provide information on the state of the exercise of RTI nationwide and the upholding of this right by government entities.

The annual report is designed as an institutional mechanism to provide Congress with the information necessary to make any required legislative modifications. At the same time, it serves to enable Congress to exercise its control functions and to impose possible sanctions or assign political responsibility in the case of noncompliance with LTAIP obligations.

The conclusions below are drawn from an analysis of the annual reports from 2004 to 2009. Only the annual reports of 2005 and 2006 were submitted to Congress by the established deadline (before March 31 of each year).¹⁰²

Through a request for information submitted by the IPYS on August 20, 2010, Congress was required to provide information on the processing of the annual reports submitted by the PCM. In accordance with congressional information, the reports from 2003, 2004, 2005, and 2006 were sent to the archive with the knowledge of the Congressional Executive Council.¹⁰³ The 2007 report was delivered to the archive with the knowledge of the executive council after copies were sent to congressional groups. The council was briefed on the 2008 Annual Report that was submitted to congressional groups, but the records do not expressly state whether or not it was sent to the archive. In light of previous experiences, it was most likely delivered to the archive. The 2009 Annual Report was submitted to Congress, but has yet to be sent to the executive council.

According to this information, the annual reports submitted to Congress did not lead this body to take any type of action and the executive council was only *informed* of the existence of these reports. The annual report does not fulfill its institutional purpose stipulated in LTAIP because it has not led to any public control action or proposal for legislative reform or public policy on RTI.

Table 2 lists the requests for access to public information reported annually by government entities to the PCM from 2003 to 2010. The table presents the total number of requests received as well as the number that were processed and those that were not, in both absolute numbers and percentages.

**TABLE 2.** Requests for Access to Public Information Reported to the PCM (2003–10)

Year	Total	Processed	Not Processed
2003	39,296	37,522 (95%)	1,774 (5%)
2004	56,122	49,942 (88.99%)	6,180 (11.01%)
2005	49,188	44,147 (90%)	5,041 (10%)
2006	57,599	51,452 (89.28%)	6,147 (10.72%)
2007	70,136	61,232 (87.30%)	8,904 (12.70%)
2008	62,968	56,414 (89.6%)	6,554 (10.4%)
2009	61,427	58,373 (95%)	3,054 (5%)
2010	68,290	65,461 (95.86%)	2,829 (4.14%)

Source: Annual reports of the Office of the President of the Ministerial Cabinet to Congress.

The figures presented may give the impression that RTI is frequently exercised in Peru. However, these numbers should be viewed with caution for two reasons. The first is related to the accuracy or sufficiency of the information. The second is associated with the fact that there are entities subject to LTAIP that do not comply with the obligation to report requests for access to information to the PCM.

On July 9, 2009, Ministerial Resolution No. 301-2009-PCM adopted Directive No. 003-2009-PCM/SGP, “Guidelines for reporting requests for access to information to be submitted to the Office of the President of the Ministerial Cabinet.” This directive was issued to (1) clarify the definition of processed requests for information; and (2) establish what information should be excluded because it is not subject to RTI and not included in LTAIP.

With respect to the first point, until the 2008 Annual Report, a processed request was defined only as one that had obtained a positive response, whereas those classified as unprocessed had received a negative response. Nevertheless, after the aforementioned directive was issued, *processed requests* were defined as all requests that had been answered, regardless of whether the answer was positive or negative, complete or partially delivered. *Unprocessed requests* were defined as those receiving no response.

This modification is criticized by some experts who argue that it is not in keeping with the spirit of RTI. They claim that according to the Constitutional Tribunal, RTI is affected in the following cases:

- When there is no response to the requests
- When the information request is denied for reasons not stipulated by law
- When there is a response but incomplete, outdated, inaccurate, or unclear information is delivered.¹⁰⁴

As a result, these experts concluded that:

“Therefore, currently, when public entities report a request for information as processed, this does not inform the leading body on the public policy of transparency on whether or not the designated entity has respected the right of access to information.”

This information only informs the PCM that the constitutional right has not been violated through silence or a lack of response, *which is of course one of the most blatant cases of its violation*. But it does not enable knowledge of whether or not the entity made a legal justification for denying the information or if it delivered the information in a complete manner.

While this omission is understood in the context of wanting to avoid further complicating the format that public bodies must complete to submit their report to the PCM, ensuring that it provides information on whether or not the citizen who requested information received a response to encourage this conduct of respect; *it should also be kept in mind that almost all public entities that provide information on this currently report high levels of compliance.*"¹⁰⁵ (Author's emphasis.)

The second part of the directive excludes from the content of RTI, and consequently from the application of LTAIP, requests from citizens, their representatives, or attorneys for information about private or personal affairs included in administrative proceedings of the entity where the request was made, among others. Thus, these requests are not reported by the entities and, consequently, are not included in the annual reports of the PCM.

This decision has been criticized because the Constitutional Tribunal qualified these types of requests as a legitimate exercise of RTI when it admitted several actions of *habeas data* in cases involving the Ministry of Labor and its Office of Normalization of Social Benefits denying information to former workers and pensioners concerning their files, in the framework of administrative proceedings of these entities to defend their rights.¹⁰⁶

This would, therefore, exclude cases in which the Constitutional Tribunal had identified RTI violations from a calculation of the number of requests made for public information. The Constitutional Tribunal is the highest-level body for interpreting the Constitution, for which reason its jurisprudential criteria is binding for all operators and interpreters of the Constitution and of fundamental rights, such as in the case of RTI.

Furthermore, the Constitutional Tribunal is characterized by an adequately rights-based jurisprudence in terms of RTI, irrespective of decisions that may require some fine-tuning or development. The Constitutional Tribunal has broadly defined the content of this fundamental right and has established specific procedures for the government to follow when it invokes a cause for exclusion of information to public access.¹⁰⁷

With respect to the sufficiency of the annual report information, it has been commented that: "...the information they report is very aggregated or general, by group of public entities; this does not allow for identifying the difference existing within each group, but especially, *it does not permit the accurate identification of the public entities that are seriously threatening this fundamental right, or to the contrary, those which because they adequately respect it, even deserve a recognition or an incentive that would encourage them to continue with this policy.*" (Author's emphasis.)¹⁰⁸

Furthermore, it is observed that: "The second problem with the annual report is the limited level of processing of the data it currently presents and that disaggregated data should be included. As mentioned, the annual report currently does not contain statistical information on topics as relevant as: which public information is the most requested in each entity; the reasons



why requests are not processed; the types of information requests that are the most and least likely to be processed, etc.”¹⁰⁹ (Author’s emphasis).

In the annual reports, the level of disaggregation varies, given the lack of a standardized method. For example, the conclusion section of the 2008 Annual Report states that the Ministry of Housing, Construction, and Sanitation received the most information requests (6,878), but it does not specify how many of those requests were processed.

The 2009 Annual Report does not disaggregate processed and unprocessed requests for access to information by ministries; rather, it simply provides aggregated figures. By contrast, the 2010 Annual Report presents disaggregated information by ministries in two graphs. That year, the ministries receiving the most information requests were the PCM (7,925); the Ministry of Housing, Construction, and Sanitation (4,967); the Ministry of Economics and Finance (4,163); and the Ministry of Health (3,851). According to that report, the ministries reporting the largest number of unprocessed requests were the PCM (260); the Ministry of Defense (90); the Ministry of Culture (88); and the Ministry of Justice (58). As is evident, these methodological discrepancies make it impossible to identify patterns with respect to requests for access to public information and responses by government entities.

Municipal government entities tend to be the public bodies that most frequently fail to comply with their obligation to submit information to the PCM for the preparation of the annual report. Of a total of 194 provincial municipal governments, only 43 (22.1 percent) fulfilled their obligation to send information in 2005. In 2006, only 34 provincial municipalities delivered information to the PCM, a number that increased to 75 (38.5 percent) of a total of 195 in 2007. In 2008, only 68 provincial municipalities complied with the obligation; in 2009, this number declined to 56.¹¹⁰ In the case of district governments, out of a total of 1,638 district municipalities, only 316 complied with the obligation to send information to the PCM in 2007, declining to 264 in 2008, and to 204 in 2009.¹¹¹

The analysis of PCM reports on information requests reveals that they are of limited reliability. The documents are a summary of an imperfect information collection process nationwide, evidenced by the fact that fewer than half of public entities fulfill their obligation to send information to the PCM. Since there has been no promotion of standardized, transparent information management processes, it is impossible to assess the actual performance of the public administration.¹¹² Information problems identified in the annual reports could be resolved if Congress used this tool for the institutional function assigned it by LTAIP.

5.2. COMPLAINTS OF THE RIGHT TO INFORMATION VIOLATIONS REPORTED TO THE OMBUDSMAN’S OFFICE

Given that the Ombudsman’s Office has a consolidated line of action on RTI and the promotion of transparency, it is of special interest to examine the complaints this institution receives for alleged RTI violations. The analysis below is based on the annual reports of the Ombudsman’s Office to Congress, beginning in 2001.

While the Ombudsman’s annual reports do not include figures on complaints presented by year, they do enable the identification of wrongful acts invoked to justify citizen complaints.

The only report that provides figures on the complaints received on RTI violations is the Eighth Annual Report, 2004–2005, in which the Ombudsman’s Office compared the number of complaints received during the first year after LTAIP went into effect (2003) with the number of complaints processed in 2004. The Ombudsman’s Office received 261 complaints in 2003 and

493 in 2004, representing an increase of 47.05 percent. The Ombudsman's Office interpreted this increase as an indicator of a more demanding attitude of citizens with respect to RTI.

The analysis of the different reports (all annual reports from 2001 to 2010) indicates that some violations are recurring. Most important among these are:

- Failure to comply with the legal time limit
- Undue or excessive charges
- Allegation of exceptions that are not adequately explained or justified.
- Requirements that are not stipulated by law (for example, the submission of documents or forms)
- Lack of designation of public officials responsible
- Lack of incorporation of the procedures for access in a TUPA (a single text on administrative procedures).

5.3. RULINGS OF THE JUDICIAL BRANCH AND THE CONSTITUTIONAL TRIBUNAL

Another key source of information is the final rulings of the judicial branch and the Constitutional Tribunal¹¹³ in *habeas data* proceedings in defense of RTI.

A study commissioned by the IPYS analyzed 150 *habeas data* final rulings of the judicial branch and the Constitutional Tribunal published between January 2009 and May 2010.¹¹⁴ An initial key finding is that the public entities involved in the most legal proceedings during that period were the Office of Normalization of Social Benefits (ONP)—26.2 percent; local governments—25.4 percent; ministries—13.8 percent; and the judicial branch (9.2 percent).

In the case of ministries, 70 percent of the claims were filed against the Ministry of Labor by former employees who demanded information contained in their files that were submitted for inclusion in the reincorporation process, in the framework of the recovery of labor rights violated during the illegal collective dismissals implemented during the government of Alberto Fujimori.

Of the 146 rulings analyzed (four of the 150 selected rulings did not provide the necessary information), requests for information associated with the *public interest* were denied by government bodies in 51.4 percent of cases; 48.6 percent of the cases referred to information related to private or personal interests of the plaintiffs.

In approximately 60 percent of the cases in which information about personal interests was requested, the information was associated with the defense of rights to benefits (pensions and social benefits); the other 40 percent of requests sought to obtain information for the exercise of other rights, such as that of due process in administrative and judicial proceedings.

The study classifies the rulings analyzed by types of cases. In the first group of cases, plaintiffs demanded information for the defense of their rights to pensions (26.2 percent). The second group involved plaintiffs who wanted information to defend their labor rights, which were affected by the illegal collective dismissals that occurred during the Fujimori government (13.8 percent). The third group of cases involved demands for information about private companies providing public services (7.3 percent). Interestingly, in this group, the same individual filed all the complaints. Finally, a fourth group of cases is of citizens who made at least two requests because they were denied different types of information on the management of public entities (salaries, budget, functioning of justice bodies, and so on) in administrative proceedings.



Finally, the study highlights the persistent allegations of formal arguments being used to deny information in administrative proceedings.

This study contributes important information regarding the precariousness of the exercise of RTI in administrative proceedings. In nearly every case in which the Constitutional Tribunal declared an action of *habeas data* admissible, the individuals involved did not ultimately receive the requested information. In addition, many of these accusations should never have reached the judicial branch or the Constitutional Tribunal given that they constitute clear cases of RTI violations (for example, in the case of retired claimants or former workers affected by the collective dismissals of the 1990s). Moreover, the traditional reticence of judges was evident with regard to the possibility of third parties reviewing documents on the processes they administer.¹¹⁵

Because the judicial branch is the first step in the system to guarantee human rights (and in this case RTI), the members of this government branch should assume their responsibility by using reasonable judgment to maintain an adequate balance between access to information and other rights that may be affected.¹¹⁶

5.3.1. Illustrative Cases of *Habeas Data* Rulings

Some concrete cases promoted by the IPYS, in cooperation with a private law firm,¹¹⁷ can provide a better understanding of the role of the judicial branch and the Constitutional Tribunal in the defense of RTI and the implications for effective accountability.

- **Access to sworn declarations of public officials.** On December 17, 2009, the IPYS requested Sections 1 and 2 of the sworn declarations on assets and revenues of former President Alan García Pérez, beginning in the year he assumed office. On January 12, 2010, the Office of the President responded to the request, delivering only Section 2 and claiming that Section 1 was not subject to public access. On March 23, 2010, in response to this refusal, the IPYS filed an action of *habeas data*. The government defense attorney requested that the Comptroller General's Office be included in the proceedings, a request accepted by the judge. On June 23, 2010, the Constitutional Court of Lima, which was the court of first instance, declared the action inadmissible. This ruling was disputed and is pending review in an appellate court.

The ruling was based on Article 15 of the Regulations of Law No. 27482 that regulates the publication of the Sworn Declaration of Income and of Assets and Revenue of public officials. According to the ruling, "In keeping with the rights set forth in numerals 5) and 7) of Article 2 of the Political Constitution of Peru, the Section 1 shall only be used by control agencies or upon an injunction." Nevertheless, Article 4 of the same law qualifies the sworn statements as *public instruments*, without distinguishing between the sections. Likewise, the Constitutional Tribunal, in its ruling published in File No. 04407-2007-PHD/TC, established that the information contained in Section 1 of the sworn declarations was of a public nature, as long as it referred to: (1) *income originating from the public sector*; and (2) *movable and immovable property that can be registered*. This criteria was rejected by the Constitutional Court, which declared the case inadmissible.

The information contained in Section 2 of the sworn declarations is aggregated, for which reason it is not possible to identify changes in the wealth of public officials. While the form in Section 1 could include information whose public disclosure might be

inappropriate and might affect other constitutional rights, the problem is not resolved by excluding from public access all information contained in that section. It would seem more reasonable to propose a solution that would reconcile transparency and RTI with the other rights involved.

- **Information on pardons granted to an individual convicted on corruption charges.**

On December 18, 2009, the IPYS requested from the Ministry of Justice the legal and medical reports supporting the decision of then-President Alan García to grant a pardon to an individual serving a sentence for acts of corruption during the Fujimori government on humanitarian grounds. On January 10, 2010, an action of *habeas data* was filed and on January 13, the Ministry of Justice rejected the action, arguing that it was for information contained in reports that formed part of the deliberation process prior to a government decision. Nevertheless, the pardon had been granted through a resolution published in the official gazette, in which it was expressly stated that the decision was based on the reports that had been the subject of the information request. The Constitutional Court declared that the action was admissible on July 19, 2010. The Ministry of Justice appealed the ruling and the Superior Court declared it null and void, arguing an alleged lack of grounds. The case has been returned to the Constitutional Court for review.

- **Reports on a donation from the Congress.** On December 18, 2009, a request was made to the Congress for the legal and budget documents justifying the donation of US\$15,000 by then-President of the Congress Luis Alva Castro to finance a Peruvian music concert. The Congress never responded to the information request. On March 23, 2010, an action of *habeas data* was filed, which was declared admissible on December 9, 2010, by the Constitutional Court of Lima. The Congress appealed the ruling, but it was upheld in appellate court on June 8, 2011. The ruling is currently being implemented.

- **Closed congressional sessions.** On September 18, 2007, a request was made for the audiotape and minutes of the session in which a congresswoman was punished for improper conduct. The Congress had declared it as a closed session, even though there is no mention of this possibility in the Congressional Regulations. The Congress never responded to the information request. In September 2007, an action of *habeas data* was filed. After nearly four years, on August 9, 2011, the Constitutional Court declared the action admissible. Nevertheless, the congressional attorney appealed the ruling, and it is pending a decision in appellate court. In all of these cases (except for the sworn declarations that are open to discussion), information of public access was requested, but the requests were denied or did not receive a response. All the requests were made to high-level institutions—Congress, the Ministry of Justice, and the Office of the President—that should have expressed a greater willingness to facilitate government transparency.

Of the four cases presented here, only one was definitively resolved. The duration of *habeas data* proceedings frequently cause the delivery of information to be delayed past the time of its usefulness, if the information was to have been used for control and accountability purposes. Moreover, litigation against the government requires a level of specialization that is beyond the capacity of many citizens. These limitations support the need to consider the establishment of an authority to enforce and monitor LTAIP; this would contribute to accountability in public affairs.



6. Conclusions

The adoption and implementation of LTAIP marked a milestone in guaranteeing and upholding RTI in Peru. LTAIP was the first to develop a systematic legal framework to regulate this constitutional right. Its adoption generated a great sense of expectation and stimulated important debates on government transparency.

Nevertheless, the previous sections describe an inefficient process of LTAIP implementation. While transparency and RTI are part of the public discourse and have been incorporated as government policies in the National Accord, in practice, there is no implementation strategy linked to clear, sustainable objectives. In this context, the efforts of different actors to implement the law remain isolated, leading to only partial results.

Three factors contribute to this situation. First, there is a lack of political will for the effective implementation of LTAIP. This is reflected in a type of bureaucratization of the law—an attempt to literally comply with its basic contents without necessarily guaranteeing maximum access to information and transparency of a public entity. The publication of budget or contract information within the legal time limits, but cloaked in administrative language, the high levels of non-compliance of local governments in submitting information for the PCM's annual reports, and the legal proceedings against national government entities are examples of this lack of political will. Secondly, a lack of a professional civil service or career public servants has a negative impact on the sustainability of efforts to implement LTAIP. The high turnover of public officials causes delays and difficulties in the implementation process. Finally, the institutional design for the implementation and oversight of compliance with LTAIP is a diffuse model that places responsibility for these tasks on several public officials and entities. This model seemed to be the most reasonable in the political and institutional circumstances in which LTAIP was adopted, but today it is insufficient. The factors identified in this analysis as well as the absence of strong institutional incentives for a functioning model (for example, linking compliance with transparency indicators to budget allocation) point to the need to promote discussion on the creation of a specialized, independent institution with authority over all of the entities subject to LTAIP. This discussion should take into account the characteristics of the Peruvian government and the experience of institutions that have demonstrated positive results in the oversight of compliance with the obligations of public entities and defense of RTI, such as the Ombudsman's Office.

In terms of civil society, the work of different organizations has favored the implementation of LTAIP. Ideally, more organizations should associate RTI with the demand for compliance with other rights; additionally, there should be more such institutions located in the country's interior. Moreover, consensus regarding the indicators or criteria that the different civil society institutions use to measure compliance with LTAIP would enable more effective assessments.¹¹⁸ This would prevent the same entity from being classified differently by these organizations and diminish the potential for submitting partial assessments as proof of an entity's transparency.

Despite the obstacles mentioned, LTAIP implementation process has generated important learned lessons. As demonstrated each year at the National Conference on Access to Public Information, there is accumulated experience in this area in several government sectors. Furthermore, civil society organizations have made significant contributions. The beginning of the new government administration offers the best opportunity for promoting some of the pending reforms (for example, a new institutional model for implementation and compliance with LTAIP) to contribute to strengthening access to public information and government transparency.¹¹⁹

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Notes

1. Constitution, Article 2. All people have the right to: (...) (Paragraph 5) Request information they need without stating a reason and to receive it from any public entity, within the legal time period, at the cost the request involves. Information that affects personal privacy is excluded, as is that expressly excluded by law or for reasons of national security. Banking and tax secrets can be lifted at the request of the Judge, the Attorney General or an investigative committee of Congress in accordance with the law and as long as the information refers to the case being investigated.
2. According to the official definition, "The National Accord is a set of government policies prepared and adopted through dialogue and consensus, after a process of workshops and consultancies nationwide, with the aim of defining a direction for the country's sustainable development and for affirming its democratic governance." The National Accord was signed in a solemn act at the Government Palace on July 22, 2002, with the participation of then-President Alejandro Toledo, the President of the Ministerial Cabinet, Roberto Dañino, and leading representatives of political and civil society organizations participating in the National Accord. See (in Spanish): <http://www.acuerdonacional.pe/an/definicion.html>
3. Ibid. p. 200.
4. Other relevant norms are Legislative Decree No. 757, the Framework Law for the Growth of Private Investment, adopted on November 13, 1991, as well as its Regulations, adopted through Supreme Decree No. 094-92-PCM. While these norms broadly regulated access to documentary information, their area of application (private investment) limits coverage.
5. Article 65 of the 1993 Constitution recognized the right of consumers and users to access information on the goods and services available to them in the market.
6. Abad Yupanqui, Samuel. Op. Cit. p. 14.
7. Many of these cases went to trial and the guilty parties were sentenced. For example, see (in Spanish): http://historico.pj.gob.pe/CorteSuprema/documentos/RN_A_V_023-2001-09_260711.pdf.
8. See *Exposición de Motivos del Proyecto de Ley No. 1356/2001-CR*, p. 3. The bill was submitted by Carlos Ferrero, who was a member of Fujimori's party but who gradually distanced himself from it, demonstrating public discrepancies with the government. See, <http://www.congreso.gob.pe/comisiones/1998/constitucion/proyecto.htm>.
9. Refers to the government led by Valentín Paniagua, which began in Peru in November 2000 after the resignation of Alberto Fujimori at the beginning of his third term, and which ended in July 2001. Its mission was to organize and hold new elections to elect a new government.
10. On this subject, see: Bertoni, Eduardo. *Libertad de información. ¿Tres palabras inofensivas? Leyes de acceso a la información y rol de la prensa*. The World Bank. 2011
11. According to articles 161 and 162 of the Constitution and Article 1 of Law No. 26520 (Organic Law of the Ombudsman's Office), this institution is created as an autonomous constitutional body charged with defending the constitutional and fundamental rights of individuals and the community, the supervision of compliance with the functions of public bodies and the adequate delivery of public services.
12. See, CPP and British Council. *Los Principios de Lima. Libertad de Expresión y Acceso a la Información en Poder del Estado*. Lima, 2001. pp. 1–4.
13. On freedom of expression and RTI as work areas of the Ombudsman's Office, see Ombudsman's Office Peru. Ombudsman's Report No. 48. *Situación de la libertad de expresión en el Perú. September 1996–September 2000*. Lima. 2000
14. Some of the most noteworthy of these norms include: Law No. 27336, on transparency and public disclosure in telecommunications; Supreme Decree No. 018-2001-PCM, which establishes the obligation of government bodies to have a special procedure to guarantee RTI; Urgent Decree No. 035-2001, which establishes rules for allowing access of individuals to information on public

- finances; Law No. 27444, the Law on General Administrative Procedure, whose Article 110 regulates the right of individuals to request information held by public entities; Law No. 27482, which regulates publication of the Sworn Declaration of Income and of Assets and Revenues of public officials and servants as well as its Regulations, adopted through Supreme Decree No. 080-2001-PCM.
15. Draft Bill No. 0021/2001-CR, submitted on July 24, 2001 by Congresswoman Mercedes Cabanillas Bustamante, of the Partido Aprista Peruano. Draft Bill No. 0103/2001-CR, submitted on July 27, 2001 by Congresswoman Marcial Ayaypoma Alvarado, of the Perú Posible government party. Draft Bill No. 0165/2001-CR, submitted on July 27, 2001 by Congressman Henry Pease García de Perú Posible. Draft Bill No. 0714/2001-CR, submitted on September 18, 2001 by Congressman Jaques Rodrich Ackerman, of Perú Posible. Draft Bill No. 1356/2001-CR, submitted on November 21, 2001 by Congressman Carlos Ferrero Costa, of Perú Posible, which is a modified version of Draft Bill No. 3903, submitted by the same congressman. Draft Bill No. 1922/2001-CR, submitted on February 1, 2002 by Congresswoman Ana Elena Townsend Diez Canseco, of Perú Posible. Draft Bill No. 1978/2001-CR, submitted on February 11, 2002 by Congressman Máximo Mena Melgarejo, of Perú Posible. Draft Bill No. 1992/2001-CR, submitted on February 12, 2002 by Congressman Luis Alva Castro, of the Partido Aprista Peruano. Draft Bill No. 3047/2001-CR, submitted on May 30, 2002 by Congressman Luis Gonzales Reynoso, of the Unión Parlamentaria Descentralista. These bills (in Spanish) may be viewed at: http://www2.congreso.gob.pe/Sicr/TraDocEstProc/TraDoc_expdig_2001.nsf/Sicr/TraDocEstProc/TraDoc_expdig_2001.nsf/Agenda/4F43C40FC1B8765D052578BF0070743E?opendocument.
 16. Originally, this committee was called the Working Group on Transparency, Access to Public Information and Citizen Participation. However, at the August 26, 2002 session of the Constitution Committee, the name was changed at the request of Congresswoman Ana Elena Townsend Diez Canseco.
 17. Ombudsman's Office. Ombudsman's Report No. 96. *Balance a dos años de vigencia de la Ley de Transparencia y Acceso a la Información Pública 2003–2004*. 15–16.
 18. This is a legal mechanism in Peru to systematize into a single document the different modifications of a law. The TUO does not modify the law; it simply integrates the different modifications into a single text to prevent normative dispersion on the same topic. The TUO is adopted through a regulatory norm called a Supreme Decree. Henceforth, all references to LTAIP refer to the TUO of Law 27806.
 19. The Ombudsman's Office disagreed with the decision that LTAIP would have Regulations, stating that: The first transitory, complementary and final provision of the Law stipulated that the Executive Branch should develop its regulations within a 90-day period. In our opinion, it is not indispensable to pass regulations because the Law is sufficiently precise; nevertheless it was decided to develop them." See Ombudsman's Office. Ombudsman's Report No. 96. *Balance a dos años de vigencia de la Ley de Transparencia y Acceso a la Información Pública 2003–2004*. 2005. p. 16.
 20. It was not possible to locate the official record of the discussions on the activities convened by the CPP or on the debate of the Working Group chaired by Townsend, for which reason this report offers general information, providing generic information on the groups that defended the different positions, based on the interviews conducted.
 21. *Habeas data* is a constitutional process to access a record or database that includes information on an individual. It is a legal guarantee for the adequate management of personal information held by third parties. It enables avoiding abuses and rectifying involuntary mistakes in the administration and publication of the data. *Habeas data* is regulated by legislation of several countries and is also included in legislation on the protection of personal information. In Peru, *habeas data* also protects RTI.
 22. Interview with Mayumi Ortecho, RTI program officer of the IPYS.
 23. See also: Abad Yupanqui, Samuel. "Servicios de Inteligencia sin Transparencia." In: *Legal Express*, No. 56, August 2005. *Gaceta Jurídica*. Lima.
 24. As mentioned in Table 1, Article 4 of the RLTAIP establishes that entities with decentralized offices may appoint the officials responsible for delivering information in each entity.
 25. Ipsos, Evaluación de la implementación de la ley de transparencia y acceso a la información. September 2009.
 26. On this case, see: <http://www.infopublica.pe/?pag=noticia&idn=88>.

27. Article 377. The public official who illegally omits, refuses or delays any action of his position shall be punished with imprisonment of no more than two years and 30 to 60 days—fine.
28. It was not possible to obtain information for this report on whether or not this sentence was disputed and in the event it was, whether or not it was the result of a ruling of the appellate court.
29. At the time of this ruling, the following text of Article 376 was in effect: “The public official who, abusing his authority, commits or orders any arbitrary act that harms someone, shall be punished with a prison term of no more than two years. When the facts derive from a procedure of coercive charge, the sentence shall be no less than two years and no more than four years.” This type of crime was modified through Law No. 29703, adopted on June 10, 2011, increasing the basic prison term to *no more than three years*.
30. The resolution deactivating the ONA did not mention the reasons for doing so; however, ever since it began operations, the need for this office to fight corruption was questioned given that it did not have clear functions with respect to other government institutions. The Comptroller General’s Office and the Attorney General’s Office publicly questioned some of the powers attributed to the ONA because they claimed that they interfered with some of the constitutional powers of these institutions.
31. At this writing, the SGP’s Technical Component on Ethics, Transparency, and Citizen Oversight is responsible for the functions of transparency and access to public information; it has three members. See (in Spanish): http://sgp.pcm.gob.pe/index.php?option=com_content&view=article&id=81&Itemid=158.
32. For example, Ministerial Resolution No. 398-2008, of December 2, 2008, through which Directive No. 004-2008-PCM/SGP was adopted, “*Guidelines for the standardization of the contents of transparency portals of public entities*”; Ministerial Resolution No. 301-2009-PCM, of July 9, 2009, through which Directive No. 003-2009-PCM/SGP was adopted, “*Guidelines for the report on requests for access to information to be submitted to the Office of the President of the Ministerial Cabinet*”; Supreme Decree No. 063-2010-PCM, of June 3, 2010, through which the implementation of the *Standard Transparency Portal* was adopted; or Ministerial Resolution No. 200-2010-PCM, of June 24, 2010, through which Directive No. 001-2010-PCM/SGP was adopted “*Guidelines for the implementation of the Standard Transparency Portal in Government Entities*.” These norms on the *Standard Transparency Portal* were promoted on the initiative of the SGP in response to constant complaints and comments from officials responsible for providing information regarding the difficulties in updating institutional Web sites. This legislation also addressed the disordered formats, diverse content and inadequate quality of the information published on the Web sites. To view the format and the applications of the *Standard Transparency Portal*, see: http://www.peru.gob.pe/transparencia/pep_transparencia.asp.
33. According to the norm that adopted the implementation of the *Standard Transparency Portal* (Supreme Decree No. 063-2010-PCM), this should be implemented within a period of 30 calendar days beginning on the date it went into effect (June 3, 2010) in the case of the national government. For regional and local governments that had Web sites, the deadline was 60 calendar days. Local district governments that did not have Web sites were given a maximum of one year to develop them.
34. Guillén Nolasco, Patricia. “Rol de la Presidencia del Consejo de Ministros en el Fortalecimiento de la Transparencia en el Estado.” Presentation at the Third National Conference on Access to Public Information. Lima. October 2010. Slides 12–17.
35. The first implementation phase has the following objectives: (1) make it compatible with systems of the Ministry of Economics and Finance (MEF), the Ministry of Labor and Employment Promotion (MTPE) and the Agency for Oversight of Government Contracts (OSCE); (2) apply the recommendations of the MESICIC: Information should follow the outline of the publication model set forth in Inter-American Model Law on Access to Public Information; and (3) promote good practices in the public administration. This was chosen as a good practice in the competition organized by the Informed Citizens organization (CAD–2010). The second phase has the following objectives: (1) improve the users administrative system to facilitate access in accordance with criteria of functions or responsibilities; (2) implement a tool that will permit the migration of Excel files to the contracting information module; (3) link public investment projects with the SEACE selection process in an effort

to inform on the procedure through the final implementation phase and to incorporate georeference data to locate it on Google Maps; (4) develop multimedia tutorials for users and administrators; (5) develop a module to monitor updating of Web sites; and (6) prepare a module for registering information on corporations under the National Fund for the Financing of Government Business Activity (FONAFE).

36. Guillén Nolasco, Patricia. Op. Cit., Slide 18.
37. Ibid. Slide 19.
38. See conclusions (in Spanish) of the Third National Conference on Access to Public Information (October 21–22, 2010).
39. Moreover, as proposed during the First National Conference on Transparency (September 2008), the purpose of institutional Web sites is sometimes distorted when public officials perceive them as a propaganda tool for the entity rather than as a communications mechanism between government bodies and society. The effective functioning of the Web sites is essential given that they are closely monitored by civil society, whose perception of transparency of government bodies is largely based on what is published on these sites. Nevertheless, the Ombudsman's Office confirmed that this has not served to promote improvements, particularly at the local government level.
40. The Specialized Bureaus are: Bureau for the Government Administration; Constitutional Affairs Bureau; Bureau for Human Rights and People with Disabilities; Bureau for Women's Rights; Bureau for the Environment, Public Services and Indigenous Peoples; Bureau for Children and Adolescents; and Bureau for Social Conflicts and Good Governance.
41. The thematic programs are: Indigenous Peoples; Decentralization and Good Government; Identity and Citizenship; Protection of Rights in Police Agencies; People with Disabilities; Criminal and Prison Affairs; and Public Ethics, Prevention of Corruption and Public Policies.
42. For example, Ombudsman's Report No. 60, *El Acceso a la Información Pública y la Cultura del Secreto* (Access to Public Information and the Culture of Secrecy, September 2001), or Ombudsman's Report No. 96, *Balance a dos años de vigencia de la Ley de Transparencia y Acceso a la Información Pública 2003–2004* (Assessment Two Years After the Law on Transparency and Public Information Went into Effect, 2003–04, October 2005).
43. The most recent records the results of the Web site assessment conducted in February 2011. The reports (in Spanish) can be viewed at: <http://www.defensoria.gob.pe/programa-gob.php>.
44. Ombudsman's Document No. 9, *El derecho de acceso a la información pública. Normativa, jurisprudencia y labor de la Defensoría del Pueblo* (The right of access to public information. Norms, jurisprudence and labor of the Ombudsman's Office, November 2009), or *Transparencia, Acceso a la Información Pública y Rendición de Cuentas. Conceptos básicos y propuestas metodológicas* (Transparency, Access to Public Information and Accountability. Basic Concepts and Proposed Methods, 2010).
45. Since its founding, the Ombudsman's Office has successfully developed this intervention strategy to defend the rights of women, indigenous peoples and environmental organizations. See Thomas Pegram, "Accountability in hostile times: the case of the Peruvian Human Rights Ombudsman. 1996–2001," *Journal of Latin American Studies*, Vol. 40, no. 1, February 2008. Several civil society organizations work in partnership with the Ombudsman's Office to promote compliance with LTAIP. For example, the CPP implements the Transparent Municipalities project; the IPYS coorganizes the National Conference on Access to Public Information with the Ombudsman's Office; and CAD organizes the Award for Best Practices, with support from the Ombudsman's Office.
46. Pegram Op. cit.
47. See Directive No. 00001–2011–CG / PEC, formulation and evaluation of the annual control plan of oversight institutions for 2011. Adopted through Comptroller's Resolution No. 002-2011-CG, of January 10, 2011. This Directive establishes supervision of compliance with LTAIP as a priority control activity. These documents (in Spanish) can be viewed at: http://www.contraloria.gob.pe/wps/wcm/connect/c7d3d080455e4a748dcdfb5c04093d8/RC_002-2011-CG_.pdf?MOD=AJPERES&CACHEID=c7d3d080455e4a748dcdfb5c04093d8.
48. In this regard, the declarations of the former Comptroller General are pertinent. He stated that LTAIP was below the Organic Law of the CGR. This opinion reflected the interpretation that an organic law is hierarchically superior to a regular law. Nevertheless, the relation between the two laws is nor

- hierarchical but rather of jurisdiction. An organic law is adopted through a more rigorous procedure than a regular law and is reserved for regulating specific areas such as functions and organization of certain institutions, but is in no way *hierarchically superior* to a regular law such as LTAIP. Moreover, this type of consideration hinders respect for RTI and creates confusion among public officials, negatively affecting the implementation of LTAIP (First National Conference on Access to Public Information, September 29–30, 2008).
49. Since 2008, the IPYS has coorganized the National Conference on Access to Public Information with the Ombudsman's Office. This is a space for discussion, debate and exchange of experiences among public officials, experts, civil society leaders, journalists and academics. Public officials include mainly the secretaries general of national government entities who are responsible for access to public information and the transparency portal. This is the only event that brings together a large number of public officials responsible for access to public information and therefore constitutes an important forum for debate and proposals with respect to the problems that the government faces in this issue as well as the advances. Four conferences have been held so far, with 150 to 200 participants each, mostly public officials. The conference is organized with financial support from the Open Society Institute.
 50. Press and Society Institute. *Relatoría de la Tercera Conferencia Nacional de Acceso a la Información Pública*. Lima 2011. p. 79.
 51. At this writing, the official conclusions of the event had still not been published, for which reason this section is based on notes taken by the author.
 52. The General Archive of the Nation is the Central Agency of the National Archive System and is an administrative system.
 53. With respect to the legislation on archives, Law Decree No. 19414, the Law on the Defense, Conservation and Increase of Documentary Heritage, of June 16, 1972, establishes the criteria, rules and procedures for the conservation of the documentary heritage. Its Regulations were adopted through Supreme Decree No. 022-75-ED, of October 29, 1975. Law No. 25323, adopted on June 11, 1991, created the National Archive System. Its Regulations were adopted through Supreme Decree No. 008-92-JUS of June 26, 1992. In addition, Law No. 28296, the General Law on the Nation's Cultural Heritage, adopted on July 22, 2004, establishes provisions to protect the country's documentary cultural heritage. The regulations of this law were adopted through Supreme Decree No. 011-2006-ED of June 1, 2006.
 54. Conference of Iván Caro Acevedo, National Director of Archive Activity and Intermediate Archives of the National Archive System, at the Third National Conference on Access to Public Information organized by the IPYS, October 21–22, 2010. See: Press and Society Institute. *Relatoría de la Tercera Conferencia Nacional de Acceso a la Información Pública*. Lima 2011. p. 41.
 55. See <http://elcomercio.pe/ediciononline/html/2009-01-09/desaparecen-mas-800-cajas-importante-informacion-ministerio-salud.html>.
 56. See <http://peru21.pe/noticia/1054036/banmat-otra-vez-envuelto-escandalo>.
 57. See <http://www.ipys.org/index.php?q=noticia/801>.
 58. See <http://www.ipys.org/index.php?q=noticia/792>.
 59. Press and Society Institute. *Relatoría de la Tercera Conferencia*. p. 79.
 60. Ibid.
 61. These sectors were selected because they provide important services to a large number of citizens and because they are considered particularly vulnerable to corrupt practices given that they have a large number of beneficiaries and a large budget as well as many procurement and contracting procedures.
 62. Press and Society Institute—IPYS. *Relatoría de la Primera Conferencia Nacional sobre Acceso a la Información*. Lima 2009. p. 67.
 63. Press and Society Institute—IPYS. *Relatoría de la Tercera Conferencia Nacional de Acceso a la Información Pública*. Lima 2011. p. 79.
 64. Proof of this is the aforementioned publications on this topic. See footnote No. 53.
 65. Annual reports of the Ombudsman's Office to Congress (in Spanish) may be viewed at: <http://www.defensoria.gob.pe/inform-anuales.php>.

66. Press and Society Institute—IPYS. Relatoría de la Primera Conferencia Nacional sobre Acceso a la Información. Lima 2009. p. 67.
67. These conclusions can be viewed at: http://www.ipys.org/accesoinfo2/mesas_discusion.html.
68. <http://www.servir.gob.pe/index.php/es/ique-es-servir/gerencias/capacidades-y-rendimiento.html>.
69. These reports can be viewed at: <http://www.defensoria.gob.pe/inform-anuales.php>.
70. For the project description (in Spanish), see: <http://www.defensoria.gob.pe/inform-anuales.php>.
71. For the project description (in Spanish), see: <http://www.consejoprensaperuana.org.pe/tempo/proyectos.php?item1=MTM>.
72. See the Ministry of Health's Plan for the Promotion of Ethics, Transparency and the Fight against Corruption, 2010–2011 (in Spanish), adopted through Ministerial Resolution No. 384-2010/MINSA, at: <http://www.minsa.gob.pe/transparencia/Archivos/RM384-2010MINSA.pdf>.
73. She was succeeded by ministers Carlos Vallejo, Hernán Garrido and Oscar Ugarte. The current administration of Health Minister Alberto Tejada has also demonstrated signs of continuing this policy.
74. Ipsos, Evaluación de la implementación de la ley de transparencia y acceso a la información. September 2009, slide. 21.
75. Press and Society Institute—IPYS. Relatoría de la Tercera Conferencia Nacional de Acceso a la Información Pública. Lima 2011. p. 79.
76. A reverse auction is the "...selection method through which government bodies choose the supplier of common goods or services based solely on the prices offered, rather than on the technical characteristics of the good or service required, given that these are predetermined." In Bossano Lomellini, Luis Miguel. "La subasta inversa: un mecanismo de contratación pública eficiente y transparente." In: DERECHO PUCP No. 66–2011. *Monográfico sobre Contrataciones y Adquisiciones del Estado*. PUCP. Lima. pp. 276–277.
77. Through Ministerial Resolution No. 584-2009/MINSA, of September 2, 2009, targets and performance indicators were adopted for the anticorruption policy in the Ministry of Health, among other issues. Three indicators are associated with RTI and transparency: (1) number of people trained in standards for ethics, transparency and the fight against corruption of the health sector. The 2009 target for this indicator was to train 400 people; (2) percentage of publication of mandatory documents in the Transparency link of the Ministry's Web site. The 2009 target for this indicator was 93 percent; and (3) number of requests information processed in the framework of LTAIP and the fight against corruption. The 2009 indicator was 3,000 processed requests. Compliance with indicators (1) and (3) is the responsibility of the Health and Transparency Ombudsman whereas the Office of Communications is responsible for indicator (2).
78. The address of the Ministry of Health institutional Web site (in Spanish) is: <http://www.minsa.gob.pe/>.
79. In 2010, nearly 6.8 billion nuevos soles were allocated to social programs, of which 4.15 billion were earmarked for the PSH, in other words, 60 percent of the total.
80. Ombudsman's Office. Op. Cit. p. 27.
81. Ibid. pp. 41–44.
82. At the publication of all the information in each item, a value of 100 percent is given, and all items are averaged to obtain a final value.
83. Ibid. pp. 124–126.
84. Ibid. pp. 127–128.
85. Adopted on July 3, 2011. Public disclosure of RUB does not only pose difficulties for the right to personal and family privacy, but in general with the right to informative self-determination or the protection of personal information.
86. <http://www.seace.gob.pe/> For information on SEACE, see Ana Teresa Revilla Vergara. "La transparencia en la ley de contrataciones del Estado" DERECHO PUCP. Revista de la Facultad de Derecho No. 66 (PUCP-Lima). *Monográfico sobre contrataciones y adquisiciones del Estado*. p. 210.
87. Ibid. pp. 202–209, 213–214.

88. These officials include the president, vice presidents, members of Congress, ministers and vice-ministers, members of the Supreme Court of Justice, chairmen and members of the collegiate body of the Autonomous Constitutional Entities. The prohibition extends to the spouse, live-in partner or the fourth degree of consanguinity and second of affinity. This prohibition has generated controversy in Peru.
89. <http://www.consejoprensaperuana.org.pe/tempo/proyectos.php?item1=MTI=&item2=MjA=>.
90. For information on the Transparent Municipalities project (in Spanish), see: <http://www.consejoprensaperuana.org.pe/tempo/proyectos.php?item1=MTM=>.
91. For details on some IPYS projects (in Spanish) that deal with transparency and access to public information: http://www.ipys.org/project_listing&term_node_tid_depth=All&term_node_tid_depth_1=31.
92. For example, CAD Bulletin No. 129 of December 7, 2010, dedicated to analyzing aspects of compliance with proactive public disclosure obligations contained in LTAIP (<http://www.ciudadanosaldia.org/boletines/default.htm>). CAD Report No. 36 (December 2004) analyzes the level of compliance with LTAIP in municipal tax administrations.
93. Results are published in regular bulletins: http://descentralizacion.org.pe/n-publicaciones-listado.shtml?conds%5B0%5D%5Bvalue%5D=Evaluaci%F3n+de+Portales&conds%5B0%5D%5Bcategory%5D=1&sort%5B0%5D%5Bpublish_date%5D=d.
94. http://www.descentralizacion.org.pe/apc-aa/archivos-aa/3c6bb51ada688b58c57cb18308d59d73/transparencia_mireras4.pdf.
95. <http://www.justiciaytransparencia.pe/> This is an important tool for officials responsible for access to information of public entities as well as for citizens who can access jurisprudence for use in defending their right to access public information.
96. Economic and Social Research Consortium (CIES), Transparency, Propuesta Ciudadana, Mesa de Concertación de Lucha contra la Pobreza, Ventana Pública of the PUCP and Ciudadanos al Día.
97. Established in 2007. <http://universidadcoherente.org/>.
98. In March 2011, the results of these indicators were published in: *Hacia una universidad transparente. Informe sobre la transparencia y el acceso a la información en las universidades públicas del Perú 2010* (http://universidadcoherente.org/documentos/info_hacia_donde_van_las_univ.pdf).
99. See <http://www.dar.org.pe/transparenciaforestal/indexproyecto.html>.
100. At this writing, the reports corresponding to 2009 (<http://www.dar.org.pe/transparenciaforestal/Documentos/Informe%202009%20TF%20c.pdf>) and 2010 (<http://www.dar.org.pe/informe-transparencia-forestal-2010.htm>) have been published.
101. Exceptions include DAR cases that have ecological components and those of Universidad Coherente, whose actions are largely driven by the right to an education.
102. The 2004 Annual Report was submitted on May 4, 2005 (Official Letter No. 092-2005-PCM/SG-200/SGP) whereas that of 2007 was submitted on April 4, 2008 (Official Letter No. 1508-2008-PCM/SG-SC). The 2008 Annual Report was sent on March 31, 2009 (Official Letter No. 1729-2009-PCM/SG-SC) and that of 2009 was delivered to Congress on March 31, 2010 (Official Letter No. 1812-2010-PCM/SG-SC).
103. The response to this information request was Letter No. 008-2010-2011-DGP/CR, of August 31, 2010, which included the information on the reports corresponding to 2003–09.
104. Esteban Delgado, Sara. “Revisión del Informe Anual de la Presidencia del Consejo de Ministros—2010” (Discussion notes). Lima, 2011. pp. 2–3.
105. Loc. cit.
106. Esteban Delgado, Sara. El derecho de acceso a la información a través del hábeas data. Insumos para una política pública de transparencia. Lima, 2010. pp. 22–23.
107. See: Castro Cruzatt, Karin. Acceso a la Información Pública: Apuntes sobre su desarrollo en el Perú a la luz de la jurisprudencia del Tribunal Constitucional. Workbook No. 6. School of Law, Pontificia Universidad Católica del Perú. September 2008. p. 47.
108. Esteban Delgado, Sara. “Revisión del Informe Anual de la Presidencia del Consejo de Ministros—2010” (Discussion notes). Lima, 2011.
109. Loc. cit.

110. Office of the President of the Ministerial Cabinet. Informe Anual 2009 sobre solicitudes y pedidos de información atendidos y no atendidos por las entidades de la administración pública. Lima. pp. 14–15.
111. Ibid. p. 16.
112. See conclusions of the First National Conference on Access to Public Information (September 29–30, 2008).
113. For information on the judicial regime of RTI and the jurisprudence of the Constitutional Tribunal, see, Pereira Chumbe, Roberto. *El derecho de acceso a la información pública y su régimen jurídico*. Lima. *Actualidad Jurídica*. T. 142. September 2005. pp. 155–160.
114. Esteban Delgado, Sara. El derecho de acceso a la información a través del hábeas data. Insumos para una política pública de transparencia. Lima, 2010. 27p.
115. See conclusions of the First National Conference on Access to Public Information (September 29–30, 2008).
116. Ibid.
117. Through an agreement with the Pereira&Asociados Law Firm, the IPYS can litigate cases of access to public information and freedom of expression both in administrative and jurisdictional proceedings, with the legal support of this firm.
118. First National Conference on Access to Public Information (September 29–30, 2008).
119. The first Ministerial Cabinet of the new government made a commitment to work with transparency and to promote access to public information.



Implementing Right to Information A Case Study of Romania

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WORLD BANK GROUP

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Abbreviations and Acronyms

ANI	National Agency for Integrity
ANRM	National Authority for Mineral Resources
ASG	Agency for Government Strategies
CEE	Central and Eastern Europe
CNADNR	National Company for Motorways and Roads
DGS	Department for Governmental Strategies
EC	European Commission
EESC	European Economic and Social Committee
EU	European Union
FOIA	Freedom of Information Act
IPP	Institute for Public Policy
IT	information technology
MP	Member of Parliament
MPI	Ministry of Public Information
NGOs	nongovernmental organizations
PAR	Public Administration Reform
PNL	National Liberal Party
PR	public relations
SAR	Romanian Academic Society
SRI	Romanian Intelligence Service
USAID	United States Agency for International Development

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Implementing Right to Information

A Case Study of Romania

1. Introduction

After a short period of debate in the media and among the political class, Law 544 on Access to Public Information, also referred to as the Freedom of Information Act (FOIA), was adopted and became effective in Romania in 2001. This was two years after the country was officially accepted as a European Union (EU) candidate (in 1999) and at the beginning of a period of rapid institutional reforms aimed at convincing the EU that the Eastern European state lived up to the higher European standards of public transparency and integrity.

FOIA's scope expanded quickly as a result of pressure from civil society, thus creating a legal basis for free access to public information to all citizens, without discrimination. The FOIA has been used by the media and civil society since its adoption—especially during the peak of the electoral cycles in 2004 and 2008–09; in turn, the law has substantially contributed to their strengthening and professionalization.

1.1. METHODOLOGY

This case study is based on desk research and interviews conducted with relevant stakeholders—public officials and nongovernmental organizations (NGOs) with extensive experience in applying the legislation—as well as previous studies produced on this subject matter by these stakeholders.

Interviews were conducted with representatives of the Ministry of Justice, the Ministry of Finance, the Ministry of Transports, the National Railways Company (CFR), the National Company for Motorways and Roads (CNADNR), the Ministry of Education, the Health Ministry, the Health Insurance Fund, the National Anticorruption Directorate, the National Integrity Agency, the Prosecutor's office attached to the High Court of Cassation and Justice, the Suceava Court of Appeal, the Mures Court of Appeal, and the University of Bucharest as well as journalists and NGO representatives.

This case study is organized into seven sections. Section 2 provides a brief history of the enactment of Law 544/2001 and section 3 describes the law's main provisions. Section 4 provides an overview of the implementation measures put in place, with data and some illustrative cases. Section 5 presents the system of enforcements and sanctions, while section 6 assesses the impact of the law and the extent to which the law is being used. Section 7 concludes.



2. Passage of Law: Context and History

Like many similar cases over the past decade, the main political driver for the passage of Law 544/2001 was the process of accession into the European Union (EU). For all the countries who managed to complete it,¹ this was a decade-long process of technical and political negotiations aimed at aligning their policies and administrations in key areas of common interest. Every member country had to transpose into its national legislation as well as implement a vast and complex body of EU laws and regulations—the so-called *acquis communautaire*.²

Before the technical negotiations even began, potential member states had to be able to prove that they fulfilled certain prerequisites: they had to convince the European Commission (EC)³ and other member states that (1) their politics were fully democratic and accountable, (2) their civil service was depoliticized and effective, and (3) that the rule of law was in place. These are dimensions on which progress is difficult to measure objectively; prescriptions for reform are hard to operationalize because improvements, when necessary, require profound changes in the politico-administrative system. European decision makers have had to rely on peer reviews and periodical political reports to assess improvements in these areas. The existence of additional mechanisms such as ATI legislation, although not mandatory as such under the EU rules, is perceived as a convincing milestone on the road toward public administration improvement.

Governments in candidate states faced substantial pressure from their civil societies to implement the required reforms as soon as possible: joining the EU is regarded as a highly desirable goal due to its demonstrated prosperity.⁴ In all of the countries, league tables were regularly published and discussed by the media, and government effectiveness judged by how well they performed compared to their peers. In the countries that were the least prepared (Romania and Bulgaria), the public was the most enthusiastic about joining the EU (over 80 percent), creating tremendous pressure on governments to demonstrate progress with the negotiations. As a result, new legislation was adopted in both Bulgaria and Romania in the late 1990s and early 2000s.

There is no specific EU-level regulation or directive dealing with overall access to information (ATI). Public procurement is an exception: because the union's founding principle is a free and open common market with no hidden state aid or privilege for domestic actors, the process of public procurement is strictly regulated in terms of openness and transparency. But other than this, there is no formal obligation for a member state to adopt ATI legislation in order to be accepted into the union. That said, EU actors applied political pressure to the governments of candidate countries, formally and informally, to address their well-known lack of transparency. A "soft" *acquis* emerged over the years dealing with the rule of law, anticorruption framework, civil service reform, and media access to information, which was regarded as a prerequisite to the official start of negotiations on technical chapters. But even as candidate countries considered ATI legislation, they overlooked the impact analysis and budget planning needed for its effective implementation.

NGOs⁵ and members of parliament (MPs), mainly from the opposition National Liberal Party (PNL), promoted ATI legislation in Romania in 2001. A new cabinet had just been installed in Bucharest the year before, the country was still in the early stages of the road toward membership, and the ruling party was eager to follow up on the promises made by its predecessors when the commission began negotiations with Romania in 1999–2000.

Because this type of law was judged to be popular with the media and public in general, it was included on the agenda of the media-conscious Social-Democratic cabinet, emulating the example of New Labour under Tony Blair. Indeed, arguing that mass media institutions should have privileged ATI (that is, shorter deadlines for response from public bodies), an idea that was eventually accepted, the minister in charge made explicit references to the best practices in the old EU member states.⁶ Meanwhile, the center-right opposition, with largely Liberal leanings, came up with its own alternative text for the law.⁷ In fact, the opposition's draft came to the Chamber floor first, about half a year before the government's.

The process of adopting this new law was in the broader context of Public Administration Reform (PAR), for which a special unit had been created at the prime minister's level to coordinate assistance from donors (mainly the EU and World Bank). While there were about 30 chapters of technical *acquis communautaire* that the candidate countries needed to adopt, no such formal blueprints existed for PAR or for judiciary reform beyond general requests that fairness, professionalism, efficiency, and depoliticization be strengthened. Progress on these dimensions was—and still is—monitored by a system of self-commitments in the form of agreed action plans, in addition to monitoring performed either by the commission or the other member states (peer reviewing). Under the new legislation, classification was the only justified exception to access. Until then, administrative transparency had not been enshrined in law, but there were laws on state secrets and their protection.⁸

In March 2001, a civil society coalition was forged that effectively facilitated consultations between the government's Ministry of Public Information (MPI) and the opposition (mainly the PNL). A facilitator was needed, since NGOs did not have the legal power to push the initiation of this legislation. A conservative group of MPs (mainly from the ex-Communist party and the extreme right) were pushing a draft of the Classified Information Act⁹ in the chamber at the same time, so the need to move fast and with a reasonably good draft was critical. Both the modernizers in government (mainly the leadership of the MPI) and civil society perceived this as a threat,¹⁰ not necessarily because of its provisions (although until then the tendency had been to interpret such clauses primarily as vehicles for restraining media freedom) but because of its timing.

If a classified information law was passed before a freedom of information law, then non-disclosure would be taken as the norm and disclosure the exception simply because that the latter law would have to reference the former. Due to the high level of public attention to the issue, the freedom of information law was adopted first (in 2001); the classified information law subsequently (as Law 182/2002),¹¹ closely following and operationalizing the system of exceptions created by the FOIA (see the next section).

The result was a common agreement by all parties to a draft freedom of information law (a rare consensus in the Romanian Parliament) that was subsequently adopted by the chambers in September 2001. The PNL caucus in the lower chamber had a strong leader on this issue—deputy Mona Muscă¹²—who had been close to civil society for years and was a strong advocate of transparency. They organized two public hearings on the subject, which were broadly advertised, and the ministry took the unprecedented step of sending top representatives to these debates. As a result of this bipartisanship, the final version of the law was a merger between the ministry and opposition drafts, plus articles and concepts proposed by NGOs and embraced by the legislators. This consultative process represented a best practice at the time in terms of civil society's cooperation with the government and other political actors.



The conservative groups from Parliament (mainly the far right group that had held sway in the recent past) also raised the issue of public archives. How was information on land and building registration (which in most countries was public, but in Romania at that time was caught up in the process of post-Communist property restitution) to be dealt with? What would be the costs and implications of a large volume of archives being made accessible to the public with tight and strict deadlines? The notion of “information of public interest” was found to exclude such cases and thus limit the bureaucratic implications.

Another discussion of the law’s provisions took place when some MPs, also from a fringe-conservative group, wanted to make it mandatory for journalists to publish everything they received as public information during a press conference or following a request, thereby eliminating the possibility of being selective in news editing. This was rejected during deliberations in parliamentary commissions. But similar ideas periodically resurfaced in subsequent years: to create by law an ethics code and forms of associations for journalists; to force the prime-time news channels to keep a “balance between positive and negative news”; or to conduct mandatory psychiatric checks for mass media employees.¹³ These were regularly turned down by the majority, either in the committees or the plenum, but their endurance indicates bureaucratic opinion regarding free speech, at least among a minority of Romanian officials.

In general, the mass media played a supportive role in the passing of an ATI law because it was beneficial to their profession. Their only concern was that the formalization of interactions between reporters and the institutions they covered might slow the investigative process, with waiting times measured in weeks. In many instances journalists with privileged contacts in the institutions they covered had managed to obtain inside information in real time through informal channels. With this in mind, the mass media wanted to make sure that the law would not be used as a pretext to excessively bureaucratize ATI and slow down communication, postponing answers to questions until the legal deadline.

3. Strength of the Legal Environment

The Romanian law is generally in compliance with the principles set forth in the model law proposed by Article XIX. This includes the scope of the law’s application, principles of free ATI held by public entities, mechanisms for filing requests and obligations of public entities to answer such requests, timetables for answering requests, including a special 48-hour deadline for requests of information that could “safeguard the life or liberty of a person,” methods for making information available, and fees that might be charged for the information. The Romanian law also includes an obligation for all relevant entities to appoint a FOIA officer, but it does not provide for the establishment of an information commissioner. However, reports prepared by each institution on the implementation of the FOIA are collected and aggregated annually into a national analysis by the Department of Governmental Strategies (DGS), which acts in part like a central monitoring agency.

The right of ATI has been enshrined in the Romanian constitution in Article 31 since 1991, but legislation giving it full effect came into force 10 years later. Law 544/2001 further describes the content of this right and develops procedures for ATI. To detail the application of the law, the government adopted the Methodological Norms 123/2002.

Two years after the adoption of the FOIA, the Romanian parliament adopted the law of transparent decision making in public administration (Law 52/2003). The law provides for

publication and public consultation of all draft regulations before adoption. Drafts must be published at least 30 days before adoption, and there must be a 10-day period for receiving comments from the public that are evaluated by the initiator (who decides what ideas will be included in the final version of the laws). These provisions apply at the national and local levels, but the parliament is not covered. As a result, laws initiated by MPs are exempted from these provisions but draft laws proposed by the government have to undergo this transparency procedure.

Law 52/2003 also states that meetings of collegial bodies in the public administration are public, and that the timely notice about the location and agenda of such meetings must be published. These provisions are more relevant for local and county councils and are directly applicable to them; no secondary legislation has been adopted to detail them further. But each of the institutions that fall within the scope of the law may include implementation provisions in its internal regulations and must prepare an annual report on the implementation of the relevant legal provisions, to be handed over to the DGS.

3.1. SCOPE OF COVERAGE

The law applies to all public institutions (central and local), as well as to public companies where the state is a majority shareholder.¹⁴ The initial version did not cover public companies at all, but NGOs argued that because an important part of the state budget is being spent on these companies, the law should also cover them, taking into account the particular circumstances in which they operate. No differentiation is made between various public institutions and authorities depending on their fields of competence. All information held by these entities is deemed public unless it is duly classified or related to personal data. In practice, the nature of the public entity's activities dictates the degree of openness: city hall will always be able to provide more public information than the Intelligence Service or the Ministry of Defense, though all are covered by the law.

In Romania, the interpretation of the scope of the law relies heavily on the courts. The precedents created so far—either spontaneously following individual requests or as a result of deliberate, strategic litigation initiated by civic groups—lean toward a liberal, pro-transparency notion of the term “public institution.” Public institutions are thus interpreted as bodies that are financed wholly from the public purse and are subject to the law as well as those governed by government appointees (such as public companies), especially those operating in a state-protected monopoly (hence, without competitors for their commercial activities), such as the postal service, forest management, and state export-promotion banks).

The emerging doctrine, therefore, is that the government is created not only by treasury funds, but also by regulation, and that it should be subject to the disclosure law. Some ministries (and occasionally, large foreign or domestic investors) were obviously uncomfortable with such decisions, but in spite of the fact that the enforcement of decisions may in itself take some time and effort, there is nothing the ministries, off-budget public bodies, or companies (even multinationals) that have obtained government contracts can do to stop the process. Examples given in the following sections attest to this.

In terms of institutional coverage, the law is comparatively broad, creating obligations for all “public sector” organizations at large. Not only do ministries, central agencies, and local governments have to comply with the FOIA, but so do public universities, hospitals, and many off-budget central and local public companies. The fundamental logic is that if you touch



public funds or exert public regulatory power, you must comply with FOIA. But this process has yet to take roots in Romanian institutional culture. In fact, it is in these gray areas of applicability that the public and legal struggles are being fought by the media and civil society in order to create precedents and strengthen procedures. Both chambers of Parliament as well as the judiciary are covered by the FOIA.¹⁵

3.2. SCOPE OF EXCEPTIONS

Every institution must review its existing information, identify and compile a list of documents that may be sensitive or could pose problems by being publicly disclosed, and then classify them according to the standard procedure. The Romanian law thus implies that any information that is not explicitly classified is accessible to the public by default.

One of the most sensitive areas in any freedom-of-information law is its exceptions.¹⁶ The Romanian FOIA exempts from free access any information regarding personal data as well as classified information on national defense, public order, deliberations of public authorities, and national economic and political interests. It is not enough that the information requested refers to a sensitive subject matter, the institution holding the information may refuse access only if it has classified the data or if the data refer to personal information. Two separate laws have been enacted to further describe the scope of classified information and personal data, which significantly contribute to the shaping of the definition of public information.

The courts not only have the authority to observe procedures followed when a particular piece of information is classified, but they can also analyze the merits of the decision by the institution to classify. Therefore, there is a opportunity for unsatisfied applicants to go before a judge. Here, the burden of proof shifts to the public institution, which must demonstrate that in every case (1) due process was followed when nondisclosure occurred; and (2) the content of information set aside from public view justifies its nondisclosure, following the letter and spirit of the law.

It is very important that the judges have full access to all classified information to be able to evaluate whether or not cases have merit—not only from a procedural standpoint, but also on the substance.¹⁷ The FOIA exempts from classification, information that shows unlawful behavior within public entities; under no circumstances can this information be exempted from public access.

In addition to these traditional categories of exempted information, commercial information is also exempted from access if the release of it would breach intellectual property rights and the principle of fair competition.

The judicial process is another sensitive area where the FOIA has to be reconciled with the provisions included in the various laws regulating judicial proceedings:

- Information with regard to criminal or disciplinary investigations is generally not public due to the confidential character of such proceedings. But according to the European Court of Human Rights, regular information must be provided to the public about high-profile cases (those involving high-level corruption and organized crime). The practice of prosecutors' offices varies across the country: some issue press releases while others are giving the media access to procedural acts (such as indictments). This has in itself been a subject of intense media debate, with prosecutors alternatively criticized for disclosing too much (in order to create a show and put pressure on the courts) or too little. Information regarding disciplinary proceedings is usually not given to the public until a disciplinary sanction is applied.

- Information regarding judicial proceedings may be exempted from free access only if its release would breach the right to a fair trial or the legitimate interest of one of the parties. Again, the practice of courts is uneven: some give full access to the judicial file; others allow the media and public to be present only during the court sessions to hear what is being discussed. This maximal interpretation of the FOIA generated various media scandals—with phone-tapping recordings and other evidence from criminal files being leaked online or to various newspapers.

The exemption most difficult to implement relates to information involving the protection of youth; a similarly worded provision appears in the constitution. To date, no consistent practice exists regarding the scope of this exemption. This exemption, as well as all the other exemptions, were debated by NGOs and public sector representatives; the list that is included in the law reflects the consensus achieved between all parties.

Also important is the fact that the applicant requesting information does not have an obligation to prove s/he has a specific personal interest in accessing the respective information. In practice, especially in the first years after the adoption of the law, state entities tried to use this argument to justify the restriction of public ATI, but the courts have consistently ruled in favor of applicants.

All persons—natural or legal, Romanian or foreign—are entitled to ask for and receive public information. This provision is very important as it opens public records not only to Romanian nationals, but also to foreign citizens and even persons who do not have citizenship, as long as they can provide a contact address where the response should be sent.

3.3. PROCEDURES FOR ACCESS

Information requests may be submitted in writing or orally, but the majority of requests are submitted in writing (both electronically and on paper). The public information officer performs a *prima facie* evaluation of the request and decides if the information requested is public or if it falls within one of the exceptions. Officers also check if their respective institution holds the information; if not, the public information officer forwards the request to the appropriate entity and informs the applicant about this.

The law has established very strict deadlines¹⁸ for answering information requests:

- Five days from the submission of the request—if access is denied. The refusal must always be explained in writing.
- Ten days from the submission of the request—if access is granted.
- Thirty days from the submission of the request—if access is granted, but the compilation of the answer is complex and time consuming. In this case, the information officer must notify the applicant about the need for extra time within 10 days of the filing of the request.

The media benefit from shorter deadlines: information requested verbally should be immediately or within 24 hours at most. Public entities also have an obligation to hold regular press conferences and allow journalists to actively participate in these events.

If, in responding to public requests for information, the institution incurs costs for copying official documents, the law allows for these costs to be supported by the applicant. This provision was intensely debated and caused problems during the law's implementation because



some NGOs claimed it could be used in bad faith by institutions to practically obstruct citizen access to important information by setting high prices for the copies (although this has not been reported as having occurred in practice).

Citizens requests should be compliant with the format provided for in the law's annex.

3.4. IMPLEMENTING RULES/REGULATIONS

Implementation norms were adopted by the government in 2002 detailing the provisions of Law 544/2001 and making them more user-friendly for public agencies. The main concern of NGOs during the drafting process was to keep the risk of limiting the provisions of the primary legislation through secondary legislation under control. In the end, the norms did not affect the initial text of the law.

The methodological norms include templates and forms to be used by applicants for easy access to information: information requests, administrative complaints, answers to the information requests, answers to the administrative complaints, and the registry for information requests. Very few public institutions have such preprinted documents; in most cases, the applicant must find the information and prepare the request according to the standards imposed.

4. Promotion, Capacity, and Monitoring

Immediately after the adoption of the FOIA, the MPI undertook the task of monitoring the implementation of the law throughout Romania, and mobilized resources for capacity building of this new institutional function. The first goal of the ministry was to ensure that information officers were appointed in various public entities and to build a network among them. Even before the FOIA was adopted, information bureaus were set up at the local level and the professionals that staffed them had organized themselves into a countrywide association initially supported by grants from the United States Agency for International Development (USAID).¹⁹ But these had not been systematic efforts and therefore the MPI tried to coordinate between them and commit more substantial resources to the task.

In retrospect, it can be said that a truly powerful FOIA coordination agency—one that could entrust higher visibility and political salience to the task—failed to materialize in Romania. While the MPI existed, it organized a few rounds of training for civil servants, but there have been no such systematic initiatives since its closure in 2003. Its successors were increasingly marginal institutions—first an agency and—since 2009—a small department in the government's Secretariat General. By virtue of law, they continued to collect primary data about FOIA implementation based on the standard fiches filled in by every institution. These data were used for compiling very brief and descriptive annual reports.²⁰

There is, however, little control by this department over the consistency of how the activity is quantified, as a series of interviews with sectoral and local practitioners made clear:²¹ depending on the sector and nature of activity in every institution, there may be ATI solicitations from citizens that are purely utilitarian or, on the other hand, that do not fulfill all the formal FOIA requirements (for example, urgent requests from journalists). As previously discussed, other institutions with a plausible role in this activity (such as the ombudsman) refrained from taking any action to consolidate various ATI requests from citizens or from giving any guidance to public entities about how they should address these issues.

4.1. BUDGET

The tasks related to the FOIA in each institution have no dedicated budget; the designated officers are civil servants with various other duties in the hierarchy who merely dispatch ATI requests to the relevant departments. In most of the local institutions analyzed and in the two sectoral ministries where extensive discussions were held (transportation and education), the task of processing the FOIA requests is assigned to a press and public relations office, which registers the requests and monitors their circuit inside the bureaucracy. There is no explicit budget for this activity.

While in principle program-project budgeting was introduced in Romania a few years ago, this element of modern public management has largely remained on paper. Without a proper system of program budgeting, it is difficult to quantify how much the FOIA implementation costs. Simply adding up the salaries of the designated FOIA officers would be inaccurate because very few of them exclusively perform FOIA-related activities in their institutions, and underestimate of the total administrative costs, because most of the time data are collected and responses compiled in the regular, line units, such as the accounting or legal departments.

Big public bodies such as ministries, agencies, or the parliament—where the “institutional distance” between the accounting department and the small unit in charge of the FOIA implementation is large—find it too cumbersome to collect per-service fees from applicants to cover their material costs for FOIA processing, though the law does allow it. Smaller territorial branches or local governments may find collecting money easier, but might choose not to because it may be unpopular with the public or perceived as abusive and challenged by activists.²²

4.2. RECORDS MANAGEMENT

There is a certain inherited discipline in public administration that guarantees the integrity of the archiving process and the flow of papers in general. In the FOIA cycle, as confirmed by most central officials interviewed, the difficulties faced in the early years of the law's implementation have been overcome, at least as far as the basic provisions are concerned.²³

The handling of data and documents by institutions could be streamlined. Annex 1, which deals with the Ministry of Education, explains some of these difficulties that are also encountered by other public institutions having to respond to thousands of requests asking for data about personal situations, employment records, or old regulations no longer in force. For example, the repeated changes in the national pension system after 2000 created a huge demand for information that people had to obtain from one institution and provide in person to another. Most of this information had to be manually retrieved from physical archives because the introduction of an integrated IT management system was incomplete.

4.3. INFORMATION TECHNOLOGY (IT)

Because, with a few notable exceptions,²⁴ there is no systematic electronic record management system within public institutions, IT intervenes in the FOIA cycle in only two ways:

- The creation of basic Web pages—or sections on the page of the institution—to disclose the *ex officio* information specified by law. In general, there is no interactivity on these pages and very little processing of the info to make it more user-friendly for the visitor.



For example, staff charts or budgets are scanned and attached as graphic files with poor resolution and budgets cannot be converted into spreadsheets for analysis.

- It is possible for the public to send official FOIA requests by e-mail. This channel of communication, has become more important in recent years for both receiving requests and sending answers: the Ministry of Education reportedly receives up to 20 percent of its requests by electronic channels (see case 1 in annex 1), which is above the national average discussed in latter sections.

But IT that is used for communication cannot solve the problem of a lack of integrated data management within the concerned institutions. Since most of the requests concern individual cases, there is a lot of effort invested in manually shuffling the physical archives of ministries that have not yet been transferred to e-platforms. Even in the case of legislative repertoires where e-databases were created (on the parliament's Web site or by commercial companies), the staff's tendency is to recover old pieces of legislation from the ministries' physical archives, largely because the object of the FOIA requests is the secondary or tertiary legislation that sometimes does not exist in free-of-charge e-repertoires.

Old employment files or past pension contributions were also not incorporated in e-databases. A lack of integrated management of information makes it difficult even for current news to be recovered and quoted in the official responses to FOIA requests, though they may exist somewhere. For example, sometimes the FOIA units do not have the resources to identify the information that is already posted as an announcement by a different branch of the ministry—not to mention the case of cross-sectoral issues—so time is spent documenting and writing a response even though a link to the announcement would have been sufficient.²⁵

4.4. STAFFING AND TRAINING

The first obligation created by the FOIA was for all the public bodies covered by it, depending on their size, to open public relations offices or at a minimum to designate civil servants in charge of FOIA compliance within the institution. The process is currently quite formalized and uniform across public bodies: applications are received by the designated service (or person) and registered; they are then forwarded to the relevant department for a draft response. The draft response is checked by the FOIA officer and countersigned alongside the relevant department head's signature. The official response is sent to the solicitor in the form preferred (for example, by paper or e-mail).

In the event of an urgent solicitation from a journalist, the process is much less formal (and more expeditious), which is mostly to their advantage. Another positive step is the clear separation of FOIA requests from petitions to institutions that have their own circuit and legal regime.

Information officers are also responsible for disclosing *ex officio* information, usually on the institutions' Web sites, although they do not have direct control over the content or technical parameters of them. Deficiencies in the Web sites is evidence of a lack of capacity, which, while not directly related to the FOIA, may affect compliance with it.

In general, there has been relatively little formal training for the concerned civil servants after the law was adopted, although the ministry had initially put a training plan in place. Several rounds of information sessions were organized and a handbook for FOIA implementation

was printed and distributed. After the MPI was terminated in 2003, support for the task was reduced even further, especially after its successor agency was also dismantled in 2009. Additional resources were poured into the system by private operators, mainly external donors operating directly or through NGO projects. These activities, either in the form of capacity building or independent monitoring initiatives were, as a rule, more visible than those organized by the central coordinators, but they were far from sufficient to cover the entire administration.

At present, most central and local public institutions have appointed FOIA officers, and they have a reasonable level of awareness of the law's general provisions. The basic contact information and most of the *ex officio* items specified in the law can be found in some form on the institutional Web sites, with the exception of activity reports, the practice of which is uneven.

4.5. MONITORING

All entities covered by this law have equal obligations. Apart from designating information officers and information departments, each institution has to publish an annual newsletter strictly related to the FOIA that includes various statistics on the ATI process, such as: (1) the number of submitted requests; (2) the number of requests per topic; (3) the number of requests for which access was granted; (4) the number of requests for which access was denied; (5) the number of requests sent on paper and electronically; (6) the number of requests from natural persons; (7) the number of requests from legal persons; (8) the number of administrative complaints—solved favorably and rejected; (9) the number of complaints to courts—solved favorably, rejected, and pending; (10) the expenditure of the public information department; (11) the price of printing; and (12) the number of visitors to the information center.

Aside from this newsletter, which is a collection of statistics related to the FOIA process, all institutions concerned have a separate obligation to write an activity report “at least annually” (article 5). This important document is, in principle, published in the *Official Gazette of Romania*—the formal channel and archive of the laws, government decisions, and public appointments in the country. This sets a very high threshold in terms of institutional effort and discipline, and most public institutions fail to live up to the standard. Although the law makes it compulsory for public institutions to publish these reports, administrative practices are uneven in this respect, and cases where such reports are not published are numerous. But when explicitly asked to produce these reports, public entities compile and forward them to applicants, which demonstrates that at least they are aware of their obligations. In principle, the FOIA's secondary legislation offers guidelines on how institutional newsletters and reports should be prepared and national-level integrative reports compiled. The FOIA officers are expected to know of these provisions and most are formally aware of them and post the text of the Law 544/2001 on their institutional Web sites. But introducing meaningful activity reports as a regular practice is an uphill struggle in the Romanian public administration in spite of the legal provisions because this depends on more than the goodwill and determination of the FOIA officers. The functioning and reporting for managerial purposes inside the institution must change, with leadership exerted from the top, for the FOIA officer to be able to compile proper activity reports. For example, a pilot study conducted by a think tank in late 2010 has



shown that—even at the topmost level—compliance with this provision of the law is patchy: only 4 out of the 15 Romanian ministries published activity reports in an acceptable form.

The only role the central government played in the process was to annually monitor compliance reports on the law enforcement status. This task was entrusted to the MPI while it existed; after 2003, it was passed to a lesser agency under the government's General Secretariat (the core cabinet chancellery). This body (the Agency for Government Strategies, or ASG) had ambitious goals that it struggled to achieve until it was dismantled in 2009 as part of a bureaucracy-reduction drive and replaced with the lower-order DGS. The attention paid to the issue of monitoring compliance was of minimal consequence.

The statistical data regarding the FOIA process were compiled and regularly published at the national level in the first few years after the passage of the law. But the quality of the information in them was sometimes dubious and made the data hard to interpret. Ministries often mixed up the FOIA requests with other requests they may have received from citizens in their routine activity. Reportedly, the Ministry of Interior included in its reporting all the applications for personal IDs, the traffic fine administrative appeals, and so on, which pushed its rate of requests into tens of thousands per year; other ministries made similar uncoordinated calculations. After accession to the EU, the attention devoted to this topic almost disappeared, along with the fear of governments that they could somehow be penalized by their European partners.

Even information related to the FOIA process is suboptimal. In annex 1, where data from the Ministry of Education are provided, some data do not add up. For instance, the total for the number of requests received does not correspond in all the tables: the number of oral requests in one place is larger than the overall total in the other, the number of e-mailed requests received appears suspiciously high when compared to the total, and so on. The transportation ministry provides aggregate sectoral data that are even more difficult to make sense of and there is little control over how subordinated public companies like the railways interpret and report requests.²⁶ These are relatively independent commercial operators and, in practice, it is difficult for a middle civil servant in the ministry, entrusted with what is perceived as a marginal task, to enforce procedural rules.

One more glaring example of poor records management and the inefficient use of existing IT resources is the procedure for centralizing information on FOIA implementation in the DSG. The standard fiches with data (included in annex 1) received from institutions are in Word format and often faxed. In such cases, extra processing is needed and data sometimes has to be manually retyped onto a spreadsheet in order to generate the national-level report. It is unclear why the coordinating agency does not create a universal Excel template to be sent exclusively by e-mail, a measure that would facilitate data aggregation.²⁷

5. Enforcement and Sanctions

5.1. APPEALS

In Romania, the process for appealing administration decisions has two phases. First, an administrative complaint is filed with the respective agency. If applicants are not satisfied with

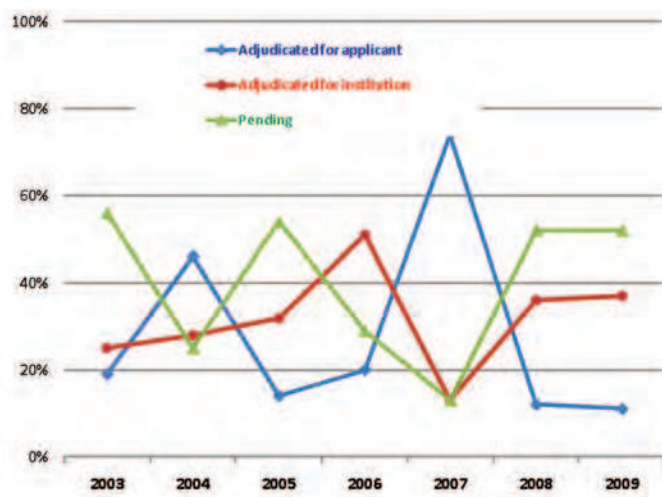
the answers received, they may file an administrative complaint to the head of the public entity that refused access. Each public entity has a commission that hears and decides whether or not these complaints are valid and communicates that answer to the applicant. If this response is unsatisfactory to the applicant, it can be challenged in court. This procedure also covers administrative silence: if no answer is provided within the legal time frame, the applicant may consider this to be a negative response.

The second line of appeals is to the courts, and enforcement of the FOIA relies almost completely on the judicial system and the deterrence created by court-dictated sanctions. When an institution procrastinates, the persons requesting information must go to court to (re)establish their rights. Therefore, over the years, the law has generated a string of cases and court precedents, like a type of *sui-generis* common law system, although the judges' decisions do not come together easily into a unitary practice—that is, judgments are not always uniform.

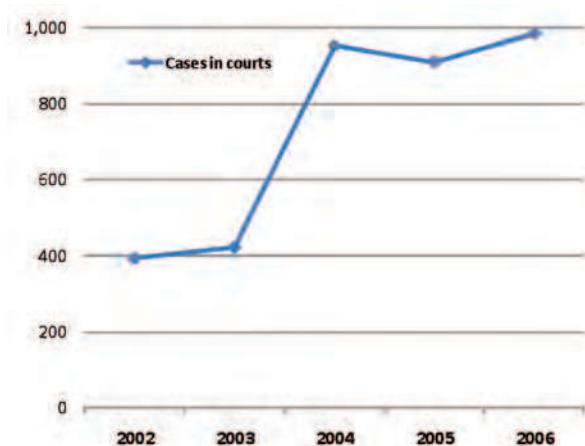
The Romanian FOIA legislation did not entrust the People's Advocate with any specific authority. But given that free access to information is a right guaranteed under the constitution and the general function of this institution is to foster the rights of individuals in their relationship to the public sector and to publicly sanction the deviation of the public sector from the norm, NGOs (such as Transparency International Romania) tried to involve the ombudsman in the implementation of the FOIA. But the People's Advocate did not have the authority to sanction breaches of the law, nor could it force public institutions to behave according to the FOIA. The effectiveness of such an ombudsman—with only an advisory role—depends on local traditions and administrative culture; for example, the effect on heads of public institutions who are singled out for lack of transparency by a body without any power to punish them, the efficiency of the system of checks and balances and the indirect social accountability in a given area, and the frequency of such transgressions. A large variation exists in this respect between countries, even within the EU: the ombudsman's office in Sweden operates much better and is much more visible than the ones in the new member states.

In practice, the courts shaped the interpretation of the law and set the boundaries of the right to free ATI. NGO advocacy programs focused on testing the FOIA were instrumental in bringing strategic litigation to court, allowing judges to pass rulings in this field. Even nontransparent entities were eventually forced by the decisions of the courts to open their doors.²⁸ This method of making the law operational is an entrenched habit in Romania, where pronouncements are taken into account by other institutions only if the entity generating them has clear enforcement powers. This tends to be the rule in post-Communist countries, and probably explains why noncompulsory guidance issued by bodies—such as the ombudsman or the information commissioner—tends to be disregarded.

Crucial for the enforcement process—but also for deterrence—is the fact that once a judge has decided against a public institution, the information must be disclosed immediately. If it is not, the judge may impose financial penalties that apply to heads of institution individually or to both the head and the FOIA officer as a fraction of their salaries. The fines accrue daily until the decision of the court is enforced (that is, until the information requested satisfactorily reaches the applicant). The data on administrative complaints and court cases are shown on the following page.

**FIGURE 1.** Administrative Complaints

Source: DGS, Last published annual report (2010) compiled by the DGS.

FIGURE 2. Cases in Courts

Source: Last published annual report (2010) compiled by the DGS.

TABLE 1. Structure of Administrative Complaints

Percentage of Administrative Complaints	2003 (%)	2004 (%)	2005 (%)	2006 (%)	2007 (%)	2008 (%)	2009 (%)
In favor of plaintiff	69	92	55	52	79	45	59.88
Rejected	16	5	33	35	17	39	22.65
Ongoing	15	3	11	13	4	16	17.47

Source: Last published annual report (2010) compiled by the DGS.

TABLE 2. Structure of Court Complaints

Percentage of Complaints in Courts	2003 (%)	2004 (%)	2005 (%)	2006 (%)	2007 (%)	2008 (%)	2009 (%)
In favor of plaintiff	19	46	14	20	74	12	11.00
Rejected	25	28	32	51	13	36	37
Ongoing	56	25	54	29	135	52	52

Source: Last published annual report (2010) compiled by the DGS.

As the data above show, in the first years after the adoption of the FOIA, there were not many court complaints: up to 400 in 2003, they reached a plateau of about 1,000 for the interval 2006–09. This increase was mostly due to an accumulation effect. It takes over a year for a full action before a court to be finalized; therefore, a case is also counted in the following year. The other explanation for the immediate increase since 2003 is the strategic litigation initiated by NGOs as a result of unsatisfactory responses received from public entities. Their actions in the courts—highly visible and covered by the media—may have had an effect both on the administration, by making it treat such requests more diligently, and on the general public, by encouraging them to pick up the law and use it. After an initial increase, the number of complaints stabilized in the subsequent years. The practice of the courts also fluctuated—as can be seen in the charts in figure 2.

The high percentage of solutions to administrative complaints in favor of the plaintiff, especially in the first years after the adoption of the law, is probably a reflection of a learning process: civil servants who were directly responsible took time to understand how the law worked, and the FOIA process took some time to be institutionalized. It is encouraging that the heads of institutions, to which the administrative complaints were submitted, have more often than not stood with the plaintiffs (69 percent in 2003; 92 percent in 2004; 79 percent in 2007; and in more than 50 percent of cases in all years), which demonstrates that there was not much procrastination regarding enforcement—at least in statistical terms.

6. Compliance

6.1. PROACTIVE DISCLOSURE

All entities covered by the law must publish proactively (without a prior request) the following information:

- the laws and regulations governing the respective entity;
- the organizational structure, the competences of each department, the opening hours, and the schedule for holding audiences;
- the names of the persons leading the respective entity and the name of the public information officer;
- the contact details of the entity: headquarters, phone number, fax, e-mail, Web site;
- financial sources, the budget, and the executed budget;



- programs and strategies;
- a list of documents that are of public interest;
- a list containing all documents generated or administered by the respective entity; and
- an outline of the appeals procedure if a person is unhappy with the public entity's answer.

People may access this information either by going to the public entity's headquarters or by consulting its Web site. Information regarding private²⁹ and public procurement contracts³⁰ should also be provided to the public at the entity's headquarters. Many public institutions did start to post more information ex-officio on their Web sites after the FOIA was adopted. There was a general understanding that the leadership should be identified, contact data should exist, the institution's budget should be made available (although the format of the budgets continued to be a problem), and a link to an *FOIA officer*, with an explanation provided about the procedures for requesting information that is not available online. This was generally the situation with "core government" institutions; 10 years after the law was passed, public school, university, and hospital management remained unaware that they had similar obligations under the FOIA.

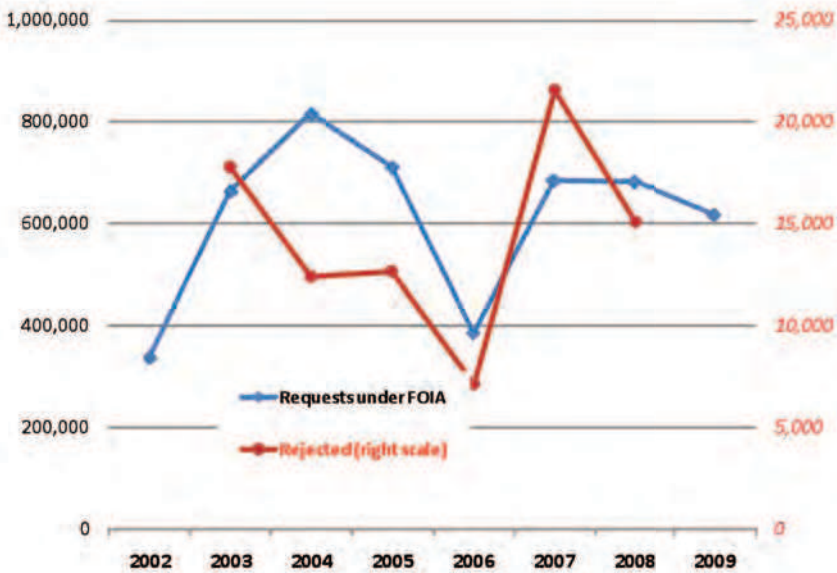
The quality and completeness of information posted online is still weak. A top-level decision was made to reduce compliance costs across the entire public administration with the posting of more relevant information online in the correct format, reducing the need for active requests; however, there are few signs of this occurring in practice. On average, 50 percent of central institutions used their Web sites to publicize information covered by Law 544 in 2008; at the local level, the figure was about 25 percent.

6.2. REQUESTS AND RESPONSIVENESS

The most encouraging development was the appearance of several active stakeholders in civil society who picked up the law and used it: citizens with individual requests; journalists conducting investigations; NGOs conducting systematic monitoring that reinforced the rules within institutions and witnessed the emergence of a critical mass of court decisions predominantly leaning toward disclosure—at least in high-profile, flagship cases. The issue was also signaled in cross-country quality of governance ratings; as a result, scores on voice and media freedom have improved.³¹ Applicants also quickly learned how to use the procedures, resulting in a decline in the number of rejected requests.

The total volume of requests was relatively high (see table 3 and figure 3) and the rate of response good, according to reports compiled by the central government unit (ASG until 2009; then DGS).³² Most of the solicitations (70–80 percent in the interval analyzed) came from individuals; all others came from legal persons (see table 5). Solicitations were usually turned down because (1) the information requested did not exist in the institution (in which case the applicant may or may not have been properly redirected); or (2) the information requested was exempted from publication under the law. None of the key persons from central institutions interviewed was able to explain why the percentage of refusals went up so dramatically—from 1–3 percent before 2006 to 39 percent in 2008 (see table 3).

The instruments used by applicants for information (according to 2008 data, table 4) are (1) verbal requests (55 percent), (2) written requests (33 percent), and (3) e-mail requests (12 percent). Here too a trend is discernible: verbal requests are declining in number; e-mails are increasing. The latter were prevalent in the first few years as citizens and companies tended

FIGURE 3. Total Number of Requests Received under the FOIA

Source: DGS.

TABLE 3. Total Number of Requests Received under the FOIA

Requests to Ministries and Subordinated Entities	2003	2004	2005	2006	2007	2008	2009
Total	662,447	815,528	710,060	384,642	684,472	681,696	615,783
Positive answers	97%	98.47%	96.20%	89%	79%	45%	n.a
Rejected	3%	1.52%	2%	2%	17.00%	39.00%	n.a
Forwarded to other institutions	0	0.01%	1.80%	9%	4%	19%	n.a

Source: DGS.

n.a. = Not applicable.

TABLE 4. Total Number of Requests Received under the FOIA, by Channel

Requests Sent	2003 (%)	2004 (%)	2005 (%)	2006 (%)	2007 (%)	2008 (%)	2009 (%)
In writing	21	23.41	35.40	26	32	39	38.70
Verbally	73	71.76	57.50	65	57	54.00	86
By e-mail	6	4.82	7.10	9	10	11.00	9.00

Source: DGS.



TABLE 5. Total Number of Requests Received under the FOIA, by Type of Applicant

Applicant	2003 (%)	2004 (%)	2005 (%)	2006 (%)	2007 (%)	2008 (%)	2009 (%)
Individuals	80	69.99	70.40	65	68	71	71
Legal persons	20	30.01	29.40	35	32	29	29

Source: DGS.

to employ Law 544 for getting any kind of utilitarian information they needed in their dealings with public authorities. The administration was also likely to report all routine interactions with citizens as requests under Law 544, probably as an old reflex to show a high volume of activity in the periodical reports.

The central administration and its subordinated institutions handle between 66–75 per cent of all requests. The deconcentrated, territorial offices of ministries and national public companies are also categorized as central bodies, which explains their high number: it is very likely citizens go to these institutions to solve their individual problems (such a various types of approvals, public services, and so on) and make appeals under Law 544 only in hopes of speeding up the process.

Even in recent years, the public information most frequently demanded had to do with normative acts and regulations, including local ones (approximately 40 percent or more). This reflects the practical limitations (high monetary and information costs) ordinary citizens and companies face when using legal databases online as well as the poor selection of such information posted *ex officio* on the Web sites of the relevant institutions. Information about budget allocations and the use of public funds comes next at 25–30 percent, which, from an accountability standpoint, is encouraging. This category is on the rise overall, but it is also the one in which most administrative rejections have occurred, usually when requests somehow involved personal financial data.

The mass media has attempted to get access to interesting bits of information from various public institutions (such as budgets, projects, tenders, and conflicts of interests). Some journalists have learned how to use the law, and with the occasional assistance from leading NGOs and media associations, have taken the time and trouble to go to court to establish precedents. Public advocacy programs have been carried out by NGOs and think tanks, sometimes with donor support, explicitly aimed at creating a string of strategic precedents, increased awareness of the law's provisions, and—by implication—a deterrence effect against noncompliance.

The need for this kind of intermediary role arose from the fact that the Romanian public had little experience in requesting access to data that were not immediately useful in individual transactions and little expertise in analyzing the more structured type of information that public agencies produce under the FOIA (activity reports, budgets, expenditure reports, and so on). Equally important was the need to monitor the responsiveness and compliance of public agencies to the FOIA in a more systematic way than random requests from citizens could ensure.

Another important function of such an intermediary is to aggregate and streamline citizen requests, thus reducing duplication and the workload of public institutions, including collecting public information released under the FOIA's provisions, processing and presenting it in a

user-friendly format, assisting citizens in submitting requests to public agencies, and monitoring the responsiveness of the latter. They also interacted with and advised public agencies (at their request) on how to release public information.

7. Analysis

The media and civil society embraced the law and, based on its provisions, created practices and monitoring tools. They did this using a broad array of tools and interventions, sometimes using institutional support for consolidating good practices in institutions, but more often taking a confrontational approach by:

- Quantifying compliance and publishing ranking tables that follow standardized, mock requests (case 2 in annex 1). Here, compliance with the law's provisions—especially the existence and quality of *ex ante* documents that must exist in the public domain—was considered not only a measure of institutional openness, but also a proxy for administrative capacity in general (examples given in cases 2 and 3).
- Suing state bodies on the FOIA to test the limits of the law's applicability and creating valuable and visible legal precedents (cases 2 and 3).

The creativity of a few civil society actors in exploiting the possibilities offered by the law has been remarkable. The Center for Independent Journalism ran a series of workshops, training many investigative and political reporters on how to use the FOIA and provided ready-made forms for information requests to eliminate the risk that an appeal would be rejected in court based on a technicality. The Institute for Public Policy (IPP), a think tank, organized systematic programs for many years to build individual track records of voting (both in the national parliament and local councils), and established rankings of the office expenditures of MPs and councilors. Such databases, when published, carry a lot of political weight and generate media coverage, which is crucial for the intended deterrence effect.

The Romanian Academic Society (SAR), a Bucharest-based think tank,³³ ran a series of projects for about 5 years to measure the transparency and quality of *ex officio* public information on public university Web sites. League tables were prepared based on these scores and made public in what became a high-profile exercise in “naming and shaming” based on this transparency criteria. Evidence from a second round of evaluations of the same universities showed marked improvement as a result of this monitoring. The project was modeled after a previous one carried out by the same organization that had effectively used the same instrument—the FOIA—to monitor the political integrity of party candidates in the 2004 national elections.³⁴

The same exercise was performed in several rounds on a sample of about 300 “core” public authorities (ministries, territorial agencies, and local governments), by either testing them on their compliance with the general FOIA provisions or by explicitly requesting more sensitive information, like the full record of public procurement from the previous budget year (see case 1 in annex 1). In all cases, rankings were prepared and published by sector and institution, and these became widely debated in the national and local media, including on talk shows.

Finally, the SAR, the IPP, and several other civic actors appeared before courts with strategic and visible cases about information of public interest not being willingly disclosed by public institutions. They won almost all of them, whether the issue at stake was the breakdown of office expenses by an individual councilor—decision: this is not personal information;



conditions of privatization of a car-making plant with Ford Motors by the State Property Authority—decision: confidentiality clauses requested by the investor and accepted by the state cannot override the law, so the contract and all annexes should be made public; or public relations and service contracts concluded by the state-owned export-promotion Eximbank—decision: these contracts are not covered by the banking secrecy rules because these apply only to clients, not to subcontractors (more details in case 2, annex 1).

The fact that, on average, the central and local public institutions have responded favorably to 95–98 percent of requests received is encouraging and testifies to the strong deterrence effect created by the flagship court cases initiated and popularized by the media and civic activists. In interviews, leaders of journalism associations explicitly mentioned such initiatives triggered good practices in public institutions that have become more forthcoming since these high-profile campaigns. In another widely publicized initiative in 2005 (see note 32), APADOR-CH, a human-rights nonprofit association, sued the General Prosecutor's Office over data on phone tapping by the Romanian Intelligence Service (SRI), the only agency entrusted with phone surveillance in Romania. They sued after they had obtained a mandate from the magistrates asking the SRI to produce the data on the number of surveillance operations and subjects there were in the previous year. By tradition, putting such reports in the public domain would have been unthinkable, as state secret laws automatically covered all such operations. But the courts finally adjudicated in favor of the plaintiffs and forced the SRI to prepare a report summarizing data on the surveillance operations. Tackling head-on one of the most sensitive areas of public policy—state intelligence services and the telephone surveillance system—the activists thus created a landmark precedent that probably influenced not only subsequent court decisions, but also the functioning of the state bureaucracies who learned that there are rules to be complied with even in domains that had seemed closed to public scrutiny.

In principle, the media was supportive of such initiatives. But the situation was complicated by the fact that in a small media market,³⁵ the higher journalistic agenda is often superseded by the narrow interests of the owners, which are often more political than economic. As a result, while praising transparency and anticorruption measures in principle, some media channels hosted public campaigns against the very champions of such moves: civic activists and public officials who were promoters of the reform.

In theory, businesses would be one of the beneficiaries from a more open and accountable administration, but to date, no critical mass has appeared among entrepreneurs in favor of this position. This is probably due to a difficult operating environment that creates a free-riding dilemma: whoever makes the first move will incur the full cost, while the benefits, if any, would accrue to all.

Annex 1

7.1. CASE 1. HOW FOIA-RELATED TASKS ARE PERFORMED IN A LARGE SECTORAL MINISTRY: EDUCATION

Like most large central institutions that have extensive interaction with the public, the Ministry of Education has a Press and Public Relations (PR) Service which is officially in charge of processing the Freedom of Information Act (FOIA) requests received by the headquarters. Similarly, the 41 county-level branches of the ministry (education inspectorates) have smaller communication units—usually consisting of one person—to fulfill the same function. The Press and PR Service in the ministry centralizes the standard fiches from the region and sends the aggregate data to the DGS once a year. The regular petitions to the ministry follow a separate path for processing and reporting and are not mixed up with the FOIA requests.

Although the Ministry of Education is a big structure, the Press and PR Service is a rather small unit made up of three civil servants. Their duties are largely threefold: (1) to monitor the media and organize the ministry's official communications, such as press releases and press conferences; (2) to receive, register, and process FOIA solicitations; and (3) to organize the proactive disclosure of public information, according to the law. This unit does not have its own budget as such, nor is the ministry's annual budget programming process organized to take into account the actual volume of the FOIA activity and budget. The only concrete element of resource programming for the FOIA tasks are the salaries of the three civil servants.

Another issue is that of the administrative fees, which by law public institutions can charge to applicants whose FOIA requests involve a substantial amount of work and use of public resources. In practice, though, this provision is difficult to apply, especially in large institutions like ministries: the Press and PR unit has no procedure for charging and collecting money from applicants and the ministry's accounting department is in a different location and too over-worked to find time to create procedures for collecting what they perceive as trivial sums.

The final result is that, because the Press and PR unit prefers not to charge for the copies or other expenses, and in order to avoid cumbersome procedures that might end up being more annoying for the applicant in terms of time rather than money, a modest source of extra revenue is lost that could have supplemented the usually tight budget for materials and consumables. Not surprisingly, the territorial branches (inspectorates), being smaller institutions, find it easier to organize the charging of service fees. According to existing data, in 2009, they incurred a net benefit from this activity: they collected about \$10,000 in revenues from charges against costs of about \$7,000. However, these numbers, especially regarding costs, should be regarded with caution.

In terms of content, the vast majority of FOIA requests are somewhat utilitarian in nature (see table 6): teachers inquiring about various pieces of legislation on regulations, mostly related to salary arrangements or promotion exams; students with individual problems or grievances; or retired teachers asked by the pension fund to produce documents from their active period. After 2005, there were a few rounds of pension recalculations done by the

government to rectify some imbalances, but due to the poor organization of the national pensions archives, the process ended with many people having to individually document their salary regime during the various stages of their active life. As a result, the ministry’s FOIA unit was burdened with a lot of archival work, frustratingly done on a case-by-case basis.

Apart from these run-of-the-mill tasks, the units also receive occasional requests for information of authentic public interest from NGOs or investigative journalists, such as those related to the use of public resources, tenders and public contracts, and performance indicators of the education system. Each request is registered at the Press and PR unit and directed to the relevant ministerial department, the majority going to the legal service; others to the economic directorate, the curriculum unit, and so on. The draft responses from the department come back to the unit, are rechecked by the head of the service, and are sent to the solicitor and to the head of the sectoral department who prepare the draft to be signed. According to the head of one FOIA unit who would occasionally meet and have discussions with his counterparts in other ministries and central institutions, there were some problems in the first two or three years after the law was passed with the interpretation of some of its provisions and in the organization of the flow of documents, but that in the last few years, “the practice has stricken roots and became reasonably well institutionalized.”³⁶

Though not explicitly requested by law, in some cases of “sensitive requests”—such as, minister’s actions, important policy changes, or significant contracts and tenders—the head of the Press and PR unit also consults the minister’s advisors before sending the reply to the applicant. Also, according to the head of the unit, solicitations coming from the mass media are given preferential treatment in this ministry and others in the sense that they are processed faster and not delayed until the legal deadline.

In terms of numbers and categories of requests received by this ministry, the last year for which information was officially reported (2009) shows the following numbers (categories follow the format of the standardized fiche provided by the law):

TABLE 6. FOIA Requests and How They Were Solved, Ministry of Education, 2009

		Central Level	County-Level Inspectorates	Total
Requests solved		2,790	7,192	9,982
Requests forwarded to other institutions		103	87	190
Requests rejected:	Information excepted	2	13	15
	Nonexistent information	30	32	62
	No/other reason	5	117	122
Total		2,930	7,441	10,371

Source: Ministry of Education, the Press and FOIA unit.

TABLE 7. FOIA Requests by Subject, Ministry of Education, 2009

Requests Received, by Subject	Central Level	County-Level Inspectorates	Total
Public funds (spending, public contracts)	224	770	994
Ministerial activity	70	956	1,026
Sectoral laws and regulations	1,558	1,784	3,342
Actions of political leaders	35	90	125
Information related to the FOIA procedures	15	54	69
Exams, curricula, transfers, other HR policy	890	2,910	3,800

Source: Ministry of Education, the Press and FOIA unit.

TABLE 8. FOIA Requests by Channel, Ministry of Education, 2009

Request Channels	Central Level	County Level
On paper	2,981	2,366
E-mail	2,600	448
Verbal	1,000	16,000

Source: Ministry of Education, the Press and FOIA unit.

TABLE 9. Appeals Following FOIA Requests and How They Were Solved, Ministry of Education, 2009

		Central Level	County Level
Administrative complaints	In favor of applicant	—	—
	Rejected	2	10
	Pending	1	15
Actions in court	Decided for applicant	2	3
	Decided for institution	1	8
	Pending	5	17

Source: Ministry of Education, the Press and FOIA unit.

7.2. CASE 2. MONITORING OF TRANSPARENCY BY SAMPLING INSTITUTIONS: THE CASE OF PROCUREMENT

In 2009, a sample of 281 public institutions from all sectors and tiers of government was developed by the Romanian Academic Society (SAR), a Bucharest-based think tank, to test them on the actual implementation of the legal provisions on transparency in public procurement.

The requests for data using the standard forms under Law 544/2001 were sent to each of the institutions by fax or/and e-mail, with follow-up requests to those who did not respond on time. The quality and completeness of the answers were quantified as well as the timeliness according to the law, the aim being to monitor the whole procurement process in the respective institution. A public procurement list of contracts above €5,000 was requested for the previous year, which included details such as: (1) the type of procurement procedure, (2) the justification of the type of procurement procedure chosen, (3) the types and quantities of products/services purchased, (4) the suppliers who won the contracts, and (5) the total value of the procurement. The scoring system is explained below and the following table summarizes the results.

- Speed of response (code): (1) within 10 days; (2) within 30 days; (3) after 30 days; (4) none.
- Completeness of response (code): (1) everything requested in the reasonable form (directly, functional Web site), friendly style; (2) reasonable but telegraphic; (3) partial; (4) unsatisfactory.
- Quality of the existing documentation (dispatched, accessible online, and so on), understanding of the procurement process (code): (1) the procurement process compliant with type of procurement versus contract value and with explicit justifications for exceptions; (2) the procurement process seems to be compliant, but justifications are not complete; (3) the procurement process is not justified from the viewpoint of the contract value; or (4) this point has been ignored.

TABLE 10. The Sample of Public Institutions Surveyed

95	Local governments
41	County councils
92	Deconcentrated (county level: police, school inspectorate, and so on)
4	"Direct" central institution (ministry, subordinated agency)
6	"Indirect" central institution (autonomous administration, public company)
18	Courts
10	School, secondary school
15	Hospital

Source: SAR 2009.

TABLE 11. Survey Results for 281 Institutions: Average Scores

	Speed of Response	Completeness of Response	Quality (Documents, Procedures)
Court	3.78	3.50	3.44
County council	3.54	3.05	2.76
Urban town hall	3.05	2.61	2.33
Deconcentrated office	2.71	2.60	2.33
University	2.30	2.90	2.70
Central institution/administration/ company	2.71	2.14	2.14
Rural town hall	1.97	1.81	1.68
Hospital	1.20	1.13	1.20

Source: SAR, 2009.

7.3. CASE 3. STRATEGIC LITIGATION ON LAW 544/2001

To supplement the data collection (case 1), gain a better insight into the practice at the subnational level, and investigate particular cases closer, the monitoring system also included a more intensive component based on the direct request of access to the whole procurement dossier to evaluate its accuracy and completeness. Local investigative journalists with an interest and some experience in public procurement were selected. They were further trained by the SAR and assisted in the submission of applications for access to all procurement dossiers in a list of 29 cases considered “sensitive” (having high visibility, dealing with suspicions of fraud aired in the media, and so on).

The 29 procurement/concession contracts surveyed were:

- AVAS (state privatization agency): selling of an automaker to Ford Motors.
- The National Authority for Mineral Resources (ANRM): offshore oil exploitation, Petrom-OMV.
- Bucharest metro company (Metrorex): contract for advertising spaces.
- Eximbank (state bank): contract for the acquisition of publicity and promotion services.
- Local government of District 1, Bucharest: large garbage collection contract.
- Cluj County Council: concession contracts for shopping mall, Nokia factory, and traffic monitoring cameras.
- Agro University of Cluj: real estate concession.
- Town Hall of Constanța: eight contracts with press and publicity agencies, security firms, and park maintenance companies.

- Braşov County Council: work contracts for offices, social housing, and sports grounds.
- Town Hall of Braşov: road and school rehabilitation contracts.
- Municipal Transport Company, Oradea: purchase of streetcars.
- Oradea University: The construction of the University Library.
- Rural municipality of Sânmartin: sale of forested land.
- Bihor County Council: rehabilitation of roads.
- Town Hall of Iaşi: services contract for towing vehicles.
- Iaşi, two hospitals: contracts for rehabilitation of premises and purchasing medical equipment.

The main results from this evaluation showed a high variability of local practices, from full disclosure to complete opacity. In general, off-budget institutions such as hospitals and schools were surprised to learn they were covered by the FOIA and must, as a result, make all their proceedings public. A similar thing occurred with the state export-promotion bank, which actually pretended that their purchase of PR and legal services was covered by the bank's secrecy laws and with the state privatization agency, which blamed its private partners for pressuring it into including confidentiality clauses in the contract. The court found these clauses groundless so the privatization file was made public.

To build a visible portfolio of best-practice cases, to clarify who has the obligation to provide public information and who doesn't, and to establish the extent to which a public authority may accept the idea of some contractors/associates introducing confidentiality clauses in their contracts, the SAR initiated legal action in the public interest based on Law 544/2001 against the above-mentioned institutions. Based on resources available, six institutions were selected for the strategic importance of the judicial precedent to be created: AVAS, ANRM, Metrorex, Eximbank, the local government of District 1-Bucharest, and the Town Hall of Constanţa. The actions were introduced in 2009, and the think tank won all six cases, including the three for which the institutions appealed the first-order court decision.

These decisions are important because they reinforce the doctrine that even "special" public institutions that are market-based and have commercial revenues, such as the state-owned Eximbank, are subject to Law 544/2001 with regard to their procurement process (but not their banking operations), and that even "strategic" privatizations or offshore oil exploration contracts must meet the requirements of transparency applicable to normal procurement operations. The law has been an effective tool for achieving such results.

Annex 2 List of Persons Interviewed

Vasile Dâncu, ex-Minister of Public Information, one of the law initiators in 2001.

Mona Muscă, ex-MP of the National Liberal Party (PNL), in opposition in 2001, another initiator of the law.

Florian Jurcan, ex-Secretary of State, Ministry of Public Information (MPI) in 2001, then with the Secretariat General of the Government.

Gabriel Bădescu, ex-president of the Agency for Government Strategies (ASG).

Lelia Oanta, head of the Department for Government Strategies (DGS), the body consolidating data on ATI.

Valeriu Guguianu, expert, DGS.

Călin Hințea, adviser to the Prime Minister on the Public Administration Reform.

Horia Georgescu, secretary-general, National Agency for Integrity (ANI).

Monica Macovei, ex-Minister of Justice, currently member of the European Parliament.

Dana Titian, counsellor to the General Prosecutor of Romania dealing with ATI.

Constantin Tomoni, head of the Media/FOIA office of the Ministry of Education.

Septimiu Buzasu, ex-Secretary of State, Ministry of Transportation.

Oana Branzan, head of the Media, PR, and FOIA service of the National Railways Company (SNCFR, under the Ministry of Transportation).

Monica Niculescu, judge, dealing with ATI complaints.

Codru Vrabie, formerly with Transparency International, Romania.

Dan Tapalaga, journalist, Hotnews (online news portal).

Dan Mihai, human rights practising lawyer, APADOR-Helsinki Committee (human rights NGO).

Cristian Ghinea, director, Romanian Center for European Policies (think tank).

A group discussion based on a guideline was also held with the FOIA officers from the following local institutions during a training session on integrity held in April–May 2011: prefecture offices of Brăila county, Buzău county, Suceava county, and Bucharest; Suceava County Council; Buzău County Pension Fund; Brăila County Employment Agency; and Vrancea County Employment Agency.

7.4. OTHER SOURCES

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Mungiu-Pippidi, Alina. "The Story of the Romanian Coalition for a Clean Parliament," *Journal of Democracy* 16 (April 2005): 154–55. <http://www.sar.org.ro/a-quest-for-political-integrity>.
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Notes

8. The first round of European ex-Communist countries (eight) were accepted into the EU in 2004, together with Cyprus and Malta. Romania and Bulgaria were still unprepared at that time and only managed to join, after substantial efforts, at the beginning of 2007.
9. The body of laws and regulations governing the EU.
10. The executive of the Union.
11. Support for EU membership in public opinion polls differed from one country to another, but the general majority was in favor everywhere.
12. Among which were the Helsinki Committee; the Freedom House, Romania; the Romanian Academic Society (SAR); and various journalists associations (see list of interviews in annex 2).
13. Interview with Vasile Dăncu, former Minister of Public Information, Cluj, May 2011.
14. Telephonic interview with Mona Musca, ex-MP from the National Liberal Party (opposition) and the main promoter of the opposition FOIA version in Parliament, May 2011.
15. Interview with Dan Mihai, human rights practicing lawyer, APADOR-Helsinki Committee (NGO), August 2011.
16. www.cdep.ro/pls/proiecte/upl_pck.proiect?idp=2517.
17. Valeriu Guguianu, expert, Department for Government Strategies (DGS).
18. www.cdep.ro/pls/legis/legis_pck.frame.
19. See note 8.
20. Among the promoters of such ideas in subsequent years were the ex-senator Gheorghe Funar (extreme right) as well as ex-senator Ioan Ghise and deputy Silviu Prigoana, both individual mavericks from otherwise centrist parties.
21. Article 2(a) of Law 544/2001.
22. With reasonable exemptions granted for documents pertaining to investigations or pending court cases (see next section).
23. Article 12 provides for the following exceptions: (1) information regarding national defense, safety, and public order, if it is classified information; (2) information regarding the deliberations and that regarding the economic and political interests of Romania if it is classified information; (3) information regarding the commercial or financial activities if its publicity breaches the intellectual property rights or the principle of fair competition; (4) personal data; (5) information regarding criminal or disciplinary investigations if, through its publicity, the investigation is endangered or confidential sources are disclosed, or if the life, personal integrity, or the health of a person related to the investigation is endangered; (6) information regarding judicial proceedings if the right to a fair trial or a legitimate interest of one of the parties is breached; and (7) information that would endanger the measures for the protection of the youth if made public. It is article 12 of the law, as indicated, transposed into shorter language.
24. For example, when a local NGO appealed in court against the secrecy of the file on the Craiova car factory privatization by Ford Motors, the judge's access to the full tender dossier was crucial. Finally, the decision went in favor of the NGO, and the government had to disclose the tender documentation.
25. The implementing norms specify that the deadlines shall be calculated taking into account the number of working—not calendar—days.
26. Telephone interview with Valeriu Guguianu, expert, DGS, Bucharest, August 2011.
27. The last two issues, 2008 and 2009, are two of the sources of hard data included in this report.
28. See annex 2 with the names of interviewed local-level FOIA officers.

29. This was true in some cases: obstructive local governments imposed unreasonable high fees that were subsequently challenged in court, creating a lot of negative publicity for the political leaders of the institution. Interviews with Dan Tapalagă (journalist), Codru Vrabie (activist), and local FOIA officers (see list in annex 2) in Bucharest (August 2011) and Sinaia (April–May 2011).
30. Interviews with Tomoni and Buzasu, from education and transportation, respectively (list in annex 2), Bucharest, August 2011.
31. For example, the budgets in spreadsheet format or some legal databases.
32. This was mentioned in relation with tenure competitions in the school system, for example. Interviews with local FOIA officers (see list in annex 2).
33. Interview with ex-secretary of state Buzasu, note 26.
34. Apparently the reason is that the exact form provided as an annex to the law must be used, which is, of course, in text format.
35. For example, the General Prosecutor's Office was ordered by a court decision in 2005 to provide information to APADOR-CH (the local affiliate of the Helsinki Committee, a human rights watch organization) on the number of phone tapings performed during the previous year with its approval by the Romanian Intelligence Service (SRI).
36. This requirement was introduced in 2007—article 2 (5).
37. This requirement was introduced in 2006—article 111.
38. See for example Freedom House's *Nations in Transit* annual reports, at <http://www.freedomhouse.org/report-types/nations-transit>
39. www.sar.org.ro.
40. www.sar.org.ro.
41. See Alina Mungiu-Pippidi, "The Story of the Romanian Coalition for a Clean Parliament," *Journal of Democracy* 16 (April 2005): 154-55. <http://www.sar.org.ro/a-quest-for-political-integrity>
42. Meaning highly fragmented, politicized, and manipulative especially in the electronic segment, where most media channels are attached to political and business groups that pursue interests other than the profits from media operations as such, with the assumption that peddling influence is more important than profits (interviews with journalists and media analysts, Dan Tapalaga and Ioana Avadani, Bucharest, August 2011).
43. Interview with Constantin Tomoni.



Implementing Right to Information A Case Study of Uganda

Anupama Dokeniya



WORLD BANK GROUP

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Abbreviations and Acronyms

AFIC	Africa Freedom of Information Center
ATI	access to information
ATIA	Access to Information Act
ACODE	Advocates Coalition for Development
ACCU	Anti Corruption Coalition of Uganda
COFI	Coalition on Freedom of information
CSO	civil society organization
DIO	district information officer
DoPT	Department of Personnel and Training
FHRI	Foundation for Human Rights Initiative
HURINET	Human Rights Network
IFAI	Federal Institute for Access to Information
IGG	Inspector General of Government
IO	information officer
KCC	Kampala City Corporation
MDAs	ministries, departments, and agencies
NGO	Non Government Organization
NNF	National NGO Forum
NOCEM	National Organization for Civic Education and Election Monitoring
NRM	National Resistance Movement
OPM	Office of the Prime Minister
PAC	Public Accounts Committee
PRO	public relations officer
PSA	production sharing agreement
RTI	Right to Information
UDN	Uganda Debt Network
UHRC	Uganda Human Rights Commission
UHEDOC	Uganda Human Rights Education and Document Center
UPPA	Uganda Parliamentary Press Association

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Implementing Right to Information

A Case Study of Uganda

1. Introduction

Until 2010, Uganda was one of only four countries in Africa¹ with an access-to-information law, the Access to Information Act (ATIA), which was passed by Parliament in 2005, and formally came into effect in April 2006. Undertaken as part of a series of reforms in the lead up to the 2006 multiparty elections in the country, the passage of the law operationalized Article 41 of the Constitution, which provides citizens with the formal right to information (RTI) from the government.

The establishment of a legal *right* to government information by citizens is a critical principle in the quest for more accountable governments. The high profile examples of India and Mexico and, to some extent, South Africa, have created enormous expectations for RTI laws. Throughout much of Africa, focus on the passage of RTI laws has been one of the key issues of civil society activism. Unlike primarily promotional instruments that focus on promoting proactive disclosure by the government, the establishment of RTI shifts the balance on information control from a presumption of secrecy to a presumption of disclosure; citizens now have a formal, enforceable right enshrined in law to access a range of government information—everything that is not included in the list of exemptions. This is a significant step in the establishment of a key principle of accountable governance and represents a major development in governance systems characterized by archaic secrecy laws.

But, as is clear from the example of Uganda, the establishment of the law is a critical but inadequate step in the direction of instituting accountable governance. Sustained changes in transparency and accountability require concerted actions along several fronts. In Uganda, the theoretical victory clearly did not translate into a practical transformation in the accountability relationship between civil society and the government for the first six years of implementation. The passage of the law provided civil society groups a platform for engagement with government and advocacy efforts for greater accountability. But beyond this, the law did not succeed as a tool to mobilize or operationalize latent demand among citizens for information, nor did it serve as a tool for making government officials responsive to such requests. Very few measures were taken to enable the implementation of the law, and critical stumbling blocks rendered the other measures ineffectual; the most marked among them was the absence of regulations to operationalize the law for several years after its passage. Somewhat proactive civil society groups² did consistently lobby for the operationalization of the law, but awareness about its



existence—even among civil society groups, aside from governance-focused NGOs—remained limited.³ The handful of requests for information that have been filed using the ATIA have failed.

This paper assesses the experience of Uganda during the six-year period after the adoption of the 2005 Access to Information Act. The study is undertaken as part of a series of case studies on the implementation of access-to-information reforms in countries with a diverse set of experiences, range of income levels, and institutional capacity, and relative capacity and influence of civil society.⁴ In the comparative perspective, the experience of Uganda on implementation is lagging that of other countries significantly.

The study is intended to serve three key objectives:

- To contribute to the drawing of comparative insights into the challenges and lessons of implementation.
- To assess the progress of implementation of ATIA, highlighting shortcomings, and proposing steps that could be taken to improve the implementation apparatus for access to information (ATI), drawing especially from the example of other countries and aimed at implementers and policymakers in Uganda.
- To provide a resource for other policy professionals and advocacy groups working in Africa and elsewhere in that the study highlights the fact that gaps in both design and implementation can be significant stumbling blocks to ATI laws. It would be useful for other countries in the region to examine the Uganda example to assess where the constraints to implementation could arise.

The study looked at three key dimensions of the operationalization of the ATIA: (1) whether the key mechanisms for implementation had been set in place; (2) if the law was being used as an instrument for enabling information access by citizens (either through proactive disclosure or responses to requests); and (3) whether the ATIA was enabling a change in the accountability relationships between state actors and civil society—a key objective of the law.

The study found that the answer on all three dimensions was negative. The various indicators used to assess the extent of the operation of the law show that efforts to implement it have been very limited. Some measures have been taken, including the identification of a nodal implementing agency, the preparation by the nodal agency of a fairly detailed implementation plan, and the appointment of dedicated information officers (IOs) in some ministries, departments, and agencies in response to an ATIA-related circular. But implementation has been stalled by an absence of key mechanisms, particularly implementing regulations.

With regard to the second dimension, research revealed only a few instances where the law was cited to request information. These were high profile cases or efforts to test the ATIA by civil society groups through requests; in every instance, they were met with denial or nonresponse, revealing the weaknesses of the implementation regime. While several advances have been made in the overall management and dissemination of information, the use of ATIA has not, to date, resulted in the disclosure of any secret information. With regard to proactive disclosure, many ministries have a range of initiatives to make information available, but they were not in response to the ATIA mandate *per se*.

Regarding the third dimension, the relationship between an ATI law and accountability is more complex. The existence of the law has two advantages. First, the law itself represents an important principle, making it an important part of the institutional development of the country that can be the basis for future transparency. Second, ATI laws can provide an important platform for civil society for engaging the government on accountability issues and keep

these issues in the forefront of the public debate, as has happened in Uganda with numerous workshops and activities of NGOs. But the ATIA has not translated into an instrument for any changes in policy, control of corruption, or improvements in service delivery.

The research also showed that the experience of implementation of ATIA reflected broader trends in the environment for accountability in the country. In the 2010 Transparency International ranking,⁵ Uganda declined to a ranking of 127th, with a score of 2.5, down from 2.6 in 2008. Uganda was also ranked as having the highest implementation gap on laws in the world—over 50 percent by the 2009 Global Integrity Report.⁶

As the other country case studies in this series demonstrate, three major stakeholders have an important bearing on RTI—whether or not laws get passed, implemented, or succeed as instruments to heighten accountability: the political regime, bureaucrats, and civil society groups. The dynamics between these groups is explanatory, to a large extent, of the experience with implementation of the laws. In Uganda, the relatively lower capacity and influence of key institutions of accountability—in particular that of civil society groups—has been the primary reason for the limited progress made on ATIA.

1.1. METHODOLOGY

The discussion is based on a detailed set of interviews, a review of key documents and policy statements procured from various government departments, and secondary sources (such as media and academic articles). The data on the passage of the legislation was secured from stakeholders closely connected to the process. Data on implementation was garnered from interviews conducted with the Directorate of Information and National guidance in the Office of the Prime Minister (OPM), the main agency in charge of implementing the ATIA—from documents made available as well as from interviews and visits to government agencies and civil society groups.

The case study also focuses on two departments—health and education. Looking at the dynamics of information sharing and dissemination through this sectoral lens is important because it is the sectors, ministries, agencies, and departments at various levels in each sector that are ultimately responsible for disseminating information and responding to requests. Information dissemination is critical to both sectors, both as a means of improving the ability of citizens to access their entitlements and to enable civil society groups to hold service providers accountable. The vulnerability of these sectors to corruption—in procurement, in the construction and rehabilitation of health and school facilities, and in the distribution and use of drugs and supplies—also makes transparency imperative (Hallak and Poisson 2007). It is important to clarify that the information gained from the health and education department are not evidence of implementation across all departments. In practice, the extent to which there is transparency (the way in which ATI is operationalized) will have different dynamics depending on the sector.⁷

2. Passage of the Legislation

Uganda predates its African counterparts in the passage of ATI legislation by several years. Civil society groups in several African countries have launched active movements for the adoption of ATI laws in the last decade,⁸ and some countries are now putting such laws in place after long and difficult processes.⁹ In Uganda, the support of the ruling National Resistance



Movement (NRM) party for the law meant that it was passed relatively early and easily in 2005 when only a handful of developing countries had such laws on the books.

The legal foundation for the ATIA was provided by the 1995 Constitution that incorporated a guarantee on ATI to all citizens. This came directly from concerns about the human rights abuses of the preceding decades by the progressive Uganda Constitutional Commission led by Justice Benjamin Odoki. Article 41 of the 1995 Constitution reflects the commission's belief in the importance of the fundamental freedom of expression and the right of every person to information, seeing them as core to the rule of law and democracy: "Every citizen has a right of access to information in the possession of the state or any other organ or agency of the state except where the release of the information is likely to prejudice the security or sovereignty of the state or interfere with the right to privacy of any other person." Article 41 (2) also requires the parliament to make laws regarding procedures for obtaining access to that information, including timelines and complaint mechanisms.

These concerns and principles were also reflected in a series of governance reforms undertaken by the NRM regime, which came into power in 1986. Since the electoral victory in the 2011 elections, the NRM party has been in power for well over two decades, but even so, the political environment in the country has improved in the direction of political pluralism, with multiparty elections, political parties, and oppositional media and civil society voices becoming increasingly vocal. Radio and print media have grown and are relatively vibrant and vocal.¹⁰

The early years of the NRM movement—coming out of a debilitating two decades of human rights abuses, civil war, and crippling poverty—were charged with idealism, international support, and the visions of a new Uganda (Robinson, 2005, 2009). Progress on macro-economic reforms, poverty reduction, and political stability was accompanied by a series of governance reforms and progressive policies on open media through the 1990s. Governance reforms in this period ranged from civil service restructuring, the creation of a series of semi-autonomous public agencies, reforms in public expenditure management, decentralization, innovations in service delivery, and legal and institutional measures to combat corruption (Robinson 2005).

In 2001, the NRM party won the single-party election with 69.33 percent of the vote.¹¹ While the proposal for multiparty elections in 2001 was defeated by a referendum, a challenge to the NRM's dominance of the political scene was already emerging. Various governance reforms were undertaken in the run up to the 2006 elections. At the international level, Uganda, signed and ratified several international and regional conventions on governance, including the United Nations Convention against Corruption and the African Union Convention on Preventing and Combating Corruption. Uganda also signed on to several international and regional treaties and declarations that advance the right to ATI, such as the International Covenant on Civil and Political Rights, the African Charter on Human and Peoples Rights, and the Universal Declaration of Human Rights.

Domestically, a new Inspectorate of Government Act clarified and strengthened the powers of the Inspector General of Government (IGG). In response to public and donor criticism of its poor record in prosecuting corruption cases and inefficiencies in its management structure, the IGG was restructured to strengthen its work and improve its effectiveness in discharging its constitutionally mandated duties (Nkata 2010). Key pieces of legislation were passed to improve accountability and transparency: the Budget Act (2001), the Public Finance and Accountability Act (2003), the Leadership Code (2002), the Inspector General of Government Act (2002), and the Public Finance Act (2005). The 2005 Access to Information Act was part of

this complement of reforms. However, the ambivalence of the regime was evident from the fact that a number of restrictive laws were also passed during this period, including the Anti Terrorism Law (2002), the pretext for which being the wake of the terrorist attack in the United States on September 11, 2001; the Uganda People's Defense Forces Act (2002), and the Police Act (2005).

Between 2002 and 2005, a number of prominent civil society groups—Advocates Coalition for Development (ACODE), Foundation for Human Rights Initiative (FHRI), and the Anti Corruption Coalition of Uganda (ACCU)—were engaged in trying to promote ATI, actively advocating for it as a tool for development and to fight corruption. In 2004, a group of civil society organizations (CSOs) moved toward introducing a private members bill in Parliament through a prominent Member of Parliament (MP), Abdu Kutuntu.¹² However, the government requested the withdrawal of that bill on the promise that it would introduce an ATI bill within a few weeks. The subsequent bill was introduced by the then Minister of Information, debated and passed by the Parliament, and assented to by the President in July 2005, coming into effect on April 20, 2006.

Interviewees attribute the passage of progressive laws, including ATIA, to the imperative faced by the NRM to seem progressive and reformist in the wake of the 2006 elections, especially as perceptions about a decline in the political and governance environment increased and pressures of aid agencies to open up the political space grew. A number of governance assessments of the country, such as the 2005 Good Governance Assessment by USAID, indicated that the government was limiting the space for political participation. The USAID assessment (USAID 2005) pointed out, "The present analysis reaffirms that...although serious issues of inclusion, governance, and fragility persist and have the potential to fuel future conflict, the predominant issues in Uganda relate to competition...Unless there are significant positive developments during the lead-up to the 2006 elections, the analysis outlined in this assessment suggests the desirability of a progressive disengagement from direct support to central government institutions in the DG (democratic governance) sector...and an increased emphasis on support to civil society, the media and the operation of political parties in Parliament."

At the same time, access to international resources, such as the U.S. Millennium Challenge Account, was premised on the idea of improving governance. The introduction of a constitutional amendment to remove the presidential term limits may also have prompted the government's active promotion of the ATI bill, as a way to counter public perception that the changes compromised government accountability; it may also have been a way to build public confidence that the constitutional amendment would not undermine transparency.¹³

3. Legal Environment

Laws are useful because they set in place the rules of the game and can only be effective when they are both comprehensiveness and clear. Although the Access to Information Act set in place a legal foundation, both critical flaws in the design of the legislation and contradictions with other elements of the broader regulatory environment for accountability created contradictory incentives.

Section 3 of the 2005 ATIA declares the purpose of the law as giving effect to Article 41 of the Constitution. The following analysis of the 2005 ATIA against global best practices



is largely based on an analysis of the ATIA undertaken by the U.K.-based global advocacy organization Article XIX.¹⁴ It also draws on the critiques of the law by civil society as well as interviews with civil society groups. The Article XIX analysis notes that, for the most part, the law was progressively drafted when assessed against good standards for right to access legislation. The Ugandan law follows many of the elements of global good practices for ATI laws, but with some significant exceptions. Although civil society groups saw the law as a progressive step, they identified a number of specific gaps, such as limitations in scope and the lack of an independent appeals mechanism. The strengths and weaknesses of key provisions are discussed below.¹⁵

3.1. SCOPE OF COVERAGE

The law applies to all information and records of government ministries, departments, local governments, statutory corporations and bodies, commissions, and other agencies, but not to private bodies, corporate bodies, or civil society organizations, even when their activities affect the rights of citizens.¹⁶

The law does not cover private companies even if they are publicly funded, as service delivery companies are in Uganda, such as electricity, water, and sanitation. As more and more public services are contracted out to private companies, this becomes a very important omission because companies using public funds are not held accountable to the public. An illustration of this omission is the case in Bushenyi district, in which a private company was awarded a contract to construct a stadium but did not deliver on the contract. Public demands for the accountability of the funds, and attempts to obtain the contract certificates and bills of quantity—were not successful, and CSO groups were not able to use the ATIA to request this information. Many private companies use public funds to carry out works but they do not have to disclose any information because the confidentiality clauses protect their contracts.¹⁷ This argument has been raised more visibly and emphatically in the refusal by government and private companies to share and make public details of production sharing agreements (PSAs) on oil in Uganda. However, the members of the 9th Parliament are making a bid to compel the Ministry of Energy to produce these agreements to Parliament for discussion and debate. In an unprecedented bipartisan move, a section of MPs in the 9th Parliament are in the process of seeking signatures from one third of all MPs for a recall of Parliament during recess to discuss PSAs between the government and private oil companies, including Heritage and Tullow Oil. This follows the widely held view by the public that Uganda has an empty deal and stands to lose from existing PSAs based on the example of the ongoing arbitration case in London between the Government of Uganda and Tullow Oil with regard to taxation of oil proceedings in the form of a capital gains tax equivalent of US\$404 million.¹⁸

3.2. SCOPE OF EXCEPTIONS

The ATIA has a fairly narrowly drafted system of exceptions, including a developed set of exceptions to exceptions (Mendel 2008). The exceptions are largely in line with standard freedom-of-information legislation; the law also provides for circumstances under which mandatory disclosure is exempted.¹⁹ Exceptions to disclosure include several categories of information, including minutes of cabinet and cabinet committee meetings, records of court proceedings before the conclusion of a case, proprietary information relating to privacy, commercial information of third parties, protection of safety of persons and property and

other areas, and information whose disclosure could endanger the life or physical property of a person.²⁰

Civil society asserts that the exemption for cabinet records, which are accessible only after a minimum of seven years, is a key weakness of the law because policymaking in Uganda is mainly conducted at the cabinet, ministerial, and sectoral levels.²¹ Civil society groups also emphasize the importance of having clear guidelines, making the scope of exemptions as specific as possible and subject to the strict tests of *public interest* and *harm*.²² Exemptions for national security are standard provisions of most RTI laws, but the definition of what constitutes national security and the protection of privacy can be a vast grey area that is subject to abuse by those meant to provide information. The definition of *national security* has been increasing around the world, expanding to cover environmental and economic issues. The fact that the Ugandan ATIA does not limit the scope of the definition of *national security* to a traditional understanding creates a risk for the abuse of the provision to limit information access.²³

3.3. PROCEDURES FOR ACCESS

Calland and Neuman point out that much emphasis must be given to the procedures for legal challenge (especially when and if the exemptions are used to shield information). Issues such as mandatory publication of certain information, time limits for completion of information requests, administrative duty to assist the requester, costs for requests and copying, sanctions for failure to comply, reporting requirements, and appeals procedures must receive much greater attention. These practicalities will ultimately determine the value and usability of the law for ordinary citizens (Neuman and Calland 2007).

The ATIA has well-established procedures for requesting and accessing information. The chief executive officers of departments are designated information officers. The ATIA provides for notice and timelines within which information should be processed and responses made (within 21 days) as well as fee schedules. But concerns have been raised about the lengthy timelines, the often complex and protracted procedures to access information, and the potential high costs.²⁴ Advocates have called for a reduction in the timeline from 21 to 15 days for standard information, fewer days when information is required by journalists to meet deadlines,²⁵ and a 48-hour turnaround when information concerns the life and liberty of persons as provided under Article 23(4) of the Constitution (FHRI and UPPA 2004).

An analysis of the recently published ATIA regulations²⁶ further highlights other procedural challenges, including the multiplicity of forms (up to 15 different types) that must be used to access information and the requirement to provide a name and physical address, eliminating the option of submitting an anonymous request.²⁷ Failure to use the right form does not automatically preclude access to information,²⁸ but sifting through the various forms and identifying the right one to use for the particular type of information being sought likely adds another step in the process of accessing information, especially given the limited access to the Internet and difficulty obtaining government-printed forms.²⁹

3.4. IMPLEMENTING REGULATIONS

One of the most significant stumbling blocks to the success of the ATIA was the absence of implementing regulations. Section 47 of ATIA provides for detailed rules and procedures for implementation to be laid out. Such implementation regulations are particularly important



in the Ugandan context to operationalize several elements of the law and to provide officials with the guidance needed to implement the law and provide the formal rules for due procedure.

Initially, there were several delays in the regulations being issued by the Minister of Information and National Guidance, according to section 47 of the Act. Subsequently, regulations were sent to the Parliamentary Council in 2008, signed by the Minister of Information and National Guidance, under the Office of the Prime Minister, and presented to the cabinet in February 2009. They were intended to be printed in the official gazette within 60 days and to become operational no later than July 2009.³⁰ However, the draft regulations were not released by the cabinet for a couple of years.³¹ There was no official explanation of why the regulations were not released earlier, but according to civil society groups, it was a result of deliberate stalling by the government. The regulations were finally passed in April 2011, gazetted in May, and published and publicly released in July 2011.³²

The absence of regulations was not a formal barrier to requests for information; citizens could still request information citing the law, despite their absence. However, government officials point out that for public officials and civil servants, the absence of the regulations, combined with the Secrecy Law still being in force, created a lack of clarity about their obligations, the procedures, and the functioning of the law. On the other hand, the absence of regulations could also be used as an excuse not to implement the law in practice, but rather to continue to exercise a large degree of discretion over decision making and the release of information. Now that the regulations have been published in the official gazette, they are accessible to the public, removing any ambiguity about their content and scope.

The regulations have generally been welcomed by stakeholders and the public and should finally pave the way to wide scale implementation of the ATIA. However, some concerns³³ have been raised regarding their effectiveness in enhancing ATI, given the potentially high cost, procedural complexities (including multiplicity of forms and processes), and lack of guidance for implementing agencies, largely leaving the individual information officers with the discretion to interpret the various provisions. A number of areas identified for further explanation in the ATIA are not expounded on in the ATI regulations, which do not give sufficient guidance to public officials and could cause ambiguity in the implementation of the ATIA. For instance, ATIA Section 47(1)(e) provides for the development of “uniform criteria” for information officers to apply when deciding what records to make available; these have not been developed. The regulations provide for a cost per request, currently set at Shs. 20,000 *per request* to cover the actual cost of retrieval and reproduction. While this fee can be waived in specific instances,³⁴ it is prohibitively high. There is also the high potential for multiple charges because the fees are assessed on a per request basis.

3.5. BROADER LEGAL ENVIRONMENT

A major challenge to the ATIA remains the archaic and inconsistent laws that are still on the statute books. Unlike global best practices regarding access to information, the Ugandan law does not provide for it to supersede the Official Secrets Act of 1964. The Official Secrets Act entrenches a culture of secrecy in all matters of public administration, with broadly framed provisions that obstruct the free flow of information from official sources. It is also clogged with severe criminal sanctions for infringement of any of the provisions. In sum, this law is disguised as a law to enhance and protect state security, but really serves to limit access to information.

Under the Oaths Act Cap 19, every civil servant, on assumption of office, must take an oath of secrecy against disclosing information received in the discharge of official duties. The Fourth Schedule of the 1995 Constitution also requires such an oath. Article 9(1) of the Public Service Act (1969)³⁵ and Article 22 (12) of the Education Service Act (2002), criminalize the disclosure of information by public servants (Uganda, 2002a). Even though the ATIA was passed, the existence of these laws on the statute books make it difficult for an information officer who has taken an oath of secrecy to disclose information to the public.³⁶ However, it can also be argued that the biggest impediment is not the in the existence of the laws on the statute books but in the attitudes of the public officials set on secrecy who have yet to acclimatize to the new law that requires openness and the sharing of information.

A key attribute of the ATIA is its protection against legal, administrative, or employment-related sanctions for persons releasing information about wrongdoing, including corruption, dishonesty, and maladministration regarding a public body. The Whistleblowers Protection Act was adopted in 2010, and regulations for its implementation are currently being developed by the Directorate of Ethics and Integrity.

The overall regulatory environment for civil society also prevents it from playing a significant or influential role or serving an effective channel of accountability. The relatively weakened position of CSOs is reflected in a regulatory environment that governs their functioning. NGOs operate under the strict legal scrutiny of the NGO Act 2006 and subsequent 2007 regulations. All NGOs in Uganda must be approved and registered by a government-appointed board composed mostly of government officials, including security officials, before they are allowed to operate. The board has used its powers to delay and deny the legal registration of some NGOs that it deems too controversial.³⁷ The government has deregistered NGOs whose operations it considered excessively political, such as the Uganda Human Rights Education and Document Center (UHEDOC); it significantly delayed registration for the National Organization for Civic Education and Election Monitoring (NOCEM) and the National NGO Forum (NNF). Freedom of assembly has also been restricted; meetings of more than seven people require permission from the Resident District Commissioner.³⁸

Similar restrictions characterize the functioning of the media. Media professionals interviewed pointed to censorship measures and limitations of press freedom undertaken by the government in the recent years. They pointed out that, even as the political system seems to be becoming more pluralistic, especially with the multiparty elections in 2006, this has caused the regime to put more limitations on the media. Several laws and regulations curtailing press freedom and imposing punitive economic measures (increasing taxes on news print) have been adopted.³⁹ Since 1986, at least 40 journalists have been charged with a variety of criminal offences and taken to court; several other court cases are pending. Journalists even claim that private newspapers fear losing much-needed revenue from government advertisements and will engage in self-censorship rather than displease high officials, often giving in to political pressure not to publish information, or to fears of nonrenewal of licenses, closures, or sanctions. All these measures contradict the spirit and letter of the ATIA.

4. Promotion, Capacity, Oversight

Implementation of ATI laws is a challenge in many countries. In the context of implementation in other countries, "Experience has proven that passing the law is the easier task. Successful implementation of an open information regime is often the most challenging



and energy-consuming part for government” (Neuman and Calland 2007). In Uganda, this challenge has been particularly pronounced. Unlike in countries such as India and Mexico, where similar ATI laws became an instrument for civil society demanding transparency and accountability from public officials, in Uganda, the promise of the legal instrument remains largely unfulfilled.

The 2009 Global Integrity report says that, of all the countries covered in the report, Uganda, along with Bosnia and Herzegovina, has the biggest “implementation gap,” that is, the gap between anticorruption laws “on the books” and the actual enforcement of those same laws. The report points out that in Uganda, auditing and monitoring of the declared assets of elected officials has proven itself to be ineffective despite a strong asset disclosure legal regime.⁴⁰

The implementation gaps have also been highlighted in the recently launched IG Report on Corruption in Uganda (October 2010), an outcome of the Data Tracking Mechanism (DTM) that seeks to track trends and the response to corruption based on national sources, including surveys and audit reports. The implementation gap goes beyond the laws and policies to the enforcement of decisions and implementation of recommendations. An example is the follow up on recommendations in audit reports on the recovery of funds or the sanctioning of implicated officials at the national and subnational levels, such as chief administration officers, head teachers, and medical officers.

4.1. LEAD AGENCY

A specialized ATI implementation oversight and coordination unit is useful in providing clarity of responsibilities, sustained attention to the issue, and enhancing the ability to conduct long-term planning, enabling users to interface more easily with the government and preventing officials with less training and resources from being excessively burdened. Such units are typically responsible for assisting and monitoring implementation, raising awareness about the new right to information, and providing a clear focal point for all efforts.

In Uganda, the Directorate of Information and National Guidance, directly reporting to the Office of the Prime Minister, was placed in charge of ATIA implementation. There are differing views about the value of placing an accountability reform such as this within the purview of the top executive. In general, championship by a prominent official with sufficient seniority, respect, and power can be an important impetus for implementation and a signal to other parts of the administration that there is political will behind the law (Neuman and Calland 2007). Direct oversight from the top of the executive can also be positive, signaling championship and support for the program from the top of the administration (as in Jamaica and Nicaragua); this increases the likelihood of political support and acquiescence by the other ministries. On the other hand, when implementation is spread across line function ministries, as is the case in South Africa,⁴¹ there is a possibility that peer ministries will ignore directives and that implementation efforts will wane (Neuman and Calland 2007).

In other countries, however, keeping the responsibilities for implementing the law within a technical ministry or independent agency has actually provided more autonomy. In India, for instance, the responsibility for implementation is vested in the Department of Personnel and Training (DoPT) because it is the agency in charge of human resources with overall responsibility for the civil service. While DoPT’s engagement with the RTI law has been mixed (and it has resisted reforms to strengthen the transparency regime),⁴² DoPT has also taken several implementation measures. In Mexico, the model has been to keep implementation responsibilities

in the autonomous Federal Institute for Access to Information (IFAI). When staffed with progressive commissioners, such a model can be the most effective in accelerating implementation, as evidenced by the number and speed of progressive initiatives implemented by IFAI.⁴³

The positioning of an organization charged with a mandate to improve accountability throughout the government within the Office of the Prime Minister was an opportunity to mainstream ATIA. But in practice, it seems to have hampered the independence of the directorate to push through the reform process, especially because the political leadership has not been focused on promoting the law.

The staff of the directorate seemed very supportive of the implementation of ATIA; they believe it to be an important element in the attempt to create more transparency in the regime. Interviews with members of the directorate revealed fairly progressive views in support of the ATIA. The directorate spearheaded the drafting of the regulations, developed a National Access to Information Program (ATIP) and issued a memo for the appointment of information officers within public bodies. An implementation plan was developed in 2008 to promote awareness of ATIA, to put in place procedures for accessing information, to cultivate a culture of openness, to build the capacity of the public bodies for effective management, to coordinate and disseminate information, and to monitor and coordinate implementation.

This strategy has not been implemented because of a lack of funding. The directorate is severely under-resourced and has relied heavily on civil society and donor interventions to undertake activities in the past. Workshops, trainings, study tours, and publications have largely been facilitated by civil society in collaboration with the directorate. The OPM⁴⁴ indicates that plans are underway to engage ministries, departments, and agencies (MDAs) as well as local governments, using existing resources within the budget and existing platforms while seeking external funding from donors. However, a more consistent approach and funding is required if the unit is to reach out and sufficiently engage stakeholders in promoting the right to ATI.

Civil society groups have also engaged in several promotional initiatives. For instance, the Coalition on Freedom of information (COFI) works with state agencies to promote ATIA through workshops, publications and study tours. Its members—FHRI and Human Rights Network (HURINET)—are represented on the National Committee on the Implementation of the ATIA, coordinated by the Directorate of Information and National Guidance, and run programs of research and advocacy for the promotion of ATI. ACODE has partnered with Green Watch on Training for Judicial Officers in environmental law. The Uganda Debt Network is piloting a project in 11 districts to enhance ATI on budgets, resources, and expenditure at the local level.

4.2. BUDGET

When the ATIA was enacted, no significant resources were allocated for its implementation. The Directorate of Information, working with other stakeholders, including civil society, has designed a program of approximately 4.5 billion shillings⁴⁵ aimed at implementing the ATIA over a five-year period through simplification, translation, dissemination of the ATIA, awareness-raising for the public, and training of public officials, in addition to other activities. But separate resources have not been allocated for this, neither to the directorate nor to individual ministries.

Given the current state of information management in the ministries of education and health, when ATIA becomes operational, enabling responsiveness will require significant funding to streamline information services, overhaul archaic information management systems, restock resource centers, and fund the publication and dissemination of information.



4.3. STAFFING, TRAINING

Section 7 of the ATIA requires every public body to appoint information officers within six months of the law coming into effect. Six months after the ATI law was passed, all public agencies were directed to appoint information officers using the formal rules and procedures for appointment and management of civil service personnel and the institutional structure of public agencies.

In 2009, four years after the implementation of ATIA, fewer than 20 public bodies had appointed information officers or public relations officers (PROs). In most cases, staff members are assigned the role of IO or PRO in addition to their other responsibilities and oftentimes they are not sufficiently empowered within the organization to access and disseminate information.⁴⁶ Currently, the volume and demand for information is low so IOs and PROs are able to juggle their existing work with process requests for information. However, it is likely that with increased advocacy and awareness, the demands will rise sharply.

Clear guidelines on the role and profile of IOs and PROs have not been published. Training in information management and public relations work is also very limited. There is a general lack of capacity among information officers. The capacity constraints at the district level include inadequate or nonexistent human resources, infrastructure, equipment, and logistics; this hampers the flow of information and accessibility to relevant policies and documents. In most public agencies, the lack of capacity also relates to the ability to handle document requests.

The Ministry of Education and Sports has recruited several officers for collection, publication and dissemination of information, but CSOs claim that this has not made any difference to improving access. Furthermore, there was a perception among the officials in the Ministries of Health and Education, who were interviewed that using the law would create more work for staff that was already over stretched.

Local government districts have also appointed information officers. The law says they should be designated as district information officers (DIOs) for ATIA but it is unclear if any of these have been formally designated to handle ATIA.⁴⁷ Capacity building at the district level has also largely been left to the CSOs with little help from the Directorate of Information. More than 70 DIOs have been trained countrywide,⁴⁸ but their orientation is more toward public relations; they need to be oriented toward an ATI regime. While about 20 percent of departments have training manuals, most staff members do not use them or are not aware of their existence.

While senior officials and the people in charge of the resource center emphasized the importance of information and outlined the various measures that had been adopted to facilitate the collection and dissemination of it, they contended that some information should be kept secret from the public. Civil society groups point out that it is the information that is not in disclosed documents that is significant. "Sensitive" information, particularly the kind that would enable the exercise of oversight and accountability is not available.⁴⁹ Civil society groups also point out that at the district level, education officers do not share information with interested parties.⁵⁰

4.4. RECORDS MANAGEMENT

The Department of Records Information Management in the Ministry of Public Service is mandated with overseeing records management countrywide, providing support and advisory services to registries in MDAs and to local governments, developing regulations and procedures for records management, and training the staff of registries in record management.

Interviews with the officials of these various ministries revealed a lack of clarity with regard to the responsibilities of the different institutions and the perception of fragmentation of institutional responsibilities for the management, storage, retrieval, and dissemination of information. The Ministry of Public Service is considered to be in charge of records management and storage, while the Ministry of Information and National Guidance is in charge of retrieval and dissemination.

The state of records management is very weak in the central government ministries and agencies and probably worse at the local governmental level. The capacity of records staff within MDAs and at the local government level is weak. Documents that have historical importance have almost been destroyed because of poor storage. There is no defined strategy for archiving and disseminating information at the local government level. The country's telecoms sector policy review (UCC 2008), sanctioned by the government, concluded, "almost all ministries, departments and local governments lack the infrastructure required to deliver anything apart from rudimentary e-Government services."⁵¹

In individual departments, the capacity to manage and maintain records varies. The Ministry of Health (MoH) is attempting to put a large number of its resources online, but the Ministry of Education's resource center, which houses much of the ministry's information, is poorly resourced and lacks adequate space and efficient management. Fragmentation of information across departments also makes retrieval difficult. Information on funding is in the finance department; statistics on teachers, schools, facilities, and students are in the Department of Education Planning. While these departments are supposed to provide copies to the resource centers for easy access, information is still kept on office shelves, not at resource centers. According to education and health CSOs interviewed, the resource centers contain obsolete information. For example, an information request by the Africa Freedom of Information Center (AFIC) to the Ministry of Education with respect to the teacher transfer policy, student admissions, and enrollment was had not yet been responded to eight months after the information request was made.⁵² Capacity constraints on records management are magnified at the district level, where most of the information on community development is kept.

The World Bank is supporting the construction of a national archive in Kampala with a records storage facility worth approximately US\$10 million.⁵³ In addition to constructing the center, the World Bank will provide institutional support, including developing a records policy, strengthening capacity of staff to manage the archives and operationalizing the archives through the provision of equipment, such as scanners, and furniture. The World Bank is currently providing ongoing support to archive existing documents prior to the center's construction.

4.5. INFORMATION TECHNOLOGY

The deployment of information technology for information management and sharing is relatively limited, although promising applications are emerging for the electronification of information and for information sharing between different departments. The Ministry of Health has introduced a number of initiatives to introduce information technology in the management of information and makes available a large set of data—both through publications and electronically, including information on budget flows and expenditures at the local level. The establishment of the Health Management Information System has increased the level of information sharing among different institutions and organs in the sector.⁵⁴ The education sector has also



undertaken reforms to harmonize information sharing between the Ministry of Education and the districts that, under decentralization, are now key players in the provision of education in Uganda (Ablo and Reinikka 1998; Hubbard 2007). The introduction of the Education Management Information System has been instrumental in harmonizing the available information at the central government, district, and school levels about staff, student enrollment, and facilities.

But several challenges remain, including the need to provide regularly updated information to enhance the utility of generated data, to overcome weaknesses in reporting and acting on information generated, and to enhance credibility and timeliness of data and information generated. For example, in 2010, a senior official in the MoH was arrested and charged with drawing money to prepare progress reports and then providing information drawn from previous reports. A final challenge is the high cost of implementing management information systems based on cost of equipment (software and hardware) and extending them to the local level. As information systems are further developed, a key challenge that will likely emerge is to make this information user-friendly and accessible to citizens.

4.6. MONITORING

Under Section 43 of the ATIA, ministers are required to submit an annual report to Parliament on requests for access to records or information and responsiveness. No public body has come up with a manual or presented an annual report to Parliament in fulfillment of the requirements of the ATIA, and Parliament has not asked for either these documents or information. Most ministries do not keep records of the types of information requests received or their responses to them. No MDA has prepared a report on implementation of the ATIA as required under law. Hence, no submissions have been made to Parliament by the ministry as the responsible entity. In the interview with the director of National Guidance and Information, she indicated that it was not possible for MDAs to present reports because there were no regulations and hence there was no official tracking of information provided to the public. She also noted that while officials did indeed provide information, it has not been possible to track and collate data to provide a report to Parliament because this information was often provided informally. There are some emerging civil society initiatives in this area. For example, HURINET has established an ATI monitoring tool that is a self-generated system with slots showing those allowed or denied ATI.

5. Enforcement and Sanctions

An independent appeals and enforcement mechanism is considered critical for the effective implementation of ATI laws, legal provisions that guarantee “a right to appeal any decision, any failure to provide information, or any other infringement of the right of ATI to an independent authority with the power to make binding and enforceable decisions, preferably an intermediary body such as an Information Commission(er) or specialist Ombudsman in the first instance with a further right of appeal to a court of law” (Carter Center 2000). Although countries vary in the design of their enforcement mechanisms, there is a growing recognition that the optimal system should be independent from political influence, accessible to requesters

without the need for legal representation, affordable, timely, and staffed with specialist commissioners because ATI laws are complex, requiring delicate public interest balancing tests.⁵⁵ There are different models for enforcement in different countries.⁵⁶

Under the model of direct judicial review, which, in addition to Uganda, is used in countries such as South Africa, Bulgaria, and at the federal level of the United States, when a request for information is denied, the requester must appeal directly to the judiciary.⁵⁷ Courts have the power to order the release of information if it has been inappropriately denied, possess wide-ranging powers of investigation, and have clearly established mechanisms for punishing agency noncompliance. But high legal costs, case backlogs, and a lack of specialist knowledge make a direct appeal to courts on administrative matters a difficult proposition, especially in countries where the judiciary has capacity constraints and courts are inaccessible to most citizens. In such instances, the deterrent effect that courts often play is minimized and may actually encourage a perverse incentive among some civil servants to ignore the law or arbitrarily deny requests. There might also be a lack of trust in a judiciary that may not yet have matured into a strong, independent branch of the state.

Independent commissions or appeals tribunals (such as in India and Mexico) usually have the power to issue rulings and binding orders. Appeals to such bodies are more accessible and affordable because there is no need for legal representation and no court costs or other fees, and in the best cases, it is highly independent. This system can allow decision makers to become ATI specialists. With the power to order agencies to act or apply sanctions, this model serves as a deterrent to the government and can alleviate the need for further court appeals. Binding decisions are issued through a written ruling, which in mature jurisdictions creates a body of precedent that can guide future internal agency and commissioner decisions and facilitate settlements. In some instances, information commissions or ombudsmen have more limited faculties for enforcement (such as at the federal level in Canada, Hungary, Sweden, and New Zealand) and can only issue recommendations to the relevant administrative agency or public functionary.

5.1. APPEALS

The Ugandan ATIA provides for appeals against the denial of information—not to an independent appeals tribunal, but to the courts. ATIA provides for aggrieved persons who have been denied information the option of appeal to the Chief Magistrate and subsequently to the High Court. The law also provides courts with the right to inspect public documents and take remedial action. The rules committee of the judiciary is required to make rules of procedure for the court within six months of the commencement of the ATIA. To date, these rules have not been made, because of which the assumption is that the normal court procedures apply.

Civil society groups pointed out that the Ugandan judiciary has several weaknesses. The lengthy judicial process discourages citizens from using the courts as a means of redress. Several critiques and reports have been issued and many see the judiciary as not being independent of political influence.⁵⁸ The funding allocated to the judiciary has been steadily scaled down since 2003, which has forced the courts to scale down their operations up to 60 percent in some respects (IBA 2007). Challenges to governance in the judicial system, lengthy trial processes, poor staff capacity, financial constraints, and current case backlog levels within the courts are all deterrents to the effective enforcement of ATIA.⁵⁹



BOX 1. THE TULLOW OIL CASE

In 2009, senior reporter Angelo Izama and Charles Mwanguhya Mpagi of Uganda's leading independent newspaper, *Monitor*, filed a case to appeal the refusal of Uganda's attorney general to provide them with certified copies of oil exploitation agreements because of alleged confidentiality clauses in the documents, according to news reports.⁶⁰ The journalists argued that the information was of public interest: Ugandans must be able to hold the government and its partners accountable for the exploitation of the oil.

However, Chief Magistrate Deo Ssejjemba said in his ruling that the petitioners had not proved either the benefit of disclosing the information to the public, according to news reports. The journalists, along with their partners the Open Society Institute's East Africa Initiative and HURINET, intend to appeal the ruling.

The implications of this are yet to be tested because the record on requests for information is very limited. The record of judicial appeals on one high profile case—that of Tullow Oil and more broadly on accountability issues—shows that the appeals process to the judiciary is problematic and that the judiciary does not have the specialist technical capacity to address ATIA issues.

According to civil society members, this case demonstrates that the judiciary, especially at the lower level, does not have specialized capacity to interpret the ATIA. When the ruling is appealed in the High Court, it may have a different result because it tends to be more independent and have better technical capacity, but such appeals are unlikely for regular ATIA requests.⁶¹

Views have been divided in Uganda about the feasibility and desirability of an independent agency. The experience of some of the other nonexecutive institutions like the Uganda Electoral Commission, the Parliamentary Accounts Committee (PAC), the Inspectorate of Government UHRC, and the Auditor General, the fairly advanced level of technical expertise, and the independence displayed by these organizations suggests that an independent agency could be a good solution. But some interviewees suggested that a proliferation of independent agencies is not an ideal solution for a capacity-constrained state.⁶² There is a partial ban on establishing new public or oversight bodies due to resource constraints; the other investigative and oversight bodies are also underfunded, lack capacity, and are not fully independent, as demonstrated by several instances of interference of their operations by the executive. Most agencies also lack the power to prosecute; that function rests with the Directorate of Public Prosecutions. But the low rate of prosecutions and the failure to check large-scale corruption by senior political figures has eroded the legitimacy of these institutions (HURIPEC 2011).

One suggestion advanced was that existing institutions such as the Uganda Human Rights Commission or the IGG could integrate this role within their functions. The Inspectorate of Government Act (2002, Act 5) provides the Inspectorate with powers to enforce the Leadership Code of Conduct and "summon any person, who in the opinion of the Inspectorate is able to

give information...and to furnish and produce any documents, papers or things that may be in possession or under the control of that person.⁶³

The law also provides for both sanctions and penalties—both financial and imprisonment for denying access, destroying, altering, concealing, or falsifying information.

5.2. SANCTIONS

The ATIA⁶⁴ provides for sanctions for officials who intentionally denies a citizen with the right of access under the law by destroying, damaging, altering, concealing, or falsifying a record; committing such an offense makes the official liable to a fine not to exceed 240 currency points imprisonment not exceed three years, or both. But to date, no public official has been charged in a court of law for denial of the right to access information.

An interesting twist to this however, could be evidenced with the unfolding events in the 9th Parliament. An unprecedented move has been made by MPs led by the chairperson of the Parliamentary Forum for Oil and Gas⁶⁵ and the Shadow Attorney General⁶⁶ to compel the Attorney General of Government to bring oil PSAs that the government signed with exploration companies to Parliament for scrutiny. At least 163 signatures have been collected from MPs to call for a special session of Parliament, which is currently on recess (under Article 95 (5)) to discuss these agreements. After a protracted and heated debate, the Speaker finally bowed to pressure and has recalled Parliament to discuss the issues raised in the petition on October 10, 2011. Copies of the PSAs have also been provided to the members of the Parliamentary Legal Committee for scrutiny.⁶⁷ While this is not a sanction as envisaged under the ATIA, the scenario is still unfolding, and it is unclear what direction it will take, this action by Parliament could provide another avenue for compelling public officials to provide ATI, especially in sensitive matters like the oil agreements.

6. Compliance

6.1. PROACTIVE DISCLOSURE

The law contains only a limited regime for proactive or routine publication of information. It provides for mandatory publication of some information, including a manual of functions and an index of records of the public body within six months of the coming into force of the ATIA, automatic availability of certain records every two years, and publication of general information about the organization in existing directories. District officers have an obligation to accurately, regularly, and consistently document and make available information on planning, budgets, and expenditures.

Civil society interviewees felt that two years for publication of several records is excessively long, and ongoing disclosures and shorter interval periods for mandatory proactive disclosures are needed. However, even the limited provisions of the ATIA on proactive disclosure have not been implemented in practice. Although government departments are making advances in the management and dissemination of information, as evidenced by the experience of the health and education ministries,⁶⁸ systematic disclosure of the documents mandated by ATIA has not happened. The ministries have not set in place systems or mechanisms to be responsive



to the 2005 ATIA *per se*. In fact, awareness of the ATIA and any measures toward systematically implementing it have been so poor that the information management and dissemination activities within individual departments and ministries have largely been developed quite separately from the ATIA.

6.2. REQUESTS AND RESPONSIVENESS

It is useful to distinguish between two kinds of information. The first is personal, routine information that people demand on a day-to-day basis. Much of this information is routine, nonsensitive, and does not require a legal instrument such as ATIA to make it available. In fact, this kind of information might be more dependent on the capacity of agencies—in terms of information technology, skills, quality of personnel, and an overall culture of serving citizens and being responsive. In such cases, the formal legal instrument could, in theory, provide a tool for civil society groups to hold officials responsible for performance and responsiveness. The second kind of information is more sensitive information—information that could potentially reveal instances of corruption or other forms of the exercise of discretionary authority not in the public interest.

The institutionalization of RTI laws does provide access to the type of information that might otherwise be out of the public sphere. The critical question to ask is not simply if more or less information is available in the public space, but if the information necessary for civil society groups to effectively monitor and oversee public officials is easily available and if the absence of access to this information is proving to be a critical, binding constraint to the accomplishment of development objectives, such as, for example, the transparent and efficient awarding of contracts in the road sector or information about entitlements to services.

The evidence from Uganda shows that the passage of ATIA itself has not stimulated more requests for information. Both in-depth interviews conducted during the research as well as other studies demonstrate that responsiveness to information requests continues to be a challenge. Although it used a very small sample size, a study conducted by HURINET in 2010 showed that of the survey participants who had requested information from a public institution, such as from the police, the local government, or the Ministry of Education,⁶⁹ as many as 70 percent had not received a response.

Some CSO interviewees contended that more than 50 percent of Ugandans requesting information about resource allocations, local government affairs, or cases with security agencies get turned down.⁷⁰ The HURINET study suggests that a majority of the respondents—71.2 percent—got their information within 21 days, which the law requires, but CSOs point out that this is atypical; citizens usually have to face lengthy delays in getting access to information.

With support from the Open Budget Initiative, the Uganda Debt Network (UDN) also carried out a study floating requests. It filed five requests to different ministries: Finance, for aid from different donors and when these were approved—Global Fund and USAID; Health, for information on expenditures on drugs, that is, how much was budgeted for drugs, what percentage of the drugs were imported and when, and whether or not the correct drugs were being received; Water, Environment, and Energy for information on oil subsidies given to private investors; and Mineral Development and Education. The overall conclusions of the study were as follows.

- **Control over information has payoffs associated with it.** Both interviews and the HURINET study suggested that often information officers stalled when releasing information, claiming the need to get “authorization” from a superior—really a ploy for bribes, the paying of which would get the information released. Officials used many ways to delay information requests, refusing information based on procedural reasons, including formal request letters and identification cards; administrative reasons, including Information not in work plan of the government; information still in raw form; restrictions, like confidential or classified information with security implications; and claims that the same information is available in the newspapers so there was no need “to burden us with something already known.”
- **There is a range of information that is considered “sensitive” and not easily disclosed.** Interviewees—both government officials and CSOs—agreed that “sensitive” information is usually not disclosed or its release is delayed pending approval from higher authorities. Interviewees highlighted different kinds of information that usually comes into this category: expenditures; information on the establishment or presidency, the state house, the army or security organizations; recruitment procedures and criteria for appointment to key positions;⁷¹ reports of commissions of inquiry; road contracts; oil contracts, such as Tullow Oil; public accounts committee reports; minutes of the Presidential Appointments Committee, Parliamentary Commission, or the committees of Parliament where proceedings are closed or held in camera as provided for under the Parliamentary Rules of Procedure.⁷² Some expenditures, such as by MPs for the Constituency Development Fund, are not openly published but are available on request.⁷³ On the other hand, many categories of information are easier to access, such as the national strategic plans for HIV action and national health policy information.
- **There is divergence in the ministries in terms of responsiveness and willingness to share information.** Interviewees suggested that the Ministry of Defense and the State House are completely closed off from the public. In the UDN study, requests were sent to different levels of the finance ministry over a five-month period with no response. The Ministry of Energy was the only one that acknowledged receipt of the request. The Ministry of Health was the worst in responding and in the end, access to the requested information was denied. The Ministry of Education provided the information requested; it is seen as having more of an open door policy. Most of the information is available on the websites, except information on contracts.⁷⁴ It is also easier to get national level information than it is to get district- or local-level information.
- **Capacity and awareness constraints can lead to the withholding of information.** Some CSOs pointed out that the withholding of information is not always deliberate, but is instead due to a lack of capacity, efficiency issues, and resource constraints.⁷⁵ Public officials are often unaware of the law, and because they do not understand it and its relationship to their work, they have reservations when it comes to giving out information, with the standard question of what the status of the requester is in demanding this information.⁷⁶ Delays in other governance processes can also be a constraint. Audits are two years behind schedule and they cannot be used because they have not been passed by the cabinet yet. The Auditor General’s Office is understaffed and overworked, and PAC has to discuss audits before it can release the information to the public.⁷⁷



- **Accessibility depends on personal networks.** In the course of the research for this paper, several NGOs were interviewed, most located in Kampala, including several service-delivery NGOs working closely with the government, and fulfilling particular functions of delivering services. Service-delivery NGOs encompass a wide range of areas, including education, health, poverty reduction, and gender equity. NGOs mainly exist as service providers and, to a large extent, are either the government's partner in implementing its programs or fill gaps in service delivery. The nodal coalition of health NGOs—UNHCO—sits on the Health Advisory Committee and has access to policy making. For other smaller NGOs, there are limitations to their ability to access information.

Other NGOs pointed out that information is not easily accessible in the absence of strong personal networks with public officials. Organizations such as the ACCU have floated numerous requests using the ATIA, writing to the Ministry of Education, Energy, and Health using RTI request forms. ACCU contends that the ministries have stonewalled with a lot of back and forth communication but no information. Health Rights Action Group (HAG) tried to ascertain if drugs intended for districts had actually reached them but was not able to find any information on this, although HAG's contention about this was refuted by the Ministry of Health.⁷⁸

- **Even when information is available, it is not always easily accessible.** Dissemination is hampered because the number of copies available is limited, copies of documents are large, and soft copies of documents are not available or they are difficult to upload. They are often too technical and irrelevant to the request, and statistics are often difficult to grasp.⁷⁹
- **Awareness continues to be a problem. Interviewees suggested that awareness about the law is very low.** Most of the CSOs consulted, and even government officials charged with implementing the law, pointed out that the public's awareness of the law was poor. Although the HURINET study is a very small sample, it confirms the relatively low levels of awareness—only a small percent of the respondents knew about the law. Interestingly, respondents also did not know where to seek information, who to approach, or the procedures for getting information.

Although the study did not look in detail at the information-sharing mechanisms at the local level, in an interview, the local chapter of Transparency International recounted that they had requested information from the Kampala City Corporation (KCC) about the state of the road repairs in Kampala. Transparency International was asked to provide evidence that they were citizens of Uganda, had to write twice before getting a response from the relevant person, and the whole process took nine months.

Even when budgets are displayed, communities find it a challenge to interpret figures. The main problem with accessing information is that even when it is given, it is rarely in an accessible form that can be easily understood by the general public, such as contract information.⁸⁰ At both the national and local levels, it is difficult to get disaggregated data on expenditures.⁸¹

Civil society groups pointed out that, at the local level, there is incomplete data on the flow of funds because not all funds expended in the health sector are channeled through the government budget or reported. There are still several challenges to accessing information and local participation in health relating to capacity gaps, the lack of consistency in gathering, documenting, and disseminating vital health information. Regarding health, information on procurement is very difficult to acquire.⁸²

BOX 2. ATIA AND ACCOUNTABILITY

Various other examples from Uganda suggest that enhanced levels of transparency can lead to greater accountability and better outcomes, including the classic case of the Public Expenditure Tracking Surveys, where publication in newspapers of school expenditures led to an increase in the percentage of the funds allocated to schools actually going to them (Reinekke and Svensson 2005).

More recent examples of civil society groups holding officials to account have also emerged. In Katakwi, community monitors acquired information around procurement related contracts in the district and documents about the substandard work on roads and schools as well as breaches of contracts.⁸³ In Mpigi, village health teams demanded that staff at medical centers work their full hours because of the information they had received on mandated working hours. They were also able to begin to register the staff at the health centers and to monitor drug use, allocation, and supplies through access to drugs stock lists.

7. Analysis

While the establishment by law of a formal *right* to information is already a significant principle, the existence of the law has not caused either an increase in transparency or in accountability. The various cases cited by civil society groups show that, unlike in countries such as India and Mexico, CSOs have not even been able to get responses to their ATIA requests, much less use this information to force the government to be held to account.

The implementation of ATIA seems to come from a minimal or partial commitment from the government, a lack of demand from civil society groups, and governmental capacity constraints. Some public officials still pay more allegiance to the secrecy oaths taken upon assumption of office than to ATIA or to the Whistleblower's Act, and fear releasing embarrassing information that could lead to sanctions. Further, an assessment of the gaps can only be made on a case-by-case basis, sometimes determined by whether or not individual officers are willing to give the information or whether or not they have capacity to do so.

The lack of capacity can also explain the gap between the law and its implementation. Getting information is an arduous task that takes time, especially when those charged with it are ill-equipped and poorly trained to handle requests, and when there are no systems in place to process the information.⁸⁴ The passage of RTI laws might have strong incentives associated with them; the adoption of them tends to have high visibility and high profiles. Implementation, however, does not benefit from the same political incentives. While passage of a law can be driven by several factors, implementation is likely to be conditioned by more fundamental factors, especially the capacity of CSOs to meaningfully engage with and influence state institutions. In fact, over the last five years or more, there seems to have been a backward slide with regard to accountability relationships. Limited avenues for continued pressure, limited capacity, and other factors have meant that there has not been a sustained momentum for implementing ATIA.



Role of political commitment. The commitment of the NRM to improving governance in Uganda facilitated the introduction of several reform initiatives. In its initial years, the NRM was responsible for opening up the space for better information flows. Movement politics was about consensus and the need to engage in a participatory process. Technocrats had more powers and were given a great deal of leeway to deal with issues. Robinson points out that the initial successes in key governance reforms eventually translated into a loss of momentum or reversals of gains in the face of the imperative of what he calls “regime maintenance.”⁸⁵

This explanation seems to be applicable to the experience of implementing ATI reforms as well. The incentive for sustaining reform momentum was strong when there were political payoffs (in terms of the regime’s progressive image in the run up to the 2006 elections). In the aftermath of 2006 election, the government became more guarded about ATI. Since the multiparty elections, however, it has created more restrictions, and the impetus for disclosure appears to have weakened.⁸⁶ The move to multiparty elections and the removal of presidential term limits that resulted in a change the constitution have come with the tidal change backwards. NGOs claim that this has to do with regime maintenance and the survival of the NRM in power.⁸⁷ The key lesson from this is that continued political will and political championship is important in maintaining the momentum for reform.

The nature of state–society relations. RTI laws have emerged from different sources—some with state sponsorship, as in Mexico; some as part of larger democratic movement or historical event, as in Eastern Europe and South Africa; and some as part of grassroots movements, as in India—but the experience across countries demonstrates that the momentum for implementation of reform has been most effectively sustained in countries with a strong foundation of civil society groups. The Ugandan case, especially when cast in comparison with RTI regimes in other country contexts, shows that the relative capacity and influence of civil society is a necessary condition to make RTI laws effective accountability instruments.⁸⁸

In countries where civil society played a significant role in advocating for the law and lobbying around the key provisions, the information regimes have worked better; examples include South Africa, Bulgaria, India, Mexico, Peru, and Jamaica.⁸⁹ On the other hand, in countries where civil society was not engaged in the debate, the right to information has atrophied and the laws have not been fully implemented.⁹⁰ In Uganda, the passage of the law was eventually state-sponsored, and civil society groups had relatively little influence on its final passage, even though they did bring a bill to Parliament prior to the state-sponsored law going into effect. The passage of the law derived from other political and international considerations by the regime, as discussed in section 2, rather than being reflective of civil society influence over the policy process.

Although there are very strong advocacy groups that continue to push for the implementation of ATIA and for amendments that would plug some of the most important gaps in the law, for the most part, the government sees these NGOs as strongly antagonistic to the regime rather than as legitimate and important actors in a participatory governance space. HURINET, AFIC, and FHRI are three of the most prominent NGOs working on ATI. Other NGOs, such as ACCU, UDN, and ACODE are very active in the anticorruption and broader accountability space. These groups have coalesced around the ATIA. COFI,⁹¹ which is coordinated and hosted by HURINET is forging links with similar advocacy groups in other countries, keeping an active media presence, and undertaking advocacy and awareness workshops. In some instances, they work in close collaboration with the Department of National Guidance,

organizing joint workshops, but overall, governance and accountability NGOs are only able to exercise limited influence over policy reform.

The capacity of civil society groups is also constrained. Most CSOs, except the larger and more prominent ones, have capacity constraints that hamper their ability to meaningfully participate and understand technical issues and key policies.⁹² Activism on this issue seems to be largely restricted to these more prominent NGOs in the capital. This study did not go to the district level, and was not able to assess levels of awareness about the law at the district level. However, discussions with CSOs based in Kampala, many of whom are also active at the district level, revealed that information problems are even more challenging at this level. Clearly, civil society activism has not translated into the kind of social mobilization that has occurred in India. In India and elsewhere, the widespread popularity of RTI as a tool for empowerment has led to sector-specific NGOs—and NGOs across the countries also working in this area—to actively mobilize citizens. Poor literacy among citizens and a belief that information and power are the state's preserve further exacerbate the problem.

CSOs pointed out that civil society activism and free media are relatively new in the country. Community monitoring is a challenge because people are uncomfortable with holding authority figures or leaders to account. There is the need for a mind shift that will allow for the creation of grassroots pressure to hold leaders accountable. People need to be able to embrace the idea of *rights*, and this is difficult because of Uganda's history.⁹³ Lastly, the capacity investigative journalists, especially at the regional and local levels, is limited.

Politicization of ATIA. Interestingly, championship of the ATIA, both by media and prominent civil society groups that the government considers antagonistic, has led to the politicization of the ATIA, which is seen as a political rather than a developmental tool. Like civil society, the media are highly polarized. Some media outlets are seen as being very close to the regime, while the regime has a very antagonistic relationship with other media outlets. The media has played a role in raising or flagging critical issues around ATI, highlighting cases, popularizing the ATIA, and petitioning Parliament to operationalize the law through the passing of regulations. But ATIA has come to be seen as a media issue, as an instrument that can be misused by the opposition and by a belligerent and antagonistic media. Interviews revealed that the law is seen much less as a service delivery issue, and service delivery NGOs tend to be distanced from the potential of the law as a tool to get critical information that would make service providers accountable.⁹⁴

The bureaucracy has very little independence to push through reforms. The bureaucracy follows the lead of the political class. Unlike other reform measures, ATI reforms were not left in the hands of technocratic or independent officials. The lack of momentum from the top has translated into bureaucratic inertia with regard to the implementation of the law. A lack of capacity and resources among information officers to translate the law into the efficient and timely release of information, especially at the district level, has been another constraint. The absence of regulations has created lack of clarity about the content or details of the law, the process for its operationalization, and the responsibilities of the different agencies under it.

The informal norms in the bureaucracy lean toward secrecy and control over information. Several interviewees pointed out that the bureaucratic culture is one of secrecy and control over information. The bureaucracy is underpinned by a very strong top-down culture⁹⁵ with



a hierarchical decision-making structure. Typically, information requests must be channeled through the permanent secretary. The overall implementation of the law is vested in the chief executive officer of each public body,⁹⁶ who is required to maintain a manual which includes the nature of all informal and formal procedures available to facilitate a request for information.⁹⁷ The standard practice is for technical officers to seek permission before releasing any information, especially “sensitive” information. Chief executive officers, particularly, the permanent secretaries of ministries, should be systematically engaged⁹⁸ to participate in the design and implementation of reforms aimed at improving ATI at the institutional level.

8. Conclusion

The key lesson that can be drawn from the implementation of ATI reforms in Uganda is that successful implementation requires continued momentum and push from the top of the political leadership and the building of capacity. But, it also requires a progressive expansion of space for civil society action, especially for those engaged in the governance area.

There is some debate in the literature about whether or not it is useful to adopt legal instruments like the ATIA if the capacity for full implementation is not present. Uganda, set in a comparative perspective with other countries in the region, demonstrates that when there is a window of opportunity, it is very important to get a law passed. Most other countries in the region have had long struggles in their attempts to get the RTI legislation passed. Liberia and Nigeria have only recently managed to get RTI laws on the books. While not fully implemented, the existence of the ATIA has formed an important locus for an interaction between civil society groups and the government and a platform for advocacy by civil society groups.

The presence of the ATIA means that Uganda is already several steps ahead of its African counterparts in terms of this critical accountability mechanism. However, it will be important to take several measures in order to realize the potential of this legal instrument, and to move toward greater transparency and more openness—key elements for improved service delivery. These would include the repeal of the Secrecy Law; the development of training programs for information officers; the employment of officers with some knowledge of the law or who are trained to handle legal requests; and enhancing district-level capabilities.

The prospects for the implementation of regulations for ATIA or for a major implementation initiative look difficult in the immediate (pre-election) term. But, as part of the broader governance agenda, some potential avenues of support could be considered in the medium term, as follows.

- **Supporting ATIA as Part of Sectoral Social Accountability Initiatives.** Awareness about the ATIA could be usefully integrated into other initiatives and programs on social accountability, undertaken in the sectors or as part of a larger governance initiative. Greater awareness and use of ATIA as a tool to request information could provide an important channel of pressure on the government to become progressively responsive and to undertake implementation measures. It can also serve as a means of strengthening civil society awareness and understanding of their rights and entitlements under the law and to serve as a catalyst for greater participation and involvement by civil society groups.

- ***Institutionalizing the Law.*** Second, it is important to continue to push for the institutionalization of the law: putting the necessary regulations in place and passing amendments to so it would supercede the Official Secrets Act.
- ***Support for the Directorate of Information's Implementation Plan.*** The Directorate of information has prepared an implementation plan with a focus on training. Even though the political will to take on this set of reforms seems to be limited at this time, the Directorate includes some very progressive officials. It is possible—perhaps in conjunction with development partners—to support awareness-raising and training activities to create the capacity and momentum for the implementation of the law. It might be useful to explore how such capacity-building measures could be supported as part of broader governance initiatives.
- ***Working at the Local Government Level.*** There appears to be a fairly significant constraint to information at the local level. The study was not able to go to the local government level, but most stakeholders interviewed pointed to this as an issue. It would be useful to look at the constraints to both information access and accountability at the local government level and to assess the possibilities for strengthening these systems at the local level.
- ***Parliamentary Monitoring of ATIA.*** While, to date, the courts have not been proactive in interpreting the provisions of the law, the 9th Parliament is increasingly looking to the courts as an avenue through which efforts to promote ATI could be realized. It could be a very positive and productive step to integrate efforts to monitor the ATIA by Parliament into this process.

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8.1. LIST OF PEOPLE INTERVIEWED

Ahimbisibwe Fortunate—Information Officer, Ministry of Education

Ariso Lilian—Assistant Commissioner, Ministry of Public Service

Baku Raphael Obudra, Acting Inspector General of Government

Banyenzaki Henry—Member of Parliament

Biraahwa Sylvia—Directorate of Information, Office of the Prime Minister

Galiwango Annie Sybil, Dir. of Education, Kampala City Council

Kagaba Cissy—Executive Director, Anti-corruption Coalition of Uganda

Kaitiritimba Robinah—Coordinator, Uganda National Health Consumers Association

Kakanda Margaret—Budget Monitoring Unit, Ministry of Finance

Kalembe Monica—Directorate of Information, Office of the Prime Minister

Kamukama Mary—Health Rights Action Group (HAG)
Kaweesa Helen—PRO, Parliament
Kiapi Sandra—Exec. Director, Action Group for Health, Human rights and HIV (AGHA)
Kiirya Geoffrey David, Principal Information Scientist, Ministry of ICT
Kitutu Kimono Goretti—Information Specialist, National Environment Management Authority
Kizito Louis, Commissioner, Ministry of Public Service
Kutegeka Sophie—ACODE
Maja de Vibe, Governance Advisor, DFID
Mugenyi Onesmus—Dty. Exec. Director, ACODE
Muhumuza Simon—PRO, City Council
Mukooyo Edward, Asst. Commissioner, Ministry of Health
Mujune Vincent—Operations Manager, Basic Needs
Muwanga John—Auditor General
Mwesigye Frederick—Coordinator, Forum for Education NGOs in Uganda
Nakalumba Sylvia—Director, Ministry of Justice
Naker Dipak—Co-Director, Raising Voices
Nanjobe Martha—Sr. Program Officer, Uganda Debt Network
Nanyonga Annette—Ministry of Education
Nkata Derek—Program Director, Link Community Development
Omare Okurut, Uganda National Commission for UNESCO
Runuumi—Commissioner, Planning, Ministry of Health
Sebagala Geoffrey—Human Rights Network for Journalists
Sendugwa Gilbert—Africa Freedom of information Center
Sewanyana Livingstone—FHRI
Ssekadde Willington—Program Officer, Raising Voices
Ssewakiryanga Richard—Exec. Director, Uganda National NGO Forum
Tumwine Peter—Research Officer, Human Rights Network (HURINET)
Wangudi Moses—Health Rights Action Group (HAG)

Notes

1. The other three are South Africa, Zimbabwe, and Angola.
2. These include HURINET, FHRI, and UDN.
3. As appeared from the interviews with many civil society groups conducted during this research.
4. Case studies include: India, Mexico, Romania, Albania, Moldova, Peru, and the United Kingdom.
5. www.transparency.org. Uganda's neighbors Rwanda and Tanzania fared better in the ranking at 66th and 116th and with scores of 4.0 and 2.7 respectively, while Kenya and Burundi fared worse with rankings of 154th and 170th and scores of 2.1 and 1.8, respectively.
6. Uganda has a relatively strong legal framework ranked at over 90 percent but a poor implementation gap, with over 50 percent of the laws unimplemented.
7. This sectoral variation in implementation dynamics is evident in both the Uganda case study as well as other case studies, including India.
8. Movements have been active in Kenya, Nigeria, Ghana, Zambia, and Tanzania.
9. Liberia and Nigeria are the latest two to adopt such laws.
10. More than 20 newspapers have begun since 1986. The broadcast media has been freed of state control and monopoly, and political commentary is widely tolerated. A number of publications and media outlets are very strident in their criticisms of the government.
11. But challenges to his rule had already begun to arise, with Kizza Besigye, his one-time ally (and private doctor) winning 27.7 percent of the vote.
12. Hon. Abdu Katuntu, Member of Parliament for the opposition, Bugweri County, Busoga Region.
13. Perceptions held by different sections of the public, including civil society groups interviewed.
14. Freedom of Information: A Comparative Legal Survey, by Toby Mendel, 2nd Edition—Revised and Updated, UNESCO Paris 2008.
15. In 2008, a joint team of government and civil society representatives with the support of the Open Society Initiative EA, visited South Africa to study the implementation of the freedom-of-information legislation. A key lesson learned was that in South Africa, stakeholders opted to implement the law as it was for a number of years before seeking reforms. See HURINET (2008).
16. See Babalanda (2009); FHRI and UPPA (2004); Article 19 (1999). See also, Mendel (2008).
17. Interview with AFIC.
18. A tax dispute arose in 2010 following Tullow Oil's announcement that it would purchase 50 percent shares owned by its partner Heritage Oil in two oil exploration blocks in the Albertine Grabene in a deal worth US\$1.5 billion. The GoU claimed US\$404 million in capital gains tax but an impasse was created when Tullow Oil refused to pay. Following negotiations and a hard stand taken by the Government of Uganda, Tullow Oil finally agreed to settle part of the claim amounting to US\$121 million, and placed the balance of US\$283 million in an escrow account in London pending the outcome of arbitration there. Also see <http://www.independent.co.ug/business/business-news/4036-tullow-oil-deal-empty-victory-for-uganda>.
19. Section 34.
20. Other exceptions include information that do or could impair the security of building, structure or system, or means of transport and information that would deprive a person of a right to a fair trial.
21. Views expressed in discussions with various stakeholders. Also see FHRI (2005).
22. Sebagala (2009). Note that the current case of Uganda vs. (former vice president) Prof. Bukenya in the Anti Corruption Court could potentially set a precedent with the Cabinet Minutes and Memos for the CHOGM subcommittee, having to be adduced as evidence in court. Prof. Bukenya is charged with two counts of abuse of office and flouting procurement regulations as chair of the GHOGM subcommittee during the procurement of vehicles (BMW's) for the transportation of officials. For the first time, cabinet proceedings could be brought into the public arena through a court enforced process, once again highlighting the critical role the courts could play in enhancing the right of access to information.

23. Interview.
24. Under the law, the electoral commission is compelled to provide participating parties and candidates with information, including updated registers. However, this is often not done in time, or only provided in part and in soft versions, as was done prior to the 2011 elections when bulky information containing almost 10 million registered voters was given in soft copy with the expectation that the requester would print the material at very high costs. It was also reported in the Global Integrity Report 2008 that access to electoral commission vote registers costs 10 million shillings (US\$5,263).
25. *Opcit* No. 15 at p.15.
26. Larsen, Excell, and Veit (2011).
27. Schedule 2 of the ATI Regulations.
28. ATI Regulations, Section 3(8).
29. *Op cit* WRI at p.2.
30. Interview with the Director and Staff of the Directorate of Information and National Guidance, Ministry of Information, Tuesday June 16th 2009.
31. Interview with OPM Directorate of National Guidance Officials.
32. See article 47 and 48 of the ATI Act 2005, page 60–62; CSOs played an active role in expediting the passing of the regulations, beginning in November 2010, when AFIC requested reports from Parliament under Section 43 of the Act on Ministers reporting. This request revealed the noncompliance of the ministers and elicited a promise to enforce the laws this year. Another request was to the Prime Minister's office in February 21, 2011, to which the Prime Minister responded with a request to the Information Minister to provide the information requested under the law. The response from the Minister of Information on April 15, 2011 was, in effect, that they had not complied; this was accompanied by a promise to pass the regulations. During a public dialogue organized by AFIC on May 2, 2011, to mark World Press Freedom Day, the Director for Information and National Guidance, representing the minister, announced that regulations had been gazetted, but it was not until July that they were officially published and released to the public.
33. See Larsen, Excell, and Veit 2011.
34. ATI Regulations, S.7(3): the access fee can be waived when the request is in public interest or if the information is likely to benefit a large section of the public; however, no guidelines are provided on these exemptions.
35. The Public Service Act declares that "it is an offence for any member or officer of the Commission [government department or organization] and any other person to knowingly publish or disclose the contents of any document, communication or information whatsoever that has come to his notice in the course of his duties in relation to the Commission without the written permission of the Minister," Chapter 277, Article 9.
36. HURINET (2010), p. 20.
37. Civil Society Organizations and Democratic Consolidation in Uganda, Mesharch W. Katusiimeh.
38. Interview with ACODE.
39. Views expressed by journalists in round table discussion on June 18, 2009. There is an ongoing constitutional case filed by the East Africa Media Institute and Andrew Mwenda to declare sedition laws unconstitutional and hence null and void. However, this case has been in the drafting stage in the constitutional court for the last four years; therefore, these sections are likely to remain on the statute books for a while.
40. The report points out that these two countries are also among the largest recipients of international donor assistance, supporting the argument that aid-dependent countries establish laws and institutions to meet donor requirements but do not necessarily implement them. Despite massive amounts of foreign aid, including a significant amount of aid for good governance and anticorruption efforts, there is little evidence to suggest that ordinary citizens are benefiting from the proliferation of legal and regulatory reforms on paper.
41. In South Africa, responsibility for the final passage of the law was transferred to the Ministry of Justice, one of the busiest departments of government and one that has proved singularly ill-equipped to master the challenge of implementation.
42. Cross-reference India case study.
43. See Mexico case study.
44. Interview with Director, National Guidance and Information, September 2011.

45. Approximately US\$1.6 million based on current dollar rates.
46. It should be noted that a difference was evident in the capacities and resources of PROs in line ministries and those in agencies and bodies like the Parliament and NEMA. The latter were specially trained and well-resourced with staff and finances and had sufficient clout and responsibility to make public comments and statements on behalf of their respective organizations.
47. Interview with CSOs.
48. Courtesy of information from the interview with the Chief Executive Officer of HURINET (U), Thursday, June 23, 2011.
49. Interview with NGO Forum.
50. Interview with Raising Voices.
51. Wairagala Wakabi. Access to Information in Uganda: Practice Should Match Policy. CIPESA Research Associate 2011.
52. AFIC.
53. US\$1.1 million to be spent on design review supervision while US\$7.6 million will be spent on construction and operationalizing the Center.
54. Other institutions in the sector to facilitate this process include the Health Policy Advisory Committee, the Uganda AIDS Commission Partnership Committee, the technical working groups, the National Health Assembly, and the Joint Review Missions.
55. Increasingly, the notion of enforcement has been conflated with supervision or oversight. In the latter, an agency or body is tasked with reviewing compliance and ensuring the proper functioning of the law through training of civil servants, preparation of guidance manuals and materials, public information, and annual reporting. Though some countries have fused the responsibilities for enforcement and oversight into one body.
56. This section of the discussion drawn from Neuman (2010).
57. The federal court in the United States, to an administrative court in Bulgaria or to the High Court in South Africa.
58. The International Bar Association (IBA), which investigated the level of respect for the principle of judicial independence in Uganda, concluded that "Evidence suggests that the Uganda Government has gone beyond legitimate criticism of court decisions and has intimidated individual members of the judiciary." See IBA (2007).
59. Interview with CSOs; Danish Ministry of Foreign Affairs DANIDA Access to justice component in Democracy, Justice and Peace Programme Uganda 2006–2010: Component description (October 2005) available at <<http://www.danidadevforum.um.dk/en/menu/Topics/GoogGovernance/Programmes/Country/Programmes/Africa/Uganda/>> (accessed on 11 February 2008) [Hereinafter DANIDA, 2005].
60. The case was originally filed by lawyer and Member of Parliament Abdu Katuntu under Uganda's Access to Information Act, a law he introduced in 2005.
61. That is according to HURINET (U) and their coalition partners.
62. Interview with IGG.
63. Uganda, 2002c, Article 26(1) (a)). Article 23 of the same law empowers the inspectorate to disseminate information on the effects of corruption on society. The law proclaims that information in its possession is privileged. It states: "Subject to any law which enjoys the disclosure of classified information, anything said, information supplied, document, paper or thing produced in the course of inquiry under this Act shall be privileged in the same manner as if the inquiry were a proceeding of court of law, and a report of the Inspectorate shall be privileged in the same manner as if it were a record and judgment of a proceeding in court" (Uganda, 2002c, Article 23).
64. ATIA Section 46.
65. Theodore Sekikubo.
66. Abdu Katuntu.
67. This avenue provides a real possibility for information on PSAs to finally be publicly shared, even with the existence of the court ruling by the chief magistrate in the Tullow Case.
68. For instance, the Ministry of Education and Sports has established the Directorate of Education Planning and Statistics (centers for educational statistics and figures) and public information campaigns that consist of the publication of monthly disbursement figures. It conducts regular audits and commissions reports on the flow of funds from disbursement through the entire system.

69. The kind of information included the local council committee minutes; procedure of district contracts committee; information relating to district hospitals or health centers especially the nonexistence of drugs; oil contracts (Tullow Oil and BIDCO Oil projects, among other oil related inquiries and operations) and their impact on the environment; development funds (accessing funds from the government's poverty alleviation program and from the NUSAF project for the reconstruction of Northern Uganda); crime and police-related information (detention centers, police procedures; crime statistics, treatment of juveniles, and so on).
70. Patrick Tumwine of HURINET.
71. Case of Global Fund recruitment for the PMU.
72. Interviews with journalists.
73. Interview with PRO Parliament.
74. FENU.
75. Interview with FENU.
76. Interview with CSO group.
77. Interview with CSO group.
78. Interview with CSO group.
79. Interview with CSO group.
80. AFIC.
81. UDN.
82. Interview with ACCU.
83. Directorate of Ethics and Integrity 2009.
84. As an example, AFIC requested information on the ATI regulations in November 2010; by end of January, there had been no response to the request. When AFIC inquired about the status of the request, it was informed that ministers were not reporting on the ATIA because there were no regulations, even though regulations are not a prerequisite for reporting.
85. When political priorities change and the politics of regime maintenance prevail over constructive state intervention, the sustainability of successful reforms becomes increasingly problematic. The Ugandan experience highlights the difficulty of sustaining successful reform initiatives over a long period of time when benign intentions can be compromised by other political prerogatives.
86. Interview with CSOs.
87. ACODE.
88. Caveats are the way in which we characterize "capacity" and "influence" of civil society; there are no absolute measures. It is a qualitative discussion.
89. Neuman and Calland (2007). Through the campaign for a legislated right to information, organizations became vested in the law's success, there was more significant buy-in from society, and the laws enjoyed greater credibility and use, although the relative strength of implementation, varies across these countries.
90. Neuman and Calland (2007). The authors point to the example of Belize. Belize passed its Freedom of Information law in 1994, one of the first countries in Latin America and the Caribbean to do so. It was accomplished with little public or parliamentary debate and no civil society involvement. For the past decade, the law has been used only a handful of times and rarely with success. NGO leaders indicated minimal knowledge of the law and little faith in its ability to promote greater transparency.
91. It came into being in 2005. The coalition has since grown from a membership of eight CSOs in 2005 to include media and communitybased organizations across the country.
92. National Health Policy (NHP), Health Sector Strategic Plan (HSSP), Millennium Development Goals (MDGs) and Poverty Eradication Action Plan (PEAP).
93. Interview with CSOs.
94. Interview with CSOs.
95. DENIVA.
96. Section 10.
97. See Section 7(1).
98. This engagement can be through existing forums, such as the monthly meeting of the Permanent Secretaries and the regular meetings of the Uganda Local Government Authorities for Local Government Leaders.



Implementing Right to Information

A Case Study of the United Kingdom



WORLD BANK GROUP

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Abbreviations and Acronyms

ATI	access to information
BBC	British Broadcasting Corporation
CFOI	Campaign for Freedom of Information
CSO	civil society organization
DPA	Data Protection Act 1998
EIR	Environmental Information Regulations 2004
FOIA	Freedom of Information Act 2000
FOISA	Freedom of Information (Scotland) Act 2000
HMSO	Her Majesty's Stationery Office
ICO	Information Commissioner's Office
MOD	Ministry of Defense
MOJ	Ministry of Justice
MP	Member of Parliament
NDPB	nondepartmental public body (official term for Quango, q.v.)
NGO	nongovernmental organization
Quango	quasi-autonomous nongovernment organization



Implementing Right to Information

A Case Study of the United Kingdom

1. Introduction

This case study analyzes the development and implementation of access to information (ATI) in the United Kingdom, enshrined in the Freedom of Information Act 2000 (FOIA). The United Kingdom was sometimes described as a laggard in this field; many of its democratic peers enacted comprehensive access laws decades earlier. This case study argues that, despite an apparent late start, ATI in the United Kingdom is relatively effective and firmly entrenched.

There are several reasons for this. The structure of electoral competition and policymaking in the United Kingdom means that ATI has long been—and is likely to remain—a prominent matter of political debate. Fundamental changes to state and society alike since the 1980s have altered the structure of political accountability and administrative authority in ways that incentivize those in positions of power—at all levels—to support openness. Finally, the United Kingdom has a vibrant civil society and independent press that defend existing gains and lobby for greater transparency.

In addition to these fundamental structural contributors, the FOIA has also proved relatively successful because it is a strong law whose implementation was reasonably well-planned and well-executed. Five years elapsed between the passage of the law and the entry into force of the right of access to official documents. This time was used to provide training, to improve records management, and to proactively publish mechanisms within the public sector. The law's success is also due in no small part to the existence of an information commissioner with extensive powers and an appeals process that functions reasonably well despite some early problems with delays. Implementation is also facilitated by the fact that public authorities in the United Kingdom are sufficiently well-funded so that they can usually bear the cost of compliance, and there is a strong official culture of taking one's duty to the law seriously—even when it might be inconvenient to do so, as is sometimes the case with FOIA requests.

The conclusions of this case study are positive but do not justify complacency. The United Kingdom has become more open over recent decades because several features of British



politics and the administration encourage the framing of disputes over power in terms of disputes over ATI. Despite this debate, and despite the profound social and administrative transformations that have occurred since the 1970s, several features that historically underpinned the United Kingdom's regime of widespread official secrecy remain in place, notably the centrality of the cabinet in the overall political system. ATI is likely to remain contested in the foreseeable future, and future gains are likely to continue to depend on the active, ongoing support of politicians, public servants, and civil society.

1.1. METHODOLOGY

This case study is based on primary and secondary documentary research as well as interviews with senior officials and representatives of the major stakeholders in the ATI policy domain (a full list of interviewees can be found in the appendixes). It focuses on the development and implementation of ATI provided by the FOIA as it applies in England, Ireland, and Wales (but not Scotland, where a separate law applies). The distinction is important, since ATI in the United Kingdom has also been secured under a range of other laws, especially at the local level, where a good deal of basic service provision in the United Kingdom is undertaken. These other laws and initiatives, some of which still exist and continue to apply, are surveyed briefly toward the end of this paper, but are only discussed in detail to the extent that they affect the implementation of the FOIA itself.

2. Passage of ATI Legislation

Narrowly construed, the FOIA was just less than 10 years in the making. Work on drafting the bill began early in the Blair government's first term in 1997. The law was passed in 2000, and entered into force progressively between November 30, 2000, and January 1, 2005 (when the right of access to official documents came into effect).

The historical roots of freedom of information in the United Kingdom are much older than this, however. The Labour Party first promised to introduce ATI legislation more than 25 years earlier, but had not yet followed through on its commitment when it lost office to the Conservatives in 1979. The party's adoption of this commitment came at a time when people at all levels of society in the United Kingdom were recognizing that state control over information was a problem whose solution lay in securing public rights of access. This recognition, in turn, formed part of a much longer history of disputes over state secrecy and political control that can be traced back to the foundation of the modern British state in the late nineteenth century.

This historical context meant that debate over the principles and legal structure of the FOIA was already mature well before its drafting. Since the mid-1970s, politicians, officials, and campaigners produced a string of proposals, white papers, electoral commitments, and even a few bills that made some progress through the parliamentary process. Several limited forms of access had been secured well before 2000, and these significantly affected both the structure of the FOIA and its implementation. These are discussed below (see 3.5. Broader Legal Environment on Transparency).

Civil society organizations (CSOs) and politically connected professional groups were the most consistent advocates of freedom of information during this period. The first demands for access laws arose in the 1960s among professionals on the margins of formal political

organizations: lawyers, journalists, academics, and occasionally backbench members of the two main parties or members of smaller parties. The central concerns of these groups were the threats to individual liberty posed by the growth of the administrative state and the inability of existing political mechanisms to adequately address them. From the early 1970s onward, they were joined by public interest, environmental, and health and safety campaigners interested in harnessing the power of the state to overcome the challenges of collective action in dealing with the spillover effects of large-scale industrial production. The Campaign for Freedom of Information (CFOI), founded in 1984, was an alliance between these two camps; organizationally, it drew heavily on support from environmental and public interest campaigners, but it drew a good deal of intellectual inspiration from politically-connected individuals. The campaign was directed by a small group of highly engaged policy professionals,¹ but benefitted from the support of more than 100 organizations, including churches, trade unions, advocacy groups, and librarian associations, among others.²

Despite a long history of mobilization and support from a wide range of social and political interests, the success of the ATI movement in the United Kingdom depended, above all, on the cabinet's receptiveness to their demands. Mrs. Thatcher was well known for her opposition to the FOIA, and little progress was made during her premiership. One of the earliest signs that the New Labour Party would follow through on its long-standing commitment to introduce ATI legislation came when then-opposition leader Tony Blair personally associated himself with the idea at the CFOI's annual awards ceremony in 1996.³ The introduction of the FOIA also appeared as an explicit commitment in the New Labour Party's 1997 election manifesto.⁴ Work on a bill began soon after the election with the publication of a white paper.⁵ Advocates welcomed the progressive nature of the proposals and the fact that David Clark, the paper's principal architect, appeared to enjoy the close personal support of Lord Irvine, the lord chancellor, and an extremely influential senior member of the early cabinet of the New Labour Party.⁶

Initial optimism, however, quickly gave way to concern, as the balance of power within the cabinet shifted toward the opponents of ATI legislation. The reasons for this shift remain something of a mystery⁷ and have led some to question whether or not Tony Blair was ever as committed to ATI legislation as he had appeared prior to the election. He certainly seemed to have either lost interest in the issue or been subject to countervailing influence by opponents within the cabinet at a relatively early stage of his administration.⁸ This was reflected in the transfer of responsibility for ATI legislation from David Clark to Jack Straw, who was understood to be personally less sympathetic to the cause than Clark, and from the Cabinet Office that had been responsible for open government initiatives since 1992 at the latest, to the home office, which was responsible for the police, security services, immigration, and other areas of government not usually noted for their enthusiasm about freedom of information.⁹ With these changes, the task of securing ATI became the responsibility of ministers and officials who were more inclined to believe that it "brings nothing but pain for governments."¹⁰

The government's consultation bill¹¹ was significantly weaker than the white paper proposals and contained much broader exemptions, less effective enforcement and appeal mechanisms, and more restrictive public-interest test.¹² It is possible that senior government figures would have preferred to abandon the legislation altogether at this point, but their election commitments and the white paper had stirred so much public interest that this would have been too risky.

The bill was altered considerably during its passage through Parliament. It was severely criticized by select committees in both the House of Lords and House of Commons,¹³ resulting



in several features that FOIA advocates found most objectionable being removed or amended by the second reading in early December 1999.¹⁴ Further concessions were made during the committee stage and in the later stages of the third reading on the floor of the House,¹⁵ although some commentators argue that these were superficial concessions that did not affect the basic structure of the legislation.¹⁶ The changes included a halving of the time frame (to 20 working days) within which authorities were required to respond to requests, the adding of a requirement that authorities give reasons for refusals, and the removal of the power of authorities to restrict the way in which information disclosed under the FOIA could be used by requesters.¹⁷ Several of the more significant changes made between the consultation draft and the final legislation are discussed below.

3. Strength of the Legal Environment

The FOIA draft drew inspiration from several sources, including earlier domestic proposals for ATI, existing rights under other laws, such as the Data Protection Act 1998 (DPA) and FOIAs in Australia, Canada, and New Zealand which were introduced in the early 1980s—not long after the New Labour Party first committed itself to ATI legislation. The United Kingdom's FOIA is longer and in some sections more detailed than these other laws but, except for the issues discussed below, similar in its structure and intent.

Those interviewed for this case study identified some features of the law as problematic,¹⁸ particularly the absence of a purpose clause; this was also identified as a potential problem during parliamentary debates when it was argued that a clear statement of the purposes to be served by enshrining in law the principle of access (subject only to specified exemptions) would aid the Information Commissioner in evaluating the discretionary decisions of authorities. But the inclusion of such a clause was rejected by the government on the grounds that it would add unnecessary “confusion” to the law.¹⁹ As a result, the various appellate bodies have occasionally had to rely on parliamentary debates in order to infer the purposes of the FOIA in cases for which the meaning of specific clauses have proved ambiguous and their interpretation difficult.²⁰

3.1. COVERAGE

The coverage of the law was specifically mentioned in interviews as a strong point.²¹ According to legal expert Professor Patrick Birkinshaw, the United Kingdom's FOIA is “the most comprehensive FOI legislation” with which he is familiar.²² It covers more than 100,000 separate public authorities—from the summit of the state in Westminster and Whitehall to local services, including schools, parish councils, and medical practices as well as a wide range of autonomous bodies at all levels. The authorities covered are explicitly identified in Schedule 1, which also specifies that certain bodies are covered only with respect to particular functions. In addition to the authorities listed there, s84 excludes “the Security Service, the Secret Intelligence Service or the Government Communications Headquarters” from the definition of a government department, while s80(2) excludes Scottish political and administrative authorities covered by the Freedom of Information (Scotland) Act 2002 (FOISA). Finally, an absolute exemption²³ in s23 applies to information held by or related to 13 security and

intelligence authorities and their related tribunals and commissions that are, consequently, excluded from the FOIA.

It was not always obvious that the FOIA would be quite as extensive in its coverage as it turned out to be. One of the drivers of demand for an access law, especially in the 1980s and early 1990s, was discontent with the central government's increasing use of quasi-autonomous organizations or "Quangos" (the official term is "nondepartmental public bodies" [NDPBs]), which were often criticized for their opacity, lack of democratic accountability, and for fostering an uncoordinated and incoherent policy and administration. Since the 1970s, both of the main parties had promised to reduce their number when they were the opposition parties, but when in power actually increased their number in order to achieve a range of outcomes, including developing policy, providing expert advice, regulating, and even directly providing some services. In the early years of the Blair government, there was concern that NDPBs would fall outside the scope of the FOIA²⁴ and early government proposals were in fact narrower in scope than the law as eventually passed.

The replacement of the government's original proposal that the FOIA should apply to a relatively narrow range of authorities with a law of much broader scope was a moral victory for transparency advocates, but it occurred without the strenuous resistance of ministers. Coverage was discussed in Parliament²⁵ but was not a matter of major debate, and the government explicitly identified breadth as one of its goals in the Lords' discussion of the bill.²⁶ Moreover, some members of the New Labour Party leadership viewed the FOIA as a means of legitimizing a new kind of British state (one characterized by decentralized governance) and of regulating relations between largely autonomous NDPBs and the public.²⁷ The introduction of the FOIA was, at least in part, a response to this specific structural transformation of the British state.

3.2. EXEMPTIONS

The FOIA contains 23 sections exempting various kinds of information. Since some of these sections contain more than one exemption, the total number of exemptions is slightly higher and relatively large when compared with similar legislation from other countries. For example, the Australian FOIA contains 17 exemption clauses, the Canadian law contains six broad exemption clauses, and the New Zealand law includes the equivalent of 19 exemptions spread across two clauses. The number of exemptions dismayed the activist community²⁸ who criticized both the consultation draft and the bill tabled in Parliament.²⁹ In retrospect, the number of exemptions appears to be less problematic than initially feared, perhaps because each specifies in detail the kinds of information that can be withheld (as opposed to earlier acts like the Swedish and American laws that rely on a smaller number of more general exemption statements). The law's specificity in this regard has limited the tendency of officials to exploit ambiguities in the law and circumvent the spirit of it.

Two aspects of the exemption regime were discussed at some length in Parliament. The first concerned the two kinds of exemptions that appear in the legislation. Nine are "absolute"—they allow information that falls into certain categories to be withheld without an assessment of whether or not there is a countervailing public interest for disclosure. This includes information held by or relating to the national security agencies (mentioned above),³⁰ court records, documents whose disclosure would infringe on parliamentary privilege, information provided in confidence, and information specifically prohibited from being disclosed by



other laws. The remainder are “qualified” exemptions, requiring authorities to assess whether or not there is an overriding public interest in disclosure.³¹ There are two types of qualified exemptions: class-based, covering particular types of information, such as that “relating to the formation of government policy” (s35), and harm-based, requiring the authority to demonstrate that disclosure would prejudice important public or third-party interests.

The introduction of the absolute exemptions is a significant point of difference between the government’s consultation bill and the white paper.³² This continues to be relevant to the Information Commissioner’s powers. In the case of absolute exemptions, she³³ can determine if particular information falls within a particular exemption, but she is not empowered to order an authority to release information after the application of an exemption has been determined to be correct. In the case of qualified exemptions, the commissioner can conduct a *de novo* review of whether or not the public interest lies in disclosure and she can order the release of that information. This power was introduced in committee;³⁴ the government’s bill only allowed the commissioner to make an advisory recommendation that the authority was free to ignore if it saw fit to do so. This debate formed part of a broader discussion about the balance of power between the commissioner and the elected government, as discussed below.

The second main focus of debate in the House of Commons concerned the specific kinds of material exempted from disclosure. Each exemption was discussed in detail in committee, but those interviewed for this case study identified two exemptions as particularly noteworthy. The first concerns the results of health and safety investigations (for example, product safety reports, pollution investigations, and documents concerning workplace accidents). The consultation bill exempted this information, a decision that was considered symptomatic of the transfer of responsibility from the Cabinet Office to the home office.³⁵ However, this exemption was removed by Parliament under pressure from civil society groups like the CFI. As previously noted, “These groups emerged as a political force in the early 1970s to address issues such as land use, product safety, human health, and environmental pollution.”³⁶ Their support of ATI legislation was motivated by a desire to break the close relations that had developed between regulatory authorities and industry. Regulators had historically sought to preserve these close relations by, among other things, invoking the Official Secrets Act (OSA) and by refusing to divulge the results of inspections to interested third parties (such as members of the public whose quality of life was affected by industrial pollution). The elimination of the proposed exemption covering these reports represents a clear instance of CSOs prevailing over the interests of the administrative state. Other evidence of this includes a narrowing of exemptions covering commercial interests and information provided to governments in confidence (that is, by regulated industries to regulators).³⁷

Another subject of debate with enduring relevance concerned policy advice that continues to be protected under the FOIA (s35). It is clear from the parliamentary debates that many Members of Parliament (MPs) believed that one of the main purposes of the FOIA was to provide access to information used by ministers and senior civil servants to decide policy. These debates focused on the possibility and desirability of distinguishing between the factual material upon which policy recommendations are based and the specific advice that ministers receive from the civil service. It was not actively disputed that the latter could be legitimately kept confidential; rather, critics emphasized the fact that ministers and civil servants alike routinely refused to divulge the former despite decades of regulatory attempts in favor of its

disclosure. Jack Straw's claim that most of the statistics on which policy decisions were made in his area of responsibility were already publicly available did little to convince these critics.³⁸

One of the major outcomes of this debate was the transformation of the government's proposed absolute exemption for policy advice into a qualified exemption. This has probably resulted in the disclosure of far more information than the government anticipated because of the way that the Information Commissioner and courts have interpreted the public interest.³⁹ It has been suggested that the government may not have opposed this change because it assumed that the new enforcement bodies would take the same line as the parliamentary commissioner for administration had taken in enforcing the existing *Code of Practice on Access to Government Information*: that the disclosure of policy advice was *prima facie* harmful to the public interest. One result of the FOIA has been the considerable narrowing of the protected space for policy development that British governments once enjoyed. Although information can still be withheld while policy is being developed, once decisions have been made, there are now far fewer grounds for withholding information.⁴⁰ Tony Blair's admission in 2010 that he considers the FOIA to be one of his greatest mistakes (because it impinges on the ability of ministers and civil servants to discuss policy proposals frankly and privately) suggests that this effect was not anticipated.⁴¹

3.3. PROCEDURES FOR ACCESS

Several procedural provisions were identified by interviewees as having proved particularly conducive to overcoming bureaucratic resistance and fostering public ATI, including the duty to provide advice and assistance to requesters (s16) and to consider any written request for information as an FOIA request, regardless of whether or not the requester explicitly mentions the law. During the parliamentary debates, MPs identified these provisions as particularly important because of the length and complexity of the law,⁴² and they have significantly contributed to the change in the attitudes about openness among bureaucrats by shifting several practical burdens from requesters to the state.⁴³

3.4. IMPLEMENTING REGULATIONS

The FOIA provides fairly extensive regulation-making powers, allowing the government to determine the commencement of many of its provisions (87(3)), to alter the authorities to which it applies (ss4–5), to set fees (s9), and to allow prescribed authorities longer time frames within which to respond to requests (s10(4))—there is a maximum upper limit of 60 working days. These have been used regularly since 2000, but except for commencement decisions (discussed below), have not materially affected the operations of the law. The FOIA also requires the government to promulgate two codes of practice that cover procedures for handling requests (s45) and records management (s46).

3.5. BROADER LEGAL ENVIRONMENT ON TRANSPARENCY

As noted earlier, the FOIA is one of many legislative instruments regulating public access to official information in the United Kingdom, and it is by no means the oldest. One of the most important laws is the Official Secrets Act (OSA), originally passed in 1889 and amended several



times over the course of the 20th century. Prior to its 1989 amendment, the infamous Section 2 of this law technically forbade any unauthorized disclosure of any state-held information by any public servant. This was controversial from its very inception and was subject to persistent criticism from official inquiries, the press, and civil society since the late 1960s.⁴⁴ The OSA remains on the books, but in 1989, its scope was restricted to the disclosure of information harming national security.

Apart from the FOIA, which, as noted earlier, applies to England, Wales, and Northern Ireland, the most important existing instruments favoring access to official information are the FOISA, which regulates ATI held by Scottish authorities; the DPA, which regulates access to and the processing and storage of personal information by organizations in both the public and private sectors; and the Environmental Information Regulations (EIR) 2004, which provides ATI on the environment even when it is held by private authorities, as is sometimes the case. For many decades prior to the passage of the FOIA, local government assemblies and authorities were subject to a range of more focused access laws, including the *Public Bodies (Admission to Meetings) Act 1960*, famous mainly because it was proposed by Margaret Thatcher at her maiden speech to Parliament in 1959. In some cases, local authorities are still subject to disclosure requirements beyond those that apply to the central government.

The FOIA and the DPA also replaced a number of partial access regimes at the national level. Perhaps the most general of these was the regulatory *Code of Practice on Access to Government Information* introduced by John Major in 1993. They also replaced a number of laws providing access to specific kinds of information (mostly personal information held by service-providing agencies or local authorities. Examples include the *Access to Personal Files Act 1987*, the *Access to Medical Reports Act 1988*, and the *Access to Health Records Act 1990*. Many of these laws had been introduced with active support from the CFI as a way of making progress on ATI despite Mrs. Thatcher's hostility toward a comprehensive freedom of information law.

4. Promotion, Capacity, and Oversight

A good deal of the early success and early failure of the FOIA can be attributed to the way the government prepared for the law between 2000–05.⁴⁵ The interval between the passage of the law through Parliament and its full entry into force was intended to give public authorities the time to put in place the necessary training, human resources, records management, and other measures that would allow its effective implementation.⁴⁶ In most cases, central authorities used this time productively and were, by and large, well-prepared. At the local level and in NDPBs, arrangements were more mixed; interviewees attributed this inconsistency to resourcing and the anticipated level of requests.

Unfortunately, preparations at all levels were disrupted—and the effectiveness of the law in its early years hampered—by a significant change in the overall implementation strategy, determined at the central political level. The government's original stated intention was to conduct a phased introduction across the public sector, starting with central departments (on the grounds that they should lead by example), followed by local government (which had been subject to disclosure laws of limited scope for several years), and finally semi-autonomous

administrations, such as the National Health Service and the police services. This phased-in introduction of the law was abandoned in late 2001, when a decision was made to introduce the law across the whole of the public sector in a single, so-called “big bang” on January 1, 2005. It is widely assumed that the electoral concerns of senior ministers significantly influenced this decision.⁴⁷

The “big bang” had several serious consequences, some of which were not overcome until 2010. Most notably, significant delays in handling complaints by the Information Commissioner’s Office (ICO) rapidly built up. The overall preparations for and the disruptions that the change in timing caused are discussed below.

4.1. ORGANIZATIONAL ARRANGEMENTS

The preparation for the entry into force of the FOIA was led by the Cabinet Subcommittee on Freedom of Information and Data Protection, chaired by the Lord Chancellor.⁴⁸ The subcommittee was supported by two interdepartmental committees: the Senior Group and the Practitioner’s Group on Freedom of Information. These were composed, of senior civil servants and lower-level officials with knowledge and practical experience, respectively. The arrangements were complemented by the Advisory Group on Implementation, composed of public sector representatives and independent experts. The nodal authority leading implementation of the FOIA within the central government has changed several times since the law was originally passed; it is currently the Ministry of Justice (MOJ).⁴⁹

Prior to the FOIA’s entry into force, initial efforts focused on developing publication schemes for the central government, on developing and issuing the Codes of Practice under sections 45 and 46 of the law, and on repealing and amending legislation prohibiting the disclosure of information (a power provided to the secretary under Section 75). This work was led by the nodal agency, the ICO, and the National Archives. The nodal agency promoted the law within the government and assisted public authorities in their organizational and operational preparations; it also promoted cultural change by publicizing good practices and conducting case studies.⁵⁰

The nodal agency continues to provide advice to the rest of the central government about its responsibilities under the law. The Access to Information Central Clearing House⁵¹ was established as a unit within the nodal agency in September 2005 to ensure the consistent application of the three main access regimes in the United Kingdom: the DPA, FOIA, and Environmental Information Regulations (EIR). The clearing house has been criticized for delays in responses and a rise in appeals, especially when requesters realize that authorities may have been willing to disclose information except that they were blocked from doing so by the central government, similar to problems in countries with equivalent legislation, such as Canada.⁵² On the other hand, the clearing house gave several advantages to those charged with implementing the law. In the early years of implementation, it was a central source of advice for many authorities, especially those that received few requests or lacked the in-house resources to develop comprehensive expertise on the FOIA. It also ensured consistency in the application of the law if similar sensitive requests were filed with multiple authorities.⁵³

The clearing house still exists but its staff has been progressively reduced to a handful of officers; its prominence wanes as authorities become more experienced with the law and processes for handling FOIA requests and complaints become embedded in normal operating



procedures. It does continue to be a source of expertise for the coordination of responses to sensitive requests and for handling cases referred to the commissioner, tribunals, and courts (it ensures that the government's position is adequately represented in proceedings whose outcomes constitute legally-binding precedents).⁵⁴

4.2. BUDGET

Public authorities are expected to meet the costs of compliance with the FOIA from within existing budgets, supplemented through fees. Below a certain threshold, authorities may only charge for costs directly incurred in providing the information (for example, photocopying and postage). This threshold is £600 for central government and Parliament; £450 for other public authorities. Once the total cost of meeting a request passes this limit, authorities may refuse to grant the request or may ask the requester to pay the full cost of provision. As discussed below, it was anticipated that authorities would reduce the cost of compliance below these limits by improving records management.

There is no reliable data on the actual cost of compliance with the FOIA. The nodal agency publishes extensive quarterly data on processing activity, but data on expenditures incurred as a result of the activity are not available. The most recent, comprehensive, cost estimate of the FOIA was commissioned by the Department of Constitutional Affairs in 2006. It estimated the average cost per request at £293 and the total cost to government at £35.5 million (about 0.007 percent of total public sector expenditures in that year).⁵⁵ This estimate was immediately criticized for inflating projected request numbers and systematically overestimating individual cost components.⁵⁶

Opinions on the budget implications of the FOIA differed between interviewees. The Association of Chief Police Officers, which coordinates the handling of FOIA requests among the 43 regional police forces in England and Wales, reports that it has experienced significant but not unmanageable resource implications.⁵⁷ Costs are mainly incurred due to the need to train staff in the legal and strategic requirements of responding to requests and the practicalities of redaction and information management. But other interviews suggest that resource implications are highly variable and that many authorities receiving fewer requests have been able to incorporate response processes into their existing legal or public relations functions with minimal disruption.⁵⁸

In addition, practices vary so considerably from authority to authority, even within a single sector, that none of the interviewees would give an estimate of the average budget impact of the FOIA. Historically, most authorities have tended to place FOIA handling either in the legal team or in central corporate services;⁵⁹ the choice was usually based on the resourcing and prevailing views as to whether or not FOIA was a matter of legal compliance or (political) management of relations with external stakeholders and client groups. Where the authority in question was headed by an elected official (that is, a minister), it was not uncommon to hear that all FOIA requests were routed through the minister's private office, especially in the early period of implementation, resulting in some inflation of costs.⁶⁰ A number of interviewees indicated that constraints caused by public sector austerity might encourage authorities to look for cost savings by co-locating FOIA handling into other functions, such as complaint handling, but they also indicated that it was too early to identify any definite trends.⁶¹

Even if they cannot be quantified, the crucial determinants of budget impact appear to be the volume and sensitivity of requests. The police sector receives a high volume of requests,

many of which pose considerable problems of coordination and consistency because they take the form of similar requests submitted simultaneously to multiple regional forces. Furthermore, the police often hold information provided by other agencies—including those responsible for national security. Thus, requests to the police often involve the consideration of numerous political and operational issues. The FOIA states that the decision about whether or not to release information lies with the authority holding it, rather than with the authority that originally provided it; in practice, however, it is routine for all affected authorities to consult with one another. This approach is desirable from an overall information management perspective, especially in circumstances when the information in question is of a sensitive nature, but it imposes organizational overhead as well as financial costs.

4.3. STAFFING AND TRAINING

There are no figures available on the total number of FOIA officers employed in the United Kingdom, and arrangements for meeting obligations under the law vary considerably from authority to authority. Prior to the FOIA's entry into force, the nodal agency coordinated an effort among public authorities to put in place appropriate organizational structures, administrative procedures, and record management processes to ensure effective compliance with the law.⁶² Authorities were given considerable leeway in determining their own arrangements. This flexibility was considered desirable given the range of authorities subject to the law, the differing resources available to each, and the diversity of the relationships they have with the formal political system and with external stakeholders.⁶³ Smaller authorities have tended to delegate the administrative handling of FOIA matters to their legal teams or to their corporate services divisions;⁶⁴ larger authorities and those receiving a high volume of requests have set up dedicated teams. The choice of staffing and organizational arrangements have also been influenced by available resources and prevailing views on whether or not the FOIA is a matter of legal compliance or (political) management of relations with external stakeholders and client groups.⁶⁵ Many interviewees were extremely reluctant to make generalizations about implementation at all, even within authorities in their own sectors, given the broad coverage of the law and the range of mechanisms in place. Any precise estimate of staff numbers or other data would be both speculative and misleading. As of late 2011, the ICO employs 328 full-time equivalent staff within lead agencies, and the Cabinet Office and nodal agency each have a small number of officials responsible for developing information policy.⁶⁶

The interviewees rarely referred to human resources issues as an influence on the FOIA, and the subject is largely absent from the secondary literature as well. The only significant exception to this is overall staffing levels: it is generally thought that authorities across the government dedicate insufficient resources to FOIA compliance, but it is also widely recognized that this is the result of budgetary issues rather than incompatibilities between the FOIA and human resource policies.⁶⁷ Other potential human resource issues appear to have been preempted by the significant centralized training efforts that occurred during the preparation phase (2000–05) that formed part of the promotion effort; this is discussed below. Since the entry into force of the right of access, responsibility for training has been largely transferred to the authorities themselves, although the ICO retains an important role in promotion. Several private sector organizations, including the CFOL, run courses on data protection, freedom of information, and other information rights.



4.4. PROMOTION

The main mechanism for publicizing the FOIA to the public was the 1996 election and the subsequent legislative process itself; these factors made the FOIA a matter of high-profile public debate; it was widely covered by the press. The main efforts at promotion occurred between 2000–05, principally focused on raising awareness within the government. These efforts have continued, mostly under the aegis of the commissioner (who is responsible under s47 of the FOIA for promoting the observance of the law within the government) rather than the nodal agency.

Prior to the law's entry into force, the nodal agency provided training to public authorities in cooperation with the ICO and CFI. This included several "road shows." At the most senior level, they involved ministers visiting authorities to emphasize the need for a positive attitude toward meeting FOIA obligations. CSOs reported that ministers responsible for promoting the FOIA, especially the Lord Chancellor, were extremely positive but lacked strong across-the-board support within the cabinet; they suggested that the FOIA had a few strong supporters and opponents, but that most ministers "remained quiet," refusing to commit themselves one way or another.⁶⁸ At the official level, these road shows involved the provision of some training, familiarization, and—above all—encouragement to authorities that they engage in more training of their staff in FOIA-relevant responsibilities. Such training, specific to the organizational context of each authority, included efforts at raising awareness and effecting cultural change within the public service.

However, a lack of widespread support within the cabinet proved particularly significant after the decision to shift to the "big bang." It introduced an unanticipated delay between the provision of training and the enforcement of the FOIA's access provisions, demoralizing the supportive constituency of trained officers among public authorities that had been built in anticipation of an early entry into force. It also exacerbated the natural tendency of organizations to lose expertise in areas that are inactive or that are not part of ongoing business priorities. An example is the loss of staff with experience and training because of transfers into positions with different responsibilities. Some interviewees implied that the eventual entry into force of the access provisions arrested this loss of expertise, particularly among authorities that received sufficient requests to build up and maintain in-house expertise.

There are no central records on the number of staff trained during this period; the costs of training were met from existing budgets.

4.5. RECORDS MANAGEMENT

Prior to the FOIA, the systematic management of records was governed largely by the Public Records Act 1958, which covers the management and storage of records that will eventually be transferred to The National Archives. This law only applies to some of the records public authorities produce in the course of their activities and, outside its requirements, the effectiveness of records management systems varied considerably from authority to authority. The implementation of the FOIA developed in parallel with efforts to improve record management systems, and the two initiatives fed off each other in a number of ways.

Effective records management was widely recognized as a precondition for an effective FOIA regime. The government's white paper had included a commitment to impose obligations on authorities to improve records management in line with "best practice guidance."⁶⁹ This

was eventually operationalized in the form of a goal to implement governmentwide electronic records management by 2004 and with the inclusion of section 46 in the FOIA, which requires the government to develop a code of practice for records management. This code was developed and is maintained by The National Archives (the lead agency for records management in the United Kingdom), in cooperation with the Information Commissioner. It covers both the management of records held by authorities subject to the FOIA during their useful life and the transfer of records to the public archives covered by the Public Records Act 1958.

Public authorities meet the costs of records management and FOIA compliance from within existing budgets. Concerns about the FOIA's implementation costs were, in part, addressed with the claim that they would be offset by savings gained through more effective records management. The experience of the police suggests that, in practice, these cost savings may not be realized, a conclusion also supported by interviewees from The National Archives.⁷⁰ There are several reasons for this. Authorities that handle sensitive requests require records management systems and coordination mechanisms that cover the creation, storage, indexing, and—when appropriate—the destruction of records and that will withstand public scrutiny.⁷¹ Establishing such systems or strengthening existing arrangements so that these goals are achieved usually costs money and, historically, authorities have usually considered good records management as an overhead cost rather than as a benefit in its own right. The interviewees from the National Archives suggested that effective records management tends to exist at agencies dependent on accurate records to conduct core business and at which missing or inaccurate records are likely to be identified as a problem in the normal course of business.⁷² They also suggested that this view of records management as an overhead cost explains why, historically, only the larger authorities have put in place dedicated records managers.⁷³

4.6. INFORMATION TECHNOLOGY

Technological change has been a driver of information policy in the United Kingdom since the 1970s; several interviewees expressed the belief that the FOIA was motivated in part by a realization that the Internet was changing social expectations about the availability of government information.⁷⁴ This was reflected in the parallel efforts discussed above to improve electronic records management.

Despite this, the law only makes passing reference to information technology or the “digital revolution” (for example, s8, which stipulates that electronic requests cannot be rejected simply because they are electronic; and s11, which states that authorities should make reasonable efforts to provide information in the form the requester prefers). Detailed engagement with the potential for greater use of information technology appears to have occurred principally as a part of the reform to records management discussed above.

Under the banner of its “Transparency Agenda,” the Conservative-Liberal Democrat coalition elected in 2010 has sought to use information technology as a tool for public sector accountability and as a driver of public sector reform. Its Protection of Freedoms Bill, which was passed by the House of Lords in late 2011, amends the FOIA to insert an explicit right to many types of public data sets (aggregate numeric data held in electronic form). The coalition has also mandated the online publication of a great deal of information about public sector spending, salaries, and contracts, and is supporting efforts to publish data in comparable, interoperable formats and on terms that favor reuse. This is likely to provide additional encouragement to authorities to better manage their records, especially those stored as electronic



databases. It is too early to make any considered judgments on its effects, but the Transparency Agenda is supported by a small but active group of CSOs composed of journalists, technologists, and FOI campaigners.

4.7. MONITORING

The monitoring of compliance with the FOIA is carried out by the Information Commissioner and the nodal agency. The ICO discharges its duties in a number of ways. Apart from hearing appeals and working with authorities to improve their internal handling processes, it maintains a Web site providing comprehensive documentation, guidance, and model publication schemes for various kinds of public authorities. The commissioner also supports research into transparency, conducts public information campaigns, and is empowered to report to Parliament on issues of concern on an ad hoc basis. To date, these reports have mainly focused on issues of surveillance and privacy. But the commissioner also reported to Parliament after both instances of the exercise of ministerial veto (discussed below), explaining the decision not to appeal for judicial review.

The nodal agency publishes online quarterly and annual reports that cover activities in 44 governmental bodies, including all major departments of state and a number of bodies with “significant policymaking, regulatory or information-handling functions.”⁷⁵ The reports cover request volumes, outcomes (requests granted in full, partially, or refused, with refusals broken down by exemption), and appeals; they are available for every year since 2005. Figures in this document are based on these data.

5. Enforcement

The FOIA is enforced by the Information Commissioner. The commissioner has the power to order authorities to disclose information if a decision was made to withhold it on the basis of an exemption subject to a public interest test. This order can be overridden by a ministerial veto, but in the absence of this failure to comply with the commissioner’s decision renders the authority liable to being found in contempt of court under s54.

Enforcement was a significant point of debate during the drafting of the FOIA. The main question was whether the final decision to release information should be made by an independent Information Commissioner or a cabinet minister. Ministerial concerns over this issue were arguably among the main reasons why the United Kingdom was so late in passing legislation: opposition to the idea of an access law among senior politicians was often justified on the grounds that it would empower judges to overrule ministers on fundamentally political matters for which ministers were normatively responsible to Parliament and accountable to the electorate. This concern was reflected in parliamentary debates, during which it was argued that ministers should retain the ultimate authority on what should be released in order to uphold parliamentary supremacy. Behind this argument was the idea that the public had elected its government to govern, with the implication that elected officials should not be beholden to the whims of unelected appointees whether they be judges or quasi-judicial figures (like information commissioners). Critics countered that the absence of independent review would make ministers into judges for their own cause and allow governments to identify their own electoral interests as “the public interest.”⁷⁶

In an attempt to reconcile these competing concerns, the draft bill sought to protect ministerial control over information in several ways. For qualified exemptions, it proposed that authorities should be the final arbiters of whether or not disclosure is in the public interest. As noted above, this proposal was abandoned in the face of criticism, and the application of the public interest test was made subject to the adjudication of the Information Commissioner. As an alternative mechanism for protecting political considerations, the government proposed a power of veto over ICO decisions to override authorities' public interest assessments. This proposed veto was originally available to all elected bodies at both the local and central levels, but the final bill provided only for a ministerial veto (under s53), the use of which is subject to judicial review.⁷⁷ At least one interviewee suggested that this may have been the government's desired outcome all along, and that the original expansive veto proposal was merely a gambit made in anticipation of heated debate.⁷⁸

Even in its restricted form, the veto proposal was controversial. The CFI feared that it might undermine the law entirely by becoming the main means of resisting politically unwelcome disclosures.⁷⁹ The government responded to these concerns during parliamentary debates by agreeing that the veto should be exercised by cabinet—not individual—ministers.⁸⁰ In the end, the veto has rarely been used, despite the many decisions by the commissioner and the tribunal that the government "cannot have liked,"⁸¹ including two decisions to protect cabinet papers and one to protect the names of the private staff of MPs. Judicial review was not sought in any of these cases. While on paper the veto appears to weaken the law substantially, the very rarity of its use suggests that its effects may not be quite as serious as feared. The veto is politically costly since its use amounts to an open admission by the cabinet as a whole that the law is being temporarily suspended, leaving the cabinet open to accusations of resisting democratic accountability for political gain.

5.1. THE APPEALS PROCESS

There is a five-step process for appealing refusals to disclose information under the FOIA, (figure 1). The first step is to request that the authority concerned reconsider its decision. The procedures for this vary from authority to authority and are regulated by the FOIA only to the extent that the code of practice issued under s45 specifies general principles to be followed. Under s50(2)(a), the commissioner is allowed to refuse to accept a complaint if it appears that this remedy has not been exhausted. The ICO reports that this relative lack of legal specificity as compared with provisions covering responses to initial requests and subsequent appeals has sometimes been a source of difficulty for requesters because it allows authorities who want to withhold information in specific cases to significantly delay the resolution of disputes.⁸²

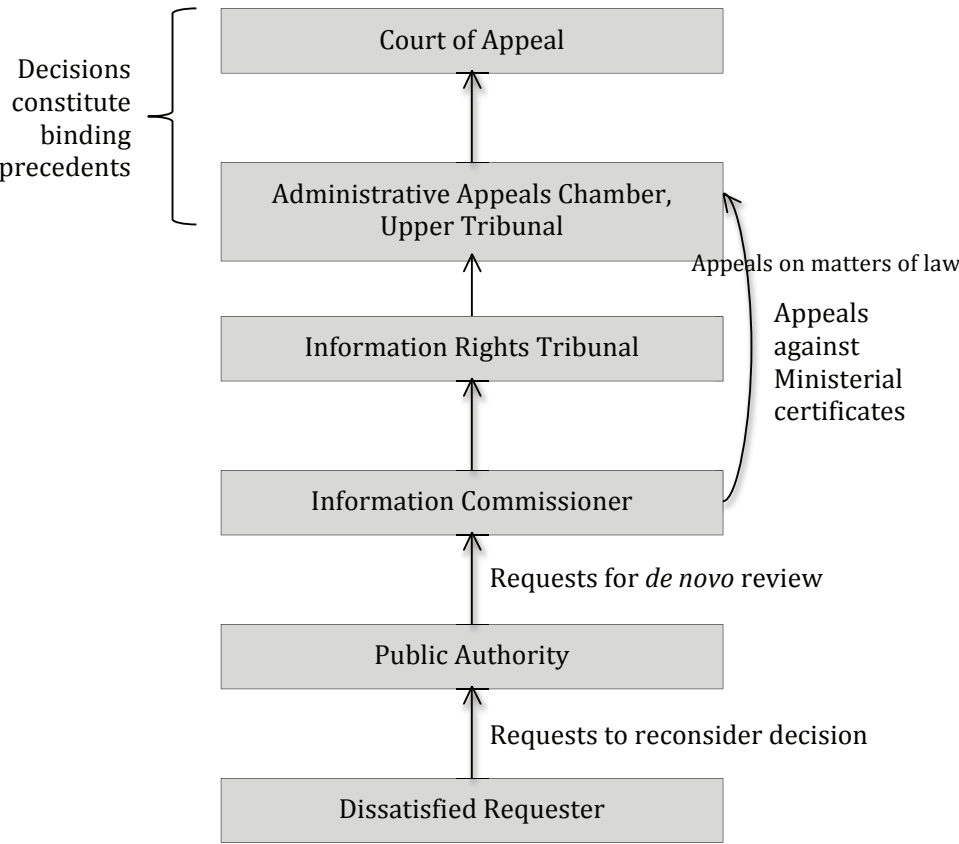
The second step is to lodge a complaint with the Information Commissioner whose powers vary depending on the specific exemptions invoked by the authority; this is discussed earlier.

The third step involves appealing decisions by the Information Commissioner to the Information Rights Tribunal, a quasi-judicial body specializing in RTI in the first tier of the United Kingdom's system of administrative tribunals. Cases are heard by panels appointed by the Lord Chancellor composed of a tribunal judge and two members from outside the legal community.

The fourth step is to appeal the tribunal's decisions on questions of law and, in certain circumstances, to request a judicial review of ministerial decisions; these appeals are heard by the Administrative Appeals Chamber of the Upper Tribunal.⁸³ Appeals against ministerial



FIGURE 1. Appeals Process under the FOIA



certificates issued on grounds of national security under ss23–4 and those issued in response to the commissioner’s decisions are automatically heard by the Administrative Appeals Chamber rather than by the Information Rights Tribunal. The government has not yet relied on certificates under s23 or s24.⁸⁴

The fifth and final step is to appeal the decision of the Administrative Appeals Chamber with the Court of Appeal. The final two steps differ from the first three in that their processes are far more formal and legalistic; steps 1–3 usually involve less formal and more requester-friendly procedures. The two final steps also differ from the first three in that their decisions constitute binding legal precedents. Decisions at all levels of this appeals hierarchy are, however, increasingly treated as *de facto* precedents by many stakeholders, including the Information Commissioner.

5.2. SANCTIONS

The Information Commissioner’s coercive powers are extensive from an international perspective, but they are not unique. By virtue of s52, she can make binding recommendations that documents be released. As in Ireland and Slovenia, these decisions are binding in the sense that failure to comply with one is considered a criminal offense or contempt of court, depending on the circumstances. This differs from laws overseen by ombudsmen who usually only

have oversight authority allowing them only to make recommendations.⁸⁵ The commissioner is also more powerful than a parliamentary commissioner for administration in the sense that she is empowered to undertake own-motion reviews rather than being restricted to investigating issues that are brought to her attention through complaints.

There was a general consensus among interviewees and in the secondary literature that the ICO was better prepared for some aspects of the FOIA than it was for others and that its performance has improved with time. The most serious problem in the immediate aftermath of the entry into force of the right to request documents in 2005 was the lengthy delays in examining complaints and issuing decision notices.⁸⁶ One study by the CFI suggested that some cases took more than four years to resolve.

The delays within the ICO undermined the law in several significant ways. They diminished the commissioner's authority when dealing with underperforming public authorities. Authorities who wanted to avoid their responsibilities could effectively secure a temporary exemption by delaying their own responses as long as possible. They could then rely on further delays within the ICO, so that, in some instances, information could be withheld for years. In many cases, this was not much different than an outright exemption, especially if a request was made by a member of the press or was for politically sensitive information. In 2010, the commissioner increased the number of staff dedicated to resolving appeals and reported that the number of open cases dropped significantly, especially among those that had been open for more than six months.⁸⁷ Because it is now routine for cases to be resolved within six months, public authorities are under greater pressure to handle requests in a more timely and positive fashion and cannot excuse their complacency by blaming the ICO.

Several factors contributed to these delays. One was the "big bang"—the decision to introduce access rights across the public sector on a single date rather than in a phased manner as originally planned, resulting in a build-up of demand and ensuring that the ICO received a large number of complaints in a single burst. Another factor was that the ICO was arguably under-resourced and unable to allocate sufficient staff to handle the load.⁸⁸

Another contributing factor was that early complaints were complex in unanticipated ways.⁸⁹ In the lead-up to January 1, 2005, the ICO had made considerable efforts at developing guidance and policy on the interpretation of exemptions. It had assumed, partially because of its prior experience administering the DPA, that applications would consist of a neat bundle of papers containing the disputed information and a summary of the authority's reasons justifying the refusal to disclose.

Many early disputes focused on whether or not the authority actually held the information in question. This has been an ongoing problem because, quite understandably, many requesters do not know exactly how authorities internally operate or manage records. In some cases, requesters ask for documents that exist and are readily communicable; in others, information might exist in some form but is not readily available. Since the FOIA provides access only to documents already in existence, the process of matching requesters' expectations with the operating structures and records management processes of authorities has proved challenging.

Aside from the initial problems with delays, CSOs and public authorities also identified problems with the way the ICO prioritized and handled different cases. The CFI suggested that the ICO erred in the first few months by focusing almost exclusively on failures to meet time limits and disputes over whether or not information was held; decision notices on substantive policy matters were not issued for almost a year, resulting in neither requesters nor



authorities receiving guidance on how to handle borderline cases for a long time. Many early decision notices were not helpful because they recited legal provisions without providing full and informative expositions of the reasons behind the commissioner's decision.⁹⁰ The tribunal, in its criticism of this, claimed that it hampered the commissioner's appellate function and reduced the usefulness of his decisions as precedent. Strictly speaking, the commissioner's decisions are not precedents in that they are not binding on future decisions, but they are effectively treated as such by many in the requester community and among concerned authorities until overruled by the tribunal.

A second complaint involved the perception that the commissioner tends to provide full decision notices only when overturning a decision by an agency, resolving instances of upholding agency decisions informally with the requesters to ensure that the requests or appeals are simply withdrawn. This issue was identified by the Association of Chief Police Officers as problematic because it contributed to a relative lack of jurisprudence in support of an authority's decision to employ particular exemptions.⁹¹ The ICO has acknowledged that this is a problem but questioned its seriousness given the considerable amount of other guidance it has produced for authorities.⁹² Dispute resolution procedures, if employed at all, are informal because complainants and authorities alike often want expedited rather than formal resolutions, and these are more cost-effective for the commissioner. The ICO has attempted to address agency concerns by employing a better triage system: informal resolution is employed early to eliminate straightforward cases and to identify those that require more detailed consideration (and that will be subject to formal notices).⁹³

6. Compliance

6.1. PROACTIVE PUBLICATION

Public authorities published a considerable amount of information prior to the FOIA, but responsibility for selecting what would be published, cataloged, and archived usually rested with the authority concerned. One study found that approximately 20 percent of administrative publications were produced by Her Majesty's Stationery Office (HMSO); and the remainder was mainly produced by ministries, departments, NDPBs, and other organizations (such as the British Broadcasting Corporation [BBC], British Library, and Central Office of Information).⁹⁴ The total number of non-HMSO publications produced was 20,000 annually for the central government and approximately 2,500 for the local government.

The FOIA seeks to encourage authorities to proactively publish more information and to do so in a more systematic manner, principally through ss19–20, which mandates every public authority to adopt a scheme for the proactive publication of information that is approved by the Information Commissioner. Apparently, the drafters of the FOIA intended for publication schemes and the right to request documents to form a virtuous cycle: publication schemes would inform the public of the information they had a right to expect as a matter of course, which would thereby help to identify the kinds of information that would require explicit requests. Meanwhile, requests would help authorities identify the types of unpublished information that their stakeholders considered valuable and that might be proactively published.

There has been a distinct convergence in the publication schemes that authorities have adopted, partly because of the actions of the ICO. This occurred in three phases. In the years after the passage of the FOIA, tailored publication schemes were developed for many different

types of authorities. After some time, it became clear that most of these schemes were dealing with seven basic kinds of information; more recent efforts have focused on developing a smaller suite of schemes for adoption across a wider range of authorities covering: (1) organizational structure and constitutional and legal governance; (2) projected and actual income and expenditure, tendering, procurement, and contracts; (3) strategy and performance, plans, assessments, inspections, and reviews; (4) policy proposals and decisions, decision-making processes, internal criteria and procedures, and consultations; (5) current written protocols for delivering functions and responsibilities; (6) information held in registers as required by law and others relating to the functions of the authority; and (7) advice and guidance, booklets and leaflets, transactions, and media releases on the services and activities of the authority. The third phase, which is now beginning under the current Conservative-Liberal Democrat government's transparency agenda, focuses on the proactive publication of public sector data sets (that is, standardized, factual non-personal data that are stored in electronic form). This is being centrally coordinated though the Cabinet Office, but amendments to the FOIA that are currently before Parliament would provide a right of access to data sets held by any public authority.

Evidence of compliance with proactive publication schemes is patchy, and it is difficult to draw any firm conclusions from it. There is a high level of compliance with the requirement to adopt a scheme, but evidence of impact or effectiveness is lacking. This is partly because these schemes are intended to preclude the need for members of the public to formally request information, and there are no systematic statistics on how many people access published documents. The ICO reports that it receives very few complaints about publication schemes, although it is not clear whether this is indicative of general public satisfaction with the schemes or of a lack of awareness of their existence.⁹⁵

Anecdotal and circumstantial evidence suggest that implementation was not always as thorough as it might have been. It appears that many authorities were slow to realize the potential of the Internet as a means of meeting their obligations under these schemes. The ICO suggests that this may have been the result of a widespread institutional separation between business units responsible for IT and FOIA requests.⁹⁶ This has gradually changed; it is possible that the availability of information would have improved even without the FOIA simply because of technological change.⁹⁷ At present, the ICO reports that the major ongoing problem with publication schemes is a failure to publish up-to-date material.

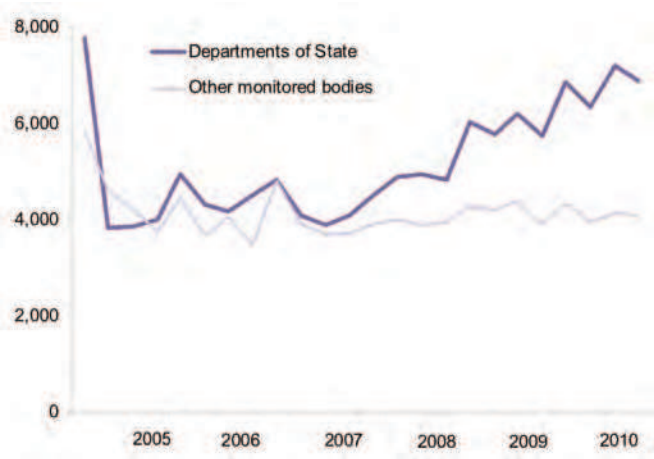
On the other hand, it seems the drafters' goal of establishing a virtuous circle between publication schemes and the right of access has been realized to some extent. Pressure from CSOs has encouraged the proactive, routine publication of some information that was initially handled on a case-by-case basis.⁹⁸ A prominent example of this is salary information for officials employed by local authorities who earn more than £100,000; the central government is in the process of extending this requirement to salaries of more than £68,000.

6.2. REQUESTS AND RESPONSIVENESS

The nodal agency publishes quarterly and annual statistics covering approximately 40 departments of state and other monitored bodies with "significant policymaking, regulatory or information-handling functions."⁹⁹ The Statistics cover requests to which authorities would not have responded except for the existence of the FOIA (so-called "nonroutine requests"); they provide details on response times, outcomes, fees, exemptions, internal reviews, and appeals to the commissioner. The distinction between routine and nonroutine requests is a matter of interpretation left to the authorities concerned.



FIGURE 2. Combined FOIA and EIR Requests per Quarter¹⁰⁰



According to these data, requests were at their highest immediately after the FOIA entered into force: in Q1 2005, almost 8,000 requests were made to departments of state and almost 6,000 to other monitored bodies, reflecting pent-up demand, due in part to the “big bang.” The number of requests to departments of state dropped to about 4,000 during the following quarter, and has grown steadily—if unevenly—since; as of Q4 2010, it stands at just less than 7,000 per quarter. Requests to other monitored bodies stabilized at approximately 4,000 per quarter in early 2007.¹⁰¹

Data through 2010 (the most recent available from the MOJ) suggest that between three-quarters and nine-tenths of all requests receive a response within the required time frame and that performance has improved in recent years (figure 3). Just more than half of all requests

FIGURE 3. Outcome of Resolvable Requests, 2010¹⁰²

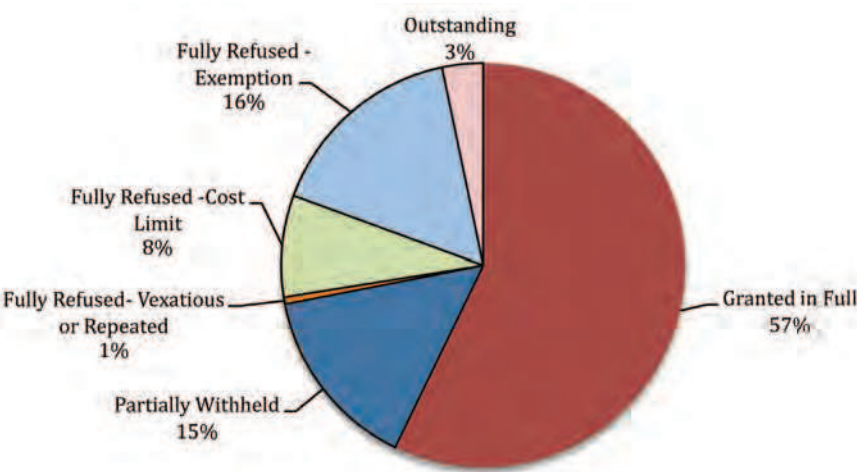
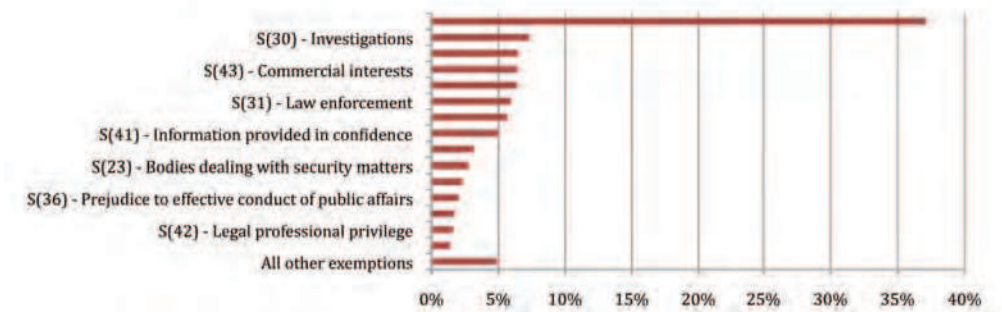


FIGURE 4. Exemptions Invoked in Withholding Information in Full, 2010¹⁰³

are granted in full, a quarter are refused in full, and the remainder are partially granted or were still under consideration at the time the data were collected. The most common exemption (by a substantial margin) invoked when partly or fully refusing information was that the request pertained to third-party personal data.¹⁰⁴ Appeals to the ICO have increased steadily since 2005, but appeals to higher authorities have remained constant at roughly 20 percent of refusals (figure 4).

It is difficult to make any firm claims about the identity of users. Part of the reason for this is that the commissioner and the tribunal have ruled that a request for information should be considered without reference to the identity of the requester or the reasons behind the request.¹⁰⁵ Even if this were not the rule, questions of identity are difficult to resolve because distinctions between individual citizens, members of campaign organizations, and members of the press are not always easy to draw. Further, such distinctions are not always informative: request volumes are so small that even minor shifts in behavior can alter results from year to year and across different parts of government. A comparison with the early years of implementation in other similar countries (such as Canada, Ireland, and Australia) suggests that the United Kingdom's law is average in terms of use.¹⁰⁶ In all cases, the percentage of the overall population making nonroutine requests for nonpersonal information is tiny: 0.06 percent on average for the United Kingdom between 2005–07; 0.21 percent in Australia in the equivalent three years (1982–84); and 0.01 percent in Canada. The consensus among those interviewed was that three types of requesters (individuals, members of organizations, and the press) are responsible for roughly a third of requests each. Attempts to back up these assumptions with hard evidence (through surveys of requesters) have not proved successful, partly due to low response rates.¹⁰⁷

There are no centralized data on the types of information being requested; data are only provided on the proportion of requests received by each authority (figure 5).

Among all monitored bodies, 86 percent of requests are handled within the 20-day deadline, and 91 percent within the permitted deadline or with a permitted extension. Overall, the performance of the departments of state is slightly worse than other monitored bodies: 83 percent of the state departments met the 20-day deadline as opposed to 91 percent of the other bodies; 88 percent of the state departments met the permitted deadline compared to 95 percent for the other monitored bodies. The 10 best-and-worst-performing monitored bodies, as measured by the total number of requests met within the deadline and permitted extensions, are shown in figure 6. For clarity, mid-range performers have been omitted.



FIGURE 5. Proportion of Requests Received per Monitored Body, 2010¹⁰⁸

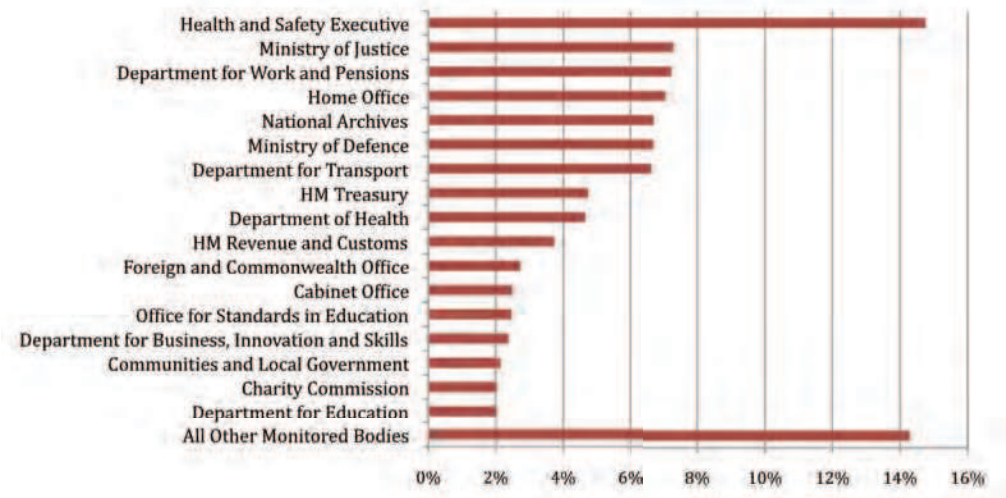
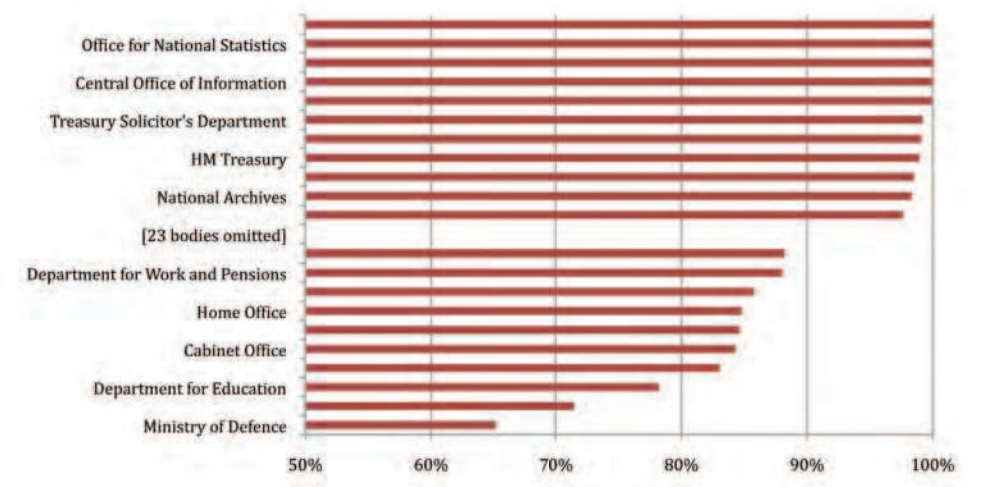
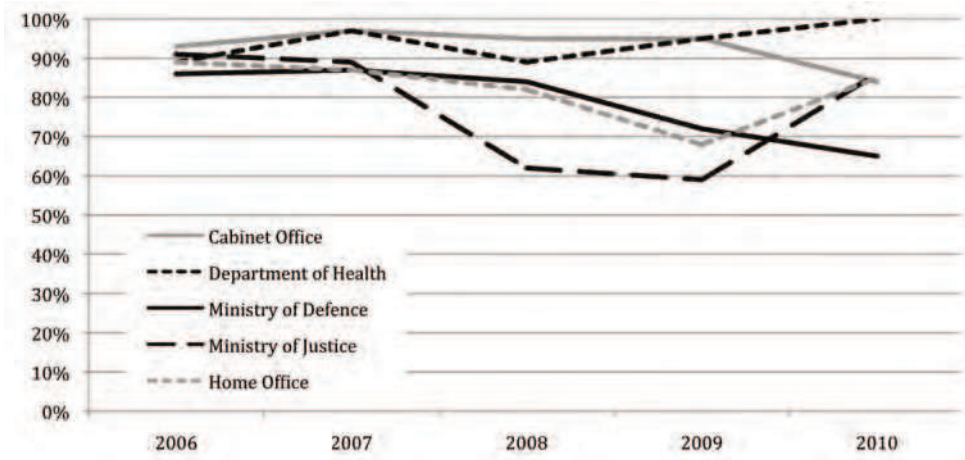


FIGURE 6. Percentage of Requests Met within Permitted Timeframe¹⁰⁹



With certain exceptions, FOIA compliance across different authorities varies primarily with regard to the volume of requests received by authorities, the resources allocated to handling them, and the attitudes of senior officials toward the value of proactive stakeholder relations management. These three factors are frequently interrelated: authorities that receive a large number of requests experience greater pressure to establish dedicated units for handling them. When the high volume of requests is due to the sensitivity and political interest of the information held by the authority—as in the case of police services—the business imperative to establish robust handling procedures is greater.¹¹⁰ Major exceptions to this are central government departments primarily responsible for handing sensitive political issues and

FIGURE 7. Requests Met within Extended Time Frame by Several Central Departments¹¹¹

coordinating whole-of-government policy, especially the Cabinet Office and the treasury. For example, the Cabinet Office has signed an undertaking with the ICO, an act that has been widely recognized as a reprimand for its poor performance in meeting its obligations under the FOIA.¹¹²

The Ministry of Defense (MOD) was one of the best performers in the early years of the FOIA as measured by the number of requests fulfilled within required time frames; the good performance may have been to compensate for the many areas of its work in which information cannot be disclosed for reasons of national security and defense. Recently, however, the MOD's performance has declined; it has signed an undertaking of its own with the ICO.¹¹³ By contrast, the Department of Health was a poor performer initially, but its performance has shown recent improvement, due in great part to the considerable efforts by the ICO to help the department improve its internal processes. Response rates for these two authorities are shown in figure 7.

7. ATI and Accountability

The general consensus in the academic literature and among interviewees is that the United Kingdom's FOIA, despite some early problems relating to delays and weak enforcement, has been reasonably successful in achieving its immediate aim of improving transparency and thereby of strengthening accountability. Unfortunately, it is difficult to provide concrete evidence of this positive effect without resorting to anecdote, as the only major study of the impact of the FOIA notes.¹¹⁴

Several of the interviewees pointed to the 2009–10 parliamentary expenses scandal as evidence of the FOIA's potential to improve overall accountability.¹¹⁵ Several MPs have been charged, reprimanded, or suspended over claims they made illegal or unethical claims under the parliamentary expenses system. Data on expenses were originally sought through a series of FOI requests lodged by nongovernmental organizations (NGOs) and investigative



journalists. They were resisted by Parliament for a considerable period; they were even the focus of an unsuccessful attempt in 2007 to amending the FOIA to exempt the material. Eventually, the information was leaked to the *Telegraph* newspaper, not released under the FOIA, but the leak only occurred after the information tribunal had ruled that the information would have to be released to the requesters. Thus, it seems reasonable to attribute the release of parliamentary expenses data and the subsequent scandal to the FOIA.

A further difficulty in assessing the effects of the FOIA is that its most beneficial effects may lie in its encouragement of officials to anticipate being held accountable, altering their behavior so that retrospective accountability is not necessary. This effect is likely to manifest itself in ways that are difficult to measure with standard techniques like media content analysis and statistical analysis of request data; two examples cited by interviewees may illustrate the point.

- Prior to the 1990s, the Ministry of Agriculture, Fisheries, and Food was regularly criticized in the press and by NGOs for its pervasive secrecy and tendency to favor producer groups over public interests. As of 2001, this ministry no longer exists; its functions have been transferred to a range of other authorities responsible for food standards and environmental protection. The immediate catalyst for this was the inability of the ministry to satisfactorily handle an outbreak of foot and mouth disease. Along with its dissolution, debates over its secrecy and poor decision-making have vanished from political discourse.
- Similar changes have occurred in nuclear safety,¹¹⁶ not only an example of retrospective accountability as an identifiable actor, but as a tool for profound structural transformation designed to prevent mistakes from occurring in the first place. This is achieved by transforming the nature and identity of the responsible parties; in other words, retrospective accountability becomes unnecessary by ensuring that correct decisions are made at the outset.

8. Analysis

ATI is a broad policy with several stakeholders whose interests could influence its implementation. This section discusses the influence of several stakeholder groups that were influential in the drafting of the FOIA.

8.1. POLITICIANS

The single most influential stakeholders in the establishment of the FOIA were politicians, especially senior members from the two main political parties. Their support remains a crucial factor in its ongoing development in that high-profile instances of ministerial refusal to disclose information are often politically motivated or widely understood to be so while proposals to extend access often have advocates or supporters at the political level because of their electoral appeal. Both attitudes flow from the structure of the Westminster system, which centralizes both political and administrative authority in the cabinet, thereby giving senior political figures a great deal of influence over both the law and the behavior of the bureaucracy. This system also centralizes electoral accountability in the same group, providing a complex set of incentives to control the distribution of official information; sometimes this aligns in favor of the right to full access, sometimes it encourage opposition to it.¹¹⁷

8.2. BUREAUCRATS

Prior to the 1990s, the civil service was widely seen as the most consistent source of opposition to the FOIA. Some commentators see all bureaucracies as inherently secretive (for organizational reasons first systematically laid out by Max Weber),¹¹⁸ but a close examination of the British case suggests that a more nuanced explanation is warranted.

One reason for traditional bureaucratic opposition is the combination of a highly politicized executive and a permanent civil service. Ministers and civil servants alike have an interest in ensuring a neutral civil service capable of providing independent policy advice. Official secrecy supports this interest by ensuring that individual civil servants are not publicly associated with particular policy positions, thus able to present themselves as nonpartisan advisors to successive ministers.¹¹⁹ Ministerial desire to preserve this source of confidential advice was directly linked to the refusal to introduce access rights in the late 1960s and early 1970s.¹²⁰

Official secrecy is not a necessary outcome of bureaucracy; it is instead affected by political concerns, suggested by the fact that the attitudes of the most senior civil servants have changed over time. The First Division Association¹²¹ affiliated itself with the CFI in 1984—the first occasion it had chosen to align itself with any external group. This was apparently intended to publicly signal that it was not interested in maintaining secrecy for its own sake but only because it protected the bureaucracy's capacity to provide independent and impartial advice to ministers.¹²² It is no coincidence that the decision to affiliate itself with CFI occurred at a time when the politicization of the civil service attributable to Mrs. Thatcher's reforms was a matter of public debate.

Bureaucratic tendencies toward secrecy have been mitigated by the profound structural reforms put in place by the Major and Blair governments: the introduction of performance management and the "Third Way" reforms under the New Labour Party. These provide incentives to authorities with managerial independence to build constituencies among their stakeholders as a means of improving their own legitimacy and influence within government. These external incentives have proved to be a major incentive for openness, perhaps even more than the FOIA, and are partly responsible for the "sea-change" in state-society relations discussed in section 8.7. "Informal Norms."

8.3. CIVIL SOCIETY ORGANIZATIONS

Despite their active lobbying for its establishment, all CSOs have not found the FOIA useful. It appears to be most helpful to NGOs for whom the preservation of a close, cooperative working relationship with government officials is not a high priority.¹²³ This includes NGOs seeking the disclosure of information that the government is expected to resist or whose goals place them in an inherently adversarial relationship with government. Campaign organizations with objectives that are controversial in society at large were mentioned by many interviewees as prominent users of the law, notably Friends of the Earth, Greenpeace, the Campaign Against the Arms Trade, animal welfare groups, and public interest groups interested in combating (real or perceived) agency capture by industry groups.¹²⁴ Official interviewees at national and local levels suggested that these groups rely on the FOIA because they are unable to develop the kinds of ongoing cooperative relationships that might provide opportunities for informal disclosure of official information. They also suggested that groups interested in establishing cooperative relations, such as those with an interest in ongoing influence over policy development or implementation, might find recourse with the FOIA counterproductive inasmuch as it



would be perceived an unnecessarily adversarial act by officials or at the very least as evidence of the absence or breakdown of the type of cooperative exchanges that these groups probably want to establish.¹²⁵

8.4. MEDIA

Historically, the press was one of the most significant organized opponents of official secrecy in the United Kingdom.¹²⁶ This was due in no small part to the OSA effectively criminalizing political reporting for most of the 20th century—a legal technicality that was limited in practice only because of a traditional unwillingness of attorneys general to prosecute.

Despite this, and even with their obvious structural interest in ATI, the media's use of the FOIA has been uneven. Within national media organizations, it appears that the FOIA is used intensively by a small group of journalists rather than being embedded in the ongoing practices of organizations. This concentrated pattern has become semi-formalized within the large newspapers and among broadcasters in the form of FOIA specialists: individuals who develop considerable practical expertise, with the support of their managers, and who are expected to advise their colleagues in making use of FOIA.¹²⁷ The knowledge that these individuals develop seems to travel with them when they move instead of remaining with the former host institution.¹²⁸

Outside the major media institutions, there are a small but significant number of freelance journalists who make use of the FOIA as a research tool, especially—but not exclusively—at the local level.¹²⁹ The ICO also reported increasing use among the specialist press in the health, IT, and police sectors. Local government information officers informally distinguish between two types of media requesters.¹³⁰ The first are investigative journalists who use the FOIA as one tool among many to pursue important issues and who produce stories for broadsheets or television. Reportedly, information officers view these kinds of requests as an inconvenient but legitimate use of the law. Stories based on this approach have often had significant impact: journalists Heather Brooke and Jon Ungoed-Thomas of *The Sunday Times* and Ben Leapman of the *Sunday Telegraph* requested information about the expense claims of 14 MPs in 2005; these requests eventually led to the disclosure of the parliamentary expenses data discussed above. The second type of requester is the freelance reporter who submits the same request to every council, hospital, or police force in the country. Results are then collated and used to identify “worst offenders.” Stories based on these data are sold to local or tabloid papers to print on “slow news days.” This strategy is viewed much less favorably by information officers since it imposes administrative costs on authorities and undermines trust in public authorities without an identifiable benefit in return. On the more general question of their relationships with information officers, journalists think that their requests, regardless of content, are seen as less legitimate—and certainly more inconvenient—than those from “ordinary” members of the public.¹³¹

There has not yet been any comprehensive study of uneven journalistic engagement with the FOIA. The interviewees for this study suggested several possibilities. First and foremost, journalists are likely to find the law less useful than the average citizen because they are interested in politically sensitive information that is explicitly exempted from disclosure or that officials are inclined to resist disclosing through procedural means.¹³² The statutory 20-day response time frame is too lengthy for most journalists whose deadlines are measured in hours.¹³³ This claim is consistent with the fact that the heaviest journalistic users appear to be

those working on longer time frames: investigative journalists, those who use it as their primary research tool, and those who sell “slow news day” stories. Lack of use may also simply be a matter of habit: some journalists who might have been willing to make more systematic use of the law in the early years were discouraged from doing so by the extensive delays; they have therefore come to rely on their existing contacts.¹³⁴

8.5. BUSINESS INTERESTS

British businesses were not a major influence on the genesis of the FOIA but were expected to make use of it after its introduction like their counterparts in the United States.¹³⁵ As it turned out, however, business use was initially so low that it surprised some observers. It is now on the rise, but the rate of use of the law by business is still far lower than in the United States. Businesses that do make requests appear to be using the law for three purposes:¹³⁶

- **To obtain background information on tenders, including previous submissions made by competitors and background information held by the public authority.** Businesses appear to be much more reticent to use the law for this purpose than their counterparts in the United States. This reticence seems to be motivated by a concern that public officials view such requests as an inappropriate use of the law; businesses fear their own submissions might be considered in a less favorable light if they are identified as requesters, despite the fact that any such retaliation would be contrary to the spirit of the law and to the commissioner’s guidance. As a result, businesses that use the law in this way often make their requests anonymous by directing them through solicitors. Moreover, businesses that have made submissions are reluctant to allow details of their contracts and pricing information released to competitors. The incidence of so-called reverse-FOIA suits is increasing, and local councils have started to adopt the practice of asking successful bidders to indicate the information they consider to be commercially sensitive.¹³⁷ Although these schedules are not conclusive evidence of sensitivity, they are considered *prima facie* evidence of a belief on the part of the company concerned.
- **To obtain data for resale or reuse at a profit.** Government files represent a significant potential source of information that firms can process, combine, and republish for profit, including maps, legal texts, and statistical data on the natural, economic, and social world. The FOIA constitutes one mechanism by which companies gain access to this information, particularly when it is not already held by public authorities in a centralized form. One example mentioned by several interviewees was requests for the procurement plans of public authorities, although officials view these requests are even less favorably than those from journalists.¹³⁸ It is important to recognize that the FOIA has partly driven and partly evolved in parallel with efforts to provide access to public sector data on terms favoring commercial reuse; the current Conservative-Liberal Democrat coalition is legislating to include a “right to data” in the FOIA and has established the principle of publishing government data sets, salaries, and contracts at central and local levels.
- **Public relations.** One particularly interesting recent development is the use of the FOIA by companies to provide the factual basis of publicity campaigns. A hypothetical example discussed by some interview subjects was using the law to collect data on accidents at pedestrian crossings to generate sales of safety equipment. This use does not appear to be common; it was mentioned because it was unexpected and rare.



8.6. FORMAL INSTITUTIONS

Formal institutions have played an important role in the development and implementation of freedom of information in the United Kingdom. The FOIA was not associated with the introduction of a new set of democratic institutions or even with the radical transformation of an existing set: it is part cause and part outcome of an ongoing process of evolution within a relatively—but not perfectly—stable political system.

The United Kingdom's competitive two-party system contributed decisively to the emergence of freedom of information as a topic of political debate. Two-party systems are structurally favorable to electoral competition on the basis of access rights because they feature clear lines of electoral responsibility and encourage opposition parties to demonstrate their trustworthiness to the electorate by promising to introduce mechanisms to strengthen retrospective sanction voting.¹³⁹ The politicization of access rights in this way has been a recurring pattern in British political life since the early 1970s. Controversy surrounding the use of secrecy to prevent reporting and criticism of British involvement in international events such as the Suez Crisis in 1956 and the Biafran War in the 1960s eventually led to a comprehensive review of the OSA under Lord Franks. This review stopped short of calling for ATI legislation, but it opened the door to it by explicitly identifying the Swedish and American laws as possible sources of inspiration for reform.¹⁴⁰ Controversy surrounding the secret actions of the British state abroad continued under both the Thatcher and Major Governments in the 1980s and 1990s; the 1989 amendments to the OSA were, in part, a response to the failure of high-profile prosecutions of public servants who leaked information to the press. The release of the Scott Report into the Matrix Churchill affair in 1996 brought the issue to public attention during the election that eventually brought the New Labour Party to power and provided Tony Blair with the opportunity to compete with the Conservative Party on the issue of trustworthiness by promising to combat secrecy and reinforce accountability. In his own words, Matrix Churchill made the case for the FOIA "unanswerable."¹⁴¹ The current Conservative-Liberal Democrat Coalition's "transparency agenda" has been presented in terms that suggest an attempt to consolidate electoral support, demonstrating a firmer commitment to retrospective democratic accountability than the outgoing New Labour Party government.¹⁴²

Precisely because of its clear lines of accountability, however, the two-party system also discourages ministers from actually implementing access rights. The difficulty faced by parties in balancing the competing imperatives inherent in the party system can be readily seen in the New Labour Party's repeated attempts to back away from its electoral commitments to freedom of information—successfully in the 1970s and "unsuccessfully" in the late 1990s. In a sense, the very existence of the FOIA is testimony to the fact that the imperatives of electoral competition in the United Kingdom can sometimes trump the long-term institutional self-interest of those competing.

The centralization of political and administrative authority in a cabinet exercising decisive influence over a parliament that is itself the supreme political institution is also an important but complex contributor to access rights. It has reinforced the tendency to politicize access rights by encouraging the framing of dissatisfaction with the expansion of the welfare state (and the associated expansion of bureaucratic control over information) as a political problem best solved through collective political action rather than as an administrative problem best solved through the courts (as was the case in Germany and France).¹⁴³ It simultaneously encouraged the executive to exert extremely tight control over the disclosure of all official

information: ministerial responsibility for the whole of the state—however imperfect it may be in practice—implies that all the information about and held by public authorities is potentially relevant to electoral assessments of government performance.¹⁴⁴

As noted earlier, the civil service has historically been one of the main sources of opposition to the introduction of access rights. The structural basis for this opposition was substantially transformed by the public sector reforms undertaken by the Thatcher, Major, and Blair governments. At the risk of grossly oversimplifying an extremely complex and contested period of political history, this transformation occurred in three stages. Under Margaret Thatcher, extensive privatization and reinforcement of cabinet control over the parts of the state that remained in public hands laid the groundwork for reform, despite the PMs personal opposition to a freedom of information law. The introduction of outcomes frameworks and performance management and the creation of agencies with focused goals and managerial autonomy¹⁴⁵ separated responsibility for policy development and implementation and established structured communication between the two as a basic public sector management tool.

Under Major, a slight but significant shift in emphasis occurred. His *Citizen's Charter*¹⁴⁶ represented an attempt to subject the parts of the state that could not be privatized for whatever reasons to marketlike pressures by disclosing timely, accurate information about their performance to the public, not just to the cabinet. This reform explicitly sought to harness the power of public opinion by casting citizens as consumers. To that end, it mandated the publication of information that would allow the public to exercise meaningful choices between different service providers: charters of service, reports of performance against the outcomes in these charters, and independent inspection reports by specially established bureaus.¹⁴⁷ Major also introduced a nonstatutory Code of Practice on Access to Official Information designed to reinforce the devolution of operational responsibility, encourage responsiveness, and facilitate dispute resolution.¹⁴⁸

The code received a lukewarm reception from civil society, and, looking back, the consensus is that departmental resistance and lack of political support resulted in a low number of requests and the release of less information than might ideally have occurred.¹⁴⁹ Nevertheless, it represented a major advancement in two respects. It mandated the proactive publication of a range of information that had previously been kept secret, including the membership of cabinet committees, the reasons for administrative decisions, and background information on past policy decisions. It also included a request mechanism—the first enforceable right of access in the United Kingdom.¹⁵⁰ Thus, it smoothed the way for the eventual introduction of the FOIA by easing traditionally secretive departments into the idea of establishing a more open relationship with their constituents.¹⁵¹

The third phase occurred under the Blair government, which introduced the FOIA partly in fulfillment of long-standing electoral commitments to democratic renewal, and partly because it formed part of its “Third Way” reform agenda, which relied extensively on distributed public governance.¹⁵² The election of the Conservatives as part of a coalition in 2010 ushered in yet more proactive disclosure of information as a public sector governance tool, albeit one with more similarities to the Thatcher and Major approaches than to Blair's. A public sector transparency board has been established within the Cabinet Office to drive this transparency agenda. It is too early to gauge its results but it is clear that the proactive publication of government data sets will be a major emphasis, and an amendment to include a right to data in the FOIA is currently before Parliament.¹⁵³



8.7. INFORMAL NORMS

Changes in informal norms have affected the implementation of the FOIA on several levels. The operation of the FOIA in the United Kingdom has also been facilitated by the widespread norm among public servants that their first responsibility is to faithfully carry out their duties under the law even when these may prove inconvenient. Several interviewees mentioned that majority of public servants seem to approach freedom of information in this manner most of the time, with the implication that they comply without being particularly motivated by the underlying democratic rationale.¹⁵⁴ A study by University College London found no hard evidence of the so-called chilling effect when officials deliberately alter the records they create or refuse to record some decisions in writing to avoid disclosure under the FOIA.¹⁵⁵

In contrast with this duty-based approach, several nongovernment interviewees mentioned that the manner in which public organizations respond to requests matter as much or more than specific decisions in influencing the perceived success of the law. Requesters, especially professionals who make frequent use of the law, expressed more positive views of those authorities that were seen to be handling requests promptly, consistently, and fairly, *even when those authorities rejected specific requests*. All parties mentioned delays in responding to requests as particularly likely to lead to dissatisfaction; one journalist indicated that, if forced to choose, an FOIA that worked quickly but that released less information would probably be more useful than one that released more information but did so more slowly.¹⁵⁶ This point about appearances resonates with a broader point made by the interviewee from the CFI. The CFI's training courses often brought together requesters with the officials responsible for handling their requests.¹⁵⁷ It is apparently quite common for requesters to adopt far more positive attitudes about the likelihood of obtaining information after they meet officials who are positive about the principle of access even if the officials do not work in the authorities receiving their submitted requests.

At the highest level of abstraction and over the long term, the FOIA is part cause and part outcome of a sea change in relations between the British state and its citizens: the development of an "open government."

Prior to the late 1970s, these relationships were highly paternalistic and characterized by pervasive, selective opacity on the part of the state. Officials sought to maintain control over policy development and implementation and were generally reluctant to seriously consult with interest groups other than industry and trade unions.¹⁵⁸ This closed style of government was associated with the tendency of officials to reserve the right to determine what information should be disclosed to the public at large; they often actively resisted attempts by journalists, NGOs, and citizens alike to obtain it.

A classic example of this traditional British approach was the regulation of industrial production processes.¹⁵⁹ Regulators in such areas as pollution control; health and safety inspections; and food, medicine, and product safety routinely refused to disclose information like the names of companies they had prosecuted or that were in breach of regulations. This was sometimes justified on the grounds that regulators needed to avoid jeopardizing the industry's willingness to share information by exposing regulated companies to the "double punishment" of negative publicity. This was clearly an informal norm because regulators were empowered through legislation to compel the disclosure of the information required but they chose to act as if they had to rely on cooperation.

By the 1990s, this kind of selective, secretive engagement had virtually disappeared, although vestiges remained in pockets of the state that were relatively insulated from direct contact with the public. The prevailing norm is now one of more active engagement and negotiation with a broad range of stakeholder groups and of acceptance at high levels that public ATI is both legitimate and desirable.

This newfound openness at the political level has allowed freedom of information to have a self-reinforcing effect at the lower levels of public service. The existence of a legal rule favoring disclosure allows officials to answer informal requests from and engage in discussion with external groups much more freely. This is because all parties know that requesters will probably be able to access information if the matter is put to the test and because the law provides clear standards for justifying the withholding of genuinely sensitive information if the need arises. In other words, the law does not just empower requesters; it also makes it easier for officials engage openly with them when they are so inclined.

9. Conclusion

Overall, it seems reasonable to conclude that the FOIA has achieved modest success in its primary aim of improving transparency, that is, ensuring the release of information that would not have been publicly available without it.¹⁶⁰ One measure of its success is the degree of consensus among those interviewed, from both government and the various requester communities, that requesters have been able to obtain information that governments would have preferred not to disclose (for example, documents relating to policy decisions) or that it actively sought to withhold (for example, parliamentary expenses). A second measure of its success is that the FOIA provides a set of rules for conducting disputes over what type of information should be available, and these rules have generally proved beneficial to requesters. CSOs have also been able to use requests and appeals to their strategic advantage, and some types of information the government may not originally have anticipated would be released are now available by request (for example, some policy-relevant information); others are routinely published despite early refusals to do so (for example, salary data for local governments).

This study has identified several contributors to this success. The interviewees frequently identified institutional contributors. The two most significant of these are the law itself, which is not perfect but compares favorably against similar laws around the world,¹⁶¹ and the existence of an information commissioner with strong formal powers. The particular importance of effective practical oversight and enforcement mechanisms was underscored by the problems caused by the appeals backlog that built up in the first few years after the law's implementation, and by the way this undermined both the commissioner's moral authority and compliance within other public authorities. More generally, the prevalence of the rule of law and the relatively high infrastructural capacity of the British state mean that authorities have generally been able to implement the law within existing resources despite occasional inconveniences. Second, the existence of a strong and varied domestic constituency was an essential contributor to the development, preparation, and the implementation of the FOIA. Repeated requests by journalists and CSOs, coupled with strategic appeals, have unquestionably led to the proactive publication of information that was routinely withheld in the first few years. The two examples discussed in this document are parliamentary expenses data and salaries.



Although the FOIA has been reasonably successful in achieving this immediate aim, its impact has not been uniform. Information about how much money the government spends, for example, is considerably easier to obtain than information about policy discussions,¹⁶² even though the former was a much less prominent matter of debate in the lead-up to legislation than the latter.¹⁶³ This variability of impact suggests that, rather than radically transforming the underlying structure of power in the United Kingdom, the FOIA has been influenced by it. The release of spending data is the result of a combination of pressure from CSOs (such as the Taxpayer's Alliance, which was founded in 2005, partly to take advantage of the opportunities offered by the FOIA¹⁶⁴) and a series of decisions by the commissioner and tribunal that have made it more difficult to withhold such information. These changes are exemplified by the disclosure of salary information that was initially considered a matter of some sensitivity by authorities like the local councils.¹⁶⁵ Over time, a consensus has emerged that information concerning senior staff salaries is a legitimate matter of public interest, although the scope of disclosure varies from authority to authority, with some publishing information on lower officials or salaries and others not.¹⁶⁶ Many councils proactively publish this information on their Web sites now, and the current Conservative government's transparency agenda has extended this still further by mandating the proactive disclosure of all local government spending above £500 along with a wide range of data on central government spending. By contrast, policy-relevant and politically sensitive information remains a controversial and contested topic, and although there have been some gains in this area, not as much of this type of information has been released as advocates had initially hoped.

The introduction of the FOIA was the outcome of several long-term trends in the United Kingdom, notably the contradictory nature of party competition and centralization of authority, and a slow, ongoing separation of political authority from responsibility for routine administrative processes that was occurring in the context of an increasingly mediated and digitized society. Together, these suggest a cautious optimism about the prospects for transparency over the long term, but its ongoing entrenchment cannot be taken for granted in the short term. The principle of ATI will likely remain contested for the foreseeable future, and strong transparency mechanisms and a vibrant civil society will continue to be essential guarantors of its development.

Notes

1. Andrew Puddephatt, *Exploring the Role of Civil Society in the Formulation and Adoption of Access to Information Laws: The Cases of Bulgaria, India, Mexico, South Africa, and the United Kingdom* (Washington, DC: World Bank Institute, 2009).
2. Interview 3, *Senior Official, CFI* (9 June 2011). By the late 1980s, the number of supporting organizations was approximately 100.
3. Tony Blair, *Speech by the Rt.Hon. Tony Blair MP, Leader of the Labour Party at the Campaign for Freedom of Information's annual Awards ceremony, 25 March 1996*. (London: CFI, 1996), <http://www.cfi.org.uk/blairawards.html> (accessed on 1 April 2011).
4. Labour Party, *New Labour. Because Britain Deserves Better* (London: Labour Party, 1997).
5. Chancellor of the Duchy of Lancaster, *Your right to know. The government's proposals for a Freedom of Information Act, Cm 3818* (London: Her Majesty's Stationery Office, 1997).
6. Interview 3.
7. HC Deb, April 4, 2000, vol. 1857, col. 838.
8. Interview 3.
9. Ibid. and HC Deb, April 4, 2000, vol. 1857, col. 848.
10. Ben Worthy, *Policy Making in British Central Government: The Freedom of Information Act 2000: A Case Study* (PhD thesis: Manchester University, 2007b), 147.
11. Secretary of State for the Home Department, *Freedom of Information: Consultation on Draft Legislation, Cm 4355* (London: Her Majesty's Stationery Office, 1999).
12. The meaning and significance of the public interest test is discussed below.
13. House of Commons, Select Committee on Public Administration, *Third report. Freedom of Information Draft Bill. Volume I. Report and proceedings of the committee, HC 570-i* (London: Her Majesty's Stationery Office, 1998).
14. HC Deb, December 7, 1999, vol. 340, cols. 714–98.
15. HC Deb, April 4, 2000, vol. 1857, cols. 930–35; HC Deb, April 5, 2000, vol. 1857, cols. 981–1123.
16. Tom Cornford, "The Freedom of Information Act 2000: Genuine or Sham?," *Web Journal of Current Legal Issues* (2001), <http://webjcli.ncl.ac.uk/2001/issue3/cornford3.html> (accessed on 1 July 2011).
17. HC Deb, December 7, 1999, vol. 340, cols. 743,772.
18. Especially Interview 5, *Senior Officials, ICO* (16 June 2011).
19. HC Deb, April 4, 2000, vol. 1857, col. 834.
20. Robert Hazell, Ben Worthy and Mark Glover, *The impact of the Freedom of Information Act on central government in the UK: does FOI work?* (Basingstoke and New York: Palgrave Macmillan, 2010).
21. Interview 1, *Official, ICO* (24 May 2011); Interview 2, *Senior Journalist, BBC* (2 June 2011); Interview 3; Interview 4, *Official, Taxpayers' Alliance* (15 June 2011); Interview 10, *Official, MoJ* (7 July 2011).
22. Patrick Birkinshaw, "Freedom of information and its impact in the United Kingdom," *Government Information Quarterly* (27:4, 2010), 312–321.
23. The meaning and significance of "absolute" exemptions is discussed below.
24. Matthew Flinders and Hugh McConnel, "Quangos and Accountability," in Matthew Flinders, Ian Harden and David Marquand (eds.), *How to make Quangos Democratic* (London: Charter 88, 1997), 42–51; Matthew Flinders, "The Politics of Accountability: A Case Study of Freedom of Information Legislation in the United Kingdom," *Political Quarterly* (71:4, 2000), 422–435; Chris Skelcher, Stuart Weir and Lynne Wilson, *Advance of the Quango State* (London: Local Government Information Unit, 2000).
25. HC Deb, December 7, 1999, vol. 340, cols. 767, 777–78.
26. HL Deb, October 17, 2000, vol. 617, col. 951.
27. Worthy (2007b).

28. Toby Mendel, *Freedom of Information: A Comparative Legal Survey* (New Delhi: UNESCO, 2003), 96–8.
29. Maurice Frankel, “Abysmal handiwork; Maurice Frankel is bitter. He feels betrayed, after campaigning for decades to get open government,” *Guardian* (25 May 1999), 19. See also HC Deb, December 7, 1999, vol. 340, cols. 735–36, 748.
30. See s23. Other information relating to national security but which is neither held by nor relevant to these authorities is subject to a qualified exemption under s24.
31. This includes, at s24, national security information not covered by the absolute exemption at s23.
32. HC Deb, December 7, 1999, vol. 340, cols. 747–48.
33. There appears to be a kind of unstated convention in the United Kingdom of referring to the office of Commissioner (as opposed to the incumbent) as “she” when gender-neutral language cannot be avoided. This may partly be a mark of respect to the first Information Commissioner, Elizabeth France.
34. HC Deb, April 4, 2000, vol. 1857, col. 846.
35. Interview 3.
36. David Winder, “Little Known British tradition—Secrecy,” *Christian Science Monitor* (17 December 1986), 1.
37. HC Deb, December 7, 1999, vol. 340, col. 773.
38. *Ibid.*, cols. 730, 751, 770, 782.
39. Interview 3; Interview 5; Interview 10.
40. Interview 5; Interview 10. It should be noted that the only major study of the effects of the UK FOIA found that changes to the policy process over the late 1990s and early 2000s were difficult to attribute *solely* to the FOIA (which is to say that the effect of other administrative and structural reforms that also occurred over the same period could not be excluded). See Hazell *and others* (2010).
41. Blair’s own retrospective assessment of his contribution to the introduction of the FOIA was: “You idiot. You naive, foolish, irresponsible nincompoop. There is really no description of stupidity, no matter how vivid, that is adequate. I quake at the imbecility of it,” in Tony Blair, *A Journey* (London: Hutchinson, 2010), 516–7; Martin Kettle, “Tony Blair interview: the full transcript,” *Guardian* (1 September 2010), 1.
42. HC Deb, April 4, 2000, vol. 1857, col. 864.
43. Interview 5.
44. See, for example, Home Office, Committee on the Civil Service [“Fulton Committee”], *Report, Volume 1, Cmnd 3638* (London: Her Majesty’s Stationery Office, 1968); Home Office, Committee on Section 2 of the Official Secrets Act [“Franks Committee”], *Report, Volume 1: Report of the Committee, Cmnd 5104* (London: Her Majesty’s Stationery Office, 1972a); Home Office, Committee on Section 2 of the Official Secrets Act [“Franks Committee”], *Report, Volume 4: Oral Evidence Mainly from Non-Government Witnesses, Cmnd 5104* (London: Her Majesty’s Stationery Office, 1972b).
45. Interview 3; Interview 5; Interview 6, *Senior Information Management Officer, Wandsworth Local Council* (17 June 2011).
46. Personal communication from a senior official, CFI.
47. Interview 3; Worthy (2007b), 154.
48. The Lord Chancellor is one of the “Great Officers of State.” These Officers have existed for centuries, and were originally Ministers of the Crown (that is, ministers appointed by the monarch, as opposed to cabinet ministers who held office by virtue of winning an election under the modern parliamentary system). Several Great Officers still exist today, but most now have only ceremonial functions. The position of Lord Chancellor is distinctive, in that it has become a cabinet position with responsibility for the administration of the courts and the legal system. The position is distinct from the Secretary of State for Justice, although both positions were held by Jack Straw under New Labour and both are also held by his Conservative successor Kenneth Clarke.
49. The original nodal agency was the Lord Chancellor’s Department, which was responsible for administering the courts and judicial system. This was merged into the Department of Constitutional Affairs in June 2003, which was renamed the Ministry of Justice in 2007 following the transfer of responsibility for probation, prisons and prevention of reoffending from the Home Office. These

- changes were described by interviewees as routine alterations to government machinery, and appear to have had little effect on implementation (staff responsible for the FOIA moved between departments along with responsibility).
50. Department for Constitutional Affairs, *Annual report on bringing fully into force those provisions of the Freedom of Information Act 2000 which are not yet fully in force*, HC 367 (London: The Stationery Office, 2001); Department for Constitutional Affairs, *Annual report on bringing fully into force those provisions of the Freedom of Information Act 2000 which are not yet fully in force*, HC6 (London: The Stationery Office, 2002a); Department for Constitutional Affairs, *Freedom of Information. Annual report on bringing fully into force those provisions of the Freedom of Information Act 2000 which are not yet fully in force*, HC 7 (London: The Stationery Office, 2003); Department for Constitutional Affairs, *Freedom of Information. Annual Report on proposals for bringing fully into force those provisions of the Freedom of Information Act 2000 which are not yet fully in force*, HC 5 (London: The Stationery Office, 2004).
 51. Department for Constitutional Affairs (2004), 8.
 52. Alasdair Roberts, "Dashed Expectations: Governmental Adaptation to Transparency Rules," in Christopher Hood and David Heald (eds.), *Transparency: The Key to Better Governance?* (Oxford: Oxford University Press, 2006).
 53. Interview 5; Interview 7, *Senior Information Management Officer, Association of Chief Police Officers* (20 June 2011).
 54. Interview 10.
 55. Frontier Economics, *Independent Review of the impact of the Freedom of Information Act: a Report Prepared for the Department for Constitutional Affairs* (London: Department of Constitutional Affairs, 2006).
 56. Anna Colquhoun, *The Cost of Freedom of Information* (London: The Constitution Unit, 2010), <http://www.ucl.ac.uk/constitution-unit/research/foi/countries/cost-of-foi> (accessed on 1 July 2011).
 57. Interview 7.
 58. Interview 6.
 59. Interview 4; Interview 6.
 60. Interview 2. The Frontier Economics report estimated Ministerial time at £67 per hour.
 61. Interview 6.
 62. Department for Constitutional Affairs, *Work of the Advisory Group on Implementation of the [Freedom of Information] Act* (London: Department for Constitutional Affairs, 2002b).
 63. Interview 4; Interview 6.
 64. Interview 4; Interview 6.
 65. Interview 6.
 66. http://www.ico.gov.uk/about_us/our_organisation/key_facts.aspx.
 67. Interview 4.
 68. Interview 3.
 69. Chancellor of the Duchy of Lancaster (1997), 31.
 70. Interview 9, *Information Policy Officers, The National Archives* (24 June 2011).
 71. Interview 7.
 72. Interview 9.
 73. Ibid.
 74. Interview 5.
 75. MoJ, *Freedom of Information Act 2000—Statistics on implementation in central government 2010 Annual and Q4: October–December 2010* (London: MoJ, 2011a), 52.
 76. HC Deb, December 7, 1999, vol. 340, col. 737, 752.
 77. Ibid, cols. 933–5.
 78. Interview 3.
 79. Interview 3.
 80. HC Deb, April 4, 2000, vol. 1857, cols. 916–7.
 81. Interview 3.
 82. Interview 5.

83. This avenue of appeal replaced appeals to the High Court in a organization of administrative tribunals in 2007–08.
84. Interview 10.
85. Although it is worth noting that in many jurisdictions, especially Scandinavia, the recommendations of the ombudsman are followed as a matter of course.
86. David Banisar, *Freedom of Information Around the World 2006; A Global Survey of Access Records Laws* (The Online Network of Freedom of Information Advocates, 2006), http://www.freedominfo.org/documents/global_survey2006.pdf (accessed on 20 September 2006); Robert Hazell and Ben Worthy, "Assessing the performance of freedom of information," *Government Information Quarterly* (27:4, 2010), 352–359.
87. ICO, *Annual Report 2009/10, HC220* (London: The Stationery Office, 2010), 27.
88. Interview 3.
89. Interview 5.
90. Interview 3.
91. Interview 7.
92. Personal communication from a senior official, CFI.
93. Interview 11, *Official*, ICO (11 July 2011).
94. Eric Gaskell, "Presentation des publications officielles dans les pays de la Communauté économique européenne," in Commission de Coordination de la Documentation Administrative (ed.), *Documentation administrative et renouveau du service public* (Paris: La documentation française, 1992), 215–226.
95. Interview 5.
96. Ibid.
97. Ibid.
98. Interview 4; Interview 6.
99. MoJ, *Freedom of Information Act 2000. 2009 Annual Statistics on implementation in central government* (London: MoJ, 2010), 38.
100. MoJ (2011a), 4.
101. Ibid, p. 5.
102. Data are for all monitored bodies, per MoJ, *Freedom of Information Act 2000—Statistics on implementation in central government 2010 Annual and Q4: October–December 2010—Full Statistical Data* (London: MoJ, 2011b), [http://www.justice.gov.uk/downloads/publications/statistics-and-data/mojstats/2010%20Q4%20Annual%20Fol%20stats%20tables%20\(values%20only\).xls](http://www.justice.gov.uk/downloads/publications/statistics-and-data/mojstats/2010%20Q4%20Annual%20Fol%20stats%20tables%20(values%20only).xls) (accessed on 1 September 2011).
103. Data are for all monitored bodies, per MoJ (2011b).
104. MoJ (2010), 6–8; MoJ (2011a), 7.
105. ICO, *Consideration of requests without reference to the identity of the applicant or the reasons for the request, Freedom of Information Good Practice Guidance No 6* (Wilmslow: ICO, 2007), 1. See also *S v Information Commissioner and the General Register Office* (EA2006/0030; 9 May 2007).
106. Hazell and Worthy (2010), 354.
107. Hazell and others (2010).
108. MoJ (2011b).
109. Ibid.
110. Interview 7.
111. MoJ, *Freedom of Information Act 2000. 2006 Annual Statistics on implementation in central government* (London: MoJ, 2007); MoJ, *Freedom of Information Act 2000. 2007 Annual Statistics on implementation in central government* (London: MoJ, 2008); MoJ, *Freedom of Information Act 2000. 2008 Annual Statistics on implementation in central government* (London: MoJ, 2009); MoJ (2010); MoJ (2011a).
112. ICO, *Undertaking with The Cabinet Office, ENF0240073* (Wilmslow: ICO, 2011a). The ICO's assessment was echoed by several interviewees: Interview 2; Interview 8, *Volunteer, What Do They Know* (23 June 2011).
113. ICO, *Undertaking with the Ministry of Defence, FPR0219435* (Wilmslow: ICO, 2011b).
114. Hazell and others (2010).

115. Interview 4.
116. Interview 3.
117. Kenneth Robertson, *Public Secrets: A Study in the Development of Government Secrecy* (London: MacMillan, 1982); Kenneth Robertson, *Secrecy and Open Government: Why Governments Want You to Know* (Basingstoke: MacMillan, 1999).
118. Max Weber, *Economy and Society: An Outline of Interpretive Sociology, Volume II* (Los Angeles: University of California Press, 1978 [1922]), 956 et sqq., esp. 992–3.
119. Interview 3.
120. Prime Minister, *Information and the Public Interest, Cmnd 4089* (London: Her Majesty's Stationery Office, 1969), 9–10.
121. The First Division Association is the union representing the most senior civil servants in the United Kingdom.
122. Interview 3.
123. Interview 5.
124. Unfortunately, representatives of these groups declined to be interviewed for this case study.
125. Interview 5.
126. Times, "Abolish Secrets Act call," Times (16 October 1973), 5; Times, "Secrets Act a menace to safety, Mr Nader says," Times (19 May 1976), 4; *ibid.*
127. The most well-known example is Martin Rosenbaum at the BBC, who was interviewed for this case study. As an institution, the *Guardian* has perhaps done most to associate itself with the use of the FOIA.
128. Interview 5; Interview 10.
129. Interview 2; Interview 3; Interview 6.
130. Interview 6; Interview 7; Lynn Wyeth *Presentation to UCL/LSE Transparency Workshop, 29 July 2011*. (London: University College London, 2011).
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150. The Code was not enforceable in the strict sense of the word, In that authorities could choose to ignore a recommendation in favor of disclosure by the Parliamentary Commissioner for Administration. It was enforceable in the sense that initial refusals to disclose could for the first time be appealed to an official body—namely the Parliamentary Commissioner.
151. Interview 3; Parliamentary and Health Service Ombudsman (2005), 34.
152. Worthy (2007b).
153. Interview 3.
154. Ibid.; Interview 5; Interview 10.
155. Hazell *and others* (2010).
156. Interview 2; Interview 4.
157. Interview 3.
158. This criticism was made most forcefully by the Fulton Committee in United Kingdom, Home Office, Committee on the Civil Service ["Fulton Committee"], *Report, 1, Cmnd 3638* (London: Her Majesty's Stationery Office, 1968).
159. Interview 3.
160. Ibid.; Interview 2; Interview 3; Interview 4; Hazell *and others* (2010).
161. Interview 1.
162. Interview 2.
163. Interview 2; Interview 3; Interview 10.
164. Interview 4.
165. Interview 6.
166. Hazell *and others* (2010).



Implementing Right to Information

Part 2 Introduction

A second round of four indicator-driven case studies was conducted in 2014 under the direction of Stephanie E. Trapnell. As part of the project design, indicators were discussed, vetted, and revised by researchers involved in the project so that the indicators could be used to guide data collection for the case studies. The indicators were intended to capture key features of agency practices, monitoring and oversight arrangements, enabling environments, and performance data.

Variables for investigation were selected based on an understanding of RTI systems as

1. embedded in public administration functions at the agency or ministry level,
2. requiring centralized government oversight of implementation processes and compliance with legal mandates and a multi-level, accessible process for grievance redress, and
3. part of an ecosystem of transparency and accountability that includes actors from politics, the public sector, civil society, media, and the private sector.

Case studies are organized into several sections that move from the legal framework and monitoring arrangements, to agency-level practices, and ending with the enabling environment.

- **Legal framework and compliance** is about the RTI laws and decrees and the extent of implementation from a national perspective: Scope of coverage, Exemptions and Balancing tests, Information requests, Appeals and Sanctions, Monitoring and oversight arrangements, Proactive disclosure
- **Agency practices** are those activities, processes, and procedures that support RTI functions within an agency: Leadership, Human resources, Performance monitoring systems, Responsiveness, Records Management, Budget, Training and public outreach
- **Capacity and influence of civil society** is an important supporting factor that operates from outside government: Individual citizen involvement/demand for RTI, Civil Society Organizations, Media, Private sector
- **Broader political environment** frames the context of RTI implementation and influences it in both direct and indirect ways: Political will, Open government efforts, Governance as it relates to RTI



Although a pilot set of indicators served as the frame for investigation, not all aspects of RTI implementation are captured through indicators. In particular, indicators are not designed to capture the complexities of causal mechanisms (i.e., why? why not? how?). Indicators and related data points simplify a complex reality. In-depth examination of causal mechanisms, however, requires investigation of the reasons for indicator values. Comprehensive case studies such as those undertaken for this project help to explain the complexity of relationships, behaviors, and contextual constraints in RTI implementation.

Pilot Indicators in the Part 2 Case Studies

The following indicators served as the basis for extended case studies that elaborated on the factors contributing to the effectiveness of RTI implementation efforts.

INDICATOR CATEGORIES

Administration Functions
1. Management
2. Budget
3. Policy Management
4. Public Awareness
Disclosure Functions
5. Information Request Process
6. Records and Information Management
7. Internal Review (Agency-level appeals)
8. Proactive Disclosure
9. Monitoring and Evaluation
Monitoring and Oversight
10. RTI Oversight and Independence
11. Oversight and Monitoring activities
Appeals and Sanctions
12. Appeals and Sanctions
13. Court System
Civil Society
14. Key Organizations and Mobilization and Advocacy Campaigns
15. Tactics and strategies employed by civil society (CSOs and CBOs)
16. Utilization of RTI obtained and/or Proactively Disclosed Information
17. Role of Media
18. Role of Private Sector
Political Environment
19. Open Government Context



Implementing Right to Information A Case Study of Jordan

Saad Filali Meknassi



WORLD BANK GROUP

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Abbreviations and Acronyms

ARIJ	Arab Reporters for Investigative Journalism
ATI	Access to Information
CDFJ	Center for Defending Freedom of Journalists
COM	Council Of Ministers
CSI	Civil Society Index
CSO	Civil Society Organization
FFF	Foundation For the Future
HCJ	High Court of Justice
IA	Information Agent
IC	Information Council
ICO	Information Commissioner
IEC	Independent Electoral Commission
JTC	Jordan Transparency Center
LPSSD	Law on the Protection of State Secrets and Documents
LSAI	Law on Securing Access to Information
MENA	Middle East and North Africa
MOA	Ministry Of Agriculture
MOE	Ministry Of Environment
OB	Ombudsman Bureau
OGP	Open Government Partnership
PPL	Press and Publications Law
RASED	The Civil Coalition for Monitoring the 2013 Jordanian Parliamentary Elections
RFI	Request for Information
RSF	Reporters without Borders
RTI	Right to Information
UNCAC	United Nations Convention against Corruption

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- Center for Defending Freedom of Journalists; and
- Foundation For the Future.

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Implementing Right to Information A Case Study of Jordan

1. Introduction and Findings

1.1. INTRODUCTION

Jordan adopted the Law on Securing Access to Information (LSAI) in 2007, after other legislation had been passed to promote greater openness and improve competition in specific sectors, such as communications and the media. The involvement of different stakeholders was limited during the passage of the LSAI, but since its adoption, many civil society organizations (CSOs) have emerged as the main actors working to raise awareness of the access to information (ATI) law and monitor its implementation by public agencies. Many observers considered this an opportunity to modernize the State, enhance respect for human rights and promote the accountability of public institutions.

The Official Communiqués of successive Prime Ministers asking public institutions to implement the LSAI prove that this exercise is incomplete. These executive orders show how difficult it is to enforce the ATI law in the absence of a central independent agency in charge of the implementation and monitoring of the LSAI. Moreover, the LSAI gave the Information Commissioner (ICO) legal responsibility only for the information produced and archived by his department, thereby significantly limiting the scope of his powers.

Jordan amended its Constitution in 2011 and integrated into it some specific reforms under the influence of the developments that were taking place in the Middle East and North Africa (MENA) region. The reforms did not proclaim ATI even though some CSOs were demanding for the adoption of ATI in the Constitution. On the other hand, the Council Of Ministers (COM) introduced amendments to the LSAI in 2012, though they have not yet been adopted by the Parliament. Many CSOs are asking for greater reform that will entail significant amendments to the LSAI or the adoption of a new law on ATI in line with international standards and best practices.

This case study will focus on the implementation of the LSAI by the Ministry of Agriculture and the Ministry of Environment. These examples will help to highlight the progress and limitations of LSAI implementation at the agency level, and to identify some general trends that could help in an analysis of the level of compliance of public agencies with ATI legislation.



The significant changes happening in the MENA region, and the membership of Jordan in new voluntary initiatives, such as the Open Government Partnership, should empower the government and different stakeholders, especially those involved in the governance and accountability sectors, to look forward and propose new reforms that will improve the pace of reforms in Jordan. The efficient implementation of ATI would be a significant step in that direction.

1.2. FINDINGS: DRIVERS OF SUCCESS AND FAILURE

Jordan passed the first ATI law in the MENA region in 2007. The law did not take into consideration different international standards and best practices to ensure its successful implementation and effective access to information for citizens. Various aspects of the LSAI and its implementation are considered as drivers of failure. These include:

- The absence of a central independent agency to support implementation of the LSAI and monitor its enforcement by public agencies.
- The dependence of the ICO on the Information Council (IC) and its Chair, the Ministry of Culture, makes this agency's mandate very limited. It limits the capacity of the ICO to challenge the Executive and pressure public agencies to implement the LSAI.
- The ICO is the head of the National Library; he is responsible for the information kept in this department and not the information kept in other public agencies. His decisions are not binding for other public agencies.
- The process of classification and categorization of information at the agency level was launched only in 2012, after the majority of public agencies had ignored this LSAI requirement for more than 5 years.
- There is no use of new information and communication technologies in processing requests for information. A citizen wanting public information has to go to the specific agency and fill in a form (if it exists) to request it.
- The details and personal data required from individuals requesting information can dissuade them from presenting requests for information.
- The Law on the Protection of State Secrets and Documents (1979) covers the secrecy of public information, and this has constituted a serious obstacle to the implementation of the LSAI. Other existing legislation also hinders implementation of the LSAI such as the Law on publications and the press code.
- The absence of sanctions in the LSAI has contributed to the current weak compliance, as there are no consequences for public officials and agencies that ignore the law's requirements.
- The broad scope and use of exemptions and the limited success in processing appeals limit the use of the LSAI.
- The High Court of Justice is the last recourse for appeals against decisions pertaining to ATI. Giving the High Court of Justice this responsibility constitutes a serious challenge to ATI because of the nature of the Court and the costs that it involves to appeal the decisions of public agencies.

Some positive aspects arising from the Jordanian context are considered drivers for success. These include:

- A vibrant and active civil society has started focusing its advocacy on ATI and has conducted monitoring exercises to determine the extent to which the LSAI is being implemented.
- The membership of Jordan in the Open Government Partnership (OGP) has already made the government pass new amendments to the LSAI, even if civil society advocates and other engaged stakeholders consider these reforms very limited. The OGP process could improve implementation of the LSAI and highlight its current constraints, especially if the process allows the full engagement of CSOs.
- The quality of the recent ATI laws adopted in the MENA region and the engagement of local and international organizations in the monitoring of their implementation can lead to an increased emphasis on the Jordanian experience. This, in turn, may strengthen the advocacy for significant amendments of the LSAI and empower different actors to make implementation of ATI in Jordan more effective.

2. History of Access to Information in Jordan

Passage of the Law on Securing Access to Information and Its History

The Law on Securing Access to Information² no. 47 of 2007 was passed at the end of the fourth exceptional session of the 14th parliament in Amman, Jordan. Its entry into force coincided with its publication in the Official Gazette on 17 June 2007. This law, by its nature and scope, was the first legislation on ATI to be adopted in the MENA region.

Many observers³ who assisted in the development of the ATI bill are of the view that the new piece of legislation did not receive much attention in the parliament and its vote was speedy. Moreover, there were no significant discussions of its content and no consultations were conducted with other stakeholders before the adoption of the law. It is important to describe the context during the adoption of the law in Jordan. There was no significant demand by CSOs or other supporters of ATI and there was a significant lack of public engagement and debate during the preparation of the ATI law. Journalists, CSOs, professional associations, private sector organizations and academia were totally absent during the formulation of the law. The process was very quick and there was no organized demand for the law in the country.

Yahia Shukkeir,⁴ an expert working on ATI who contributed to the drafting of Jordan's ATI law, relayed the events leading to the adoption of the law. During his work at the Higher Media Council, government officials asked for recommendations on improving Jordan's rank on the Press Freedom Index run by Reporters without Borders (RSF).⁵ Among others, the adoption of an ATI law was then suggested. The Amman Center for Human Rights declared in its 2007 annual report that "the joint legislative committee—the Freedoms and Legal Committees—endorsed the draft in 30 minutes, while the House of Representatives took no more than 30 minutes to vote on the law."⁶



The process of adoption of the LSAI has had a significant effect on its implementation and promotion. Because the LSAI was adopted with little public discussion, its implementation had to start from scratch and required a concerted effort to involve all stakeholders and ensure their understanding of the significance of this new right. By adopting the law in these circumstances, the government did not gain any advantage for its promotion, with the result that RTI was recognized more in theory than in practice.

The LSAI was adopted after Jordan had ratified many international conventions and covenants. Jordan had adopted the Rio Declaration that includes the principle on access to environmental information, as well as the International Covenant on Civil and Political Rights, and on 24 October 2005, Jordan ratified the United Nations Convention against Corruption (UNCAC). The UNCAC promotes in its articles 10 and 13 specific fundamentals related to RTI, especially the promotion of transparency and ensuring that the public has access to information so that it can participate in the fight against corruption.

Back in 2007, Jordan was considered regionally as a leading country for the process of reform in the MENA region (e.g., liberalization of the media, adoption of the ATI law), but this will not remain the case as different national and international observers will soon point out the shortcomings of the ATI legislation and its failure to incorporate important international standards. Even though the 2007 law did not integrate some specific international standards, it was seen as an opportunity to modernize the administrative system and change the relationship between citizens and authorities.⁷ The RTI is therefore considered the cornerstone for press freedom and public participation in public affairs.

Implementation of laws is vital for the rule of law and functioning institutions, especially when it concerns accessing rights. However, the implementation of RTI in Jordan has been very limited since the law came into force. Some improvements have occurred in the last 2 years, but the interviews conducted with different stakeholders indicated the limits of the implementation of the LSAI and the continuous challenges for ATI effectiveness.

Different public agencies have responded differently to the LSAI. Since 2012, some public institutions started integrating the procedures of the LSAI into their internal processes and launched new ones to adapt to this legislation. Moreover, they started the process of classification and categorization of information and communicated to the IC basic data on the number of requests for information they have received. Other agencies, however, are still not taking into consideration the existence of the LSAI.

After several years of existence, it seems that the law has not been largely known by institutions and citizens, and it has not constituted a significant move towards an easy and effective flow of information to citizens.⁸ The culture of secrecy that was relatively common in some significant government institutions has not been challenged by the existence of the ATI law. The results of surveys conducted by some CSOs and research centers show that a large number of public institutions have no knowledge of the law and have not integrated the content of the law into their services.

After a long process of deliberation and a multi-stakeholder debate, the IC proposed amendments to the ATI law, which were validated by the Cabinet in September 2012. These amendments will (i) affect the composition of the IC by adding representatives of civil society (a representative of the Bar association and a representative of Journalists), (ii) guarantee ATI to foreigners with reciprocity rights, and (iii) reduce the timeline for responding to requests for

BOX 1. THE WASTED RIGHT:⁹ RESULTS OF THE STUDY CONDUCTED BY CDFJ IN 2012

The Wasted Right presents the results of the study conducted by the Center for Defending Freedom of Journalists (CDFJ) in 2012. It seeks to describe the actions taken and applications developed by public departments in relation to the ATI law.

The Center for Defending Freedom of Journalists (CDFJ) sent questions to the Office of the Prime Minister, 6 ministries and the National Library (in its capacity as ICO) about specific aspects:

- The categorization of their information and data;
- The proportion of information classified;
- The number of requests received since 2007 from researchers, specialists and ordinary citizens and their outcome; and
- The existence of an official request for information form, as required by the law.

The conclusions of this research showed that:

- Most of the ministries have no previous information about the ATI law;
- Some of the questions sent to the ministries were lost, with the exception of 3 ministries out of 7 and the National Library;
- No focal point or Information Agent (IA) is available at public institutions to deal with requests for information (RFI);
- There are no RFI forms except at the Ministry of Finance, the Ministry of Justice and the National Library;
- Some of the ministries, including the Ministry of Social Development, admitted that they were not committed to the enforcement and application of the LSAI in classifying the information in their databases;
- There was a problem in some cases in understanding the law and its applications. The Ministry of Health formed a committee to study the mechanisms of enforcing the ATI law after receiving the questions of the CDFJ and other journalists;
- The answers that CDFJ received showed that no one had submitted a request to the Ministry of Social Development in the past, while three requests had been filed with the Ministry of Health. The Ministry of Education informed the project's team that they did not turn down any request, but the Ministry did not say how many requests had been filed with its departments; and
- The ministry or department concerned failed to give a receipt against the submitted request, and did not even give the request a number in the official incoming registry, which violates the law. These practices have been frequently reported with regard to some agencies.



information and appeals from 30 days to 15 days. These amendments have not yet entered into force; they still have to be presented to the Legislative Committee of the Parliament and then voted on by the Parliament and the Senate.

The amendments presented and validated by the COM have been widely criticized for their limited scope. In particular, two civil society groups are developing efforts to pressure the parliament in order to achieve basic amendments that will conform to international standards. Moreover, increased demand for public information and the insistence of civil society are crucial to change the ATI rules as applied since 2007. Such changes will provide a new opportunity to make ATI efficient and implemented on a broad scale.

The following analysis of the implementation of the law will show its significant limitations compared to existing international standards. In particular, the ATI law does not promote sanctions if the law is not implemented. In addition, the IC is very dependent on the executive branch and does not have the powers to seek public information from other public agencies.

3. The Legal Environment and Compliance with the Law

Jordan's present legal system is based on the Constitution, the Court Establishment Law of 1951, and a civil and criminal code, in addition to Islamic and ecclesiastical laws regulating specific sectors like the family code. The legal system has been influenced by many sources: The system developed from codes of law instituted by the Ottoman Empire that was mainly inspired by French law; British laws during the mandate period; and Islamic law, which has been influential, modifying in many ways the European models.

Jordan amended its Constitution in 2011 under the influence of the events that emerged regionally and integrated some specific reforms. The reforms did not proclaim Access to Information among other fundamental rights recognized in Chapter 2 (on the Rights and Duties of Jordanians), such as the freedom of the press and the freedom of association. Some amendments proposed by CSOs concerning the integration of RTI did not find their way into Article 15 of the Constitution, which was amended by specifying in more detail the obligation of the State to secure freedom of opinion and freedom of the press within the limits of the law.¹⁰

The Law on Securing Access to Information (LSAI) was adopted in 2007 and became the first legislation on ATI in the MENA region. An important limitation to the effectiveness of the LSAI is that it does not supersede any other existing legislation currently in force. The Protection of State Secrets and Documents Provisional Law No. 50 of 1971 is still in force, and this is the biggest obstacle to ensuring the Right to Information. The LSAI does not conform to international standards on ATI and presents many limitations. The lack of independence of the ICO and the IC, and the broad scope of exceptions limit significantly the effectiveness of this legislation.

3.1. SCOPE OF COVERAGE

A cornerstone of good ATI legislation is the inclusion of provisions in the law that (i) presume that all government documents and meetings will be open unless the custodian can

demonstrate a legitimate basis for non-disclosure, and (ii) place a burden of proof on the State to establish that there is a legitimate reason for non-disclosure. The LSAI does not explicitly promote proactive disclosure and it limits the access to information to the existence of a legitimate interest and reason presented by the requester for public information. It states in article 7 that each Jordanian citizen "is entitled to have access to the information he/she requests pursuant to the provisions of this law, if he/she has legitimate interest or cause for that." The LSAI grants access to information exclusively to Jordanian citizens and requires requesters for information to demonstrate what their interest is in accessing the requested information.

3.2. SCOPE OF EXEMPTIONS AND CATEGORIZATION OF INFORMATION

The law bans public requests for information involving religious, racial, ethnic, or gender discrimination (Article 10), and allows officials to withhold all types of classified information, under very broad categories (Article 13).¹¹

Article 13 of the Law enumerates the grounds upon which a public records custodian is not required to disclose information considered as a specific exemption:

- Secrets and documents protected under any other legislation;
- Classified information obtained through an agreement with another state;
- Secrets of national defense, national security, or foreign policy;
- Information which contains analysis or recommendations, proposals or advice offered to an official before a decision is taken thereon, and correspondence and information exchanged between various governmental departments;
- Information and personal files on a person's educational records, medical records, career, bank accounts or professional secrets;
- Correspondence of a personal or confidential nature whether postal, telegraphic or by telephone or through any other technical means with government departments, and answers thereto;
- Information, the disclosure of which would influence negotiations between the State and any other country;
- Investigations by the general prosecution or judicial enforcement or security agencies on any crime or case within their jurisdiction, as well as investigations by the competent authorities to detect financial or customs or bank irregularities unless the competent authority authorizes such disclosure; and
- Information of a commercial, industrial or financial or economic nature, and information on bids or scientific research, the disclosure of which would lead to an infringement of copyright and intellectual property, fair and legitimate competition or would lead to unlawful profit or loss for any person or company.

All these elements make the list of exemptions broad and not really well defined. This gives the public agency or the Information Agent (IA) the freedom of choice as to whether or not to provide the information, especially when there are no sanctions involved and other existing laws can make him/her responsible for revealing information that "may cause harm."



Each department, as stated by the LSAI, is required to classify and organize all information and documents held by its agencies. The department is responsible for determining which information and files shall be considered protected and classified in accordance with the applicable laws. The LSAI did not provide any restrictions on information disclosure in other existing legislation.

The Prime Minister's Communiqués 17/2007, 24/2007, and 13/2008, as well as the Communiqués of 7 April 2009 and 27 March 2011, ordered each public entity and department to categorize and organize all its information and documents. They were given three months after publication of the LSAI in the official gazette, as stated in article 14 of the LSAI, to determine which information shall be deemed protected and classified in accordance with the applicable laws. These public entities were also asked to communicate to the IC the list of documents considered secret.

Despite constitutional protections of freedom of information, there remain several laws that hinder free expression and access to information. These include the Jordan Press Association Law (1998), the penal code (1960), the Defense Law (1992), the Contempt of Court Law (1959), the Protection of State Secrets and Classified Documents Law (1971), and the Press and Publications Law (1999 and its amendments of 2012). In this context, existing legislation, especially the Archives Law and the Law on the Protection of State Secrets and Documents (LPSSD), will limit significantly the information that may be accessed. The LPSSD states that classified government documents may be declassified after 30 years. Moreover, it does not outline a clear mechanism for the classification of government documents that may be exempt from disclosure.

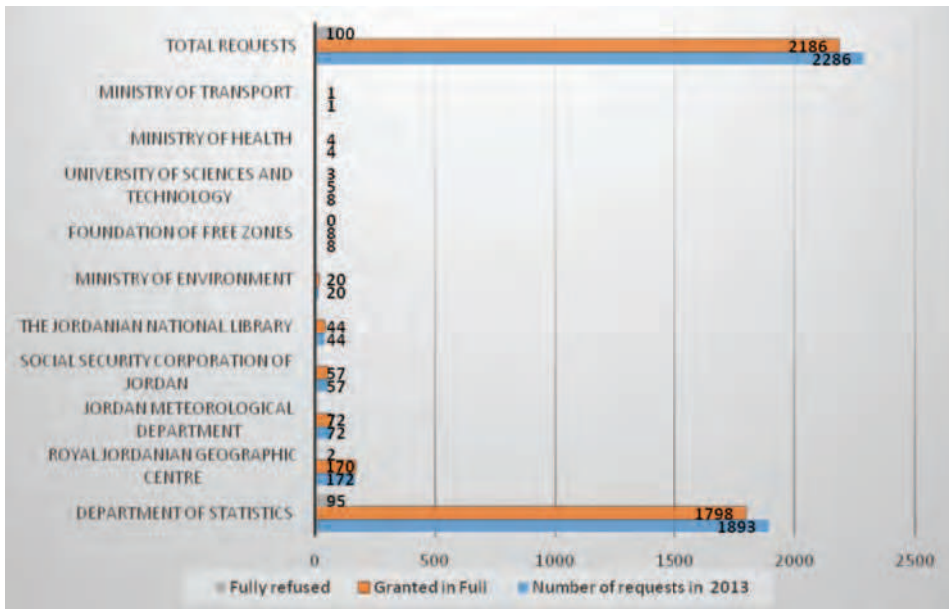
The LSAI in its article 19 refers to the COM as the authority to adopt the necessary operational legislation to ensure implementation of the law on accessing public information. However, the COM has adopted only the framework for fixing the fees for copying and reproducing information and the forms to be completed when submitting RFIs.

3.3. REQUESTS FOR INFORMATION AND THEIR CHARACTERISTICS

The requesting procedure requires citizens to fill out a form of two pages in the offices of the agency that holds the information. Filling out the form requires sharing personal information (name, address, National Identification Number, etc.) and explaining the purpose of the request. The formal procedure requires the IA to complete two pages referring to the request and to write the decision as to whether the information has been released or not. If the response is negative, the IA has to give in-principle reasons for the refusal. The LSAI in its article 9 states that the IA should provide a reason if access to information is denied to the requester; on the other hand, it considers the mute refusal of a public agency valid as a response.

The timeline provided by the LSAI is 30 days for the IA to respond to a request for public information. The timeline to send a complaint to the ICO is of the same duration (30 days), and the last recourse, which is an appeal against the decision of the IC or the public agency, has a similar timeline of 30 days.

The institution that received the largest number of RFIs in 2012 is the Department of Statistics with 1798 requests, followed by the Royal Jordanian Geographic Centre with 170 requests. Some CSOs and observers criticized the accuracy of these statistics on the basis

FIGURE 1. Requests for Information Received by Public Institutions in 2012

that the number of requests was overestimated and did not consider RFIs exclusively.¹² These critics believed that even requests that had been presented without filling out the forms were considered as requests, especially in the case of the Department of Statistics.

3.4. FEES FOR ACCESSING PUBLIC INFORMATION

Article 18 states that an allowance has to be paid to the department that provided the information to cover the costs of copying information and reproducing the information in a specific “container” (CD, tape...). The LSAI refers to the COM as the authority to approve the regulatory framework to fix the fees to be paid by requesters for copies of documents and to cover the costs for the reproduction of various types of information. The IC proposed a framework, which was sent to the Prime Minister on 1 November 2007 and 8 January 2008, proposing the fees to be paid for each type of information support and for photocopying documents as stated in article 18 of the LSAI. The Cabinet approved the framework proposed by the IC and this entered into force on 23 January 2008.

The framework adopted set some basic principles as stated by the LSAI. The fees are paid to cover the cost of the reproduction of information and not the information itself. This framework recommends that every agency should provide a copy of the pricing list together with the RFI forms to inform the public about the fees. It also lists all types of information and fixes the price for each type. Some information types (maps and plans) do not have a fixed price, and the agency can fix the price in accordance with the document’s characteristics.



No data is available on the amounts collected through fees by public agencies. The limited number of requests registered since the adoption of the law is an indicator of the limited significance of these fees.

3.5. LACK OF SANCTIONS AGAINST AND INCENTIVES FOR PUBLIC AGENTS

The LSAI does not provide for any types of financial or disciplinary sanctions against public agents who do not release existing public information. By contrast, if public agents release administrative documents without the approval of the minister or the minister's representative, they risk disciplinary measures and sanctions under several laws.

The absence of sanctions in the LSAI, in addition to the existing laws that contradict some of its fundamentals, creates confusion for public agents in charge of ATI in the absence of clear instructions and classification standards. Public agents will possibly not release the information to avoid being responsible for releasing secret or sensitive information.¹³

On the other hand, no incentives have been formulated in the LSAI for public agents or agencies who work on the promotion of ATI. Moreover, even the ICO who is the central piece in this architecture does not receive any kind of compensation for ATI functions.

3.6. LIMITED NUMBER OF APPEALS BEFORE THE HIGH COURT OF JUSTICE

Article 16 designates the High Court of Justice (HCJ) as the last resort for an appeal against a refusal to release requested public information or to respond to a request. If access to information is denied and the response of the IC to the appeal is negative, the requestor has to present an appeal to the HCJ within a period of 30 days, starting from the day that the decision was received. A lawyer represents the requester before the HCJ, which has the authority to consider the agency's decision to refuse a request for information or not to respond to such a request. The LSAI does not set any deadline for the HCJ to provide a decision.

There are no statistics on ATI cases presented before the HCJ, although the ICO referred to 2 to 3 existing cases. Interviews with journalists and CSOs indicated that, after many attempts to appeal to the HCJ, the court on many occasions found procedural errors and other reasons for not taking any action on ATI cases. Some interviewees also presented the cost of the appeal as an obstacle to an appeal (around 2,500 JD¹⁴) with the likelihood that plaintiffs would not win their cases.

In September 2010, journalist Majdoleen Allan filed the first appeal to the HCJ against the Department of Lands and Survey for its refusal to disclose information about the price at which public property was sold and the identity of the buyer.¹⁵

First, Allan submitted the appeal on behalf of the NGO Arab Reporters for Investigative Journalism (ARIJ). The prosecution found that ARIJ had not disclosed its budget, had not renewed its registration and the Court established that ARIJ does not have a legitimate interest to access this information. Allan later submitted the appeal as a journalist. The Court, however, dismissed the application on the grounds that the applicant was not a registered journalist and therefore decided that she is ineligible to request such information. The journalist appealed a third time to the Court as a Jordanian citizen, but the appeal failed again because the HCJ found that the requester had no legitimate interest.¹⁶

The Court system proved to have major limitations for the implementation of LSAI. The choice of the HCJ to look into complaints is a serious challenge because of the nature of the Court and the costs that it involves to appeal the decisions of public agencies on ATI. All cases presented before this court were considered to have formal defects (irregularity in the procedure) or the requesters were considered to lack the legitimate interest to request public information.

3.7. THE OVERSIGHT INSTITUTIONS CREATED BY LSAI: THE INFORMATION COUNCIL (IC) AND THE INFORMATION COMMISSIONER (ICO)

The LSAI establishes the IC and states in article 3 that it will be composed of (i) the Minister of Culture as the chair, (ii) the ICO, who is the Director General of the Department of the National Library, as the vice chair, and (iii) the following seven members:

- The Under-Secretaries of the Ministry of Justice, the Ministry of Interior and the Higher Media Council;¹⁷
- The Director General of the Department of Statistics;
- The Director General of the National Information Technology Center;
- The Director of the National Guidance Directorate at the Jordanian Armed Forces; and
- The High Commissioner for Human Rights.

The IC is in charge of promoting access to information and looking into appeals filed by applicants whose requests were refused by public agencies.

The IC is required to validate the annual report on the implementation of ATI, which is prepared by the ICO, and to present it to the Prime Minister. The report describes the efforts initiated by the ICO and the IC in promoting ATI and presents figures and statistics on appeals received by the IC and the number of requests handled by public agencies.¹⁸ Although article 4 of the LSAI provides for the production of the annual reports, there is no requirement for their publication. Accessing the report of the IC has been a serious challenge for the public. A Jordanian graduate student submitted a request to access the IC's annual report to use it in his PhD thesis on ATI in Jordan. He was initially denied access, and so he decided to sue the IC. He then negotiated with the IC representatives, who finally agreed to provide the student with a summary of the report.¹⁹ Prior to this event, CSOs had requested the report from the IC but were not given access to it.²⁰

Article 6 describes the responsibilities of the ICO. These include supporting public agencies in developing the RFI forms, and centralizing the appeals/complaints presented by citizens and submitting them to the IC for resolution. The LSAI assigns to the National Library the task of providing professional and administrative services to the IC and ICO.

The IC and the ICO have no control over other public institutions on ATI. The ICO receives appeals, as described in the LSAI, through a form that is completed by citizens for this purpose. Once the appeal is received, the ICO analyzes the matter and asks for a meeting with the other members of the IC within 10 days. After deliberation with the members of the IC who attended the meeting, the ICO sends his response to the initiator of the appeal informing him/her of the result of the appeal, granting the release of the information or its refusal. If the response is positive, the ICO informs the initiator of the appeal that the public institution concerned has been notified in writing to release the information.



The Limited Role of the Oversight Institutions

The LSAI places restrictions on the scope of work of the ICO by limiting his functions to the legal responsibility of managing only the information produced, archived and related to his department. The ICO has no mandate to request information from other public agencies. He has the mandate of filing the received appeals and presenting them to the IC, for it to resolve the case. The ICO then sends the decision to the agency that was the subject of the appeal and the requester.

The limited powers of the ICO, together with the lack of a central institution in charge of the implementation of the LSAI, reduces significantly the possibility of the effective promotion of ATI in Jordan. In addition, the effectiveness of the law has been undermined by the lengthy request procedure and the lack of ATI progress monitoring by the government. Moreover, the IC does not interfere in the classification and categorization process. The IC merely receives a list of existing information and its categorization from the public institutions.²¹

Appeals Received by the ICO

The ICO has received few appeals since the adoption of the law, although the number increased significantly in 2013 compared to previous years. According to the ICO, this situation has resulted mainly from delays in starting to develop and implement the procedures for the classification of information at the agency level, and in the appointment and training of the IAs, which only started officially on January 1st, 2012.²²

The IC has received 28 appeals since the adoption of the LSAI, at least 15 of them in 2013. The most appeals (10) targeted universities, followed by different ministries.

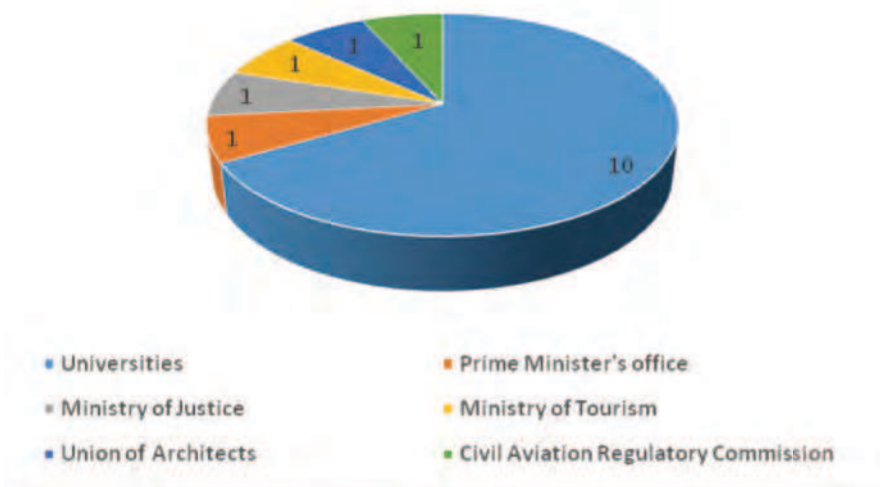
Journalists and university students are the main requesters of information using the law.²³ Concerning appeals, journalists have submitted 25 out of the 28 appeals made since the adoption of the law.²⁴ In 2013, 67% of the appeals concerned information requested from universities. The 10 appeals targeting universities resulted from exercises conducted by Radio Al Balad and ARIJ.²⁵ CSOs have initiated monitoring exercises to highlight the limited implementation of ATI. These efforts have probably affected the number of appeals addressed to the IC in the last two years.

The IC's 2012 annual report stated that the IC organized 10 meetings during the previous 2 years to develop resolutions on specific appeals and discuss the set of LSAI amendments presented to the COM. It gives information about the number of IAs designated by public institutions as being responsible for communication with the IC. Forty-two public departments and agencies communicated the contact details of 48 IAs appointed during 2012. Civil society advocates believe that there are more than 120 public departments and agencies covered by the LSAI.

FIGURE 2. Total Number of Appeals Received by the ICO

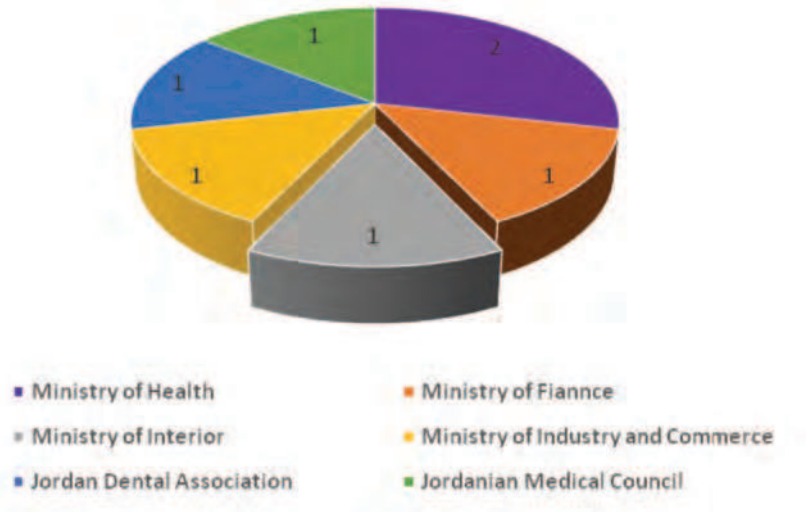


FIGURE 3. Distribution of Appeals to the ICO in 2013, by Agency



Based on the results of their monitoring exercises, CDFJ filed appeals²⁶ with the IC against four ministries that did not adhere to the time limit stipulated by the law. The IC issued its decision number 4/2012 indicating that, on 10 November 2008, the Ministry of Interior provided the IC with a list of subjects and files indicating the information that was classified as confidential and protected, and it did not include the information related to the request filed by CDFJ. The resolution of the IC issued on 24 July 2012 accepted the applicant's appeal and requested that the Ministry of Interior provide the CDFJ representative with the requested information. Based on this decision, the CEO of the CDFJ on 23 August 2012 sent a letter to the Minister of Interior. The same steps were observed with the other ministries and the same resolutions were issued.

FIGURE 4. Distribution of Appeals to the ICO in 2012, by Agency





The responses received from the IC show that the ministries in question admitted classifying some of their documents as confidential, but it was noticed that these categories were not founded on a clear basis for all the ministries. Each ministry made its own categorization according to its opinions. The Ministry of Finance and the Ministry of Industry and Commerce admitted having not received any RFI before the one presented by the CEO of CDFJ.

The ICO did not mention in his communication of 2013 the number of public institutions that had completed the process of classifying their information.²⁷ The statistics of the public institutions that reported the number of requests received in 2013 show that a total of 14 agencies received requests. The IC's 2012 annual report shows a total of 2,286 requests, and only 100 requests did not get a response.

Ninety-two out of 110 focal points (IAs) were trained during 2012, and they have started formulating the list of secret documents in their institutions to provide to the IC. The IC finds the public institutions generally cooperative, even if its decisions are not binding by law. Several training sessions are organized in cooperation with CSOs, namely the Amman Center for Human Rights and the CDFJ.

3.8. PROPOSED LSAI AMENDMENTS AND THEIR ASSESSMENT BY CIVIL SOCIETY

After Jordan became a member of the Open Government Partnership (OGP), the government of Jordan announced in its first action plan that the LSAI would be amended. After a long process of deliberation and a multi-stakeholder debate, the IC proposed amendments to the ATI law, which were validated by the COM in September 2012. These amendments will affect:

- The composition of the IC, by adding representatives of CSOs (a representative of the Bar association and a representative of Journalists);
- The ATI for foreigners with reciprocity rights;
- A reduction in the timeline for responding to RFIs and appeals from 30 days to 15 days.

These amendments have not yet entered into force; they still have to be presented to the Legislative Committee of the Parliament and then voted in the parliament and the senate.

Civil society advocates interviewed believe these amendments are lacking the scope that will empower the ICO to become independent and they only target the same government agencies that are currently subject to LSAI. Moreover, they argue that the LSAI should be expanded to include private institutions financed by the government.

Additionally, these amendments include a requirement that the IA must provide the requested information or refuse the request within 15 days. Another amendment allows the requester to submit an appeal to the IC within the next 15 days (previously 30 days) if the request is denied. The IC must then issue a decision on this appeal within 15 days. If denied, the requester has the right to appeal to the Supreme Court within 60 days (previously 30 days) after receiving the IC's decision.

While these modifications constitute a step in the right direction, they are not sufficient to bring the law up to international standards. Further reforms are needed to ensure the Right to Information.²⁸ CSOs focusing on ATI are rallying MPs and political parties to stop the vote on these amendments and consider either extending the scope of the amendments or introducing a new bill that will improve ATI effectiveness in Jordan.²⁹ CSOs previously rallied different stakeholders in 2011–2012, asking for a reform of the LSAI, and proposed amendments that

BOX 2. MEMORANDUM OF THE NATIONAL COALITION FOR LEGISLATIVE REFORM ON THE LSAI

The Memorandum proposed important steps to make a fundamental change to the existing RTI law

- Changing the composition of the IC with a greater representation of civil society and independent judicial bodies and professional associations of lawyers, journalists and non-government media.
- Including in the definition of information, the documentation of oral statements.
- Avoiding the limitation of RTI that refers to legitimate interest or reason.
- Adding in article 4 describing the functions of the IC, "the monitoring of irregularities and the publication of reports and studies that expose obstacles to the exercise of the RTI, and clarify how to overcome them."
- Modifying article 7 to grant "RTI to all persons (not only Jordanian citizens)."
- Changing article 9 of the law to disallow mute refusal and require that a reason be given for a refusal to release information.
- Reducing the duration of response and appeal.
- Removing article 10 that is considered a limit to the right to information. This article states that information "that may bear the stamp of religious discrimination or racial or ethnic discrimination" cannot be requested.
- Modifying article 17 by giving Courts of first instance the mandate to judge on the decision to give or refuse to give the information issued by public departments, instead of the High Court of Justice.
- Adding representatives of CSOs to the composition of the IC and making the Chair the Ombudsman Bureau (OB) instead of the Minister of Culture.
- Giving the ICO full financial and decisional independence.
- Adding a set of articles to protect personal data and its management.

were based on international standards and best practices, although they bear some similarities to the current changes being proposed.

The CDFJ facilitated a participative process to develop a Memorandum of the National Coalition for Legislative Reform on the LSAI (see Box above). These amendments were a component of the 2012 Campaign "Ask...it's your right to know". They proposed the basic principles that a new ATI law should develop and made specific recommendations for changing the law.

The proposed principles focused on limiting the scope of the exceptions and making access to information the rule, by narrowing the conditions when information cannot be released, and by limiting the possibilities of inaction by public agents. They also recommended limiting the cost of ATI and imposing sanctions on public agents who do not release information without good reason. They also asked for the protection of IAs if they release information in error.



In addition to the work of CDFJ,³⁰ Al Quds Center for Political Studies³¹ through its Jordanian Media Monitor³² organized in 2013 a series of multi-stakeholder debates to propose amendments to all legislation on the work of the press and media in Jordan.³³

4. Public Sector Capacities and Agency-level Practices: The Ministry of Agriculture and the Ministry of Environment

Since its adoption in 2007, the ATI law has shown little progress in the scope of its implementation. Some relevant steps have been taken in the last two years, and that proves that the law seems to be gaining significant interest resulting from the advocacy of CSOs and the membership of Jordan in the OGP. The mobilization of specific CSOs and their collaboration with the ICO, through developing initiatives and activities focusing on ATI, have succeeded in attracting more governmental participation in ATI and improving the implementation of the ATI legislation.

LSAI implementation has been very limited and largely ineffective for many different reasons. Some factors are related to its content and others are more associated with the context and the conditions of its implementation. In addition, some needed amendments of other legislation, such as the LPSSD, are crucial to support an effective implementation of ATI in Jordan.

Reasons for ineffective implementation include:

- **Lack of consultations with stakeholders.** Since the LSAI was adopted without any prior consultations, its implementation was adversely affected by the lack of participation of different stakeholders. Surveys conducted by CSOs (discussed below) show that the level of knowledge about the existence of the law among significant stakeholders is still very limited.
- **Lack of leadership.** There is no strong leadership supporting the implementation of the LSAI and the decisions of successive Prime Ministers were not fully considered in the implementation of this legislation. The last executive order issued through Communiqué 4 of 2013 recalled the content of Communiqué 19 of 2012 ordering all public agencies to appoint their Information Agents (IA) to become specialized in ATI and act as focal points between ministries and public agencies and departments, and communicate their contact details to the IC. This Communiqué showed that the IC received 52 responses from different public institutions listing 56 IAs.
- **Lack of authority of the ICO and IC.** The role of the ICO and the IC is mainly consultative and this has limited significantly the implementation of the LSAI. Stakeholders interviewed considered the role of the ICO central in the implementation of the law and its effectiveness. They criticized the lack of power characterizing the functions of the ICO under the LSAI and described the need for significant advocacy and lobbying of MPs to vote for a new RTI law guaranteeing the independence of the ICO from the Executive.
- **Lack of coordination.** There are significant disparities in the level of implementation of LSAI. The agencies studied in this case study show how implementation of LSAI at the

agency-level can be fundamentally heterogeneous. In Jordan, each agency is responsible for the implementation of LSAI and the coordination of implementation efforts is not organized.

The description of ATI implementation at the agency-level would be incomplete without the inputs of some reports and surveys developed by Jordanian CSOs, since the information developed and provided by agencies and oversight institutions is very limited in time and scope. This report will focus on two agencies: the Ministry of Agriculture and the Ministry of Environment.

4.1. PERSONNEL IN CHARGE OF ATI AT THE AGENCY LEVEL

In the Ministry of Agriculture (MOA) and the Ministry of Environment (MOE), the personnel in charge of ATI are not working exclusively on promoting and developing ATI. There is no specific department or staff in charge of just ATI. The personnel working in the Office of Communication with the Public undertake the general functions of IAs. In both agencies, the IAs have taken part in training sessions organized by the ICO and CSOs.

In response to a survey on ATI,³⁴ MOA indicated that all RFIs are dealt with immediately or transmitted to the departments that are supposed to have the capacity to provide responses. The classification of information is done by the Center of Information of the MOA and this department has the authority to categorize the information produced or archived by the MOA.

At the MOE, the information advisor and the official public relations officer were appointed as IAs and they are in charge of undertaking all functions related to ATI. They also organize press conferences and take care of interviews with journalists and the media.

4.2. LACK OF SPECIFIC BUDGETS

There is no specific budget for ATI activities at any level. The ICO and the IC carry out their role without any financial compensation, and the same situation is to be found at the agency level. IAs were appointed to cover the ATI functions in addition to their original jobs. There is no specific budget to cover the IAs' responsibilities for the implementation of the LSAI and to promote ATI within different departments and sections of the agency.

Activities of ATI promotion have to be funded by different lines of the agency budget. The majority of the activities related to ATI promotion and training were organized in collaboration with CSOs and funded mainly through international cooperation arrangements.

There is no specific line item for ATI in agencies' budgets. Instead, the ATI is funded from agencies' administrative budgets. The MOE has no specific budget for ATI activities and it is funded as part of the public awareness activities budget that has approximately USD150,000 per year.³⁵ This total amount is intended to cover the activities of raising awareness developed by regional delegations and the associations that manage environmental reserves, in addition to ATI activities.

4.3. PROCESSING OF REQUESTS

Requesters can only present their RFIs in paper form. They have to fill out the specific request form and present it to a particular agency. At the agency level, information can be provided by reproducing it on paper or electronically (CD-ROM, tape, etc.). The MOA and MOE do not receive requests or send information to requesters by e-mail.



The basic step for public agencies to implement LSAI consists in developing their own request form based on the model proposed by the ICO and adopted by the Prime Minister. The MOA has not yet adopted a request form. The representative of the MOA stated in our interview that: "information can be shared more efficiently with journalists and requesters by phone or other means rather than by following the procedure for requests and its timeline." The agency is not implementing the LSAI and it is continuing to handle requests in the way it did before the law was adopted.

The procedure for requesting public information as set out in the LSAI is considered time consuming and inefficient by the MOA representative. The flow of information is considered to be faster and more effective when the MOA answers journalists' requests by phone or fax, although requesters can submit written questions to the MOA's Office of Communication with the Public.³⁶ There are no statistics about the number of requests received by MOA and there is no mention of this agency in the annual report of the IC that contains all the statistics on requests and appeals collected in 2012.

The MOA claims that all requests have been responded to even though they were not presented as formal requests using a request form, but as questions presented in writing to the Office of Communication with the Public or through phone calls with MOA officials.

For the MOE, citizens wanting to request information have to fill out the request form and hand it to the Office of Contact with the Public. The MOE established a committee with responsibility for categorizing the information and this will state if the information can be released or not. The legal unit, under the supervision of the Communication adviser, the Secretary General and the Minister, is responsible for the categorization of information. An Executive Board is responsible for giving the final approval for releasing documents that contain sensitive information or could carry risks.

The MOE responded fully to all 6 requests received in 2013.³⁷ According to the IA, the main requesters of information are researchers and university students.

The MOE does not publish an annual report, although some studies and reports on the environment are published on its website. The 2012 Annual Report of the IC indicates that the MOE received 20 requests in 2012 and they were all fully answered. All the executive orders on implementation of the LSAI were implemented in 2013, and so the categorization of MOE's information and the designation of the IA have been in place since January 1, 2013.

4.4. PERFORMANCE MONITORING SYSTEMS

No Performance Monitoring Systems have been developed or used by the IC, and its role is limited to the promotion of ATI without being able to supervise the performance of other public institutions by initiating binding decisions.

In 2012, the IC, for the first time, gathered information on the number of requests made to some public institutions. By Communiqué 19 of 2012 and based on a request from by the IC, the Prime Minister ordered public agencies to provide statistics on RFIs received and asked them to detail their results by indicating which requests were responded to and which requests were refused. The reasons for such refusals should be provided.

The IC received statistics on the use of ATI from 14 public institutions subject to the ATI law, but the remaining public institutions did not provide this information.³⁸ It is probable that these institutions do not collect this information or do not implement the ATI law. The MOA corroborates this situation.

Moreover, no initiatives have been developed to measure the performance of the IC or other public institutions on ATI. Some ATI monitoring exercises were initiated by certain CSOs, but they were limited in time and scope.

The RTI rating developed by CSOs³⁹ at the global level ranks Jordan 90 out of 95 countries with a score of 55 points out of 150. This ranking measures the strength of the ATI legislation and compares it to specific international standards. The absence of an independent central agency in charge of ATI implementation, limited ATI for nationals, the timelines for ATI and appeals, and the need to give a reason/interest for ATI are examples of why the LSAI is performing poorly at the global level.

CSOs in Jordan did not launch any internet platform or tool to monitor the implementation and use of ATI in Jordan. At the regional level, some current efforts are emerging, particularly in Tunisia,⁴⁰ to develop participatory tools for measuring the implementation and use of ATI by public institutions and other stakeholders.

4.5. RECORDS MANAGEMENT

The collection, retention and preservation of records are not regulated by the LSAI. Instead, the Law on Archives governs records. This constitutes one of the main challenges to the implementation of the LSAI at the agency level. The timeline for keeping records is long and accessing them is not well organized.

The majority of public institutions have an information center that is supposed to gather the information of the agency and organize it so it can be accessed by the public. These information centers are not organized the same way in all agencies and their resources are very variable depending on the priority that each agency gives them. These centers are considered more as libraries than offices and are responsible for organizing the information produced by their own agency.

There is no specific policy at the MOA or MOE to manage records. These two agencies have their own information centers, but their procedures are not described and their linkage to the IA is not detailed in any policy.

The MOE classified and categorized its information and submitted the details to the ICO. A specific commission with representatives of the Minister of Environment was set up to accomplish this task and to look into RFIs that contain requests for sensitive information.⁴¹ In contrast, at the MOA, there is no indication that such categorization has been undertaken.

4.6. PROACTIVE DISCLOSURE AND OPEN DATA

The statistics and data on the use of the LSAI are not available on-line. The IC does not have a website, while the National Library's website has just a page that gives the content of the law and the entitlements of the IC. An exclusive website for the IC is being developed by one of the institutions represented in the IC, the National Information Technology Center.⁴² No proactive disclosure policy has been developed by the IC and the report of the IC was not available to the public in the past. The IC is not included in the Open Data portal of the Government of Jordan.⁴³

The MOA has a functioning website and some general information and statistics can be found on the main page. The website is updated and presents reports dated from 2013. It features a section for requesting information through an electronic form.⁴⁴ The MOA publishes an



annual report that contains information on imports, exports and the situation in the markets. There is no mention of RFIs either in the annual report or on its website.

The MOE has an up-to-date website that allows environmental complaints to be submitted electronically, but not RFIs. The MOE does not publish an annual report, but some studies and reports are published on the website. There is no mention of the number of requests or environmental complaints received through the website. The website does not give a definition of environmental complaints, but they are considered distinct from RFIs.

The Open Data portal is a page hosted on the E-gov Website: <http://www.jordan.gov.jo/wps/portal/>. The information presented on this page is not organized in any specific way—not by sector or department. It is mainly dated 2010 and 2011.

Jordan's Anti-corruption Commission and the Audit Bureau started publishing their annual reports for the first time in 2011. These reports were not available to the public in the past.

4.7. TRAINING AND PUBLIC OUTREACH

The MOA and MOE did not launch any specific efforts on training and increasing public outreach in relation to the LSAI. The MOE develops campaigns in partnership with its regional offices on preserving the environment, but there is no specific mention of the use of ATI as a tool to seek or report specific information about the environment.

All the campaigns for public outreach were mainly organized by CSOs in partnership with the ICO. The ICO is very responsive to these initiatives but he does not launch his own campaigns because of the lack of resources.

Representatives of the MOA and the MOE attended the sessions of ATI training organized by the ICO in collaboration with some CSOs, mainly CDFJ and the Amman Center for Human Rights. The training was limited to two sessions and focused on general aspects of ATI without developing any specialization. From all public agencies, 92 out of 110 focal points (IAs) were trained during 2012.

5. Capacity and Influence of Civil Society

The Civil Society Index report on Jordan⁴⁵ recommends the establishment of a leadership and good governance institute that can focus exclusively on developing leadership and administration skills in CSOs. It also urges the activation of conventions on best practices regarding the good governance and transparency of CSOs, as well as the adoption of policies on environmental standards, paid work, and equal work for women. The report also notes the need to place additional importance on awareness programs, training, and capacity building with regard to building networks and alliances, as CSOs must gain the necessary skills for coordination and exchange of information and services. The report emphasizes the importance of placing the values of tolerance, dialogue, and acceptance of others and the culture of non-violence on the agenda of civil society in Jordan, taking into consideration that the role of civil society in the promotion of non-violence and dialogue is still limited.

The report encourages civil society to develop and apply its media and communication skills, to help familiarize the public with the activities and programs of CSOs. In addition, the report asks the national registry of societies at the Ministry of Social Development in Jordan to provide qualitative data on registered organizations, and suggests that other relevant

ministries follow these steps. The report emphasizes the need to develop databases on CSOs and publish their content periodically on websites or in annual reports.

The report concludes that CSOs based in the capital and the main cities enjoy acceptable infrastructure and communication capacities, but for those working in rural and remote areas the reality is very different. Civil society has a diverse structure and is mostly independent, both financially (dependent on international cooperation and not local funding) and administratively (even if the registration process is quite complex, CSOs can register with different ministries). CSOs operate in a politically conservative and biased general environment that supports the state's interventionist role in their affairs, which in turn weakens their impact. The majority of CSOs have poor practices in terms of leadership turnover and limited financial transparency. They still lack adequate financial resources, while negative perceptions of foreign funding affect public confidence in CSOs. Civil society's collective capability to launch a dialogue with the state, the private sector and foreign donors is weakened in the absence of a holistic national action strategy, which allows too much scope for foreign donor influence.

5.1. POLICY IMPLICATIONS

In 2007, when the law was adopted, the focus of CSOs on ATI was very limited and they did not contribute to the adoption of the law. In fact, the process of promulgating the LSAI was fast and did not allow any public consultations with or participation of interested stakeholders, including CSOs.

Following adoption of the LSAI, some CSOs started focusing on ATI and developed specific projects to analyze the implementation of the law and monitor the institutions in charge of promoting ATI. CSOs also developed training sessions for IAs and prepared reports on ATI. In the last two years, CSOs have organized conferences to debate the content of the law and proposed amendments to the ATI law.

Many CSOs working on promoting human rights and defending journalists have developed their advocacy for better implementation of ATI. In addition, some research centers have started investing in initiatives and projects on ATI in collaboration with international partners.

Al Quds Center for Political Studies, the CDFJ and recently the Jordan Transparency Center (JTC) have mobilized groups of CSOs to propose amendments to the ATI law. These CSOs and other civil society groups have organized activities on ATI and collaborated with the ICO to raise awareness and discuss the law and the functions of the ICO and the IC.

Al Quds Center through its Jordanian Media Monitor organized in 2013 a series of multi-stakeholder debates to propose amendments to all legislation relating to the work of the press and media in Jordan. These events gathered MPs, judges, lawyers and media representatives to discuss the content of the legislation governing the work of the press and the media and aimed to develop proposals to amend existing legislation toward more freedom and the abolition of restrictions on freedom of opinion and expression in accordance with international standards.

There was a specific recommendation to abolish the 1971 law on the protection of state secrets and documents. In the section dedicated to ATI, the Center proposed a matrix with the existing articles of the law and proposed changes; it also proposed additional articles for the law and the bodies that should be established.

In 2013, Al Quds Center also organized meetings with MPs, especially the National Committee for Orientation and the Legal Committee. These MPs and other public officials take



part in events organized by CSOs and they exchange opinions and maintain a good relationship with each other. The Center organized regional meetings in four different regions (Arbid, Alkarak, Almafrik and Azzarkae) between February and June 2013, and three other meetings in the capital Amman. These meetings aimed to raise awareness about ATI and explain the content of the ATI law and the proposed amendments developed by the Center. These meetings mobilized CSOs, political parties and organizations, academia, youth organizations and university students.

The CDFJ is the pioneer organization working on ATI in Jordan. This organization has organized different events and a training session with the IC. To celebrate the Right to Know day of 2012, CDFJ mobilized different partners to organize a national campaign "Ask...it's your right to know." The aim of this campaign was to raise awareness among the public and the institutions about the ATI law, and the need to implement it to improve integrity and accountability, fight corruption and establish a free and professional media. The campaign used flyers showing an RFI form and explained to citizens the importance of making use of ATI. This campaign was organized in collaboration with the IC.

The JTC⁴⁶ also organized different meetings, leading a group of CSOs in early 2013 to propose amendments to the ATI law. The amendments were presented to the legislative committee of the parliament on 28 May 2013, and the organization is reaching out to MPs to move forward with these reforms.

The JTC criticized the lack of coordination between NGOs to create synergies and develop greater advocacy and lobbying power. The representatives of the organization also criticized the "events-driven" policy of some NGOs who work on specific topics just because of the availability of international funding. The JTC advocates for more training for MPs and public institutions on ATI.⁴⁷

These efforts are important, but unfortunately they are still more personal or linked to a specific project of a given CSO; there is no coalition or network of CSOs creating synergies and increasing decisively the level of organization and advocacy to move forward with amendments and influence effectively⁴⁸ the parliament and other institutions of the State. ATI is still regarded as a topic to be discussed by experts rather than by citizens who can see the importance of reforms that ATI could bring. There is a need for more efforts to develop knowledge around ATI and encourage its use, especially among government departments responsible for its enforcement. CSOs can play a significant role in explaining and promoting the use of ATI and facilitating the flow of information to citizens and journalists.

The amendments proposed by different civil society groups are quite similar and they are based on international standards and best practices. The keys in this process are leverage and the capacity to develop advocacy and lobbying in order to amend the LSAI. These groups have developed the proposed amendments in a participative way, involving a range of stakeholders in formulating recommendations.

5.2. THE CAPACITY AND EFFECTIVENESS OF CIVIL SOCIETY GROUPS TO LEVERAGE ATI

Jordanian CSOs have developed different projects in recent years to raise awareness and train professionals about ATI. Media groups, especially ARIJ and CDFJ, have conducted surveys about the use and level of implementation of the law.

The community of CSOs and professionals working on ATI has progressed significantly during the last few years, but it is mainly members and specific partners who know about their work. There are no strong ATI campaigns and messages to foster the use of RTI in Jordan. It is also important to build institutions to make RTI sustainable. Campaigns can mobilize the population to use the LSAI, but if there is no organized infrastructure to receive their RFI, ATI campaigns can have an adverse effect. In fact, CSOs should ensure that the infrastructure for ATI exists before they start focusing on the use of an ATI system. Specific monitoring exercises can be relevant and can be used for advocacy goals, but if citizens request information repeatedly and never get responses, they will stop using ATI and they will also talk negatively about it and consider it an invalid tool. CSOs cannot reach the public to any great extent without the support of the government. This support can be direct through funding and opening channels for collaboration in developing campaigns and training. On the other hand, the ICO could develop its own campaigns on ATI, but for the moment, it lacks the financial and human resources to do so.

Promotion of ATI through Investigative Journalism

Majdoleen Allan, an investigative journalist who prepared ARIJ's study on the monitoring and follow-up of the implementation of ATI, highlighted the lack of any government mechanism to record the number of requests by either journalists or ordinary people. The IC only records the number of complaints against government refusals. For the study, Allan submitted 10 requests to various government agencies to test their responsiveness; she then reported on the outcomes of those 10 requests. Only one agency provided the information in a timely manner and two other responses provided partial information. The rest of the responses were irrelevant or agencies refused to give information on the grounds of confidentiality and lack of legitimate interest.

In an interview, the Executive Director of ARIJ⁴⁹ described the efforts made by the organization in launching appeals before the HCJ and conducting follow-up exercises on ATI implementation in Jordan. ARIJ organizes training courses at the regional level to empower journalists and develop their skills in investigative journalism. ATI is one of the tools developed in the training modules. She considers that informality in journalism is the rule, and the majority of journalists prefer to get information through their family contacts or other means rather than by following the ATI procedure, because it is long and can be costly when having to refer appeals to the Courts. She also mentioned the lack of professional expertise and, sometimes, the financial means to appeal decisions as the long procedures require lawyers' fees and other expenses. She finds that the interest in ATI is quite seasonal in Jordan, and there are no significant coalitions that are developing a sustainable approach to this work, based on a programmatic lobbying of the relevant bodies and individuals to change the law and improve its implementation.

The level of ignorance about the ATI law and human rights and their mechanisms is significant, and the projects developed with international cooperation focus mainly on the political interests of the donors.⁵⁰ The cases presented before the HCJ were all turned down by the Court because they had a formal defect (such as an irregularity in the procedure), and, in her view, this is indicative of the current shortcomings on the political front for efficient implementation of the ATI law.



Example of Civil Society Efforts and the Impact on ATI

A recent experience of RASED,⁵¹—the civil society coalition that monitored the elections on 23 January 2013—provides some insight about ATI. RASED reports that the information released was shared in password protected PDF files, which did not allow for copying or conversion of the data for purposes of review, audit and analysis. In addition, the Independent Electoral Commission (IEC) failed to publish the executive regulation for the counting and announcing of the results. RASED filed several requests with the IEC in order to receive the final results of the elections in Excel formats, in order for its teams to carry out further audits and a statistical review, but no positive response has been received from the IEC at the time of writing this report.

Access to information was also impeded by the IEC in relation to the outcome of its investigations into the electoral violations documented by RASED. RASED had provided the IEC with reports on multiple violations by voters, candidates and IEC staff; however, no concrete actions have been taken by the IEC in this regard, posing questions about the transparency of the electoral administrator's accountability.

RASED conducted also a monitoring exercise on the performance of the 17th Jordanian Parliament⁵² during its work in the Non-Ordinary session of 2013. The report provides a repetition analysis for MPs' speeches during the session's confidential deliberations (Figure 3 in the report); this shows that the ATI law was mentioned by 2 MPs, making it the least mentioned topic. Corruption was cited by 104 MPs as the most mentioned topic.

In an interview with the General Director of Al Hayat Center for Civil Society Development,⁵³ who is the coordinator for RASED, many aspects of the implementation of the ATI law were discussed and especially the work with MPs for amending several laws (e.g., ATI law, Elections law, Political parties law, Municipalities law). The Center is developing a shadow report for the OGP on the participation of Jordan and coordinating different initiatives between CSOs and MPs. He considers that the public does not trust CSOs and the majority of MPs do not take them seriously. Creating trust is a long process where face-to-face meetings are periodic and productive, and it is worth taking the time to establish long-term relationships. He also sees a need for a sustainable means for tracing and tracking information.

He commended the work carried out by CDFJ before the elections in proposing to candidates that they sign a commitment to work with MPs to raise awareness about the limitations of the proposed amendments of the ATI law. He also raised a serious issue about the transparency of CSOs and their management of funding, which is mainly from international sources. He considers that many cases of cross-funding exist, with many organizations hiding the sources of their funds. While possibilities for collaborative work with the government on ATI exist, many organizations, including community based organizations, are not involved in such work. Moreover, the scope of work of the main organizations working on ATI covers only journalists and some CSOs. CSOs generally prefer to take undemanding actions even though there is a serious need for the monitoring of service delivery and of the use of ATI as a tool to fight corruption. He concludes by stressing the crucial role for international organizations in developing transparent criteria for the funding of projects, sharing the information about these projects with the public, and reporting the outcomes.

5.3. THE MEDIA SECTOR AND THE LIMITED USE OF ATI

The Jordanian media sector has experienced a rapid transformation over the last decade in response to the mass digitalization of information and the liberalization of the visual and

audio sector in 2002. The number of radio stations in Jordan could be counted on one hand a decade ago; it now has numerous entertainment and news-oriented stations, broadcasting in both Arabic and English, with new channels constantly coming on the air.

The number of newspapers has also increased rapidly, alongside many free advertising publications. The television segment of the media sector in Jordan remains the only segment that has not experienced significant growth. Jordan Television (JTV), a state-owned radio and television broadcaster, was the sole television broadcaster in Jordan prior to the introduction of the Audiovisual Media Law in 2002.

The development of internet and technological convergence has led to a significant change in the traditional media sector. The high penetration levels of internet has meant that paper newspapers are losing their importance globally as the main source of news, as more and more people are turning online to access on-line news media.

On the limited use of ATI by the media, the Executive Director of ARIJ⁵⁴ attributes this to "lack of community pressure as it was not the outcome of a systematic struggle by civil society."⁵⁵ In her view, it is the relationship that journalists have with public institutions that makes it possible for them to access information without using the procedures in place. Journalists, in general, can rely on their relations and acquaintances in order to obtain information, without filing an official request. A 2009 survey shows that 42% of journalists do not know about the ATI law.⁵⁶

The procedures in place are also criticized for making the work of journalists almost impossible if they have to follow those procedures. Saad Hattar, Head of the Investigative Journalism Department at ARIJ, has noted that journalists encounter problems due to the complexity of procedures when they file the request, the one-month time period while they await the government response, and the complicated litigation procedure when there is a refusal to provide the requested information.⁵⁷

During a panel discussion on World Press Freedom Day on 3 May 2011, Communication Minister Odwan said that "Journalists do not create enough pressure to get more access to information. They should be professional and find the right sources through which to access information. Documents will be classified in all ministries of Jordan and archived in accordance with the Access to Information Law."⁵⁸

As part of a study, the Jordanian Media Monitor undertook a survey among 504 journalists in March–April 2012 to evaluate the level of "soft" containment of the media by the government.⁵⁹ The study found that 84% of the participants believe that the government uses different "soft" means to contain the media. This is a significant increase from 2009, when the figure for the same study was 70%. The means used for soft containment are categorized as: (i) gifts and grants (70%), (ii) facilitation of transactions with officials (42%), and (iii) nomination to a government position and participation in official conferences, missions and trips (36%).

Al Ra'i Newspaper

Al-Rai⁶⁰ (meaning The Opinion) is an Arabic daily newspaper in Jordan founded in 1971. The newspaper is owned and published by the Jordan Press Foundation, which is government-owned (the Social Security Corporation is the Company's largest shareholder, with an ownership stake varying between 55% and 65%, followed by the Arab Bank with a 10% holding).⁶¹ It is the official newspaper in Jordan and has more than 200 journalists. It also owns 35 news websites. The Jordan Press Foundation also owns the Jordan Times,⁶² an English-language daily founded in 1975.



The interview with the representatives of Al-Rai focused on the limited use of RTI by Al-Rai journalists because they have the possibility of using other means to access public information. They consider the ATI procedure very long, and their privileged situation of being part of one of the oldest and most widely respected Jordanian newspapers helps them to find sources of information in an efficient way. They also collaborate with some CSOs to cover campaigns and activities, but generally they do not cover very sensitive information. They support the new amendments to the Press and Publications Law, because they believe this will improve the organization of the electronic media sector. They also find the level of knowledge and awareness about ATI very low, attributing this to the absence of sanctions in the ATI law, and the fact that the decisions of the ICO are not binding.

Radio Al-Balad

Radio Al-Balad was founded as an independent radio station through AmmanNet.Net in 2000 as the first internet radio station in the Arab region. This radio received a ten-year FM license in 2005 and has been broadcasting news, alternative music and special programs since then. Since this station focused a lot of its work on empowerment of different segments of society, the community radio station in Amman has become a model community radio providing training services and networking opportunities for local, regional and international groups.

Radio Al-Balad's efforts have not been without problems. AmmanNet.Net's publication⁶³ reports that the speaker of the Jordanian parliament stopped their unique (for the region) live radio broadcasts of the parliament; governors in various districts have banned the Radio from holding public events and debates; and the mayor of Amman has continued to prohibit the Radio from broadcasting live the capital's monthly council meeting. The Radio survived some legal lawsuits and others are still not resolved. The efforts of the Radio to establish radio stations in some regions of Jordan were rejected by the government without any explanation, and their advocacy for the reform of Jordan's Audio Visual law, which adds extra fees for stations that broadcast news and politics, has yet to produce results.

Radio Al-Balad has helped citizens reach government officials and find solutions to their requests. Examples of such cases relate to service delivery and access to basic rights such as education, the National Aid Fund and essential services.

Radio Al-Balad is one of the main initiators of RFIs and their follow-up. The Radio launched an Investigative Unit that is working on a daily basis on important cases, and they try to use ATI to get the information they need about stories in the daily news about cases of corruption or misuse of public services. The Investigative Unit received correspondence from the IC on 24 April 2013 responding to different cases that had been appealed.

This correspondence, consisting of eight responses, presents some statistics that are not published in the Annual Report of the IC, and indicates that, for many RFIs, the information is not released because it is considered an exception under Article 14 of the law: These responses are:

- i. *Number of appeals since the establishment of the IC.* The response mentions 25 cases where the IC decided not to accept the appeal and thus not to ask the public institution to release the information, considering it an exception. In some cases, the expression "taking into consideration article 14 of the law" was added to the response to provide a legal basis to consider this information as an exception.

- ii. *Annual Reports of the IC.* The requester of the Annual Reports of the IC was directed to request such reports since 2008 from the Prime Minister and not from the IC.
- iii. *Appeals before the HCJ.* In response to a request for statistics regarding the number appeals before the HCJ, the IC directed the requester to request this information from the Court itself.
- iv. *Number of IC meetings.* The IC has held 28 meetings since its establishment.
- v. *Minutes of IC meetings.* The minutes of the meetings of the IC are not available to the public but the agenda of the meetings can be requested.
- vi. *Classification of documents.* In response to the letter of the IC, 92 ministries and public institutions indicated that they have classified their information and provided the IC with the titles of the secret documents in their possession.
- vii. *Expert opinion.* The IC invited some experts from the civil service to give their opinions about some cases (e.g. the legal adviser of the National Library).
- viii. *ATI law amendments.* The last response denied the request to give the content of the proposed amendments of the ATI law because they are classified under the exceptions, as stated in article 14 of the ATI law. However, the IC could give the names of the persons and institutions who contributed to the amendments. The IC proposed to the requester of this information to contact these contributors to find out about their proposed amendments.

The interview with Radio Al-Balad⁶⁴ showed that some of the media professionals do not trust the IC's decisions and they have concerns about the transparency of the official statistics provided. They also claim that knowledge of the ATI law among public institutions and the parliament is very limited. They also criticize the IC for its lack of initiative and its limited diligence. They find accessing public information very hard and sometimes the requester has to negotiate to get the information.

Media professionals consider the interest of many CSOs working on ATI as just seasonal, because there are no organizations working exclusively on ATI, as a result of the limited funding available. The work on ATI takes place at the time of the celebration of the Right to Know day and there is no sustainable support for litigation. They find the role played by CSOs really limited and centralized in the capital. They also describe the situation as suffering from a significant lack of political will, with the existing initiatives generally feeding relationships with the elite and attracting approval from the government.

5.4. INVOLVEMENT OF INDIVIDUAL CITIZENS AND THE PRIVATE SECTOR IN CREATING THE DEMAND FOR RTI

The LSAI considers all requesters of public information as individuals (Jordanian citizens) and does not allow organizations or companies of any type to submit an RFI.

Citizens' involvement in developing a sustainable demand for ATI is limited, which can be explained by the Jordanian context. Political participation of the public is relatively limited and the membership of CSOs working on ATI is very limited. Some pioneers, who have funded CSOs that are working on ATI, and a limited number of advocates, who have undertaken research and become actively involved in advocacy work, are demanding better ATI in Jordan.



BOX 3. THE WASTED RIGHT:⁶⁵ RESULTS OF TWO SURVEYS CONDUCTED AMONG JOURNALISTS

The results of these surveys show that:

- The number of professionals who make use of the ATI law is still very small, and there is clearly confusion between accessing information through using an approved official RFI form and the traditional means used by media professionals and journalists to obtain information.
- It is evident that media professionals obtain information in a decreasing order through: 1- phone; 2- fax; 3- E-mail; 4- hand delivery; 5- direct interview and/or friends.
- Most of the information requested by the information professionals does not include written, photographed or electronic documents, which reveals that the information obtained by the information professionals is actually oral and not supported by documents.
- Only 1.8% of those surveyed have asked for the official request form, while 98.2% have never asked for any form because they have never made requests in this way.
- The timeline used by officials to respond to official requests fluctuated between 60 and 150 days; in exceptional cases, it was much less, sometimes less than 12 hours and sometimes between 3 to 5 days.
- Most of the applicants who do not receive answers to their requests do not resort to filing complaints or appeals against the public institution concerned.

Stakeholders interviewed do not consider the private sector as an actor involved in advocacy for better ATI. Some CSOs are considering how to engage the local private sector in such advocacy, but these efforts are still very limited. CDFJ is considering the integration of ATI into a Corporate Social Responsibility initiative that will target the private sector with the aim of getting it involved in the ATI agenda and its implementation.

6. Broader Political Environment

The realization of other rights, such as the freedom of association, freedom of speech and freedom of the press, affects the level of awareness and implementation of ATI. The mobilization of a group of journalists since the adoption in 2012 of the amendments to the Law on Press and Publications shows how this has resulted in the marginalization of these activists and the extent to which they have lacked support.⁶⁶ Although the Jordanian government does not engage in extensive blocking of websites, behind-the-scenes pressure for private entities to delete or block content on their sites or servers continues. In 2012 the parliament adopted amendments that require news websites to register with the government. Meanwhile, online tools—particularly news websites and the social media—have played an important role in mobilizing public protests to oppose restrictions to free expression and to call for broader political reforms.⁶⁷ Different articles published on the internet describe the blocking of over 200 websites, mainly news and political websites.⁶⁸

6.1. POLITICAL WILL FOR IMPLEMENTATION

Since adoption of the LSAI, no central agency has been in charge of its promotion and implementation. All recommendations initiated by the IC have had to be adopted by the Prime Minister and implemented through an executive order. Since 2012, and after Jordan's adoption of the OGP Action Plan, the Ministry of Planning and International Cooperation—in addition to the Minister of Culture who heads the IC—started advocating and focusing on the implementation of ATI. The Ministry of Planning and International Cooperation presented some recommendations on ATI in the framework of the OGP, which were implemented by executive order following adoption by the Prime Minister.

6.2. EMERGING EFFORTS FOR MONITORING IMPLEMENTATION OF THE LSAI

Since the adoption of the LSAI in 2007, there has been a critical lack of implementation, and the majority of Executive Orders for its enforcement have not received the full attention of public institutions.⁶⁹ Moreover, civil society advocates consider the ATI amendments proposed by the Government to be negative. They criticize these amendments because of their limited scope and, in their view, the amendments will not change significantly the effectiveness of ATI in Jordan. On the other hand, the membership of Jordan in the OGP seems to be giving impetus to a new set of incentives that might have a positive effect on the implementation of ATI.

The number of ATI training courses and events has increased significantly since 2012. It seems that ATI is becoming an important element in the governance agenda and that is why more efforts are being conducted in support of the consistent and widespread application of LSAI procedures.

Civil society advocates⁷⁰ believe that particularly strong efforts have been made in the last 2 years to implement LSAI. Two specific factors, if not more, can explain the change of attitude and the better communication about ATI among different stakeholders. First, specific CSOs have focused their work on ATI and developed some advocacy tools to promote better implementation of LSAI; they point out the limited quality of LSAI in comparison to new legislation promoted in the region (Tunisia and Yemen). Second, the membership of Jordan in the OGP has definitely brought a new incentive to deliver on the implementation of ATI and make it an indicator of the government's progress in general.⁷¹

6.3. SIGNIFICANCE OF THE ENABLING ENVIRONMENT

The Constitution of Jordan and especially its recent amendments and the commitments formulated in the National Charter in the early 1990s provide strong support for freedom of expression, access to information and the role of the media. However, an assessment of Jordan's media law framework, based on UNESCO Media Indicators, reveals that there are a number of ways in which free speech and the rights of the media are undermined in legislation, regulations and practice.⁷² The Jordanian media environment is relatively diverse, but reporters often lack adequate expertise, ignore professional standards, and indulge in self-censorship because of biases, employers' affiliations, fear of legal consequences, if not sometimes also fear of physical threats in a context of impunity, and lack of accountability by duty-bearers. Media professionals are also aware of "red-lines-not-to-cross" (if not taboo topics), mostly related to the monarchy as well as to religious and ethnic issues. Investigative reporting and reporting on certain topics of common interest such as the environment, gender equality and human rights are not encouraged.⁷³



The relative political openness that Jordan has experienced since the 1990s has led, despite fluctuations, to a better environment for the growth of CSOs, in which they have been able to practice their activities more freely. Increased political openness has also attracted international attention to its civil society and enabled it to benefit from substantial support from various sources.

The limited number of public institutions implementing the ATI law illustrates the limited awareness of the existence and the content of the LSAI. As shown in different surveys,⁷⁴ there is a serious lack of knowledge and use of RTI. To remedy this situation, during the last two years, some training courses for government officials, MPs, CSOs and the media about the benefits of making use of the ATI law have been conducted, mainly by national CSOs with international funds.

6.4. JORDAN'S PARTICIPATION IN THE OPEN GOVERNMENT PARTNERSHIP⁷⁵

The Jordanian government explains the reason for and the importance of its participation in the OGP as follows:⁷⁶ "Jordan's successful management of its reforms will not only secure Jordan's stability, but will also offer a model to follow for other countries in the region by providing a successful road map for stabilizing and developing effective reforms."

The COM approved Jordan's participation in the OGP in August 2011, and the Prime Minister formed an Ad-hoc Committee in October 2011, chaired by the Ministry of Planning and International Cooperation, comprising representatives from the public and private sectors in addition to CSOs. This Committee had to work on developing the Action Plan pertaining to Jordan's participation in the OGP, and on identifying the reform measures to be undertaken by the Government of Jordan in the area of governance.

The OGP is considered important for Jordan to move forward with the democratization of the development process, and to further strengthen the foundations for political inclusion, social stability, good governance, an efficient public sector, improved service delivery, as well as the rule of law.⁷⁷ To this end, Jordan's OGP National Action Plan has a specific focus on the following targets:

1. Improving public services
2. Increasing public integrity
3. Managing public resources more effectively

Some of the commitments under the OGP action plan have the specific objectives of increasing public integrity through promoting transparency and access to information and enhancing citizen participation in decision-making. The commitments linked to ATI were:

- An Administrative Court would be established in order to increase transparency in public sector performance and enhance the specialization of the Judiciary.
- Access to information would be improved through adopting amendments to the existing Access to Information Law; such amendments would not only further improve access to information but also ensure that the law is consistent with international best practices.
- The annual reports for 2011 of the Audit Bureau and Anti-Corruption Commission would be published in the first half of 2012.

Jordan's first progress report⁷⁸ on the National Action Plan was published in February 2013. In the section on "Promoting transparency and access to information, enhancing citizen participation in decision-making," the report describes developments concerning the new Electoral law and the creation of the Constitutional Court. There is just one mention of the amendments to the LSAI: "The Council of Ministers approved in September 2012 the amended Access to Information Law. The amendments facilitate the public's access to information and enables non-Jordanians to access information in compliance with international agreements that Jordan has signed. Added to that, the law improves civil society organizations' representation in the Information Council."

The report does not mention the fact that the amendments have not yet entered into force because they need to be reviewed by the legislation committee of the parliament and then adopted by a majority of deputies in the parliament and the senate.

The participation of Jordan in the OGP and the publication of its action plan and the progress report show that there are some departments willing to develop new initiatives and raise the bar on matters of transparency and accountability, but the participation of CSOs on this front is still limited or even non-existent. CSOs need to be more actively engaged, particularly in following up on the commitments made by the government and in playing their role as watchdogs.

In the UN e-government Index, Jordan moved from position 51 in 2010 to 98 in 2012, even though in 2012 six new e-services were created. The government is also developing its Financial Management Information System, but raising awareness about the use of ATI is still an increasing necessity that is recognized by the government itself.⁷⁹ It is hoped that the OGP mandate will strengthen the emphasis on ATI, bring support for more reforms and enable the achievement of better benchmarks. Public sector integrity is intended to improve gradually, along with the strategic reform of ATI.

The Government recently launched a consultative multi-stakeholder process to develop an Integrity Charter with the participation of 12 governorates and aims to develop an action plan for its implementation.

6.5. CHECKS-AND-BALANCES INSTITUTIONS

The Ombudsman Bureau (OB) of Jordan⁸⁰ receives and investigates group and individual grievances. In coordination with the related public institutions, OB tries to reach just solutions for the parties involved. The OB was founded on February 1, 2009 and had received more than 8,000 complaints by February 2013. The OB resolved 78% of the submitted complaints in which the public administration was found to be in error, according to the OB President.⁸¹

The mandate of the Ombudsman is not directly related to ATI, but many observers proposed this organization as structural support to ATI implementation. In some of the proposed amendments to the ATI law, some CSOs proposed that the OB Chair should serve as the Chair of the IC instead of the Minister of Culture. The OB makes it possible for requesters to file a complaint against refusals to release information by public institutions. In one specific case described in the 2010 report of the OB,⁸² the OB helped a citizen employed by a university to access information withheld by this public institution.



During 2013, the role and mission of the OB were questioned after the decision was made by the National Assembly to merge the OB with the Anti-Corruption Commission. As a result, the future institutional framework of the OB remains unclear. Moreover, the appointment of the President of the OB ended on June 23, 2013 without being extended.

6.6. EFFECTS OF OTHER LEGISLATION ON ATI EFFECTIVENESS

Existing legislation prior to the adoption of the LSAI in 2007 has continued to hinder access to public information. The LSAI did not introduce any new measures to limit the scope of those laws, and so they have neutralized the effectiveness of the LSAI and limited the possibility of good implementation of ATI. The laws apply to many aspects of the administration's environment and the categorization of public information.

Despite constitutional protections of freedom of information, several laws continue to hinder free expression and access to information. These include the Jordan Press Association Law (1998), the Penal Code (1960), the Defense Law (1992), the Contempt of Court Law (1959), the Law on the Protection of State Secrets and Classified Documents (1971), and the Press and Publications Law (1999 and its amendments of 2012). In this context, existing legislation will limit significantly the amount of accessible information, especially the Archives Law and the Law on the Protection of State Secrets and Classified Documents.

The Law on the Protection of State Secrets and Documents (LPSSD)

The LPSSD (No. 50 of 1971), and especially articles 3, 6, 8 and 10, contradict and, in many cases, preempt application of the LSAI. The LPSSD was originally drawn up as a temporary law, but it is now considered the biggest obstacle to the application of the LSAI. The scope of classified information is overly broad in this legislation, and it fails to identify either the competent body in charge of classifying information and documents or an independent agency to verify and review the classification system. The Law mandates that classified government documents must be declassified after 30 years. However, it does not outline a clear mechanism for the classification of government documents that may be exempt from disclosure.

ATI Law and the Press and Publications Law

Freedom to access, obtain and circulate information and ATI, particularly from the government, has become a central element of freedom of opinion and expression and freedom of the press. The ATI legislation is crucial for journalists to fulfill their role as government watchdogs and encourage discussion and deliberation on issues of public concern.

Many international and national observers consider that the Jordanian Press and Publications Law (PPL) is very ineffective in regard to journalists' right to access information. Furthermore, although the LSAI provides additional guarantees and support for freedom of the press, unfortunately both laws have significant limitations.

The media-specific laws that relate to freedom of information are the PPL No. 8 from 1998 and its amendments of 2007, 2010 and 2012, and the ATI law. The right of journalists to obtain information is stipulated in the PPL, Articles 6 and 8. Article 6 was included in the

original 1998 PPL and was not amended in 2007 or 2010. Article 6(c) states that freedom of the press includes:

“The right to obtain information, statistics and news of interest to citizens from various sources and the right of analysis and circulation, publication and comment on the same.”

Article 8 of the same law, significantly amended in 2007, addresses access to information in subsections (a) and (d) stating that:

(a). “The journalist has the right to obtain information, and the official bodies and public institutions are obliged to facilitate his/her mission and allow him/her to view their programs, projects and plans. The competent authority shall provide the requested information as soon as is necessary according to the nature of the news or requested information if described as urgent, and within a period of not more than two weeks if not described as such.”

(d). “Within the limits in the exercise of his/her profession, and in accordance with the regulations prepared for this purpose by the authorities concerned, the journalist has the right to attend public meetings and court hearings and public meetings of the Senate and the House of Representatives and the meetings of the general assemblies of political parties, professional unions, clubs and associations and other public institutions, unless such meetings or sessions are closed meetings or confidential by law, regulation, or applicable instruction.”

The amendments to the PPL broadened the definition of a press publication to include electronic websites. Therefore, they are subject to the provisions of the PPL on licensing and prohibitions. The amending law also subjected electronic information platforms to sanctioning, such as heavy fines for violating the law's prohibitions. Pursuant to Article 48 of the revised PPL, non-compliance with the registration requirement may result in a fine of between JD 1,000 and JD 5,000 (approximately USD 1,400 to 7,000). Article 49(g) also requires the Press and Publications Department to block any website that violates any provision of the amended PPL, or any other law.

This problem is exacerbated by the lack of procedural protections or oversight. Although Article 42 of the amended law designates a specialized court to deal with publication related offenses, such as civil defamation suits and security-related crimes, Article 49(g) blocking orders are imposed by the director of Jordan's Press and Publications Department. The court appears to have no role in determining whether or not the blocking of websites is legitimate. This is a clear breach of the rule, noted above, that registration systems should be overseen by bodies which are independent of government.

The National Charter

After the elections of 1989, a royal committee was designated to prepare Jordan's Second National Charter of 1990. The Charter was promoted to lay the foundations for diverse political activities based on constitutional principles and to facilitate Jordan's transition to a more democratic system. The Charter gained national consensus and acquired a unique status subordinate to the Constitution, but no mechanisms or procedures were formulated to implement it.

Chapter Six of the Charter on “Information and Communication” highlights the role of mass media in “strengthening the democratic process,” and provides that “Citizens must have the right to know and to access information from legitimate transmission and publication sources within Jordan and abroad.” It states, “The circulation of news and data must be



regarded as an indivisible part of the freedom of the press and information. The state must guarantee free access to information to the extent that it does not jeopardize national security or the national interest.”

7. Conclusion

The absence of consultation prior to the vote on the ATI law in 2007 meant that no stakeholders were involved, and CSOs, in particular, had to develop their capacities to acquire the necessary expertise and raise awareness about this new right that “has been offered.”⁸³ CSOs and some media professionals played a key role in addressing the ATI situation by carrying out studies and analysis to show the gaps in the implementation of the ATI law.

The analysis of the implementation of ATI in Jordan shows the importance of investing in the building blocks before aspiring to new dynamics of change. The development of ATI needs strong public institutions with the capacity to deal with the potential demand for public information. However, in Jordan there was no great demand, and this is very closely interconnected with the limitations of the institutions in place to implement the ATI law. The right to access information was conveyed in an administrative environment where secrecy was the rule, and the LSAI did not change this reality. At its origins, the LSAI had several shortcomings compared to other existing models of ATI and this contributed continuously to the failure of its implementation.

Depending on the lens we use to analyze the Jordanian experience in implementing ATI, very different conclusions can be drawn. Almost seven years have passed since the adoption of the LSAI and the main surveys developed by CSOs show that its implementation is still very weak. The progress made during the last two years has exceeded by far the progress that was achieved during the first five years of implementation. However, some developed countries that approved new ATI laws in the past have dedicated a significant amount of time to preparing for this cultural shift in the local administration and developing the basic mechanisms for implementation of the law. What is surprising in the Jordanian case is the absence of prevailing logic to explain why its ATI legislation was adopted after 30 minutes of debate in the parliament, with all the consequences that it would create for all the stakeholders involved.

The recent emergence of new ATI laws in the MENA region, especially in Tunisia and Yemen, and the better quality of legislation being adopted in the region are raising the bar of ATI standards at the regional level. If Jordan used to be the exception after 2007, this reality has changed within the last few years and increasing voices are advocating for amending the ATI law in Jordan. The political changes that have happened in other countries in the region and their consequences on the enactment of new ATI legislation in Tunisia and Yemen and the constitutionalizing of ATI in Morocco have highlighted the limitations of Jordan’s experience with ATI. Such changes elsewhere in the region have given CSOs and observers some benchmarks to advocate for a better ATI law and pursue its substantial implementation.

Many initiatives have been developed in the last few years to work with MPs and government institutions to raise awareness about the existence of the law and identify its shortcomings. Because of these developments, the Government presented minor amendments to the Parliament in 2012, but major CSOs mobilized different stakeholders and especially MPs to block these amendments and pursue more significant changes. Without these important

measures, successful implementation and better benchmarking at the regional level are almost impossible.

Furthermore, the recent membership of Jordan in the OGP in 2011 is bringing a set of new commitments and reforms on transparency and accountability that is creating momentum for improving the ATI agenda. However, this will require a more significant mobilization of CSOs and the public to create major pressure on the parliament and state bodies to enact better legislation and develop the critical means to monitor its implementation.

To improve the quality of the existing ATI law and strengthen its implementation, CSOs have to increase their ability to cooperate and work in partnership with the parliament and senators to raise a critical majority that may force the government to withdraw the existing proposed amendments and increase their scope and quality. An alternative, albeit harder, approach would involve reaching a more significant number of deputies to propose a new ATI law and lobby for its vote.

More extensive efforts are needed to develop knowledge around ATI and encourage its use, especially among government departments responsible for its enforcement. CSOs with sufficient support, especially at the local level in governorates, can play a significant role in explaining and promoting the use of ATI and facilitating the flow of information to citizens and journalists.

Finally, the tour de force of the whole ATI situation in Jordan consists in increasing the use of the existing LSAI. If the demand for ATI with its existing limitations grows, this will result in greater political and societal support for reform and will create sustainable dynamics for change. The government will then be in a position to adapt to the new reality by making fundamental adjustments to the LSAI and improving the environment for its implementation.

Annex 1. Methodology

The World Resources Institute, in collaboration with different partners, is conducting the World Bank RTI Implementation project to provide a greater understanding of the key issues surrounding current RTI implementation practices and enforcement in Jordan, South Africa, Thailand, and the United States through a case study analysis.

The first phase of the project consisted in developing and refining the methodology to use in effectively evaluating RTI implementation in these four countries presenting varying states of RTI development and implementation. The project aims to develop a case study to assess RTI legislation, its implementation, enforcement and performance.

In Jordan, the study started with a desk research to identify and review all the studies developed in Jordan on ATI since the enactment of the law in 2007. The second step consisted in looking at the formal institutional mechanisms set up to build public sector capacity and incentives for compliance with RTI, as well as the broader enabling environment that drives how the RTI regime functions.

It is important to take into consideration the limited years of existence of the ATI law in Jordan and its limited implementation for a benchmarking exercise. The most recent data is available, but no information was collected before 2012 on the number of RFIs submitted to institutions covered by the law. The agency-specific data on ATI is not available for all agencies, and where it exists, it is partial and does not allow for a breakdown of agency performance.

The desk research was conducted in September and October and the interviews and the field research were carried out in Amman, Jordan from 20 October to 1 November 2013. More than 25 interviews were led in situ with different stakeholders (government and public agencies, media and civil society). A first list of interviewees was established before the mission with all the existing organizations and experts who have produced reports on ATI or have taken part in regional and global meetings. The list was finalized with other stakeholders who are working directly or indirectly on ATI, and their feedback was crucial to analyze and comprehend in detail the functioning of the ATI system in Jordan.

The report focused on evaluating three government agencies: the Ministry of Agriculture, the Ministry of Environment and the Information Council / Information Commissioner.

The case study highlights the latest data available on ATI implementation and tries to cover all studies developed by different stakeholders. CSOs' work on ATI is more accessible and they are the main actors assessing the implementation of ATI and the performance of the mechanisms in place.

Annex 2. List of Interviewees

Interviewee Name	Agency/Organization	Title
Nimer Haddadin	Ministry of Agriculture	Director of the Communication Unit
Nasser A. Al-Zou'bi	Ministry of Planning and International Cooperation	Focal Point of the OGP
Nancy Fasho	UNDP and former coordinator of a project on Public consultations with WBI	Lawyer and consultant on Anti-corruption
Yahia Shukkeir	Journalist, author of ATI studies and project Jordan Media Monitor	Head of project
Oraib Al Rantawi	Al-Quds Center for Political Studies	Director General
Raja Hiyari	Partners Jordan	Executive Director
Mohamed Younes Elabbadi	National Library/ Information Commissioner	Director General
Ena'am Yousef Mutawe	National Library/ Information Council	Head of Research Section
Mohamed Afana	Ministry of Environment	Director of Policy and Development
Khaled Shogran	Al Rai Center	Director
Amer Bani Amer	Hayat Center for Civil Society Development	Director General and coordinator of the Coalition for Election observation
Mouhammad Al-Tarawneh	Judge at Cassation Court	Judge and participated in a regional event on ATI in 2012 organized by WBI
Hilda Ajeilat and Sakher AL Khasawneh	Jordan Transparency Center	President of the organization and members
Conference "Open Government and ATI in Jordan"	Al-Quds Center for Political Studies	Around 50 participants representing different stakeholders attended this event.
Hazem Kashoue	The Jordanian Parliament	Deputy—National Guidance committee
Khaled M. Al-Bakar	The Jordanian Parliament	Deputy
Daoud Kuttab	Radio Al Balad - Amman.net	Director general
Musab Al-Shawabkeh	Radio Al Balad - Amman.net	Investigative Journalism Unit Manager
Judge Mansour Hadidi	The Judicial Institute of Jordan	Director General
Nidal Mansour	Center for Defending Freedom of Journalists	Executive President

(continued)

Interviewee Name	Agency/Organization	Title
Ahmed Al-Heyari	Watn News Agency	General Manager
Basil Okoor	JO24.net	Editor-in-Chief
Francesco Rosa and other staff	Foundation For the Future	Chief Operating Officer
Rut Gomez Sobrino	UNESCO Amman Media and elections program	Project Manager
Rana Sabbagh	Arab Reporters for Investgative Journalism ARIJ	Executive Director
Saad Hattar	Arab Reporters for Investgative Journalism ARIJ	Head of Investigative Journalism Department

Resources

- The Wasted Right. The Case of the Right of Access to Information in Jordan. Center for Defending Freedom of Journalists, 2013.
- Proposed amendments to legislations organizing the work of press and media in Jordan. Al Quds Center for political studies, Jordanian Media Monitor. Yahia Shukkeir. 2013.
- Study on implementation of ATI conducted by Al Quds Center for Political Studies. Provisional results presented during the National conference "Open Government and ATI mechanisms in Jordan" on October 27, 2013.
- Ombudsman Bureau resolved 78% of complaints received since 2009, by Dana Al Emam. Jordan Times, February 27, 2013. Available at: <http://jordantimes.com/ombudsman-bureau-resolved-78-of-complaints-received-since-2009>
- RTI rating. Access Info Europe and Centre for Law and Democracy. 2013. Available at: www.rti-rating.org
- The Tshwane Principles on National Security and the Right to Information: An Overview in 15 Points. Open Society Justice Initiative. June 2013. Available at: <http://www.opensocietyfoundations.org/fact-sheets/tshwane-principles-national-security-and-right-information-overview-15-points>
- RSF Press Freedom Index. 2013. Available at: <http://en.rsf.org/press-freedom-index-2013,1054.html>
- Access to Information in the Middle East and North Africa Region: An overview of recent developments in Jordan, Lebanon, Morocco and Tunisia. World Bank Institute and the World Bank Middle East and North Africa Social Development Department. Said Almadhoun. 2012.
- Study on Impact of soft containment on freedom of press and its independence. Jordanian Media Monitor. 2012. Available in Arabic at: http://jmm.jo/application/uploads/assets/jmm_1350455484_5583.pdf
- Freedom on the Net. 2012. Freedom House. Available at: http://www.freedomhouse.org/report/freedom-net/2012/jordan#_ftn3
- Statement expressing the concerns of the Amman Center for Human rights with other 11 Human rights organizations about the amendments of the Publications Law on September 2, 2012. Available in Arabic at: <http://www.jo24.net/index.php?page=article&id=12144>.
- Redefining media boundaries. AmmanNet.Net. Available at: <http://ar.ammannet.net/news/category/english>
- Surgical Procedure required for media laws in Jordan, Yahia Shukkeir, Ainnews in Arabic, May 4, 2011. Available at: <http://ainnews.info/83815.html>
- Communication and Information Sector Brief 2010–2013. UNESCO Amman Office. See: The Civil Society Index, Analytical Country Report: Jordan, 2010. Civicus, AL Urdun Al Jadid Research Center, 2011. Available at: <http://civicus.org/downloads/CSI/Jordan.pdf>

Fragility of the ATI law and government's disregard, ARIJ, November 23, 2010. Available in Arabic at: <http://bit.ly/1ITni5y>

Status of Media Freedoms in Jordan during 2007, Amman Center for Human Rights. Available in Arabic at: <http://bit.ly/1a3Alit>.

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Annual Report of the Information Council, Jordan, 2012.

Official Communiqué 17 and 24/2007.

Official Communiqué 13/2008.

Council of Ministers' Resolution No. 502 dated January 23, 2008.

Official Communiqué of April 7, 2009.

Official Communiqué of 27 March 2011.

Ombudsman's report of 2010 in Arabic. Available at: <http://www.ombudsman.org.jo/arabic/news/Pages/SummaryReprtheOmbudsman%202010.aspx>

Official Communiqué of the Prime Minister n°19/2012.

Official Communiqué of the Prime Minister n°4/2013 recalling the content of the Official Communiqué n°19/2012.

The Open Government Partnership. Jordan: National Action Plan. April 2012. Available at: http://www.opengovpartnership.org/sites/www.opengovpartnership.org/files/country_action_plans/Jordan%20Draft%20Action%20Plan.pdf

First progress report of Jordan on the implementation of the OGP Action plan. Available at: <http://www.opengovpartnership.org/sites/default/files/OGP%20first%20progress%20report%202012%20feb%202013%20%20final.pdf>

WEBSITES

Al Quds Center for Political studies: <http://alqudscenter.org/english/>

Center for Defending Freedom of Journalists: <http://www.cdfj.org/look/en-index.tpl?ldLanguage=1>

Jordanian Media Monitor: <http://jmm.jo/>

Ministry of Agriculture: <http://www.moa.gov.jo/Default.aspx?tabid=129&language=ar-JO>

Ministry of Environment: <http://www.moenv.gov.jo/Ar/AboutUS/Pages/default.aspx>

Marsoum 41: an Internet platform developed by a Tunisian CSO TOUENSA to gather ROI and do monitoring of requests and the time of response of public institutions. Available at: <http://www.marsoum41.org/en>

Ombudsman Bureau: <http://jordantimes.com/ombudsman-bureau-resolved-78-of-complaints-received-since-2009>

The Jordanian Open Data Website: http://www.jordan.gov.jo/wps/portal/!ut/p/b1/04_SjzS0NLQ0NbcwN9aP0I_KSyzLTE8syczPS8wB8aPM4h2NHAMdPS2NDfzDLN0MPM29XIN9wyNHE3N9IMTi_RzoxwVAdotzCo!/

Al-Balad Radio: <http://www.balad.fm/>

Al-Rai Newspaper: <http://www.alrai.com/>

Jordan times: <http://jordantimes.com/>

Notes

1. For a list of interviewees, please see Annex 2.
2. The law was published in the Official Gazette no. 4831 page 4142 on June 17, 2007.
3. Cited in interviews with Yahia Shukkeir on October 23, 2013 and Rana Sabbagh on October 31, 2013. This information was also reported in the report "Access to Information in the Middle East and North Africa Region: An overview of recent developments in Jordan, Lebanon, Morocco and Tunisia." Said Almadhoun. 2012.
4. Interview with the expert on October 24, 2013 in the Office of the Jordanian Media Monitor/ Al Quds Center.
5. Jordan's ranking fell from 109 in 2006 to 122 in 2007 according to RSF Press Freedom Index. In 2013, Jordan ranked 134 out of 179 countries. Available at: <http://en.rsf.org/press-freedom-index-2013,1054.html>
6. Status of Media Freedoms in Jordan during 2007, Amman Center for Human Rights. Available in Arabic at: <http://bit.ly/1a3Alit> (Accessed on January 5, 2014).
7. See: The Wasted Right. The Case of the Right of Access to Information in Jordan. Prepared by Waleed Husni, Center for Defending Freedom of Journalists, 2013.
8. Ibid.
9. Ibid.
10. See: Freedom on the Net, 2012. Freedom House. http://www.freedomhouse.org/report/freedom-net/2012/jordan#_ftn3 for more information about the amendments of the Jordanian constitution (Accessed on November 25, 2013).
11. See: Freedom on the Net. Jordan. Available at http://www.freedomhouse.org/report/freedom-net/2012/jordan#_ftn3 (Accessed on November 25, 2013).
12. Interviews conducted with ARIJ and Yahia Shukkeir.
13. The Civil Service Regulation in its article 66 states: "The employee is prohibited under penalty of disciplinary responsibility...to keep for him/herself any document or official information or its copy or its image or supply it to newspapers, magazines and news agencies, or any information about it." (Unofficial translation).
14. Equivalent to 3,500 USD.
15. Fragility of the ATI law and government's disregard, ARIJ in Arabic, November 23, 2010. Cited in Almadhoun, 2012.
16. Surgical Procedure Required for Media Laws in Jordan, Yahia Shukkeir, Ainnews in Arabic, May 4, 2011. Available at: <http://ainnews.info/83815.html> (accessed on April 6, 2012)
17. The Higher Media Council has been abolished since the adoption of the law, but mention of it has not yet been amended in the Right of Access to Information Law.
18. The annual report of the Information Council is not published on-line; a photocopy of the summary of the 2012 annual report was provided after submission of a request.
19. Access to Information in the Middle East and North Africa Region: An Overview of Recent Developments in Jordan, Lebanon, Morocco and Tunisia. World Bank Institute and the World Bank Middle East and North Africa Social Development Department. Said Almadhoun. 2012.
20. See: Fragility of the ATI law and Government's Disregard, ARIJ, November 23, 2010. Available in Arabic at: <http://bit.ly/1ITni5y> (Accessed on December 29, 2013).
21. A survey conducted by the CSO ARIJ found that 16 government agencies use different procedures to classify their information. See: Fragility of the ATI law and government's disregard, ARIJ, November 23, 2010. Available in Arabic at: <http://bit.ly/1ITni5y> (Accessed on December 29, 2013)
22. Interview with the Information Commissioner on October 24, 2013 in the National Library, Amman, Jordan.

23. Stakeholders interviewed commented that researchers and university students are the main requesters.
24. Interview with the Information Commissioner on October 24, 2013 in the National Library, Amman, Jordan.
25. ARIJ, Radio Al-Balad and some investigative journalists reported on their attempts and experiences to request specific information and they followed the procedure by appealing the decision and sometimes appealed the refusal to release information by public institutions before the High Court of Justice. Reference to the study developed by ARIJ in Arabic: <http://arij.net/en/node/4795/page/0/1%3Fpage%3D0?qt-report=0> (accessed on December 30, 2013)
26. The complaints were filed by the CEO of the CDFJ as a Jordanian citizen.
27. A report presented by the ICO in Amman during an event for the OGP and ATI, organized by Al Quds Center for Political Studies (October 2013).
28. Al See: Jordan Council Approves Modifications to FOI Law. October 29, 2012. Yahia Shukkeir. <http://www.freedominfo.org/2012/10/jordan-council-approves-modifications-to-foi-law/> (Accessed on November 28, 2013).
29. Interviews conducted with CDFJ, Al Quds Center, ARIJ.
30. See: <http://www.cdfj.org/look/en-index.tpl?IdLanguage=1>
31. See: <http://alqudscenter.org/english/>
32. More information about Media Monitor is in Arabic at: <http://jmm.jo/>
33. See: Proposed amendments to legislation on the work of the press and media in Jordan. Al Quds Center for Political Studies, Jordanian Media Monitor. Yahia Shukkeir. 2013.
34. Study on implementation of ATI conducted by Al Quds Center for Political Studies. Provisional results presented during the National Conference on "Open Government and ATI mechanisms in Jordan" on October 27, 2013.
35. Interview conducted with the representative of the MOE.
36. Interview with the Director of communication of the Ministry of Agriculture on October 23, 2013 in his office in Amman, Jordan.
37. Interview with the representative of the Information advisor on October 24, 2013 in the Ministry of Environment, Amman, Jordan.
38. The total number of public institutions subject to the ATI law may be 120.
39. Access Info Europe (AIE) and the Centre for Law and Democracy (CLD) developed the ATI rating. A new updated version was launched on September 28, 2013. Available at: <http://rti-rating.org/index.php>
40. A CSO from Tunisia (TOUENSA) launched an internet platform to gather RFIs and monitor requests and the time taken by public institutions to respond. Available at: <http://www.marsoum41.org/en> (Accessed on December 30, 2013)
41. Interview with the representative of the Ministry of Environment.
42. Interview with the ICO on October 24, 2013 in the National Library, Amman, Jordan.
43. See the Jordanian Open Data Website: http://www.jordan.gov.jo/wps/portal/!ut/p/b1/04_SjzSONLQ0NBcwN9aP0I_KSyzLTE8syczPS8wB8aPM4h2NHAMdPS2NDfzDLN0MPPM29XIN9wyNHE3N9IMTi_RzoxwVAdotZCo!/
44. See: <http://www.moa.gov.jo/Default.aspx?tabid=129&language=ar-JO> (accessed on December 26, 2013).
45. See: The Civil Society Index, Analytical Country Report: Jordan, 2010. Civicus, AL Urdun Al Jadid Research Center, 2011. Available at: <http://civicus.org/downloads/CSI/Jordan.pdf>
46. Interview with a group of representatives of JTC on October 26, 2013.
47. See: Consortium in Jordan Plans to Push RTI Amendments. June 14, 2013. Available at: <http://www.freedominfo.org/2013/06/consortium-in-jordan-plans-to-push-rti-amendments/>
48. Interviews conducted with MPs in Amman.
49. Interview conducted in the Office of ARIJ on October 31, 2013.
50. Many stakeholders interviewed (parliamentarians and civil society representatives) believe that international donors have their own objectives, and that implementation of ATI requires the creation of channels of collaboration with the government.

51. See: Conclusion of the Report on Monitoring the 2013 Jordan Parliamentary Election. The Civil Coalition for Monitoring the 2013 Jordanian Parliamentary Elections—RASED. Hayat Center for Civil Society Development.
52. See: A report documenting the performance of the 17th Jordanian parliament in the first hundred days of its work in the Non-Ordinary Session 2013. Executive summary. Published by Monitoring the Elections and the Performance of Elected Councils Program “RASED”. Al Hayat Center for Civil Society Development. May 2013.
53. Interview on October 24, 2013 in the office of Al Hayat Center in Amman.
54. Interview with the Executive Director of ARIJ on October 31, 2013.
55. See: Why Jordanians Do not Use the Right to Access Information, Rana Sabbagh, Ammon News, in Arabic, July 2, 2010. Available at: <http://www.ammonnews.net/article.aspx?articulo=54159> (accessed on January 10, 2014).
56. See: 42 percent of media professionals do not know about the ATI law, February 2009 in Arabic. Available at: <http://www.amanjordan.org/articles/index.php?news=3379> (Accessed on January 10, 2014).
57. See: Right to Access Information between theory and practice, Saad Hattar, Sahafi, November 24, 2011 in Arabic. Available at: <http://www.sahafi.jo/files/54179a9bee957f823faa013d4e1eab8ab35d8a1a.html> (Accessed on January 10, 2014)
58. Reported in Almadhoun, 2012. Debating access to information in Jordan, May 16, 2011.
59. Study on Impact of soft containment on freedom of press and its independence. Jordanian Media Monitor. 2012. Available in Arabic at: http://jmm.jo/application/uploads/assets/jmm_1350455484_5583.pdf (Consulted on January 8, 2013).
60. Available at: <http://www.alrai.com/> (accessed on January 10, 2014).
61. See: Jordan Press Foundation—Al-Rai (PRES) Equity Research Report—Initiation of Coverage. Available at: http://www.abci.com.jo/cms_files/Jordan_Press_Foundation_-_Al-Rai_%28PRES%29_-_Initiation_of_Coverage.pdf (Accessed on January 10, 2014).
62. Available at: <http://jordantimes.com/> (Accessed on January 10, 2014).
63. See: Redefining media boundaries. AmmanNet.Net. Available at: <http://ar.ammannet.net/news/category/english> and Al-Balad Radio <http://www.balad.fm/>
64. Interview with the founder and a member of the Investigative Unit on October 28, 2013.
65. The Wasted Right. The Case of the Right of Access to Information in Jordan. Prepared by Waleed Husni, Center for Defending Freedom of Journalists, 2013.
66. See: Statement expressing the concerns of the Amman Center for Human Rights with 11 other human rights organizations about the amendments of the Publications Law on September 2, 2012. Available in Arabic at: <http://www.jo24.net/index.php?page=article&id=12144> (accessed on December 30, 2013).
67. See: Freedom On The Net 2012: Jordan. Freedom House. Available at: http://www.freedomhouse.org/report/freedom-net/2012/jordan#_ftn3 (accessed on December 30, 2013).
68. Interviews with some journalists who took part in the protests and had their news websites blocked on October 29, 2013.
69. Stakeholders interviewed commented that the absence of an independent central agency with significant powers in charge of implementation and the lack of political will are the main causes of this limited implementation of LSAI.
70. Interviews conducted with CDFJ and Al Quds Center for Political Studies.
71. Interview conducted with the representative of the Ministry of Planning and International Cooperation.
72. Interview with the Program Manager of the Media and Elections Program on October 30, 2013 in the Office of UNESCO Amman.
73. See: Communication and Information Sector Brief 2010–2013. UNESCO Amman Office.
74. Surveys developed by: Al-Urdun Al-Jadid Research Center (UJRC) in 2010, half of the ministries did not know about the law and 40% of journalists had no knowledge of its existence. In March 2010, a survey by Arab Reporters for Investigative Journalism (ARIJ) found that only 5% of journalists used the law to request information. Available in Arabic at: <http://arij.net/en/node/4795/page/0/1%3Fpage%3D0?qt-report=0>

75. The Open Government Partnership was officially launched on September 20, 2011. The founding governments (Brazil, Indonesia, Mexico, Norway, Philippines, South Africa, United Kingdom, and the United States) endorsed an Open Government Declaration and announced their country action plans. See: <http://www.opengovpartnership.org/about>
76. See: The Open Government Partnership. Jordan: National Action Plan. April 2012. Available at: http://www.opengovpartnership.org/sites/www.opengovpartnership.org/files/country_action_plans/Jordan%20Draft%20Action%20Plan.pdf
77. Interview with the representative of the Ministry of Planning and International Cooperation.
78. See: First progress report of Jordan. Available at: <http://www.opengovpartnership.org/sites/default/files/OGP%20first%20progress%20report%202012%20feb%202013%20%20final.pdf>
79. Interview with the Focal Point of the OGP at the Ministry of Planning and International Cooperation on October 23, 2013.
80. Available at: <http://www.ombudsman.org.jo/arabic/Pages/default.aspx> (accessed on January 10, 2014)
81. See: Ombudsman Bureau resolved 78% of complaints received since 2009, by Dana Al Emam. Jordan Times, 27 February 2013. Available at: <http://jordantimes.com/ombudsman-bureau-resolved-78-of-complaints-received-since-2009> (accessed on January 8, 2014).
82. See: Summary of Ombudsman's report of 2010, in Arabic. Available at: <http://www.ombudsman.org.jo/arabic/news/Pages/SummaryReprttheOmbudsman%202010.aspx> (accessed on January 10, 2014).
83. This quote was proposed by different civil society advocates to refer to LSAI. They consider it an effort to improve the image of Jordan at the international level without the political will for an effective ATI.



Implementing Right to Information A Case Study of South Africa

Elizabeth Moses



WORLD BANK GROUP

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Abbreviations and Acronyms

CEO	Chief Executive Officer
CER	Center for Environmental Rights
COJ	City of Johannesburg
CSO	Civil Society Organization
DEA	Department of Environmental Affairs
DIO	Deputy Information Officer
DOJCD	Department of Justice and Constitutional Development
EDMS	Electronic Document Management System
FOIP	Freedom of Information Programme
GCIS	Government Communication and Information Services
GDACE	Gauteng Department of Agriculture Conservation and Environment
GKA	Golden Key Awards
IDP	Integrated Development Plan
M&G	Mail and Guardian
NEMA	South Africa National Environmental Management Act
NIOF	National Information Officers Forum
OBI	Open Budget Index
ODAC	Open Democracy Advice Centre
ODCG	Open Democracy Campaign Group
OGP	Open Government Partnership
OSID	Office on Institutions Supporting Democracy
OSMI	Open Society Monitoring Index
PAIA	Promotion of Access to Information Act of 2000
PCSN	PAIA Civil Society Network
POPIA	Protection of Personal Information Act
PSC	Public Service Commission
R2K	Right 2 Know Campaign
RTI	Right To Information
SAHA	South African History Archive
SAHRC	South African Human Rights Commission
SAPS	South African Police Service



Implementing Right to Information

A Case Study of South Africa

1. Introduction and Summary of Findings

1.1. INTRODUCTION

After enduring a long struggle against oppression and autocratic rule under the apartheid era, South Africa cemented its transformation into a modern democracy with the historic general elections of 1994. Culminating with the passage of the Constitution of the Republic of South Africa in 1996, South Africa created a broad foundation for an open and accountable government. The protection of human rights was highlighted in the embedded Bill of Rights. This inclusion of socio-economic, political, and civil rights was seen, by most, as a commitment from political leaders to a more representative, participatory form of governance in South Africa's public institutions.¹

Included in this broad list was the right to information (RTI). Section 32 of the Constitution guarantees the "right of access to any information held by the state and any information that is held by another person and that is required for the exercise or protection of any rights."² Because control of information and enforced secrecy were such essential tools of the apartheid government,³ it is significant that this section of the Constitution not only includes the right to access state information but the right to access information held by a private body or individual as well. There is widespread recognition among academics and RTI advocates that this broad inclusion of access to information represented one of the most unique and powerful delineations of RTI in law at the time.⁴

The final constitution came into effect on February 3, 1997. It required the passage of enabling legislation for the right to access information within three years. This requirement is the genesis for South Africa's Promotion of Access to Information Act of 2000 (PAIA). PAIA recognizes in its preamble the fundamental connection between access to information and democracy. It states that "the system of government of in South Africa before 27 April 1994, amongst others, resulted in a secretive and unresponsive culture in public and private bodies which often led to an abuse of power and human rights violations."⁵

Almost immediately after and consistently since its passage, PAIA implementation has been tracked and analyzed by a broad range of stakeholders.⁶ In practice, implementation of PAIA has not lived up to the noble ideals and exuberant expectations surrounding the



end of apartheid and passage of this RTI law. A host of implementations issues have been documented and the limitations within the law have been highlighted. This case study briefly outlines the passage and legislative scope of PAIA. It analyzes the strengths and weaknesses of implementation and the key actors involved during its 13-year history.

1.2. SUMMARY OF FINDINGS

PAIA implementation has been both positively and negatively impacted by a wide range of overlapping and interconnected issues.

The factors that have influenced the success of PAIA implementation include:

- *The overall strength of the law and a strong foundational support for access to information within the South African Constitution.* The law is comprehensive and includes a clear procedural outline. PAIA was also the first law to allow the submission of requests to private bodies.
- *The strong, independent and internationally well respected Constitutional Court.* In most cases the court has ordered the release of information in PAIA cases. These cases have played a central role in shaping PAIA's enforcement as well as in elaborating its scope.
- *A vibrant and active civil society.* Civil society organizations (CSOs) have a long history of advocating for access to information. They engage in a wide range of tactics and strategies to improve the legislative strength of PAIA, its compliance and implementation, and broader goals of using PAIA to improve the human and civil rights of South Africans.
- *A competent oversight and monitoring institution.* The South African Human Rights Commission's PAIA unit takes its PAIA mandate seriously despite consistently limited resources and a lack of political support.

Drivers of failure that have impeded effective PAIA implementation include:

- *The lack of an independent, enforcement and compliance mechanism outside the court system.* Litigation as the only recourse results in a slow, expensive, and complicated process. It limits the number of requests that can be challenged and reduces the effectiveness of the law.
- *The overall lack of political will and awareness of PAIA by senior Ministry officials.* Together with the subsequent lack of prioritization within public institutions, this has resulted in inadequate staffing, limited budgets, poor training, and unclear information request procedures.
- *The low use and lack of awareness of PAIA within the general population.* This has contributed to government officials' justifications for ignoring PAIA requirements. It has also fueled the perception that PAIA is only effective for a small group of elite organizations.
- *The overuse and appearance of arbitrary use of PAIA exemptions.* This has led to the perception that information officers are not well versed with PAIA requirements and procedures and are motivated to limit the amount of information released. This overuse has also increased the number of cases taken to court.
- *Lack of sanctions outlined in PAIA.* This has contributed to ongoing poor compliance as there is no consequence for ignoring PAIA requirements.

- *Insufficient resources.* Institutions do not have the budgets to adequately support staffing, training, records management, or strategic planning and communication. The South African Human Rights Commission has repeatedly cited the lack of resources as a significant impediment to carrying out its PAIA mandate.
- *Poor records management.* The use of manual records management systems, minimal budgets, and a lack of support from senior management has impacted the capacity of government officials to locate and produce requested information.
- *Weak political support for improving PAIA implementation.* Despite repeated efforts by civil society and the South African Human Rights Commission to persuade political leaders to address poor PAIA compliance, no political champions have come forward to ensure these issues are addressed. The lack of support has contributed to the perception that political leaders are more interested in limiting access to information as a screen for hiding corruption.

The cost, complexity, and expense of pursuing appeals will be addressed by the Protection of Personal Information Act (POPIA) and the creation of an Information Regulator. Passed by Parliament in September 2012, POPIA has not been implemented to date. However, the Information Regulator will have powers to investigate and mediate PAIA conflicts. It will also have the power to oversee compliance, monitoring, and promotion of the law.

2. Passage of PAIA: History and Context

In 1994, Deputy-President Mbeki appointed Advocate Mojuanku Gumbi to chair the Task Group on Open Democracy. The Task Group's goal was to develop a set of policy proposals needed to give effect to the enabling legislation.⁷ Initially, the Task Group sought to include broader constitutional principles of public participation, accountability, and transparency. Inspired by a wide range international RTI legislation including the laws of Australia, Canada, New Zealand, India, the United Kingdom, and the United States,⁸ these policies were presented to Parliament in 1996 as the draft Open Democracy Bill. It included five important open and democratic governance principles:⁹

1. Proactive publication of government information;
2. Access to government records;
3. The correction and protection of personal information held by governmental and private bodies, including privacy protections;
4. Access to government meetings; and
5. Protection of whistleblowers.¹⁰

However, the larger governmental political transition was proving to be a difficult and time consuming process and the debate over priorities influenced the development of the law. During this time the executive and other governmental departments made substantial changes to the bill.¹¹ Citing a desire to only address the issue of access to personal information and no other privacy related concerns, the data protection chapter of the bill was removed. The



open meetings chapter was removed as well. Cabinet records were excluded after concerns were raised about the unintended consequences of unrestricted access to information.¹² While the importance of whistleblower protection was confirmed, the Parliamentary Joint Ad Hoc Committee on the Open Democracy Bill agreed it was not appropriate to include it in legislation dealing with the right of access to information, so it was also removed and taken up under separate legislation.¹³

Further, the enforcement provisions attracted controversy and were contested.¹⁴ Modeled on the Information Commissions seen in other countries, the Task Force originally recommended the development of an Open Democracy Commission to provide for the promotion and monitoring of the law and a separate Information Court to handle complaints and appeals (after internal appeals decisions were exhausted at the public institutional level).¹⁵ After a long process of consultation and deliberation, however, the Cabinet instead provided for disputes to be litigated in the High Courts. The promotional and monitoring duties were given entirely to the South African Human Rights Commission (SAHRC).¹⁶

The Committee noted that other jurisdictions had created an Information Commissioner and that "this system enjoys great success," but they also were "aware of the lack of financial and other resources, and it is not intended or advisable to allow for a proliferation of commissions, despite the desirability of such alternative less adversarial type of enforcement mechanisms in our nascent democracy."¹⁷ However, because the committee recognized that the existing formal court procedures would not allow for the easy settlement of informal disputes, the Department of Justice and Constitutional Development (DOJCD) was requested to investigate the feasibility of establishing an enforcement mechanism like the Information Commissioner and report back to the committee within 12 months after promulgation of the bill.¹⁸ However, in reality this type of enforcement mechanism has only recently been considered.

Eventually in October 1997, the Open Democracy Bill was published for comment before being introduced to Parliament in July 1998. The Justice Portfolio Committee Chairperson, Mr. J De Lange, called the Bill "the most complex piece of legislation since the Truth and Reconciliation Commission Bill."¹⁹ In 1999, the National Assembly's Portfolio Committee on Justice took up the bill and held public hearings. South Africa's second democratic elections were held in June 1999. With the constitutionally mandated deadline looming, the bill was passed to the Parliamentary Ad Hoc Joint Committee who took up the task of developing the final piece of legislation and held a second round of consultations. By the time the bill was passed, the scope had been narrowed significantly and the name had been changed to the now more appropriate Promotion of Access to Information Act (PAIA). Overall, the legislative changes made over the course of debate foreshadowed many of the implementation and enforcement challenges documented by PAIA stakeholders and government officials.

Passed in 2000, PAIA was warmly welcomed by most South Africans who knew about it, especially by social justice activists who saw the possibilities for using PAIA to access information around apartheid-era human rights violations.²⁰ Inspired by the grassroots movement of India, advocates were also eager to apply PAIA for the protection of socio-economic rights including the right to have access to adequate housing, healthcare, water, sufficient food, and basic education.²¹ PAIA's goal is to "foster a culture of transparency and accountability in public and private bodies by giving effect to the right of access to information and actively promote a society in which the people of South Africa have effective access to information to enable them to more fully exercise and protect all of their rights."²²

3. Legal Environment and Compliance

PAIA came into effect on March 9, 2001. Although the right to information under PAIA is more limited than that under Section 32 of the Constitution,²³ its governance takes precedence over other legislation that may restrict access to information. The Access to Information Europe and Center for Law and Democracy's Global Right to Information rating places South Africa 14th out of 95 countries when evaluating RTI laws in comparison to international best practice, citing its strong legal framework based on a clear constitutional right to access all government information and "backing by a robust promotion regime."²⁴

3.1. SCOPE OF COVERAGE

All people have a right to access information including non-citizens and non-residents of South Africa as long as they comply with the Act's requirements.²⁵ A company or association is also allowed to request information. PAIA allows information to be requested from national, provincial, and municipal departments as well as Chapter 9 Institutions,²⁶ but limits the right of access to records or recorded information (regardless of form or medium). Requesters do not have to specify a reason for submitting information requests to these public bodies. The law also allows public bodies to make requests for information to private bodies, but specifically prohibits them from making requests to other public institutions.

Records of the Cabinet, its committees, or individual members of parliament and provincial legislatures are excluded from release requirements. Judicial functions of a court or special tribunals or decisions regarding the appointment of a judicial officer are exempted as well. PAIA applies to all records regardless of when they were created, an important fact given the sordid history of records management under the apartheid governmental era.²⁷

South Africa was the first country to give individuals the right to access information from private companies. However, to gain access to this information, a person must show that the information is required to protect another right. Thus, unlike with public body records, the ability to access private records is limited and requires the requester to state what right they wish to exercise or protect, the record required, and why that record is required to exercise or protect that right.²⁸ The courts have determined that political parties are defined as private bodies for the purposes of PAIA requests.²⁹

Despite this unique inclusion in the law, very few requests are submitted to private bodies.³⁰ CSOs have said it is challenging to demonstrate that a record requested from a private body is required for the exercise or protection of a right. This challenge has been exacerbated by legal interpretation that the requester has to show that the records requested are "essential or necessary" rather than "useful or relevant" for such exercise/protection.³¹

3.2. EXEMPTIONS

PAIA contains a long and detailed list of exemptions including protections for commercial information of third parties, trade secrets, financial, commercial, scientific, or technical information, or information supplied in confidence. Most exemptions are subject to a harm test. Exemptions must also be balanced against a public interest test that requires disclosure if the information shows a failure to comply with the law or a serious public safety or environment



risk. It also applies in cases where the public interest clearly outweighs the harm. This public interest clause in PAIA trumps all exemptions, even in cases of national interest. Specifically, if a requester can show that obtaining the information is more important than the harm from disclosure, information should be released.

Public and private bodies must refuse access if the request involves the unreasonable disclosure of personal information about a third party, including a deceased person. A private body must also refuse a request for access if the request:

- Contains commercial information;
- Constitutes a breach of a duty or confidence;
- Can reasonably be expected to endanger the life or physical safety of an individual;
- Contains privileged information from production in legal proceedings; or
- Contains information about research being carried out.

Civil society stakeholders interviewed have expressed concern regarding the overuse of PAIA exemptions by government officials responsible for PAIA implementation.³² They believe officers have taken more of a “menu or checklist approach” when determining if and what exemptions can be used to deny a request instead of taking the time to determine accurate grounds for refusal.³³ Stakeholders believe the overuse has contributed to a high rate of refusal of information requests in general. This overuse also has increased the number of the PAIA related litigation cases based on disagreements over the appropriate use of these exemptions and application of the public interest test. One interviewee suggested that “negotiating what is and is not an exemption appears to be part of the information request process.”³⁴

3.3. PROCEDURES FOR ACCESS

Requests must be submitted to a designated Information Officer using a prescribed form. The law defines this officer as the administrative head of a public institution responsible for PAIA implementation. The Information Officer has the power to designate a Deputy Information Officer to take over the responsibilities of PAIA, including receiving and responding to requests. PAIA stipulates information officers are “necessary to render the public body as accessible as responsibly possible for requesters of its records.”³⁵

The request form can be submitted by mail, fax or electronic mail. It must also identify the record requested and the applicant. A separate form is required for information requests submitted to private businesses although information required on this form is essentially the same.

A requester who is unable to submit a written form may make an oral request. Similarly, government information officers must provide “reasonable assistance, free of charge, as necessary to enable applicants to make requests.”³⁶ Government information officers must also take reasonable steps to make records available in an appropriate form for a requester with a disability. Private bodies are not required to provide any of these services.

Information must be granted in the requested language if it exists in that language. There is no obligation to translate a record into the preferred language of the requester. The law contains detailed provisions for the transfer of requests whenever the record requested is in the possession of a different public body. It requires the transfer to occur as soon as possible

or within 14 days. Further, the original officer is obliged to inform the requester of the transfer and the name of the officer to which it was transferred.

Both public and private bodies may charge applicants fees for requests including for the reproduction of the record and for search and preparation. The DOJCD establishes the schedule of fees. There are income threshold exceptions to payment as well as Minister authorized exemptions.

Public and private bodies must notify a requester of the decision to grant or refuse access within 30 days of receiving the request. Partial disclosure of information requested is allowed under the law. The period for response can be extended for another 30 days when a request is for a large number of records or would unreasonably interfere with the activities of the institution. The applicant must be notified of any time extensions. Failure to respond to a request within the prescribed time is defined as a deemed refusal of access. There are no provisions for responding to urgent requests.

However, despite the clear request procedures outlined in the law, in practice stakeholders including the SAHRC, have highlighted a number of barriers to access to information resulting from the way these procedures have been drafted. Despite efforts after the end of apartheid to make the regulatory process more accessible by creating simplified language requirements, language remains a significant obstacle for the use and awareness of PAIA.³⁷ South Africa has 11 official languages including English, Afrikaans, and Zulu. Only a minority of the African population speaks and understands English, yet English remains the primary language of government.³⁸ Further, the form uses bureaucratic language that many people find difficult to understand.³⁹

Having a form-based information request procedure can be an obstacle for illiterate low-income community members who may not have easy access to the form, technology (printers, email, internet, etc.) or the information on procedures needed to submit a request.⁴⁰ Further, most civil society stakeholders interviewed believe the support provided by government officials is not easily or readily obtainable in practice.⁴¹ In a 2003 information request analysis, the Open Democracy Advice Centre (ODAC), an important CSO leading access to information work in South Africa, found that 70% of oral requests could not be submitted.⁴² In particular, blind and illiterate requesters were found to experience severe obstacles in making requests. Though some departments, including the Premier of the Eastern Cape and the Department of Defense displayed some commitment to assisting disadvantaged requesters, the study concluded that "PAIA is inaccessible for the illiterate."⁴³

Charging a fee can impede access for many community members who may not be aware of the procedure for requesting a waiver. The implementation of charging a fee has also been documented as a problem.⁴⁴ In one incident, ODAC submitted an information request, was sent letters asking for the fee, and then after payment, never received a response to their request.⁴⁵

CSOs have also documented an increase in the use of time extensions for responding to requests and have suggested it may reflect the need for more institutional resources or the overuse of the third party notification requirements.⁴⁶ This overuse, in conjunction with the lack of a provision for urgent applications, diminishes the "contextual seriousness" of complying with the time periods.⁴⁷



3.4. APPEALS/COURT

Presently there are two levels of appeals under PAIA: an internal appeal within the public body and after that avenue has been exhausted, application to the courts. A requester can lodge an internal appeal using the appropriate form if the public body has

- issued a refusal,
- failed to respond to a request at all (a deemed refusal),
- surpassed the time period,
- charged an inappropriate fee, or
- granted access in a form other than that requested.

A third party is also permitted to lodge an appeal against a decision to release information that affects them. There is no provision, however, for an internal review at private institutions. Requesters must go straight to court when an information request is denied.

In refusal cases, an information officer must state adequate reasons, including the provision of the act relied upon to make a decision, and inform the requester on his or her right to lodge an internal appeal. There is a growing body of case law on the adequate level of justification required.⁴⁸

A request must be refused if disclosure could reasonably be expected to endanger the life or physical safety of an individual. Notwithstanding exclusions in the public interest, public bodies must also refuse requests pertaining to the police docket law, enforcement and legal proceedings, legally privileged records, revenue collection information, as well as requests considered frivolous or vexatious.

PAIA includes little enforcement or sanction provisions. It is a criminal offence to destroy damage, alter, conceal or falsify a record with intent to deny a right of access. Regulations issued by the Minister of Justice in 2006 also make it an offense for an information officer to fail to make Section 14 or 51 manuals available or to charge a fee for reviewing or copying this publicly available information. However, PAIA also ensures no person shall be liable for anything done in good faith.

The institution of the Public Protector receives complaints against government agencies and officials and has the power to investigate and take appropriate remedial action. This mandate includes the power to resolve disputes related to PAIA through mediation, conciliation, or negotiation. However simply refusing a request for information is not sufficient cause for action; a claimant must show a right was violated, making this a difficult avenue for resolution. Further, it is up to the office to determine what cases it pursues and the inability to finalize cases quickly limits the usefulness of this office.⁴⁹ The SAHRC is also empowered to hear complaints, but because it can only make recommendations and cannot formally sanction, its enforcement responsibilities are, by definition, limited.⁵⁰

The lack of an independent, intermediate compliance and enforcement mechanism has been consistently raised by virtually all PAIA stakeholders inside and outside the government as a major weakness in the law.⁵¹ It is one of most important explanations cited for poor enforcement and a formidable disincentive to ordinary individuals to use their right to access information.⁵²

The cost, complexity, and expense of pursuing appeals has been cited as a primary reason only a handful of cases have been taken to the courts.⁵³ This issue was directly addressed in the recently signed Protection of Personal Information Act (POPIA). Introduced in August 2009,

this bill was passed by Parliament in September 2012 and signed by the President. Although it has not been implemented to date, all stakeholders interviewed are hopeful this legal framework improvement will help strengthen PAIA implementation and access to information for all South Africans.

Information Regulator

POPIA will regulate and protect access to personal information, although the request procedure under PAIA will continue to apply. The bill establishes an Information Regulator that will have powers to investigate and mediate conflicts surrounding other components of the personal information bill and PAIA. The PAIA compliance, monitoring, and promotion responsibilities of the SAHRC will be transferred to this office as well. The Regulator will be empowered to assess whether a public or private body generally complies with the PAIA policies and implementation procedures. The Regulator will be independent and accountable to the National Assembly of Parliament.

Once the internal appeal process has been exhausted, a requester (or third party) will be able to submit a complaint to the Information Regulator. The Regulator will also hear cases where an internal appeal was refused because it was submitted past the deadline.

After receiving a recommendation from the enforcement committee, the Regulator can serve a public or private body with an enforcement notice. The Regulator will have the power to confirm, amend, or set aside the initial decision. It will also have the authority to require the body to take or refrain from taking action. A body that refuses to comply with an enforcement notice can be found guilty of an offense and liable upon conviction to a fine and/or imprisonment for no more than 3 years. Decisions of the Regulator may be appealed to the courts.

3.5. IMPLEMENTATION CAPACITY OF THE OVERSIGHT AGENCIES

South African Human Rights Commission

The Human Rights Commission Act 53 of 1994 established the SAHRC. It was launched on March 21, 1996 with a mandate to promote respect for human rights and a culture of human rights; promote the protection, development and attainment of human rights; and monitor and assess the observance of human rights in the Republic. SAHRC's leadership consists of up to 11 Commissioners and a Secretariat, although there are rarely 11 Commissioners appointed at one time. Commissioners provide strategic leadership and direct policy. They are appointed by Parliament on a seven-year term and can be reappointed to an additional term.⁵⁴

SAHRC's PAIA specific responsibilities include:

- Promoting the right of access to information by developing a guide and education programs aimed at raising awareness on the right to access information;
- Monitoring and assisting both public and private bodies with the compliance and implementation of PAIA;
- Conducting training for Information and Deputy Information officers;
- Assisting communities in exercising their right to access information; and
- Informing and monitoring legislative development and contributing to law reform by making recommendations and submissions on legislation that may have a bearing on the right to access information.⁵⁵



The Commission executes its mandate through the PAIA unit, based at the Commission's head office. With a minimal 2013 budget of R759,000 (approximately \$74,000) and current staff of 5, this office produces numerous publications for public institutions and the general population including an official PAIA annual report, which it submits to the Portfolio Committee on Justice and Constitutional Development of Parliament. It holds hearings, workshops and consultations and offers training and assistance to various public and private institutions on PAIA compliance. The SAHRC also conducts an annual PAIA compliance audit of public institutions. A consolidated audit aggregating results from 2008–2012 has also been published. The SAHRC website contains numerous sources of PAIA information for citizens, government officials, and private institutions including the majority of SAHRC's PAIA publications.

Because of limited resources and the fact that private body requirements for publication of Section 51 manuals were delayed, SAHRC has not focused its time or efforts on private body PAIA compliance.⁵⁶ To date there has also been very little formal investigation of the implementation and usage of PAIA in the private sector.⁵⁷

SAHRC efforts to co-host the National and Provincial Information Officers Forums and Golden Key Awards provide an illustrative example of their promoting and monitoring efforts. The National Information Officers Forum (NIOF) was established in 2003 by SAHRC, the Department of Justice, ODAC, and other CSOs to support government officials after the newly passed PAIA. The goals of the NIOF include providing a platform for sharing issues and challenges relating to PAIA and encouraging access to information practitioners to "embrace the culture of openness and accountability."⁵⁸ These efforts provide capacity building tools to increase compliance and implementation of PAIA. They also offer another opportunity to link the right to access information to the realization of socioeconomic rights and service delivery. SAHRC and ODAC launched a similar Provincial Information Officers Forum in 2010.

Launched in 2006, the Golden Key Awards (GKA) are conducted along with the NIOF. Both are co-hosted annually on the International Right to Know Day by SAHRC and ODAC. The research process for determining the awards helps identify institutions that have not done well in implementing PAIA. It also highlights best practices by national, provincial and municipal public institutions. In 2012/13 awards were provided for:

- Best Deputy Information Officer (DIO),
- Best User of PAIA,
- Best Promoter of PAIA,
- Best Performing National Department of PAIA,
- Best Performing Provincial Department, and
- Best Performing Municipality.

Overall, most PAIA stakeholders interviewed believe SAHRC has taken its PAIA mandate seriously and has attempted to perform its duties admirably over the past 13 years.⁵⁹ However, SAHRC is faced with a number of institutional constraints that limit its ability to carry out its PAIA mandate. First, SAHRC's education and public awareness responsibilities under PAIA are required only "to the extent that financial and other resources are available."⁶⁰ Further, Section 85 of PAIA states, "Any expenditure, in connection with performance of the HRC's functions in terms of this Act must be defrayed from moneys appropriated by Parliament to that Commission for that purpose."⁶¹ This lack of dedicated funding for PAIA has created a dependence on the "fiscal goodwill of the government"⁶² and ultimately has resulted in

financial and human resources constraints within the PAIA unit.⁶³ SAHRC has stated directly that the lack of a dedicated PAIA budget remains a major hindrance to the operations of the Commission.⁶⁴

For example in 2013, the SAHRC recommended using the management performance assessment tool developed by the Department of Performance Monitoring and Evaluation in the Presidency to monitor compliance with the PAIA. This decision was based in part on the fact that SAHRC could only afford to randomly select a small number of institutions for its compliance audit instead of the over 300 public departments that currently exist in South Africa.⁶⁵

Second, despite being described as “watchdogs” that help keep the government in check, all Chapter 9 institutions including the SAHRC do not have the power to take disciplinary action against government officials.⁶⁶ This structural deficiency, in conjunction with the fact that PAIA does not provide SAHRC with enforcement power, further limits its ability to ensure compliance with PAIA obligations.

On the 10-year anniversary of South Africa’s attainment of democracy, Professor AK Asmal chaired a committee evaluating the progress of Chapter 9 Institutions. The subsequent report, generally referred to as the Asmal Report, documented the historical problems with the oversight of the commissioners that have impacted the work of the SAHRC. These included internal dissent, an unclear division of roles and responsibilities amongst the commissioners and between the commissioners and staff, and the appointment of an inadequate number of commissioners. The SAHRC has also experienced gaps in commissioners’ terms, often as a result of the Parliament failing to fill vacancies.⁶⁷

The Asmal Report concluded that the SAHRC needs to adopt a more aggressive stance toward the implementation of PAIA, particularly regarding reporting provisions for private and public bodies and assistance in bringing matters to the courts. It highlighted the difficulties experienced by the SAHRC when dealing with PAIA requests, especially in regard to the lack of cooperation from government officials in departments non-compliant with PAIA.

The Asmal report, as well as other civil society advocates interviewed, suggests that the SAHRC has taken an “overly timid approach and a poor use of resources” by not using its subpoena power more frequently.⁶⁸ Interviewees also felt the commissioners, as political appointees, often make decisions that are more reserved and overly diplomatic, and that this remains an issue for ongoing efforts to strengthen PAIA.

In 2012, the SAHRC responded to concerns regarding the lack of visibility of the program and the amount of resources dedicated to it by elevating the PAIA unit to the Office of the Chief Executive Officer.⁶⁹ This change has given the PAIA unit a more important strategic role and senior management oversight is improving.⁷⁰

Despite these obstacles, the PAIA unit at SAHRC has attempted to champion access to information principles. SAHRC’s annual PAIA reports systematically and bluntly highlight the significant implementation and compliance problems for government officials, Parliament, and the public at large. Through events such as the NIOF and GKA, SAHRC has repeatedly reached out to other PAIA stakeholders, including CSOs, to develop deep and meaningful relationships and work cooperatively on a number of initiatives. Further, as part of its annual submission to DOJCD, the PAIA unit has repeatedly provided recommendations for the regulatory improvement of PAIA including in 2013 a long list of amendments for strengthening PAIA based on the African Union’s recently passed Model Law on Access to Information.⁷¹ SAHRC has also consistently highlighted the importance of understanding access to information in the context of social rights, and the essential role it plays in the delivery of services. In



2013, SAHRC followed up a series of hearings on water and sanitation issues with specialized community training on PAIA to reinforce this connection.⁷²

Other Oversight Institutions

In addition to the SAHRC, the Public Service Commission (PSC) shares responsibility for monitoring PAIA as a sub-function of its role to promote sound principles of public administration. The mandate of the Department of Justice and Constitutional Development (DOJCD) also includes ensuring that applications to all government public institutions for access to information are provided within the legislated 60-day time frame. Secondly, DOJCD assists other public institutions, through training and other relevant interventions, to comply with PAIA.

3.6. PROACTIVE DISCLOSURE

Legal Requirements

Most RTI advocates stress the importance of the proactive disclosure of information.⁷³ By maximizing the information publicly available without the need to submit a request, proactive disclosure is an essential tool for ensuring efficient and effective access to information. Not only is the bureaucratic burden on public bodies reduced when the scope and number of information requests are limited, but citizens are provided with an expanded amount of easily available information.

Under PAIA, each public body is required to compile a manual with information about its information disclosure process. The content requirements of the manual are set out in Section 14 and include:

- information about the structure and function of the public body including the address and contact information,
- the procedures for making an information request,
- what to do if your request is refused,
- services available to the public, and
- a description of how to participate in or influence the formulation of policy.

Section 14 manuals must also provide an outline of the categories of records available on request, the records routinely or proactively available as well as the records which cannot be disclosed. The manual must be published in three of the official languages, updated annually and disseminated publicly including posting it on the institution's website, having it available at all of the institution's office branches, and sending a copy to the SAHRC.

The SAHRC is also tasked with publishing a guide in all 11 South African official languages on how to use the law. Section 10 sets out in some detail what must be included in the guide, including the names and contact details of every information officer of every public body, the procedures for requesting information and assistance available through the Commission. Interestingly, Section 16 of PAIA requires the Government Communication and Information Services (GCIS) to publish in every telephone directory postal and street addresses, phone, and fax numbers, and if available, electronic mail addresses of the Information Officers of every public body.

Section 15 of PAIA requires public bodies to annually submit to the DOJCD a description of the categories of records that are automatically available without a request. This list must also be available through the DOJCD website.

Civil society advocates have raised a number of concerns about the strength of these provisions.⁷⁴ Because there are no requirements for determining the quantity or quality of information disclosed, public and private institutions have a high degree of discretion in determining what is proactively available.⁷⁵ Further, providing a list of categories is a poor reflection of what specific data and information is actually accessible.⁷⁶

Private bodies are similarly obligated through section 51 to publish lists of proactively available information. However, private companies within certain sectors are now exempted from compiling and submitting these manuals until December 31, 2015. They are not exempted from complying with the rest of the Act.

Public bodies also submit an annual report, a Section 32 report, to the SAHRC with summary details on the number of requests received and the outcomes including the total number of requests refused, the number partially refused, and the number of times a specific section of the law was used to justify the refusal. Recording the number of applications submitted to the courts and complaints lodged with the Public Protector is also required. Section 32 reporting requirement definitions under PAIA are broad and ambiguous.⁷⁷ This has created interpretation problems for public bodies and other stakeholders interested in using the data.⁷⁸

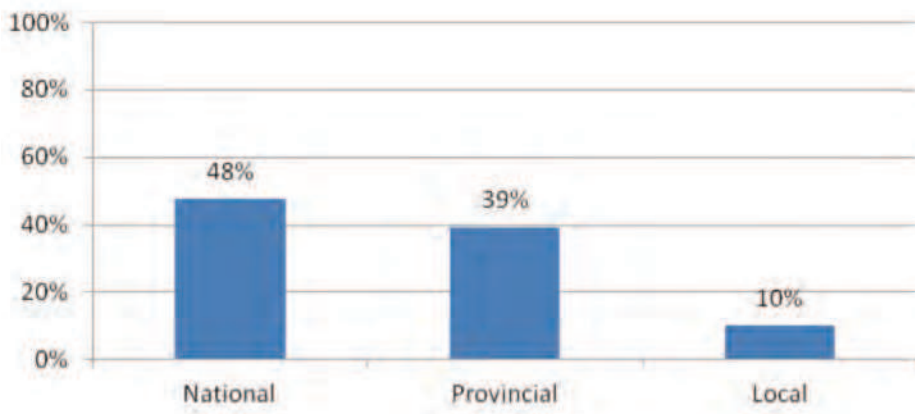
Proactive Disclosure Compliance

Sections 14, 15, and 32 of PAIA place important proactive disclosure obligations on public and private institutions. These manuals and reports help monitor PAIA compliance, facilitate the submission of information requests, and provide an essential PAIA public awareness tool. However, compliance with these sections remains lacking after 13 years of PAIA implementation.

SECTION 14 PAIA MANUALS

The number of Section 14 manuals available remains remarkably low.⁷⁹ Although a significant number of public bodies attempted to comply with this obligation in the first four years, in 2007 only 54% of national, provincial, and local institutions surveyed by the PSC had Section 14 manuals.⁸⁰ Six years later the PAIA Civil Society Network (PCSN) discovered that only 27 (60%) of national public institutions had a manual available on their website.⁸¹ Further only 8 (18%) of these institutions had a PAIA manual available in three languages as prescribed by law.⁸² This poor compliance is ongoing although there are numerous options available to help create these manuals; in particular, all the requirements are stated on the SAHRC's website. The compliance rates for the 2010/2011 reporting year are provided below.⁸³

Manuals are often not easy to locate on the institutional websites, and in many cases are outdated, requiring further research to identify the appropriate DIO.⁸⁴ The SAHRC has also noted in the consolidated compliance audit that many manuals were not very user friendly and often used bureaucratic language, thereby defeating the purpose of the PAIA manual. The majority of institutions did not have manuals readily available in the areas frequently visited by the public.⁸⁵ Reliance on internet technology and the failure to provide manuals to frontline

FIGURE 1. 2010/2011 Section 14 Manual Compliance

office staff constitute a severe impediment to disadvantaged and illiterate groups in the community who do not have access to such technology.⁸⁶

SECTION 15 REPORTS

Multiple sources also confirm poor compliance with the proactive disclosure requirements under Section 15 of PAIA across all tiers of government.⁸⁷ In 2007, the PSC found very low compliance with this requirement.⁸⁸ Only 27% of the surveyed public institutions had submitted their reports to the Minister annually as required. SAHRC's consolidated audit found this number had only increased to 38%. In 2013, the PCNS's investigation reported that out of the 40 national departments checked, 80% of the bodies surveyed had failed to comply with this requirement at all.⁸⁹ Recent attempts to access annual reports of provincial departments led to the discovery that 58% of the ANC-led provincial departments failed to make these publicly available on their website.⁹⁰

Reasons for the low implementation and compliance levels is attributable to a lack of awareness, inadequate resources and the lack of buy-in from the executive management of public institutions to ensure that PAIA is being implemented in accordance with requirements.⁹¹ However, one government official also highlighted the bureaucratic obstacles of the procedures for compliance.⁹² Publication in the Gazette is expensive and having to send the information to the DOJCD slows down the process and makes updating the information very cumbersome.⁹³

OTHER ONLINE INFORMATION

Sixty percent of the public institutions audited by SAHRC had submitted information to the GCIS in compliance with Section 16 of PAIA.⁹⁴ However, a review of this information on the GCIS website for this case study shows that much of the information is outdated or missing. ODAC has also reported that the GCIS website fails to provide working links to the details of information officers.⁹⁵

Most government institutions have a website that contains information on the institution's mission and duties, senior staff contact information, tender proposals, and publications and

assessments. Annual and strategic reports, including institution-wide budgetary information, are also proactively available.

The Department of Environmental Affairs (DEA) provides a large amount of information proactively on its website. Civil society advocates have hypothesized that much of this proactive information is required under different environmental regulations, particularly through the South Africa National Environmental Management Act (NEMA).⁹⁶ However, it also serves as an indication that officials tend to implement laws better when they are subject to a core piece of legislation with clear responsibilities that they know well.⁹⁷

SECTION 32 REPORTS

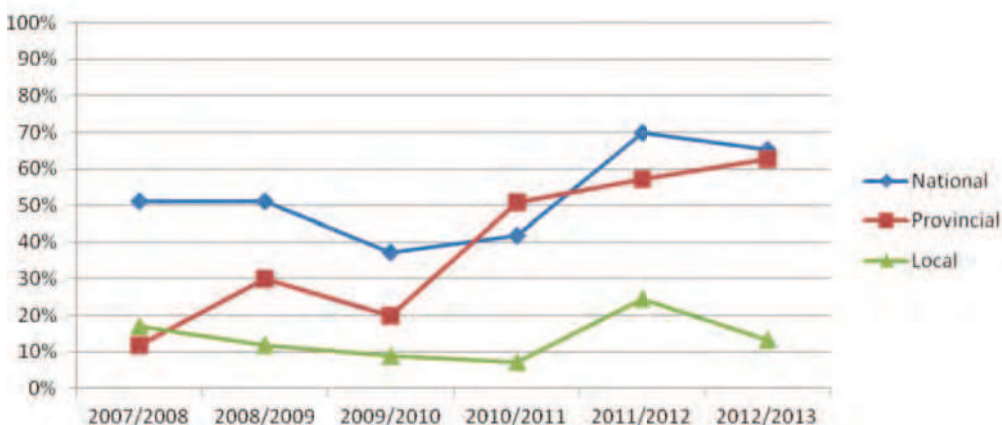
In the 13 years since the passage of the PAIA, the number of public bodies submitting section 32 reports remains low;⁹⁸ public institutions are not complying with all requirements and, despite training, inaccurate reports are submitted. A summary of compliance rates is provided below.⁹⁹

In 2007, the PSC survey found that half of respondents had not complied and submitted these reports to the SAHRC.¹⁰⁰ By the 2012/13 reporting year, only 65% of national departments had complied.¹⁰¹ The SAHRC also noted with concern that a number of departments that had submitted reports in the 2011/2012 cycle did not resubmit the following year.¹⁰² Most seriously, over 90% of municipalities have consistently failed to submit these reports to SAHRC.¹⁰³ The Public Protector has also not submitted information regarding the number of PAIA complaints lodged and the nature and outcome of the complaints in recent years.¹⁰⁴

In addition, based on reports received, SAHRC has concluded that there is an increasing trend by public bodies not to comply with all of the specific reporting requirements including cases where the specific provisions used to justify a refusal are not reported.¹⁰⁵

Public institutions are also submitting inaccurate information.¹⁰⁶ This may be due in part to poor records management, but SAHRC has also reported confusion over the specific reporting dates that should be included. Misinterpretation of the requirement to report the number of requests refused in full or granted partially is also common.¹⁰⁷

FIGURE 2. Section 32 Compliance Rates





Unfortunately, the lack of SAHRC enforcement power also hinders its ability to demand compliance by public bodies, as noncompliance is not an official PAIA violation. It has also resulted in SAHRC focusing its attention on securing higher submission rates as opposed to dedicating resources for substantive evaluation of report content.¹⁰⁸

4. Ministry Level Implementation

4.1. DEPUTY INFORMATION OFFICERS

Public officials' knowledge and understanding of PAIA is at the core of proper and efficient implementation of PAIA.¹⁰⁹ DIOs, frontline and other officials with PAIA responsibilities "play critical roles on a day to day basis in determining how RTI is translated into a tangible right for citizens."¹¹⁰ As the key officials responsible for this day to day role, DIOs are the foundation for the successful implementation of PAIA.¹¹¹

Unfortunately, after 10+ years since PAIA's passage, SAHRC and PSC found there were still institutions that had not appointed DIOs. In fact, over 60% of the 43 institutions included in SAHRC's consolidated audit had not formally designated their DIOs as required under PAIA.¹¹²

While most staff could identify the Information and Deputy Information Officer at their respective institutions, the majority (87%) of frontline officers—receptionists, access control personnel, etc.—could not.¹¹³ In only a little over a quarter of these institutions were other officials aware of the PAIA procedures. The respondents also indicated that there were inadequate guidelines for frontline officials on how to assist requesters.¹¹⁴ This lack of awareness makes it highly unlikely that the public will be directed to the appropriate official responsible for handling information requests.

SAHRC's consolidated audit found that, while most DIOs had post graduate degrees and had been appointed for more than two years, some openly demonstrated a purely formalistic approach to interpretation and application of the legislation, focusing largely on compliance as a technicality. The Commission expressed deep "concern that all of the personnel consulted indicated that PAIA was an added function to their existing functions."¹¹⁵

This attitude significantly impacts implementation, as a meaningful understanding of PAIA is needed to justify the appropriate allocation of resources for implementation.¹¹⁶ As a result, PAIA is dealt with on an ad hoc basis. The 2007 PSC investigation of PAIA concluded "the most important change that needs to occur is at a conceptual level—where access to information is seen not only to actively promote good governance but also to realize the socio-economic rights of citizens."¹¹⁷

A poor commitment from institutional senior executives has resulted in systemic implementation issues.¹¹⁸ SAHRC has found through its audits that 90% of executive management consulted were not aware of PAIA, have not made any financial commitments to the administration of PAIA within their departments or included PAIA in their strategic plans and budgets.¹¹⁹

4.2. STAFFING

Another consequence of this lack of DIO support is that departments in general are not investing in human capital for the administration of PAIA. SAHRC has stated the absence of personnel to administer PAIA is "one of the greatest impediments to efficient delivery of the right to access information."¹²⁰

SAHRC's consolidated audit has concluded that the three primary factors contributing to the lack of personnel within public institutions are: (i) a lack of awareness of PAIA, (ii) a lack of commitment from senior management, and (iii) increasing staff turnover. A lack of awareness of the obligations faced under PAIA removes the motivation to hire the appropriate number of staff for PAIA administration. It also reinforces the lack of executive management commitment to PAIA and delivery on the mandate to provide access to information. Increasing staff turnover often results in a lack of continuity and in most instances "abandonment of the PAIA portfolio."¹²¹

This lack of awareness and commitment, in turn, further reinforces the lack of motivation to prioritize adequate PAIA resources or ensure personnel are equipped with the necessary skills and expertise to handle requests for information. In such instances, departments often appoint junior personnel as DIOs who are often unable to interpret and apply the Act or exercise discretion when making a decision on a request for information.¹²²

A report authored by the Center for Environmental Rights, *Unlock the Doors: How Greater Transparency by Public and Private Bodies Can Improve the Realization of Environment Rights (Unlock the Doors)*, confirmed this lack of knowledge. When assessing the results of requests regarding access to environmental information, they concluded that officials administering requests were unfamiliar with PAIA and that its provisions are poorly used and understood. In fact, the results of their study found that "obtaining information about requests for information was in itself a monumental task."¹²³

ODAC has also highlighted that accessing information varied within the same department, depending on the official one came into contact with.¹²⁴ In response, ODAC has created a simplified PAIA manual for frontline staff in order to assist government departments in training those who act as the direct interface with the public.

4.3. PERFORMANCE MONITORING SYSTEMS

The inclusion of PAIA in operational and strategic plans illustrates that a public institution recognizes the right to access information and its role in good governance and accountability.¹²⁵ However, PAIA stakeholders have repeatedly documented the lack of dedicated monitoring and evaluation of departmental PAIA performance and compliance.¹²⁶ PAIA compliance is also not reported in most institutions' annual reports.¹²⁷ Nor has it been incorporated into local government information sharing platforms including Integrated Development Plans (IDPs) or Imbizos (community meetings).¹²⁸ IDPs provide an overview of how basic services are going to be provided to communities and provide an important public participation opportunity. Overall however, it is clear there is a tendency to see PAIA as irrelevant to the existing participatory governance framework.¹²⁹ By not providing community members a method for collecting information, these public participation forums risk becoming "rubber stamping" exercises.¹³⁰

4.4. RESPONSES TO REQUESTS FOR INFORMATION

Many of the implementation investigations conducted by PAIA stakeholders involve the submission and tracking of information requests to various government and private bodies and then an evaluation of the responses received. Unfortunately, they provide a comprehensive, consistent pattern of chronically low compliance and poor PAIA implementation that places the use of PAIA well beyond the reach of ordinary citizens. In fact, the SAHRC reported in its



latest PAIA annual report, an “increasing trend by public bodies not to comply with the provision of the PAIA in dealing with information requests.”¹³¹

Internal Procedures

Poor tracking systems do not support monitoring request progress, especially the adherence to timelines, responding to requestors, and reporting to the SAHRC.¹³² In fact, the index compiled by ODAC and used as the basis for awarding the Golden Key Awards has consistently shown that the institutions best implementing PAIA are the institutions that have established internal systems and structures specifically designed to support compliance and guide implementation.¹³³

However, the SAHRC consolidated audit found that only a third of the audited institutions had established internal protocols for dealing with requests for information. In 2011, PSC found that an average of 62% of departments had procedures in place for access to information.¹³⁴

Most SAHRC audit respondents indicated that (i) request and appeal forms were not available at their entry points, (ii) the forms had not been translated into other languages and were only available in English, and (iii) information requests were received, tracked and processed manually. Many were of the opinion that the manual system of monitoring was adequate and did not need to be addressed because of the low volume of requests processed.¹³⁵ SAHRC’s 2012/13 audit noted, however, an increase in the number of institutions that have created a specific PAIA email address.

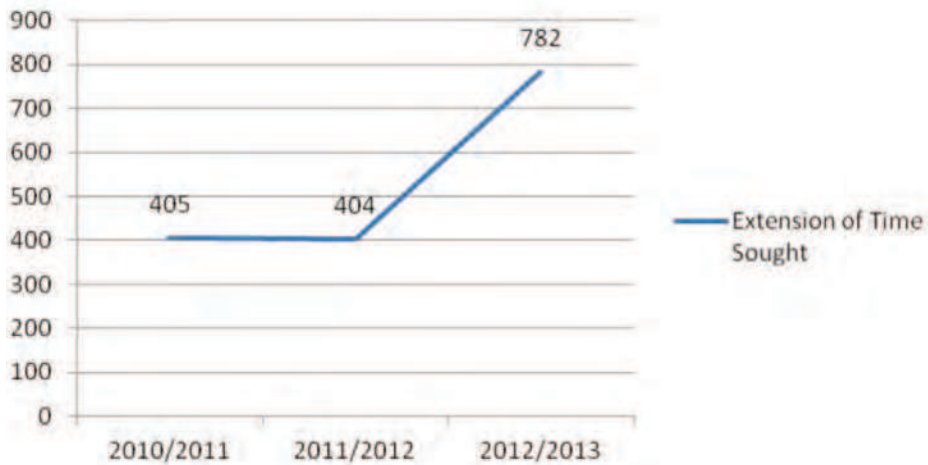
Time Frame

Despite the limited number of institutions with internal procedures for responding to requests, consolidated audit respondents believed that there were effective internal procedures for processing requests within the 30-day period as required by law. In cases where the timeline was not met, the respondents mentioned the following factors:

- Incomplete forms,
- Late payments,
- Complex applications,
- Inadequate resources,
- Delays in responses from third parties,
- The nature of requests being overly broad or ambiguous,
- The time it took to source the correct information, and
- Slow interdepartmental responses.

However, despite claims from the consolidated audit that compliance with time limits was not an issue, both civil society and the Section 32 reports have documented an increase in the use of timeline extensions.¹³⁶

The 2013 Shadow Report, produced by the PAIA Civil Society Network (PCSN), reported that only 22% of the 258 requests submitted by civil society members and 7% of internal appeals were responded to within the statutory time frame. Having submitted and tracked information requests through the network since 2009, they believe there has been a “notable increase in the utilization of the extension of time for responding to requests by public

FIGURE 3. Extension of Time Sought

Source: SAHRC

bodies.”¹³⁷ As a PCSN member, ODAC reported that, in 2011, the utilization of extension of time for responding to requests had increased eightfold from the previous reporting year, partially explaining the increase in compliance with timelines from 2010.¹³⁸

Unlock the Doors found that the likelihood of a PAIA request being acknowledged and processed within the legislated 30-day time frame depends wholly on the individual processing the requests. While there are highly competent officials who process requests rapidly and respond to correspondence, there are also officials who simply fail to respond in a timely manner or even at all.¹³⁹ One former head of the PAIA unit believes that PAIA administrators view PAIA as burdensome, confusing and complex, and often defer decisions to grant access to their legally qualified peers or senior management, thereby running afoul of the 30-day time frame.¹⁴⁰

Response Rates

Because of the inaccurate data collected in Section 32 reports, as well as the limited number of public bodies actually submitting reports, statistical data on request totals and response outcomes is rarely aggregated for PAIA implementation analysis. Nevertheless, a brief overview of the number of requests submitted and response outcomes highlights the low use of the law and poor response efforts of public institutions.

In 2012/13, 25,342 requests were submitted to national, provincial, and local governmental institutions. The total number of requests received throughout the history of PAIA is summarized below.

As figure 4 illustrates, the vast majority of information requests are submitted to national public institutions. In 2012/13 SAHRC reported in its PAIA annual report that national public institutions received a total of 23,380 information requests, down from 24,857 requests in the previous reporting cycle. However, the vast majority of these national requests are submitted



FIGURE 4. Number of Requests Received

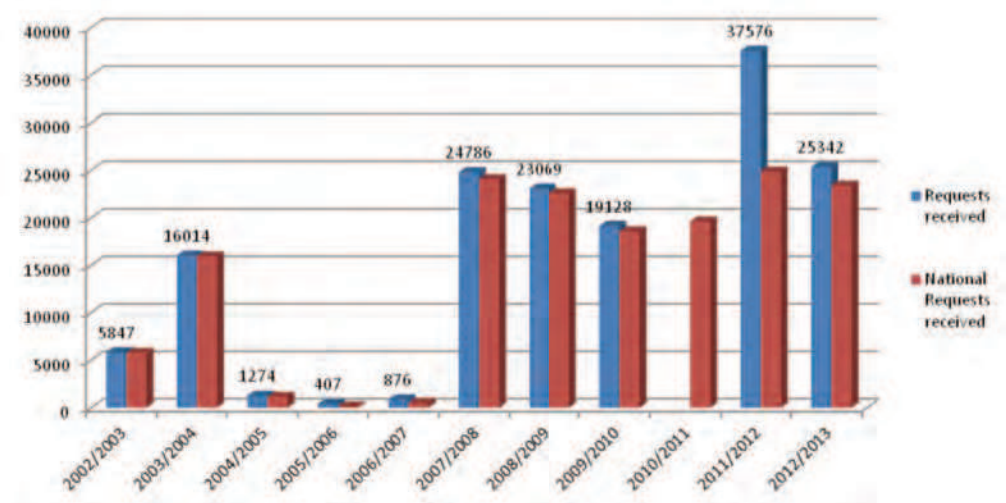
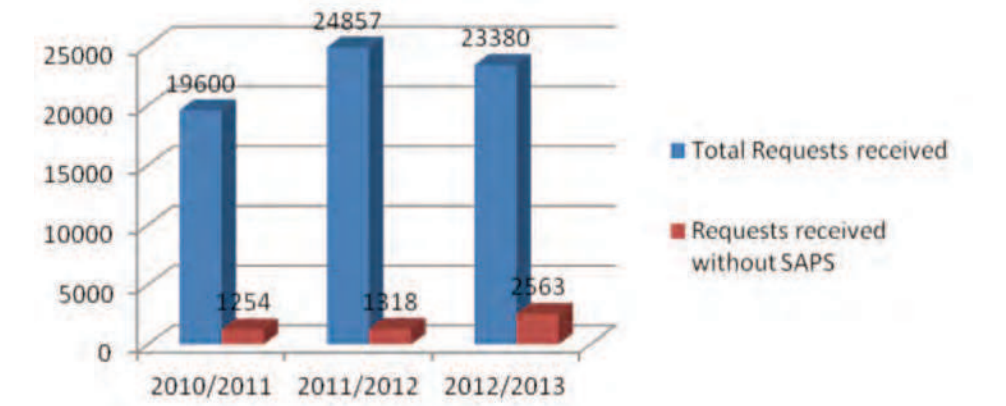


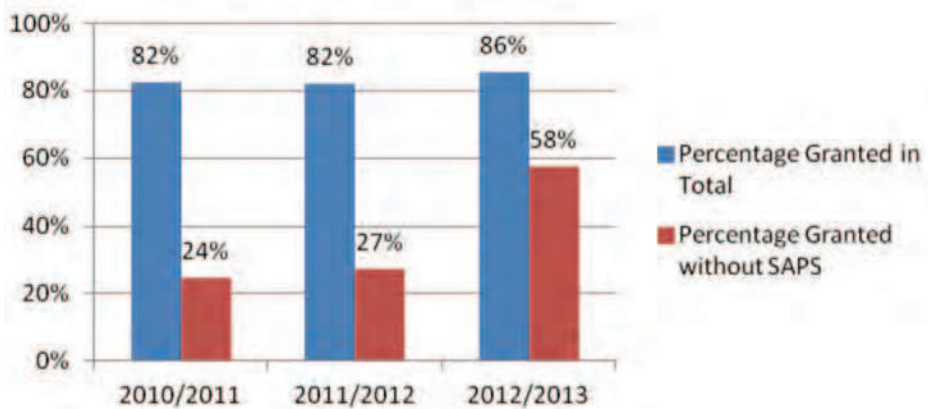
FIGURE 5. Difference in Total Number of Requests without SAPS



to the South African Police Service (SAPS), who typically grant access to information. For example, in the 2012/2013 reporting year, 89% of the requests received went to SAPS.¹⁴¹

Without the requests from SAPS, it becomes clear that a low percentage of information requests submitted to national public bodies are granted in full.

In addition, the SAHRC reported that further research conducted for the 2012/13 GKA, including a ghost information request exercise, revealed that the response rate for national and provincial institutions was significantly lower than the 2011/12 results.¹⁴² The SAHRC also reported that a number of institutions that were compliant with PAIA statutory obligations could not grant access to records that are listed as automatically available. Further, a GKA follow-up study revealed that most of the recommendations provided by SAHRC to assessed departments have not been implemented to date.¹⁴³

FIGURE 6. Percentage of Requests Granted in Full with and without SAPS

Statistics collected by the PCSN also paint a poor PAIA response picture. In their 2013 Shadow Report summarizing the response to 236 information requests submitted from July 2012 to August 2013, they found that public bodies granted only 16% of information requested in full. Further, public institutions refused 65% of the requests when they actually responded. In these cases, public institutions failed 40% of the time to provide adequate information about why access was being refused and how the grounds for refusal related to the particular record requested.¹⁴⁴

The failure to respond to requests at all is a significant issue and represents a complete failure to communicate.¹⁴⁵ The SAHRC and other RTI practitioners have suggested the apartheid legacy and culture of secrecy is one of the major contributions to the reluctance of officials within the public sector to invest resources in PAIA and to share information with the public.¹⁴⁶ They have hypothesized:

“The fear of being vulnerable to litigation and being held accountable for delivery or non-delivery on promises made is often the reason why officials prefer to withhold information from members of the public. It may also be motivated by the comfort that the resulting appeal will remove them from the decision making process and escalate it to a higher level official.”¹⁴⁷

Whatever the reason, deemed refusals create real frustration for civil society. In *Unlock the Doors*, CER concluded that “the approach encountered to giving civil society access to information required for the exercise of their environmental rights can only be described as suspicious and apprehensive.” They believe that while there are some unexpected exceptions, “most public and private bodies that hold environmental information not only fail to facilitate, but actively avoid or delay giving civil society access to information.”¹⁴⁸

4.5. RECORDS MANAGEMENT

An important part of promoting transparency must be the collection and storage of properly maintained information. However, the apartheid regime left South Africa with a legacy of lost and destroyed records. This legacy has had a profound political and social impact on access



to information in South Africa.¹⁴⁹ As one interviewee said, “Rights of access to information is predicated on the assumption that records exist!”¹⁵⁰

Poor records management is a significant problem at all levels of government and has impacted the capacity of government officials to locate and produce requested information.¹⁵¹ Civil society advocates believe that the large percentage of refusals for information requests submitted is directly related to poor records management.¹⁵² In fact, in the 2013 Shadow Report, the most common ground for refusal cited in 44% of responses was that the records requested do not exist or cannot be found.¹⁵³

This is also illustrated by the fact that a high number of public institutions are not complying with the Section 14 PAIA manual requirements of the law and are therefore failing to provide a list of the records held, available on request, and proactively available.¹⁵⁴ Clearly, if records were properly kept and thus readily available, there would be fewer problems with compiling this information.¹⁵⁵ Previous SAHRC institutional assessments have shown that direct financial investment in records management in particular, tends to result in better PAIA performance.¹⁵⁶

Records management is regulated primarily under the National Archives and Records Service of South Africa Act, 1996.¹⁵⁷ It covers the prescribed records classification, disposal, and archival preservation systems to be used, and determines the conditions to which electronic records systems should be managed. It provides the National Archives and Records Service with the authority to inspect public records to ensure compliance with the Act and provides training to records managers and senior administrative officials. However, the Act and the implementing institution, the National Archives and Records Service, play a very minor role in PAIA implementation.¹⁵⁸ Civil society advocates interviewed believe that while most public bodies understand their obligations around both the National Archives directive and information security, there is no PAIA training for records management and insufficient records management training for PAIA compliance officers.¹⁵⁹

The SAHRC found through their audits that, in general, poor records management mechanisms can be attributed to a lack of knowledge of officials, little advocacy or support from senior management in ensuring proper practices, and very little or dedicated budget for records management programs.¹⁶⁰ Most institutions have appointed a records manager, have a file plan in place and a system for storage and organization of records but it is usually not centralized and typically based on manual filing.¹⁶¹ The SAHRC has also reported that there is resistance from staff to comply with the proposed use of these systems, so most institutions are not clear on where and if such systems are used to actually generate records.¹⁶² A 2010 PSC report also recommended the need to improve the internal coordination between records management and information officers, and between departments which hold the same information.¹⁶³ The report stated, “Records managers should be highly aware of what the department has communicated to the public through its PAIA manual and embrace the responsibility of assisting information officers to comply with the Act.”¹⁶⁴

Electronic filing systems are used by many institutions including the City of Johannesburg (COJ) and the Gauteng Department of Agriculture Conservation and Environment (GDACE).¹⁶⁵ The DEA also has incorporated PAIA into their electronic filing system, the Electronic Document Management System (EDMS), and uses it to track information requests.¹⁶⁶ Ironically, electronic record management remains a problem at SAHRC. Not only has a records manager only recently been appointed but most of the filing is still conducted manually.¹⁶⁷ Consistent allocation of reference numbers or saving electronic correspondence is not the norm.¹⁶⁸ There

have also been instances where complaint files for specific human rights violation cases simply cannot be found.¹⁶⁹

4.6. BUDGET

In general, the lack of financial resources hinders PAIA implementation. PAIA stakeholders all agree that limited financial resources are impacting records management, staffing, training, strategic planning and communications, and other key components of effective PAIA compliance.¹⁷⁰ Over 87% of the institutions surveyed in the consolidated audit indicated no specific budget for PAIA implementation or compliance. In the institutions with a PAIA budget, allocations reported varied from 0 to R200,000 primarily based on manual printing costs. Most departments audited did not see the need to create a PAIA budget, citing the low number of requests received.

However, resource constraints are not necessarily a justification for disregarding PAIA requirements. Many institutions such as the COJ, GDACE, the Officer of the Premier, Limpopo and the Limpopo Department of Health and Social Development have all been cited as best practice institutions that developed effective implementation mechanisms with minimal costs and have ensured that the department processes requests effectively.¹⁷¹

While having a PAIA budgetary line item may make PAIA expenditures easier to track, it does not appear to be a requirement for better PAIA implementation. For example, the COJ, GDACE, and DEA, all public institutions with a strong PAIA compliance record, do not have a specific budget line item.¹⁷²

4.7. TRAINING AND PUBLIC OUTREACH

Training

Numerous access-to-information practitioners and advocates have highlighted how inadequate training has had a major impact on PAIA implementation and poor compliance.¹⁷³ This is especially true for DIOs, as their decisions significantly affect the manner and ability with which citizens are able to access information and participate in government processes, especially in cases where access to information is denied.

Historically, SAHRC training has focused on DIOs in order to improve the poor response levels of government departments to information requests as well as to enhance the implementation of PAIA.¹⁷⁴ The DOJ Justice College also provides PAIA training for public institutions. In 2013, SAHRC conducted 33 workshops and reached out to 1065 DIOs, at least 21 PAIA public institutions, and multiple local communities through trainings and other forums.¹⁷⁵

There is also an expectation that DIOs will conduct internal staff training on PAIA regarding the role they can play in assisting requesters. As a result, all DIOs are expected to not only receive training upon appointment; they also should receive regular and continuous refresher training. However the 2012/13 PAIA audit revealed that a very small percentage of institutions conduct continued training on PAIA.¹⁷⁶

In the past, departments have indicated the reasons for not providing training to DIOs included the fact that (i) DIOs had only been appointed recently, (ii) trained DIOs often left departments, (iii) changes in departmental structures impacted appointment decisions, (iv) opportunities for training were limited, and (v) officials not working with the PAIA were often wrongfully nominated for training.¹⁷⁷



Given the numerous developments on access to information in the last year including the passage of POPIA and the impending creation of the Information Regulator, it is critical that DIOs keep abreast of developments and effectively incorporate any new duties that will arise.¹⁷⁸

The SAHRC consolidated audit discovered that participants who had not been trained indicated that they relied on an interpretation of the Act itself and that application was done largely through trial and error. The majority of institutions had not developed specific PAIA training manuals for their staff. For respondents that had received training, positive outcomes listed included the significant enhancement of processing and a decrease in response rates of more than 30 days. Some also indicated that records management training had been factored into the PAIA training offered and that this was their sole training on records management.

Public Awareness

Overall, public institutions engage in very little public outreach on PAIA outside the published Section 14 manuals. In 2012, the SAHRC shifted its emphasis away from the training of government officials and began to focus more on supporting the public's right to access information. This shift was in recognition of the need for the public to hold government to account in the delivery of various social services. SAHRC has also developed a new project, the PAIA Law Clinics in association with the Law Clinic of the University of Witwatersrand. In this program, 14 final year law students join the PAIA Unit. The students work with staff to complete information requests submitted on behalf of community members.¹⁷⁹

4.8. DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT

Given the department's responsibility for ensuring compliance with PAIA, RTI advocates interviewed have been particularly disappointed with PAIA implementation at the DOJCD. The prevailing view within the community of users is that the DOJCD has not fully asserted its authority in encouraging proper compliance with the Act.¹⁸⁰ In 2011/12, DOJCD only achieved 61% PAIA compliance on a total of 1,107 requests.¹⁸¹ The explanation provided by DOJ was that a significant number of the requests were from inmates in correctional facilities appealing their sentences.¹⁸² In these cases, information could not reach them in prison as they were released, deceased, or were not allowed to receive any documentation. The delay in the completion of transcripts by transcribers also impacted compliance.¹⁸³ However, civil society experiences with DOJCD reinforce a pattern of noncompliance.¹⁸⁴ In a 2013 report based on submitted information requests, civil society stated that of the 7 information requests submitted, 4 requests remained pending by the end of the reporting time while 3 were never responded to (deemed refusal).¹⁸⁵

Between 2002 and 2012, the department has been sued for information more than any other public institution and in a number of cases they have had to settle out of court.¹⁸⁶ Interviewees believe that the department seems to be staffed by a lack of specialists.¹⁸⁷ Other assessments have also documented a lack of responsiveness and overall poor engagement of leadership.¹⁸⁸

4.9. BEST PRACTICE

However, it should be noted that, despite such a bleak overview, a number of best practice government institutions can be found. The COJ, the Gauteng Office of the Premier, the

Department of Agriculture, the national Department of Agriculture, Forestry and Fisheries, Department of Defense, Limpopo Department of Health and Social Development, and the Western Cape Department of Human Settlements have all been singled out in the SAHRC consolidated audit for their outstanding commitment and dedication to PAIA.

The DEA also provides an example of effective PAIA implementation at a public institution. Their DIOs and frontline staff have a strong knowledge and capacity to implement PAIA.¹⁸⁹ They also provide a clear and accurate outline of staff with PAIA obligations and have developed a standardized, well publicized internal workflow system.¹⁹⁰ While there is no separate PAIA unit, the Chief Director's office assistant receives and processes all requests. The officers from the corporate legal support and litigation office, trained lawyers familiar with PAIA legal requirements, are responsible for reviewing all information requests and ensuring that they are transferred to the correct department or branch within DEA. All Deputy Director Generals within the Department have been designated as DIOs. By keeping the PAIA work flow at a fairly high level, DEA staff are held accountable for ensuring requests are answered.¹⁹¹ Specific internal templates have been created. When internal deadlines are not met, officials have the authority to escalate the matter to a higher level. By incorporating PAIA compliance into the Key Performance Areas used for staff performance reviews, officials are motivated to spend money for training, travel and other PAIA activities to ensure proper implementation. PAIA compliance is included as a strategic objective and published in DEA's annual report.¹⁹² In essence, because access to information is an important priority for the Ministry, disclosure has become part of the DEA's mandate.

Civil society advocates have also reported that the DEA is the highest performing institution when responding to information requests when compared to the other public institutions governing environmental information.¹⁹³ They have also noted better communication and a higher quality of knowledgeable officials, which is a reflection of their PAIA investment. This makes a big difference in interactions between the community and the institution.¹⁹⁴

5. Appeals and the Courts

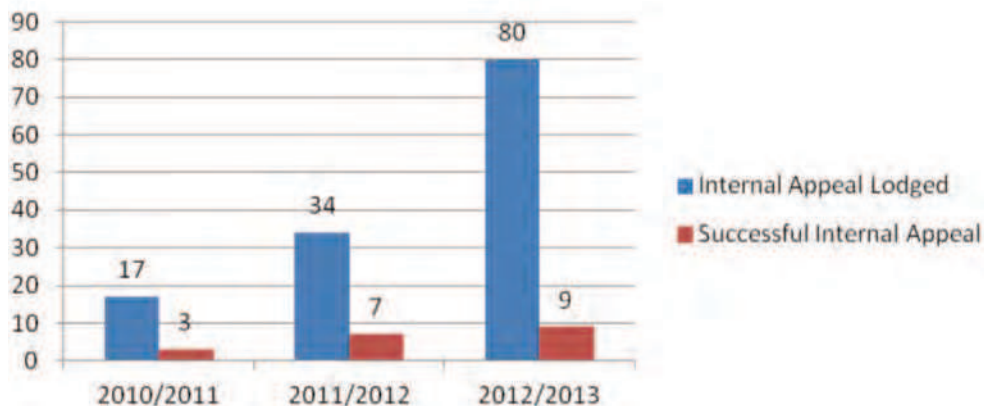
5.1. INTERNAL APPEALS

The low number of internal appeals submitted and responses received highlights how the process for reviewing original decisions is not working. In the 2012/13 reporting year, only 80 internal appeals were lodged with national government institutions.¹⁹⁵

Consolidated audit respondents indicated that most requesters were advised of their right to appeal, although 20% reported the institutions did not have internal appeal mechanisms in place. Respondents indicated that appeal forms were rarely available at the frontline office and were not translated into any other language but English.

In the 2007 PSC survey, the majority of departments (61%) indicated that they never had to deal with any appeals as none were submitted. Of greater concern is the fact that they used this as a reason not to inform the public about this entitlement. The PSC concluded:

"This is an unfortunate perspective because it ignores the fact that the public should be informed of their rights as a matter of course, and that departments should therefore not wait to be approached with an appeal before they can make the public aware of these

FIGURE 7. Number of Successful National Internal Appeals

rights. The right to appeal needs to be communicated to citizens especially when access to information is denied. Without this right being communicated, fewer citizens would appeal and the majority might actually accept the response of the department as final and thus not take any further steps received.”¹⁹⁶

While the 2013 Shadow Report indicated that the internal appeal mechanism appears to be working slightly better than it has in the past, the number of appeals to which requesters simply never receive a response remains high; in fact, over 50% of the internal appeals submitted by PAIA network members were dismissed. Section 32 reports also point to a high number of deemed refusals for internal appeals.¹⁹⁷

5.2. COURTS

Virtually all PAIA stakeholders interviewed are hopeful that the newly created Information Regulator will be an effective resolution for dealing with the slow, complex and potentially expensive appeals mechanism provided for in PAIA. However, as mentioned above, the law was only signed into law in November 2013. The office of the Information Regulator has yet to be set up and only time will tell whether it will be adequately resourced and staffed with officials sufficiently skilled to carry out its mandate. Thus, until POPIA is fully implemented, the ultimate enforcement power in South Africa remains the Court System.

Court applications under PAIA are considered civil proceedings. The burden of proof rests with the public or private body, which must establish that the decision that brought the case to court complies with PAIA provisions.

Originally, a requester was required to lodge a complaint in the High Court. This greatly restricted access for the average citizen.¹⁹⁸ However, In October 2009, rules of procedure were promulgated by which PAIA requests could be enforced in the Magistrates Court. These courts are far more accessible to the majority of the population than the High Court.¹⁹⁹ However, to date PAIA training for Magistrate judges has not been completed.²⁰⁰ It is also important to

note that taking a PAIA case to a lower court does not prevent the case from being appealed to a higher court. Ultimately, Magistrate Court rulings could delay the final judgment.²⁰¹

Originally, court applications had to be filed within 30 days. However this requirement was considered by the Constitutional Court in *Brummer v Minister for Social Development*. In that case it was held that the 30-day period did not provide requesters with an adequate and fair opportunity to seek judicial redress and was not a reasonable and justifiable limitation on the right as provided for in section 36 of the Constitution. Accordingly, the Court ordered that the time period for applying to court was invalid. The 30-day period was extended to 180 days.

This decision was made in August 2009. The declaration of invalidity was suspended for 18 months to allow Parliament to enact legislation to correct the invalidity. However, it is only with the implementation of POPIA four years later that PAIA's time period for applying to court will be officially changed.

In determining a PAIA application, the court has the power to confirm, amend or set aside the decision. It can require the relevant official to take or refrain from taking action as the court considers necessary within a specified period, and can grant special relief for compensation.

PAIA makes no specific mention of court costs. However, In *Claase v Information Officer of South African Airways*, as part of the court's determination that South African Airways should be treated as a private body, it held that the pre-litigation costs had been unnecessary and exorbitant. The court imposed punitive costs on South African Airways. The judgment of the court also noted "one of the objects of the legislation is to avoid litigation rather than propagate it."²⁰²

The issue of costs was also considered in *Biowatch v Genetic Resources*. In that case, the Constitutional Court considered what should constitute the standard principles for awarding costs in constitutional litigation. It found that in litigation between the government and a private party, if the government loses it should pay the costs of the private party. If the government wins, each party should bear its own costs. The court further found that "powerful reasons" for departing from these general principles must exist where matters of genuine constitutional import arise.²⁰³

Courts are empowered with the ability to examine any record of a public or private body to which the Act applies. Often described as a "judicial peek," this power allows a court to review a document that a public or private body is claiming is exempt from access under PAIA in order to determine whether the ground for refusal has been appropriately applied.²⁰⁴ Judicial peek was at the center of a landmark case, the *President of the Republic of South Africa and Others v Mail & Guardian (M&G) Media Ltd*. In this case, M&G had submitted a PAIA request for the Khampepe-Moseneke Report on the legality and reported violence during the 2002 Zimbabwe elections, commissioned by the then President, Thabo Mbeki. The request was denied and the case was brought to the High Court, the Supreme Court of Appeal, and ultimately the Constitutional Court. The Constitutional Court claimed that although judicial peek should be used sparingly, discretion should be utilized in cases where it is in the interests of justice to do so. Ultimately the Court referred the case back to the High Court to start *de novo* (again) using the judicial peek disclosure. Substantively, the M&G case provided clarity on when public bodies can rely on PAIA exemptions to deny access to information. It should be noted, however, that to date, M&G has still not received the information requested.²⁰⁵



In addition to these important procedures cases, the courts have played a central role in shaping PAIA's enforcement as well as elaborating PAIA's content.²⁰⁶ Case law, for example has informed:

- The relationship between the Constitution and PAIA,
- Records entitled to under PAIA and records that do not apply,
- The process when refusing access and procedures for when a record cannot be found or does not exist,
- Grounds for refusal based on exclusions, and
- Application of the public interest override.²⁰⁷

Case law has also played a major role in private sector compliance with PAIA. Major legal decisions, for example, have determined the definition of a private body, the fact that a record will be required to exercise or protect a right, when a record is required, as well as the definition of "required."²⁰⁸

Obstacles to the Use of the Courts

Overall, most stakeholders believe the court system is "both functional and mainly honest."²⁰⁹ In almost all instances where PAIA matters have proceeded to court, the court has ordered the release of information.²¹⁰

However, using the courts creates a formidable barrier for the majority of people in the country.²¹¹ The system is complex, expensive and time consuming. The challenge has been further compounded by the general resistance to litigation characteristic of most South Africans.²¹²

Stakeholders believe the threshold for accessing information from private institutions is "cumbersome and rather difficult to achieve" and thus discourages the public from using PAIA.²¹³ It also can be argued that this difficulty is contrary to the objectives laid out in PAIA.²¹⁴

Because of these obstacles, very few cases are brought to court. When they are, they are usually brought by civil society or other high profile institutions such as the newspaper, *Mail and Guardian*. These applicants help reinforce the perception that information rights are elitist or luxury rights of no real value to ordinary people. However, it should be noted that because the government fails to collect accurate statistics, it is difficult to determine exactly who is really using the law and with what frequency.²¹⁵ At present, however, the number of instances where litigation is embarked on for strategic purposes far out-numbers instances of ordinary litigation.²¹⁶

6. Capacity and Influence of Civil Society

6.1. CITIZEN DEMAND FOR RTI

Despite efforts by various organizations to promote PAIA, in reality, the awareness of PAIA and its value as a tool for access to information is simply not reaching all South Africans. In a survey conducted for the Open Society Foundation for South Africa, in 2011, 86% of the respondents had never heard of PAIA.²¹⁷ In another survey conducted by ODAC, one in ten people surveyed felt that they did not have the right to ask the government for information.²¹⁸ Of those who did

think they had a right to ask for information and who were aware of PAIA, they are most likely to: be white and male, speak English or Afrikaans, and be better educated and in the higher income bracket.²¹⁹

Multiple explanations exist for this low awareness. Clearly the bureaucratic barriers within PAIA have prevented many citizens from using the law. These include the requirement to use a form to submit a request, the use of English as the primary language of government, and the difficulty in obtaining easily understandable information about how and where to submit information requests.

However, because the apartheid system was by nature, authoritative and repressive, a culture of fear of authority as well as apprehension with interacting with government directly was established.²²⁰ Many community members focused on the day-to-day challenges of living in poverty do not receive the adequate public services they require from the government such as clean water, adequate sanitation, housing, or educational opportunities. They simply do not have the time nor do they see PAIA as a meaningful tool for addressing these concerns.

In addition, intrinsic tensions exist between some aspects of African traditional customary law and practices and conventional government engagement.²²¹ For example, the use of PAIA may undermine traditional leadership structures in various rural communities.²²² These cultural traditions also shape the way information is recorded and accessed within a community.²²³ Together with the challenges created by multiple languages, multiple writing scripts, very low level of literacy, and historical high levels of mortality, typical western based models of records management and procedures for access to information are not a logical fit with many populations within South Africa.²²⁴ Thus, the education and training provided by civil society to support local communities has special significance in South Africa well beyond the simple use of PAIA. It directly helps improve the lack of awareness and cultural barriers that have historically excluded rural, low income and marginalized sectors of the community.

6.2. CIVIL SOCIETY

Civil society has played a fundamental role in promoting access to information in South Africa. With deep roots in campaigns against apartheid, many civil society groups clearly understand the link between access to information and a truly accountable and participatory government. Civil society has remained an active and forceful participant, engaging academics, international advocates, the media, government institutions, and other South African social justice CSOs in a broad range of activities to help strengthen the use and implementation of PAIA. Further, they have reached out to local communities in an attempt to illustrate how PAIA and access to information can be used as an essential tool in their fight for better government service delivery and broader human rights.

Legislative Development of PAIA

Civil society was instrumental in the development of PAIA. After an attempt to create the Open Democracy Advisory Forum by the Freedom of Expression Institute faltered, a broad range of organizations formed the Open Democracy Campaign Group (ODCG).²²⁵ This coalition focused on developing a unified, coordinated voice whose range of expertise made it a key resource to member organizations, the media, and members of Parliament.²²⁶ Throughout the five-year campaign that led to the creation of PAIA, ODCG utilized international experts and resources to investigate best practices as well as studied effective grassroots citizen campaigns



(such as efforts of the Mazdoor Kisan Shakti Sangathan or Association for the Empowerment of Workers and Peasants) to inform the South African process.²²⁷ They offered draft language and constructive policy alternatives, and submitted strategically coordinated comments to the multiple parliamentary committees working on the bill.²²⁸ The coalition also engaged with the media and developed personal relationships with many MPs.²²⁹

The key strengths of ODCG's advocacy and engagement strategies have been highlighted by other RTI practitioners and are recognized as important contributors to South Africa's law development.²³⁰ These include the creation of a diverse, well-funded coalition.²³¹ The coalition developed an effective strategy to work respectfully and constructively with government officials by not just offering criticisms but viable solutions. The consistency of engagement over the long term allowed the coalition to build trust internally between coalition members as well as between members and other stakeholders and ensure a voice in the process.²³²

Civil society has never stopped advocating for the inclusion of an independent Information Commissioner in South Africa. The success of POPIA's passage is a testament to their tenacity and activism. The present day advocacy on behalf of PAIA, including the active, ongoing use of the law by many CSOs, is also a legacy of this early, successful involvement.

Ongoing Parliamentary Advocacy

As part of their broader mission to promote an open and transparent government, most CSOs engage in a wide range of right-to-know activities that move beyond access to information. This work ranges from parliamentary advocacy, engagement with government institutions, regional and international advocacy, and grassroots campaigning. It includes issues such as strengthening whistleblower protection, promoting open data, securing access to historical documents related to the struggle against the apartheid era, promoting environmental justice, and fighting the perceived growing culture of corruption.

The Right2Know Campaign (R2K) provides an illustrative example of civil society working in coalition on these broader social justice issues. R2K was launched in 2010 in response to government attempts to update the Protection of State Information Act of 1982. Although unable to prevent South Africa from passing a new controversial law that regulates the classification, protection, and dissemination of state information, R2K's mobilization and advocacy successfully expanded the debate around the legislation to a more comprehensive focus on their perception of a growing culture of secrecy and the need for meaningful access to information for all.

R2K has a diverse membership that includes both traditional NGOs and a large number of community based organizations. It has a small staff spread out in four South African provinces. The grassroots issue focus has included:

- Stopping the Protection of State Information Bill and other national security bills and acts,
- Supporting communities and groups in the coalition to access information,
- Media freedom, diversity, and the right to communicate, and
- Justice for whistleblowers.²³³

In addition to monitoring and responding to legislative developments, the group focuses on public education and political protest. They have developed a strong internet presence and engage closely with the media. R2K was named "2012 News Maker of the Year" by the Johannesburg press club for example.²³⁴ In this broader context, access to information is used as an

important tool to inform this work. A PAIA application was submitted, for example, to obtain the National Key Points list. This list, which is kept secret from the public, includes any building deemed important to national security and in need of extra security. As a former apartheid-era national security law, R2K activists believe the expansion of this list is being used to deny public access to information and suppress peoples' rights to protest.

Civil society also works to advocate for access to information in the region and internationally. ODAC has taken the lead in engaging in the Open Government Partnership (OGP) process, for example. In addition to monitoring progress, they have coordinated the inputs of key transparency stakeholders and submitted information on the core transparency issues relevant to the OGP commitments made by the South African government. They have also attempted to engage government representatives to ensure civil society is properly consulted and involved in the implementation of their OGP commitments. They have advocated for the inclusion of stronger commitments that include a proper implementation plan with specific responsibilities and deliverables for government officials. Further, they have launched a separate OGP Monitoring website at a centralized location for OGP related monitoring, analysis and advocacy.

Using PAIA for Research and Implementation Monitoring

CSOs have not only focused on supporting government research and monitoring of PAIA, they are also active participants in the development of new information. Submitting information requests and monitoring results has proven to be a useful method of providing statistical and anecdotal evidence of poor PAIA compliance.

The South African History Archive (SAHA) has developed the PAIA Request Tracker, an online information management tool designed to track and manage requests made under PAIA. Both SAHA and other members of the PAIA Civil Society Network (PCSN) are able to use the PAIA Request Tracker to create and send information requests to both private and public bodies. The system also includes the ability to track PAIA requests and all related communication against the prescribed timelines as well as send automated faxes /emails. The goal of the PAIA tracker is to expand the capacity of other CSOs to use PAIA. It also hopes the increasing the number of requests submitted to public institutions will increase the motivation of these institution to effectively implement PAIA.²³⁵ ODAC is also developing an online public hub that will allow all citizens to submit PAIA requests. The site, askAFRICA, will also act as a data repository.

The most well-known source of civil society generated information is the Shadow Report. Regularly cited by government, other transparency advocates, and academic stakeholders, it is authored by the PCSN. Sponsored by SAHA and using PAIA Tracker data, the PCSN focuses specifically on effective implementation and usage of PAIA. Given the commonly cited concerns over the inaccuracy of PAIA section 32 reports, the Shadow Report provides another source of information for SAHRC and other PAIA stakeholders to use when monitoring the implementation of PAIA.

ODAC has developed a strong working relationship with SAHRC's PAIA unit. They co-host the NIOF and Golden Key Awards, with ODAC providing the funding, organizational support and research to support these events. In addition to allocation of the awards, ODAC uses the collated statistics to support stronger PAIA implementation and advocacy efforts. Golden Key survey results are regularly cited in ODAC and SAHRC reports, newsletters, and other materials



as evidence of the poor state of compliance and implementation, and as justification for the demand for more resources and political support from parliament, other monitoring ministries, and public institutions.

ODAC also uses this research to inform their other open democracy work. For example, in a submission to the National Anti-Corruption Forum, a coalition of business, civil society and government sectors working on corruption issues, ODAC highlighted the 2011 GKA results as part of the advocacy paper highlighting the importance of access to information in the fight against corruption.²³⁶

The Centre for Environmental Rights (CER) is an environmental justice CSO that operates a transparency in environmental governance project; it uses information requests to evaluate the extent to which civil society can access environmental information held by regulators and private entities. In *Unlock the Doors*, CER submitted 98 requests and 42 formal requests to 52 public and private institutions. The report highlighted the lack of awareness, training and incentives, as well as inadequate structures, to achieve PAIA compliance. The report concludes, "The culture of avoidance, delay, and non-compliance with PAIA is fundamentally and significantly hampering the realization of environmental rights as guaranteed in S.24 of the Constitution."²³⁷ In recognition of this work, the CER won the Best User of PAIA in the 2012/13 Golden Key Awards.²³⁸

Strategic Litigation

The limitations of PAIA's court based enforcement mechanism, in conjunction with the general lack of political will to improve PAIA implementation through traditional governmental practices, have made strategic litigation a key civil society strategy for dealing with poor compliance and implementation.²³⁹

SAHA's Freedom of Information Programme (FOIP) has been tasked with, among other things, "pushing the boundaries" of PAIA by utilizing the court system. It regularly provides *amicus curiae* briefs for important PAIA cases. Until recently, ODAC's litigation unit used to operate a law clinic. Its strategic litigation was primarily aimed at the elaboration of PAIA procedures. It also took on important test cases where requests were denied by either public or private bodies. In these cases, pro bono services were offered to individuals and community-based clients who could not afford the expense of litigation.

CER also makes legal services available to communities and CSOs to support the assertion of environmental rights in prioritized cases. This includes providing negotiation and dispute resolution support through its monthly Environmental Rights Clinic. It also initiates legal proceedings on behalf of clients, as public interest litigants and a friend of the court. CER has also directly engaged in legal proceedings to compel production of environmental records.

Training and Public Awareness and Supporting Local Communities

CSOs have also played an important role in raising public awareness and education on PAIA. To that end, a number of guides have been created by civil society to help ordinary citizens, lawyers, and information officers navigate PAIA and submit information requests. CER, ODAC, and SAHA all offer training and workshops on PAIA. Historically, ODAC specifically offered training for holders and requesters of information, as well as workshops on how to compile the manuals required under PAIA. Currently ODAC offers PAIA and open data online training for journalists.

In addition, SAHA's FOIP offers training and capacity building to organizations and individuals. It has developed strategic sector based training programs which focus on vulnerable and disadvantaged communities, including gender based violence and transitional justice and more recently lesbian, gay, bisexual, transgender and intersex (LGBTI) communities, and environmental justice. SAHA won the 2012 best promoter GKA for its continued training with communities.²⁴⁰

6.3. MEDIA

In many countries, the media are active users of RTI laws. Given the vibrant and generally free press in South Africa, it would be logical to expect this to be the case in South Africa. However, in practice, journalists are not heavy users of PAIA.²⁴¹ The long time needed to gain access as well as the bureaucratic hurdles, overuse of exemptions, and lack of awareness of government officials ensure PAIA obtained information is not a viable source for reporters often working on short deadlines and/or needing current information.²⁴²

In a notable exception, investigative journalists have used PAIA to collect important information on government corruption and abuses of national security claims.²⁴³ In one recent case, multiple organizations, including media houses, submitted a successful PAIA request to obtain the Manase report.²⁴⁴ This report outlined the maladministration in the eThekweni Municipality. The report was commissioned in response to widespread allegations of corruption in the city, including the use of emergency regulations to grant R500 million housing tenders during the 2009/10 fiscal year.²⁴⁵

The Mail and Guardian (M&G) paper has repeatedly used PAIA. Brummer, in the important time limit PAIA case *Brummer v Minister for Social Development*, was M&G investigative journalist, Stefaans Brümmer. In addition, the M&G houses and helps fund the independent, non-profit, M&G Centre for Investigative Journalism. The Centre, known as amaBhungane, Zulu for the Dung Beetle, was founded to develop investigative public interest journalism. The Centre produces investigative stories and engages in advocacy efforts to "secure the information rights investigative journalists need to do their work." It is an active participant in the larger R2K Campaign and offers support to investigative journalists using PAIA to collect information.

amaBhungane regularly uses PAIA and has taken cases to court to not only secure information but advance the scope of PAIA. It is currently attempting to obtain complete information about the costs of President Zuma's Nkandla residence.²⁴⁶ amaBhungane submitted a PAIA request related to the use of state funds to upgrade the President's private estate in July 2012. It was denied by the Department of Public Works, claiming secrecy under the National Key Point Act. After submitting an internal appeal (which was ignored), and then receiving incomplete information, the case went to court. Ultimately over 12,000 pages of evidence were released. The Centre believes more high level records involving the interactions of senior officials, the president, the minister and his deputy have still been withheld.²⁴⁷ In any case, the records received document how the costs for this renovation have grown from R27.8 million in 2009 to R270 million in October 2012.²⁴⁸

6.4. PRIVATE BODIES

Despite the unique inclusion of private entities, PAIA has not proven to be a useful tool for access to private body information. The overall lack of public awareness surrounding PAIA and hesitation by the general population to utilize the law have only been compounded by the



delaying of Section 51 manual requirements.²⁴⁹ While the delay was initially justified based on the impact on small businesses and the lack of SAHRC resources, this delay has limited the information on the records available and the procedures for accessing private information.²⁵⁰ The SAHRC has readily admitted it still does not have the resources to receive the manuals nor the infrastructure to house and review them.²⁵¹ Adding to these barriers is the lack of an internal appeal mechanism for private requests, leaving requesters little option outside of court as recourse.

Civil society has admitted to a limited exploration of this aspect of PAIA and has submitted very few information requests to private bodies when compared to government institutions.²⁵² However, in the few cases where requests were submitted, most private bodies did not provide information.²⁵³ In one case where the CER submitted 11 environmental information requests, private companies failed to respond 60% of the time.²⁵⁴ In these cases, private bodies often referred CER back to the relevant public body. In two cases, private bodies responded to requests from civil society by threatening legal action. In 2011, in collaboration with ODAC, CER sent formal requests to 30 of the largest mining companies asking them to voluntarily release environmental licenses.²⁵⁵ Of the companies, only two agreed to do so, and only one followed through on the request. CER concluded that private bodies with more administrative capacity tend to use PAIA to resist disclosure, indicating a belief that “greater transparency poses an unacceptable risk to these bodies and their shareholders.”²⁵⁶ Further, the lack of requirements to proactively disclose information gives them little incentive to do so.²⁵⁷

7. Broader Political Environment

Virtually all PAIA stakeholders agree that the lack of political will is a significant factor impeding the proper implementation of PAIA. Not only is the lack of commitment of senior executives inhibiting the appropriate motivation and internal readiness at public institutions, but a limited broader political commitment to PAIA is also evident.

7.1. POLITICAL WILL

With the passage of POPIA, Parliament has addressed one specific structural weakness of PAIA. However, the issue of weak political oversight remains. The Asmal report concluded that Parliamentary oversight of the work of the SAHRC and engagement with its reports is inadequate.

This has been reinforced by SAHRC commissioners, who have concluded that there is reluctance from government for political reasons to make PAIA more effective and believe a “champion in Cabinet to fight in our corner” would be helpful.²⁵⁸ It is also worth emphasizing that, despite the fact that SAHRC’s Annual Reports, Strategic Plans, and PAIA annual reports have all directly and consistently reported to Parliament how their human capital and resource constraints have impacted their ability to meet their PAIA obligations, little action has been taken by Parliament to intercede.

Not a single Minister of Justice of the Mbeki administration has publicly expressed support for PAIA, despite the fact that President Mbeki had sponsored the enactment of the legislation as deputy president during the Mandela administration.²⁵⁹ In fact, one of these Ministers has been quoted as saying that the minimal desire to push a reform agenda in cabinet is because

“when the cabinet looks out of the window, what it sees is the law being used by its political enemies to embarrass it.”²⁶⁰

However, in 2013, as a speaker at the NIOF, Deputy Minister John Jeffery publicly spoke about the importance of access to information and acknowledged the poor implementation in general and the need for better Parliamentary oversight.²⁶¹ He also spoke about the Information Regulator and the newly formed Office on Institutions Supporting Democracy (OSID), which is part of the Speaker’s Office of National Assembly. Based in part on the recommendations made in the Asmal report, the purpose of this office is to facilitate and co-ordinate all engagements between Parliament and Chapter 9 Institutions. However, it has not yet begun its work, nor formally committed to addressing PAIA implementation issues. Deputy Minister Jeffery also did not address the significant PAIA compliance issues at his own department.²⁶²

The best way of demonstrating political will for making an RTI law succeed is clearly by allocating resources to the proper implementation of the law.²⁶³ The long list of implementation issues outlined in this case study clearly illustrates this lack of Parliamentary commitment.

Further, Parliamentary members have not responded to repeated notifications of poor compliance. Almost since its inception, the SAHRC and PSC have been documenting the poor implementation of PAIA. The SAHRC has repeatedly referred to PAIA compliance as “dismal” and highlighted the bureaucratic resistance to implementation in PAIA annual reports and other documents to the Portfolio Committee on Justice and Constitutional Development.²⁶⁴ It has written that “Parliament and Government needs to demonstrate the necessary political will to give effect to the Constitutional right to information for all.”²⁶⁵ And that “Having submitted these [PAIA annual] reports, the SAHRC hopes that Parliament will take steps to ensure that the status of implementation changes and that the constitutional principles of an open democracy are upheld. This expectation has not been met, and until such time that corrective measures are put in place, compliance with the PAIA and its implementation will continue to dwindle.”²⁶⁶ Despite the passage of POPIA and the creation of the OSID, to date Parliament has taken little action to directly address PAIA implementation.

7.2. BROADER GOVERNANCE ENVIRONMENT

South Africa was the first African country to adopt an RTI law. PAIA was used as a reference point for civil society and public officials alike throughout Africa in drafting their own bills or ideas on implementation.²⁶⁷ Since that time, there has been a wave of activity in Africa in respect to the right to information. Many other African countries have passed RTI laws or regulations including Angola, Ethiopia, Guinea, Liberia, Niger, Nigeria, Rwanda, Tunisia, Uganda and Zimbabwe.²⁶⁸

South Africa was one of the Open Government Partnership’s (OGP’s) founding countries when President Zuma launched the initiative along with other heads of state and ministers in New York. Its OGP plan focuses on eight commitments aimed at enhancing service delivery, fighting corruption, and encouraging civil participation including four commitments directly addressing access to information values.²⁶⁹ In the 2012 Open Budget Index (OBI) assessment of whether a government makes eight key budget documents publicly available in a comprehensive, timely, and useful fashion, South Africa scored 90 out of 100, placing it among the top performers, (although it represents a slight decrease in score from 92 on the 2010 OBI).²⁷⁰ The Constitutional Court’s independence is also internationally well regarded.²⁷¹



However, 20 years after South Africa transformed itself into a modern democratic state, it continues to struggle with unemployment, poverty, service delivery protests, corruption, and significant income inequality. In an attempt to measure South Africa's progress toward creating an open society, the Open Society Monitoring Index (OSMI)²⁷² concluded that South Africa's threats to openness are not the result of poorly constructed laws and institutions, but instead from the lack of political commitment to making these legal instruments and processes work.²⁷³ At the same time, the OSMI index confirmed that the low level of citizen engagement with formal rules and institutions remains a significant issue.²⁷⁴ In a sense, low demand and poor PAIA compliance are only one of many human rights' values finding implementation a challenging problem.

7.3. CORRUPTION

Corruption appears to be a significant concern for most South Africans. Transparency International found that 54% of the population surveyed felt that corruption had increased a lot in the country.²⁷⁵ Over 70% of the respondents felt that the political parties, parliament, the police, and public officials and civil servants were corrupt.²⁷⁶ With a score of 42 out of 100 (with 100 being a perfectly clean government), South Africa ranked 72 out of 177 countries on Transparency International's perception of corruption index.²⁷⁷

Current events help to confirm this perception. Accusations of corruption scandals are a regular occurrence in the media to the point where some journalists have created a new South Africa syndrome: scandal fatigue.²⁷⁸ Based on PSC data, financial misconduct in the public service cost taxpayers R346 million in 2009/2010, 87% of which was never recovered. The reporting year 2011/2012 brought even worse news, with that number rising to R930 million.²⁷⁹ Freedom House has reported that between 2006 and 2009, President Zuma was charged three times with corruption and cleared of those charges on procedural grounds.²⁸⁰

These ongoing allegations of corruption and the lack of action by government leaders have greatly impacted the country's ability to address public service delivery and have fostered poor public trust. In theory, a well implemented PAIA should provide one avenue for alleviating corruption as transparency supports the creation of an open and accountable government where corruption is difficult to sustain. In a country where corruption is such a significant issue, having an effective tool such as PAIA becomes even more critical for ensuring an open and accountable government.

7.4. PROTECTION OF STATE SECRETS BILL

The Protection of State Information Bill has generated considerable controversy both in South Africa and internationally. Some stakeholders have suggested it is part of a global tendency to use the emergence of terrorism as a justification to limit access to information in the name of national security.²⁸¹

The bill establishes review procedures for requests for access as well as procedures to prevent the abuse of the classification system including oversight by a Classification Review Panel. It also outlines penalties for violations. The South African National Assembly adopted a revised Protection of State Information Bill on Nov. 12, 2013. It will now go back to President Zuma for his signature.

Despite a number of revisions, many open government stakeholders, including the R2K Campaign, continue to raise a number of concerns including the lack of a "full public interest

defense” clause, lack of protection for the population at large to ensure they are not criminalized for unknowingly seeking secret information, draconian sentences of up to 25 years in jail for intentional violations, and expanded powers of the Minister of State Security to give classification powers to other state bodies and junior officials.²⁸² It is likely the government will take the bill to the Constitutional Court for review. If not, R2K has said they are committed to challenging it before the Court directly.²⁸³

The original draft indicated that the bill would take precedence over PAIA. However, this was changed in the revised version. The signed bill now specifically indicates that the right of access to information (and other rights enshrined in the Bill of Rights) will inform its implementation. While this commitment is welcomed by civil society stakeholders, most are still concerned that the other provisions will negatively impact access to information by creating a new set of justifications for refusing information requests.²⁸⁴ They are also concerned it will support a culture that discourages the release of information.²⁸⁵

While the outcome of this legislation has not been finalized, its promulgation in conjunction with the allegations of political corruption is fuelling public frustration with the current leadership. Transparency stakeholders consider this part of a disturbing trend to limit the freedoms protected under the Constitution.²⁸⁶

8. Conclusions

There has been a fundamental paradigm shift in the understanding and application of the RTI around the world. Access to information is now recognized as a fundamental human right with its own set of attributes and intrinsic worth (Article 19 UN). RTI has become a well-regarded tool for strengthening social and economic rights. In its evolution to democracy, South Africa entrenched these principles in its Constitution and created a strong legislative foundation for their execution. It is important to acknowledge the gains that have been made.

Yet, 13 years after the passage of PAIA, overall implementation at the national, provincial, and local level remains “dismal.”²⁸⁷ The SAHRC has consistently reported noncompliance and cited a lack of both political will and prioritization of PAIA within public institutions. This fundamental impediment has created a ripple effect of issues including:

- A lack of awareness within public institutions of both the law and the procedures for processing requests for information;
- The inability to assist requesters by not making request procedure information readily available and not adequately educating frontline staff;
- A limited number of staff, who have PAIA responsibilities added on over and above their dedicated portfolios;
- Poor, ad hoc protocols for answering information requests including the overuse of exemptions, deemed refusals, and time extensions;
- The lack of adequate resources and disorganization of records management;
- The poor integration of PAIA activities into broader information sharing and public participation activities and strategic planning;
- The lack of a sufficient budget to properly address the PAIA workload; and
- Minimal internal training on PAIA’s goals, objectives, and procedures.



Of course, all of these implementation problems are compounded by the existing weak enforcement and compliance mechanism. The costly, time consuming, and bureaucratic process of taking information requests to court has limited the number of applications. It has also resulted in the process being used more for strategic litigation. Hopefully, the creation of an Information Regulator will not just structurally correct this significant weakness in PAIA, but provide a meaningful tool for both strengthening PAIA compliance and providing a more effective and efficient path for resolving PAIA request conflicts.

Despite regional RTI trends, including the Model AU Law on Access to Information, and the Declaration of Principles of Freedom of Expression and Access to Information in Africa, the political commitment to address these implementation issues is lacking. South Africans have also not found a way to overcome the institutional and cultural barriers to take full advantage of its law as they struggle to address serious service delivery and other broad socio-economic problems in their communities.

Improvements in South Africa's access to information will be rooted in a political commitment to embrace PAIA objectives and ensure that institutions do the same. Until then, poor implementation will continue to thwart not only access to information, but also the accountable and transparent government envisioned in the South African Constitution.

Annex 1. Methodology

The purpose of this case study is to examine how South Africa's PAIA law has worked in practice. It specifically provides a brief overview of the RTI legislation as well as a discussion of the strength of the implementing environment, the responsible institution's capacity to carry out its PAIA promotion, monitoring, oversight, enforcement and compliance mechanisms as well as the broader political environment and RTI accountability.

The study is based on extensive desk research of primary and secondary resources including a variety of ministry and other national government reports, newspaper articles, academic journals, and civil society and media assessments. Interviews with a variety of stakeholders and government officials were conducted to augment the desk research.

Prior to the research, case study indicators were developed to organize and analyze the information collected. The indicators were used to monitor and evaluate the different variables impacting RTI implementation and performance. These indicators were adapted from the indicator categories developed for the Public Accountability Mechanisms (PAM) created by the World Bank. New indicators were developed to address the existing gaps in RTI implementation monitoring and evaluation and to develop a better understanding of the capacities, incentives, and other factors that enable effective implementation including the role of civil society and the broader governance environment. Specifically the RTI-related responsibilities for the following agencies or RTI stakeholders were investigated:

- The Ministry or Department in charge of RTI Oversight and Monitoring
- The Ministry or Department in charge of the Environment
- The Ministry or Department in charge of Agriculture
- The Institution responsible for Appeals, Mediation, and/or Sanctions
- The Court System: Any specific court responsible for RTI oversight and enforcement
- Civil Society Organizations engaged in RTI activities
- Major Media Outlets

Annex 2: Chart of Organizations Included in the Study

Agency Name	Type of Agency (Oversight and Monitoring, Implementing, Appeals and Sanctions)	Link to website, if applicable
South African Human Rights Commission	promotion, protection and monitoring; Note: This is the primary oversight and monitoring organization.	http://www.sahrc.org.za/home/?ipkMenuID=10
Public Service Commission	monitoring and oversight of public administration	http://www.psc.gov.za/
The Government Communication and Information Services	promoting communication	http://www.gcis.gov.za/content/resource-centre
Department of Justice and Constitutional Development	monitor justice system	http://www.justice.gov.za/
Department of Environmental Affairs	Implementing Agency	https://www.environment.gov.za/
Department of Agriculture, Forestry and Fisheries	Implementing	http://www.daff.gov.za/

Organization Name	Type of Organization (Civil Society, Community-Based, Media, Private Section)	Link to website, if applicable
Open Democracy Advice Centre (ODAC)	civil society	http://www.opendemocracy.org.za/
South African History Archive (SAHA)	civil society	http://www.saha.org.za/
Center for Environmental Rights (CER)	civil society	http://cer.org.za/
Right 2 Know (R2K) Campaign	civil society coalition	http://www.r2k.org.za/info-access-now/
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Mail and Guardian	media	http://mg.co.za/

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Implementing Right to Information A Case Study of Thailand

Somrudee Nicro, Panicha Vornpien and Nongpal Chancharoen



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Abbreviations and Acronyms

ACT	Anti-Corruption Organization of Thailand
AEC	ASEAN Economic Community
ASEAN	The Association of Southeast Asian Nations
BOI	Board of Investment
CSO	Civil society organization
DEQP	Department of Environmental Quality Promotion
EGAT	Electricity Generating Authority of Thailand
EHIA	Environmental and health impact assessment
EIA	Environmental impact assessment
ENLAW	ENLAW Thai Foundation
EU	European Union
FTI	Federation of Thai Industries
FY	Fiscal year
G-to-G	Government to Government
IDT	Information Disclosure Tribunal
ISRA Foundation	ISRA Institute Thai Press Development Foundation
KPI	Key performance indicators
MoAC	Ministry of Agriculture and Cooperatives
MoNRE	Ministry of Natural Resources and Environment
NACC	National Anti-Corruption Commission
NBT	The National Broadcasting Service of Thailand
NEQA	Enhancement and Conservation of National Environment Quality Act, B.E. 2535
NIDA	National Institute of Development Administration
NRE	Natural resources and environment
OIA	Official Information Act, BE 2540 (1997)
OIC	Official Information Commission
ONEP	Office of Natural Resources and Environmental Policy and Planning
OOIC	Office of the Official Information Commission
OPDC	Office of the Public Sector Development Commission
OPS	Office of the Permanent Secretary
OSSC	One-stop service center
PCD	Pollution Control Department
PM	Prime Minister

RTI	Right to information
SDF	Sustainable Development Foundation
SLC	Service Link Center
TAO	<i>Tambon</i> (district) administrative organization
TBA	Thai Bankers’ Association
TCC	Thai Chamber of Commerce
ThaiSGWA	Stop-Global Warming Association Thailand
UDHR	Universal Declaration of Human Rights
UNDP	United Nations Development Programme



Implementing Right to Information

A Case Study of Thailand

1. Findings

Drivers of Success

- The public's call for transparency in official information in 1992 was the prime driver of Thailand's Official Information Act (OIA) in 1997. Shortly after its promulgation, the Act received a warm welcome from citizens, civil society organizations (CSOs) and the media. However, the enthusiasm has now subsided.
- The OIA, related laws and regulations, an oversight agency, and appeal mechanisms are in place.

Drivers of Failure

- The OIA is not clear and does not provide specific guidelines on what information can or cannot be disclosed. This is left to the judgment of officials.
- The OIA does not provide protection for the officials who disclose information. But it poses a sanction (fine or imprisonment or both) on the officials who disclose information under exemption. The officials, for fear of penalty, often choose not to disclose the information.
- The OIA does not impose any penalty on the state agencies that fail to disclose information after receiving a request. Nor does it prescribe any penalty for the agencies that respond to the request later than prescribed by law.
- The use of the OIA is on the decline because it takes a long time to get a response from the relevant agency. Often the requester has to appeal to the Information Disclosure Tribunal (through the Official Information Commission), which will take a few more months. If not satisfied with the result, they have to appeal to the Administrative Court.
- The oversight agency, the Office of the Official Information Commission (OOIC), is under the Office of the Permanent Secretary. As such, it lacks independence from political power.
- The OOIC does not have sufficient funds or personnel.
- Right to information (RTI) is not a priority of implementing agencies.



- There is a lack of political will to support RTI because the OIA is deemed to be a tool for investigating corruption in the government.
- A culture of secrecy and a patronage system underline the above problems and result in unequal access to information among different sectors and actors.

Current/Future Developments That Will Impact Implementation of the Law

At present, Thailand is facing a large-scale, nationwide confrontation between two political factions. One faction is calling for political reform. One of the proposed reform areas is elimination of corruption. If this reform materializes, it may have significant and desirable impacts on the OIA.

2. History and Context: Passage of the Law and Its Importance

Article 19 of the Universal Declaration of Human Rights (UDHR), adopted by the UN General Assembly on December 10, 1948, states:

Everyone has the right to freedom of opinion and expression; the 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.

The advent of the RTI law in Thailand might not have been influenced by Article 19 cited above. But its origin surely echoed that of the UDHR. Whereas the UDHR arose directly from the experience of the Second World War, the RTI law in Thailand stemmed from an episode of political turmoil.

In the early 1990s, Thailand was once again under the rule of a military Premier. Given that Thailand had been a constitutional monarchy since 1932 and witnessed its first general election in 1933, Thai citizens were irritated to see the return of a military ruler after almost thirty years of 'electoral democracy'. The uprising of the urban middle class in Bangkok against General Suchinda Kraprayoon in May 1992, generally coined as the 'mobile-phone mob,' was met with a news embargo and the imposition of a curfew. Unsurprisingly, this political climate and information distortion resulted in public anger against the authorities and the first true demand for the right to know and for transparency within the government.¹

The ensuing Interim Government, headed by a former Thai Ambassador to the UN, H.E. Anand Panyarachun, was responsive to this demand. A committee was formed to prepare a White Paper on an Official Information Act, drawing law professors from several universities, including Chulalongkorn, Thammasart and Ramkhamhaeng.²

Although the draft Bill was completed in 1992, it was under General Chavalit Yongchaiyuth's Government that the Bill was tabled before the Parliament and was passed on July 23, 1997. The Official Information Act B.E. 2540 (1997) (henceforth referred to as the OIA) was published in the Royal Gazette on September 10 and came into force on December 9, 1997.³

For the first two years after the promulgation of the OIA, the general public was not aware of the law. However, public enthusiasm for the OIA increased considerably after a few scandals had come to light through implementation of the law. This was especially the case after

Mrs. Sumalee Limpa-ovart cited the law to request information from Kasetsart Demonstrative School. She wanted to know why her daughter's admission to the school's first-grade class was denied. She uncovered that the school admitted children of privileged families and donors. However, it took two and a half years of struggle before her case was resolved.⁴

A notorious scandal within the Ministry of Public Health, which involved medical procurement worth 1.4 billion Baht in 1999, was another case that captured public interest. NGOs and a rural doctors network provided information to the National Anti-Corruption Commission (NACC), enabling the Commission to rule that the procurement involved corrupt practices. The case led to the resignation of the Minister and two officials and the imprisonment of the Minister. The media and OIA advocates implemented the OIA law to request information about this case from the NACC. After several appeals, advocacy groups and journalists successfully obtained the records of the NACC investigation with the names of eyewitnesses blackened to protect their identities.⁵

However, the hype surrounding Thailand's OIA did not last very long. A study in 2011 by the Center of Philanthropy and Civil Society, National Institute of Development Administration, divided the development of OIA into three phases.⁶

- The initial phase: 1997–2000
- The implementation phase: 2001–2005
- The amendment phase: 2006–2010

During the initial phase, the media sought to promote the new Act and raise public awareness of the law. Many of the media reports on the law during this phase, however, were related to state agencies' lack of compliance with the Law, particularly the independent public agencies such as the NACC, the Office of the Auditor General and the Office of the Election Commission, who viewed themselves as independent from the OIA. The media also referred to a culture of secrecy and patronage as key impediments to the law's implementation.

The implementation phase covered the period when there were several reports on Thailand's RTI. Several newspapers reported on the higher usage of the OIA among state employees, journalists and citizens. Political interference was also reported—when two members of the Official Information Commission (OIC) were removed from their posts. Several problems started to emerge during this period, including events relating to conflicts between different rulings such as those relating to the OIC and the Constitutional Court, and the OIC and the authority of the NACC.

From 2006, the OIA entered the amendment phase. The OIC attempted to request amendments both to the Law and its structure. Reports at this time focused on stories relating to non-disclosure of information by state agencies. This phase saw a reduction in the usage of the OIA.

3. Key Provisions of the Law: A Snapshot of the RTI Law

Scope of Coverage: information, documents

- The Constitution of the Kingdom of Thailand B.E. 2550 (2007) Section 56 and 57
- The Official Information Act B.E. 2540 (1997)



- Royal Decree on Criteria and Procedures for Good Governance B.E. 2546 (2003)
- Rules on Maintenance of Official Secrets B.E. 2544 (2001)

Exemptions: harm test, public interest test

Exemptions are applied to the following:

- Information that may jeopardize the Royal Institution (OIA, Section 14).
- Information that would affect national security, international relations, national economic or financial security, where disclosure would endanger the life or safety of a person, where it would harm law enforcement, or where disclosure would unreasonably encroach on the right of privacy (OIA, Section 15).

Procedures for Access: deadlines, fees, and requesters

- According to the OIA, a state agency has to (i) publish in the Government Gazette its structure and organization (Section 7); (ii) make available for public inspection official information such as decisions, policies, work plans and contracts (Section 9); and (iii) be prepared to provide information that may be requested by an individual (Section 11).
- The OIA does not provide clear and precise time limits for responding to requests. It only states that upon receiving a request for information, a state agency must reply “within a reasonable period of time” (Section 11). However, the Royal Decree on Criteria and Procedures for Good Governance of B.E. 2546 (2003) indicates that the state agencies are required to respond to requesters within 15 days (Section 38).
- The associated cost for a disclosure request is fixed according to the “OIC Announcement on the fee rate for document duplication or certification for official information,” dated May 7, 1999.
- Only Thai citizens can request official information.

Appeals/Courts/Sanctions

- When the government agency fails to comply with the law as set out in the OIA, the public has the right to file an appeal to the Information Disclosure Tribunal (IDT) through the OIC (OIA, Sections 13, 18, 25 and 33).
- The requester can submit a petition to the Administrative Court if dissatisfied with the IDT’s decision (The Establishment and Consideration of the Administrative Court Act, B.E. 2542 (1999)).
- Sanctions can be imposed under Sections 40 and 41 of the OIA.

Oversight Agency

- The Official Information Commission (OIC) was established by the OIA as the oversight Committee.
- The Office of the Official Information Commission (OOIC) serves as the secretariat for the OIC, also established by the OIA.

Proactive Disclosure

- Information under Sections 7 and 9 of the OIA has to be proactively disclosed and posted on the websites of state agencies that have websites (The Cabinet Resolution of April 20, 2011).

4. The Legal Environment and Compliance

This chapter discusses the strength of the legal environment and the extent to which ministries and agencies have complied with the law.

4.1. SCOPE OF COVERAGE

Strengths

- There are several laws guaranteeing citizens RTI.
- State agencies are required to have information centers, and these are proactive in providing information to the public.
- OIA covers a wide range of state agencies: central administration, provincial administration, local administration, state enterprises, government agency attached to the National Assembly, courts (only in respect of court affairs not associated with the trial and adjudication of cases), professional supervisory organizations, independent agencies of the state, and such other agencies as prescribed in the Ministerial Order.

Weaknesses

- It is left to officials' discretion whether information can be disclosed.
- There is no protection for officials who disclose information.
- Penalties (fines and imprisonment) may be applied to officials who disclose information under exemption.
- The OIA does not provide the RTI to non-citizens.
- The OIA does not require agencies to have a specific budget for promoting RTI or RTI training.

RTI-related Laws

In Thailand, the right to information is guaranteed by laws at several levels, from the Constitution to specific legislation and Royal Decrees. These laws are:

- The Constitution of the Royal Kingdom of Thailand B.E. 2540 (1997) and B.E. 2550 (2007)
- Prime Minister's Office Regulations on Good Governance (1999)
- The Royal Decree on Criteria and Procedures for Good Governance, B.E. 2546 (2003)
- Specific legislation: The Planning Act B.E. 2518 (1975); the Enhancement and Conservation of National Environment Quality Act, B.E. 2535 (NEQA 1992)
- Official Information Act B.E. 2540 (1997)



The Constitution of the Kingdom of Thailand B.E. 2540 (1997) (in effect between 11 October 1997 and 19 September 2006) included a number of provisions protecting the public right to official information. Its Section 58 stated that *"A person shall have the right to get access to public information in possession of a State agency, State enterprise or local government organization, unless the disclosure of such information shall affect the security of the State, public safety or interests of other persons which shall be protected as provided by the law."*

The provision of this right continues in the currently effective **Constitution of the Kingdom of Thailand B.E. 2550 (2007)**, which is intended to improve the quality of governance and aims to balance legislative, executive and judicial powers. It also seeks to give rights, duties and fair political participation to Thai citizens.⁷

Section 56 of the 2007 Constitution maintains the same right to public information with an elaboration on people's 'right to know' and an exception regarding personal information. The text states:

"A person shall have the right to know and have access to public data or information in possession of a Government agency, a State agency, a State enterprise or a local government organization, unless the disclosure of such data or information affects the security of the State, public safety or interests of other persons which shall be protected, or unless it is personal information, as provided by law (Section 56)." [Emphases added]

The Constitution also gives a person the right to (i) receive data, explanations and reasons from the government prior to the approval or the operation of any activity that will impact them or their communities, and (ii) express his/her opinions to the concerned agencies.

Section 57 of the 2007 Constitution states:

"A person shall have the right to receive data, explanations and reasons from a Government agency, a State agency, a State enterprise or a local government organization prior to the approval or the operation of any project or activity which may affect the quality of the environment, health and sanitary conditions, the quality of life or any other material interest concerning such person or a local community and shall have the right to express his or her opinions to agencies concerned, for assisting further consideration of such matters."

Thailand's bubble economy in the late 1980s–1990s eventually reached its peak, resulting in a landmark economic crisis in 1997. Given the economic globalization, the crisis caused a domino effect on neighboring economies. International financial institutions explained this so-called '*Tomyum Kung Crisis*' by pointing their fingers at the lack of good governance among Thailand's financial institutions. In effect, it has raised the Thai public's attention to the concept of 'good governance' and the lack thereof, not only amongst state and commercial banks but also within state administration, among the bureaucrats and those holding political office.

Thailand's economic growth since the 1980s was a result of development projects and economic activities involving industrialization, the excessive exploitation of natural resources and forest encroachment. The number of disputes related to natural resources and the environment began to rise nationwide. Environmental NGOs started to attribute the cause of the disputes to the lack of participation of local communities impacted by such activities in the decision-making processes. Hence, the call for people's participation in natural resources planning and management and in the state's policies and plans was mounting.

Amidst this backdrop, the Prime Minister's Office announced the **Prime Minister's Office Regulations on Good Governance in 1999**, aimed at providing guidance for state agencies to conduct their public services.

Four years later, the **Royal Decree on Criteria and Procedures for Good Governance, B.E. 2546** (2003) was promulgated to guide the conduct of state agencies and officials.

This royal decree has 9 parts that cover the Criteria and Procedures for Good Governance—*"Part I: good public administration; Part II: responsive public administration; Part III: result-based management; Part IV: effectiveness and value for money administration; Part V: lessening unnecessary steps of work; Part VI: mission review; Part VII: convenient and favorable public services; Part VIII: performance evaluation, and Part IX: miscellaneous."* In particular, Part VII: convenient and favorable public services, refers to the right of access to information (e.g., Sections 38–41).⁸

In addition to the above laws, which apply generally to all state agencies and sectors, there is also legislation that is specific to certain issues and enforced by particular ministries that guarantee the right to information, although the degree of clarity for implementation of the legislation varies. These laws include the Planning Act, B.E. 2518 (1975) and Enhancement and Conservation of National Environment Quality Act, B.E. 2535 (NEQA 1992).

This report focuses on two implementing agencies: the Ministry of Natural Resources and Environment (MoNRE) and the Ministry of Agriculture and Cooperatives (MoAC), and so only the NEQA 1992 will be discussed.

Section 6 (1) of the **Enhancement and Conservation of National Environment Quality Act, B.E. 2535** (NEQA 1992) provides the right of a person *"to be informed and obtain information and data from the government service in matters concerning the enhancement and conservation of environmental quality, except the information or data that are officially classified as secret intelligence pertaining to national security, or secrets pertaining to the right to privacy, property rights, or the rights in trade or business of any person which are duly protected by law."*

It should be noted that while this Act was ahead of its time in granting people the right to information, i.e., preceding the 1997 Constitution and the 1997 Official Information Act, it does not spell out how this Section should be implemented. In practice, it was left to officials' interpretation and judgment.

Thailand's RTI law is known as the **Official Information Act, B.E. 2540 (1997)** (henceforth referred to as the OIA) and was promulgated in 1997. The OIA trumps all other laws in the country on the provision and restriction of access to information (Section 3). The drafting of this Act was done in parallel with that of the 1997 Constitution. Thus, the OIA does not make any reference to the Constitution and it would not be possible to do so.

The OIA provides a legal framework that recognizes the fundamental right of access to information, but it fails to express categorically the fundamental right of people to access information. In other words, it does not have a statement which says "people have the right to..." as in the Constitution. Instead, the OIA provides instructions as to how the state agencies are to respond to people's requests for information in their possession.

The OIA consists of seven chapters as follows:⁹

Chapter 1: Information Disclosure

Chapter 2: Information not Subject to Disclosure

Chapter 3: Personal Information

Chapter 4: Historical Information



Chapter 5: Official Information Committee

Chapter 6: Information Disclosure Tribunals

Chapter 7: Penalties

The OIA guarantees people's rights to access government information, ranging from the right to inspect, to request a copy, to get advice, to make complaints and appeal, and to ask the state to correct or change personal information. Such rights are bestowed on an individual whether or not s/he has any involvement or relationship with the cause and effect of the information s/he is requesting. If a state agency denies disclosure of the requested information, citizens have the right to appeal to the IDT through the OIC to reconsider the case.

The OIA covers two important domains. First, the law guarantees to all citizens the freedom of access to public sector information. Second, it obliges all state agencies to provide protection for personal information or privacy in all public sector information (Chapter 3).

The OIA covers information which is in the possession of state agencies, whether that information is about government agencies or the private sector. 'State agencies' are defined to cover: central administration, provincial administration, local administration, state enterprises,¹⁰ government agency attached to the National Assembly, courts (only in respect of court affairs not associated with the trial and adjudication of cases), professional supervisory organizations, independent agencies of the state, and such other agencies as prescribed in the Ministerial Order (Section 4).

Section 11 stipulates that a state agency has to be prepared to provide information that may be requested by an individual (Section 11). In addition, it is required to publish in the Government Gazette its structure and organization, and all information affecting the general public (Section 7); and make available for public inspection official information such as decisions, policies, work plans and contracts (Section 9).

Whilst every citizen has the right to request the disclosure of any government information, whether or not the request will be granted is at the discretion of the authorities. In the event of refusal, the authorities have to give a reason and mostly it is because of "national security" reasons or potential "negative impact on the public". However, citizens have the right to appeal against refusals.

State officials have to advise the citizens with regard to their request (Section 12). When the decision is for non-disclosure, the State agency has to make sure that the reason for the decision and the requester's right to make an appeal (within a certain time frame) are clearly explained to the requester (Section 15).

It must be noted, however, that non-citizens do not enjoy these rights to the same extent as Thai citizens. Section 9 stipulates that the rights of non-citizens to inspect or obtain a copy or a certified copy of the information shall be provided by a Ministerial Order. Since there has been no Ministerial Order to date, the government agency that receives the request has to make the decision.

The impacts of this restriction on non-citizens should not be overlooked. Given the fact that Thailand's income is higher than its neighboring economies, a substantive number of migrant workers from Myanmar, Laos and Cambodia have been working in several economic sectors in Thailand. These non-Thai-citizen workers who are not yet residents of Thailand have practically no right to access official information. These migrant workers are highly likely to catch communicable diseases because their living quarters are often congested and

unhygienic. Without adequate and timely access to information, especially the possible health risk imposed on them by their work environment, their health will remain vulnerable and eventually the general public can also be at risk.¹¹

Additionally, in the light of the forthcoming ASEAN Economic Community (AEC) and the more frequent and intense communication among the citizens of ASEAN member countries, an increasing number of non-Thai citizens in Thailand are likely to seek information possessed by various state agencies. An ASEAN system of regional exchange of information could be set up to facilitate their access to information and ensure that no country will have an unfair advantage over the others.¹² Such a mechanism can be viable only after the OIA is amended.

It should be noted that the OIA does not enable government agencies to obtain information from each other. Obtaining information from another government agency follows the government administrative system, not the OIA.

4.2. USE/ABUSE OF EXEMPTIONS, HARM TEST AND PUBLIC INTEREST TEST

Strengths

- Complaint and appeal mechanisms and timelines are in place.
- The OOIC has complaint and appeal procedures, how-to guidelines, and downloadable forms available on their website.

Weaknesses

- The public interest test is sometimes used to deny requesters access to information.
- The Law relies on officials' discretion; but officials are reluctant to disclose information for fear of a penalty.
- There is no protection for officials who disclose information or for whistle-blowers.

Although the OOIC hails the following motto "Disclosure is the norm; closure is the exception" and has it posted on the agency's website and printed on its paper publications, the OIA allows certain categories of information to be exempted from disclosure.

As a rule, before disclosing information, designated officials at the agency receiving a request will check whether the requested documentation is subject to non-disclosure, as outlined in sections 14 and 15 of the OIA. Information that may not be disclosed under these sections is:

Section 14. Official information that may jeopardize the Royal Institution.

Section 15. A state agency or state official may issue an order prohibiting the disclosure of official information falling under any of the following descriptions, with due consideration to the implementation of the agency's duty under the law, public interests and the interests of the related private individuals combined:

- (1) The disclosure thereof will jeopardize the national security, international relations, or national economic or financial security;
- (2) The disclosure thereof will result in the decline in the efficiency of law enforcement or failure to achieve its objectives, whether or not it is related to litigation, prevention, suppression, testing, inspection, or knowledge of the source of the information;



- (3) An opinion or advice given within the State agency for the handling of a matter, excluding a technical report, fact report or information supporting the internal provision of opinions or recommendations;
- (4) The disclosure thereof will endanger the life or safety of any person;
- (5) A medical report or personal information the disclosure of which will unreasonably encroach upon the right of privacy;
- (6) Official information protected by law against disclosure or information given by a person who does not wish the authorities to disclose it to others;
- (7) Other cases as prescribed in a Royal Decree."

The exemptions outlined above have unfortunately turned out to be barriers to the disclosure of information. The Director of the OOIC said:

"The description in Section 15 is rather broad and as such officials are bound to apply their own judgment. In practice, officials are often reluctant to apply their judgment to disclose the information in question even if there are precedent cases. They are more willing to disclose information only when they receive a formal order to do so. This is because they feel insecure and fear a penalty."¹³

Exemptions in the RTI law are not unique to Thailand's OIA, as a study on environmental governance in Asia found exemptions common to many other Asian countries and made the following observation:

"These kinds of restrictions also put pressure on government workers not to reveal information to the public, for fear of prosecution. In the absence of legal mechanisms to protect whistle-blowers, institutional culture within state institutions can constrain government workers to reveal information for fear of retribution within their agencies, even in cases in which the information is not sensitive. Without clear guidelines and recognition of the right to reveal state information that is in the public interest, state agencies can be expected to continue to be reluctant to disclose information at the risk of exposing themselves to public criticism."¹⁴

4.3. APPEALS COURTS AND SANCTIONS

Strengths

- Administrative Courts exist in Thailand.
- There are two levels of appeal for non-government complainants, first to the Information Disclosure Tribunal; and if not satisfied with the IDT's decision, the complainants can appeal to the Administrative Courts.

Weaknesses

- Implementing agencies do not have an internal appeal system specifically for RTI.
- People do not understand the OIA, the responsibilities and powers of the related state agencies or the procedures. Hence they cannot benefit fully from the existing law and mechanisms.

Appeals

According to the OIA, there are two mechanisms of grievance redress for information requesters: complaints and appeals. Complaints are made when a state agency does not proactively disclose information which is supposed to be made publicly available or when a requester does not receive responses from an agency after his/her request was made. Complaints are to be sent to the OIC. Appeals are filed when a person receives state agency's (1) refusal of his/her request for information disclosure, (2) refusal to make corrections to his/her personal information, or (3) non-disclosure of his/her personal information. Appeals are made to the Information Disclosure Tribunal (IDT), via the OIC.

State agencies do not have internal appeal mechanisms. However, some agencies have a complaint-receiving mechanism, such as the Civil Servant Development Bureau. This mechanism is for any complaints, not necessarily about RTI. In addition, citizens can make complaints to the official's superior authority, according to Administrative Procedural Act, 1996. Again, this is not necessary about RTI but can include RTI as well.

Officials are required to inform requesters of the reasons for not disclosing the requested information. The requesters can appeal to the IDT through the OIC within 15 days after receiving the notification of non-disclosure (Section 18, OIA). The implementing agencies do not have any in-built internal appeal system. The complainant has to follow the required procedures and timeline when making an appeal.

In case an agency's official considers that disclosing the requested information may impact the interest of a particular individual, s/he will have to inform the requester accordingly and advise him/her of the right to file a complaint against the agency for non-disclosure within a certain period of time, as determined by the agency, but not less than 15 days (Section 17). Should the agency reject the non-disclosure complaint, the individual can then appeal to the IDT through the OIC within 15 days after receiving the notification (Section 18).

The appeal procedure, guidance on how to appeal, downloadable appeal forms, appeal examples and the time required for each step of the process (totaling 46 days) are provided online on the OOIC website.¹⁵

When receiving an appeal, the OIC will firstly consider if the case falls into either of the following categories:

- the state agency refuses to disclose the information as requested; and
- the state agency refuses to pay attention to a person's objection to the disclosure of information about which the person has a stake and that s/he has already submitted an objection to the agency



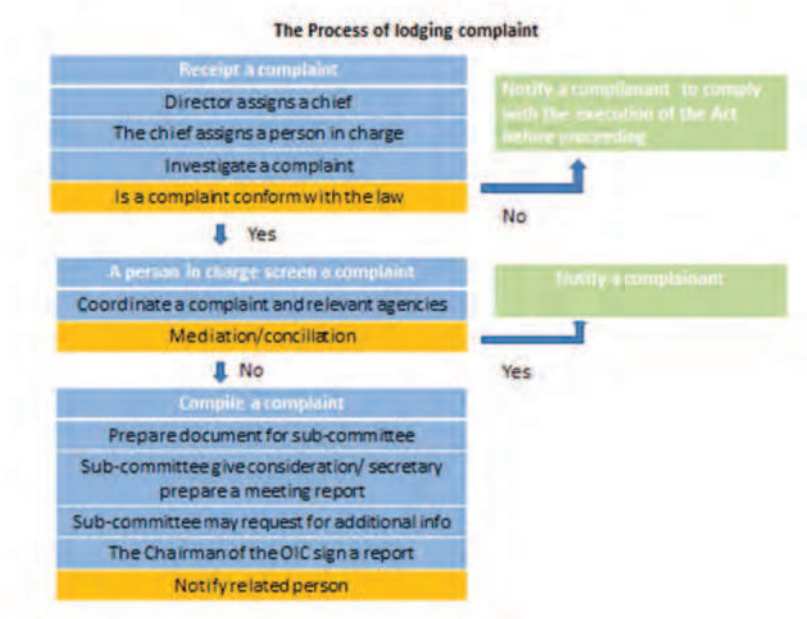
If the case does fall into one of these categories, the OIC will then proceed with the appeal. The OIC will forward the appeal to one of the five IDTs most relevant to the case. The five Tribunals are: Foreign Affairs and National Security; National Economy and Finance; Social Affairs, Public Administration and Law Enforcement; Medicine and Public Health; and Science, Technology, Industry and Agriculture.

There is no fee and no lawyer required for making an appeal. When a complaint or appeal is lodged with the OIC because access to the requested information is denied, the Commission will have to complete its consideration within 60 days from the date it receives the complaint or appeal.

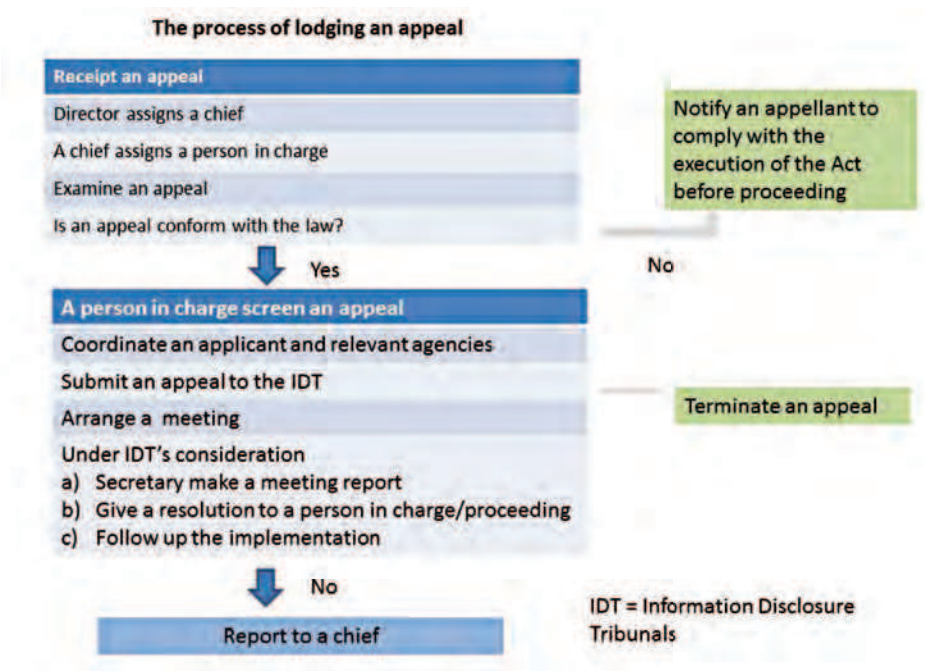
When the Tribunal decides that the state agency has to disclose the requested information to the requester, this decision is deemed final to that state agency, i.e., the agency has to disclose the information.

However, when the Tribunal's decision is in accord with the state agency—i.e., not to disclose the requested information, the requester can appeal to an Administrative Court within 90 days after being notified of the Tribunal's decision. The Court can revoke the Tribunal's decision; and its ruling is considered final. The requester cannot appeal to the Court without first making an appeal to the IDT. However, the Court can only examine whether the Tribunal's decision is lawful, i.e., the Tribunal has considered the appeal in good faith and in accordance with the intention of the law. If the Court finds the Tribunal's decision to be unlawful, the Tribunal's decision will then be revoked. Agencies will comply with the Court's ruling. The Court does not have the authority

FIGURE 1. The Process of Lodging Complaint



Source: http://www.oic.go.th/content_eng/citizen2.htm

FIGURE 2. The Process of Lodging an Appeal

Source: http://www.oic.go.th/content_eng/citizen3.htm

to consider the interests of the stakeholders; only the agency officials and the Tribunal have the authority to consider the stakeholders' interests in making their judgments.¹⁶

The OOIC's website¹⁷ provides clear instructions on how to file a complaint and an appeal, as well as the procedures, the downloadable forms and the timeline.

Number of Requests, Complaints and Appeals

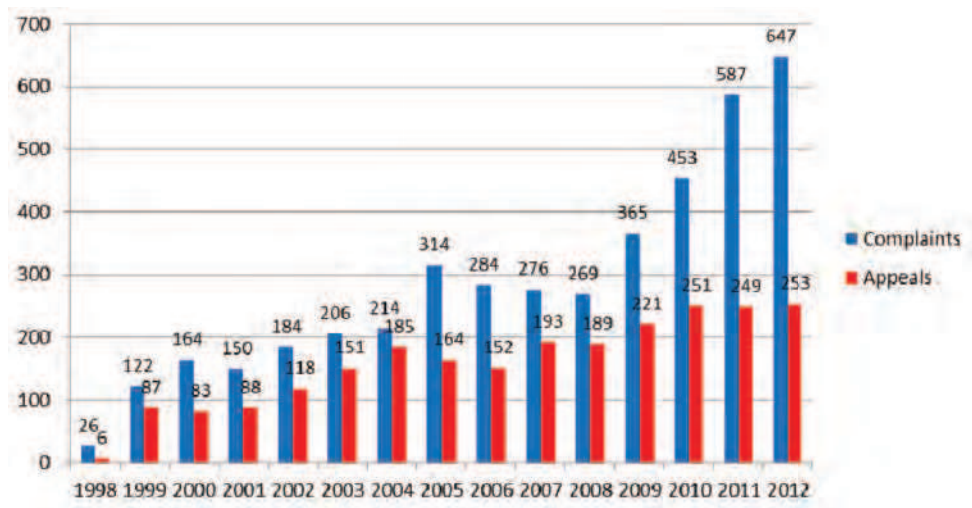
The bar chart in figure 3 depicts the number of complaints and appeals made against state agencies nationwide and submitted to the OIC from 1998 to 2012. It clearly shows that both numbers are on the rise and peaked at 647 complaints and 253 appeals in 2012.

Among all the complaints made against state agencies and submitted to the OIC during fiscal years 2010–2012, complaints about information regarding procurement numbered higher than any other categories (25 percent). Next to procurement was investigation on the use of agency's authority (22 percent). This was also true to each of the three years.

The OIC received 453, 567 and 619 complaints on state agencies' non-compliance with the Official Information Act in fiscal years 2010, 2011, and 2012, respectively. Most of the complaints were against central state agencies, constituting 61.81 percent, 67.84 percent and 67.37 percent, respectively, for the three years, followed by the local and regional agencies.

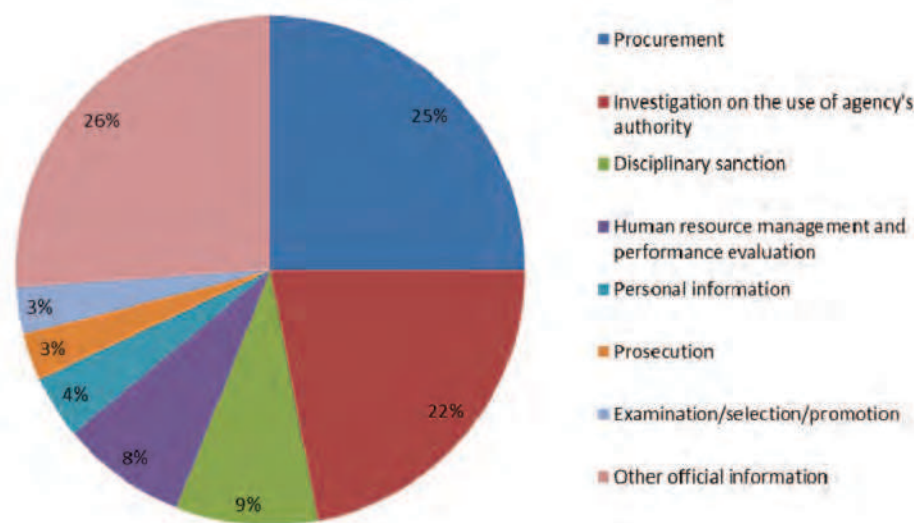


FIGURE 3. Number of Complaints and Appeals between 1998–2012*



*Based on calendar year
Source: Office of the Official Information Commission
www.oic.go.th/content/stat.htm

FIGURE 4. Complaints by Categories between 2010–2012*



*Based on fiscal year
Source: Office of the Official Information Commission (Annual report 2010–2012)

TABLE 1. Numbers of Complaints Filed against Agencies

Agencies Against Which Complaints Were Filed	2010*	2011*	2012*
Central	280 (61.81%)	386 (67.84%)	417 (67.37%)
Regional	26 (5.74%)	28 (4.92%)	25 (4.04%)
Local	147 (32.45%)	155 (27.24%)	177 (28.59%)
Total	453 (100.00%)	567 (100.00%)	619 (100.00%)

*Fiscal years

Thailand's administration is divided into three levels: central, regional (provinces) and local (municipalities and *tambon*, or district, administrative organizations).

Interestingly, each year at least half of all the complaints were submitted to the OIC by government officials, followed by general citizens, and then companies/legal entities. In 2012, for example, 56.78 percent of all the petitions were filed by state officials, 25 percent by the general public and 5.08 percent by companies or legal entities.¹⁸

Administrative Court

The Administrative Court is an independent body resulting from the Constitution and is regarded as a state agency by the OIA.

Once the IDT has made its decision and the private complainant is not satisfied with the result, the latter can then submit an appeal to an Administrative Court. In such a case, the complainant has to file the appeal within 90 days, as stipulated in Section 49 of the Establishment and Consideration of the Administrative Court Act, B.E. 2542 (1999). The Court will dismiss the appeal if filed after 90 days.

The Court will send its rulings to both parties in dispute, i.e., the private individual(s) and the state agency, and post the rulings on a website without identifying the names of the complainants. The Court has the authority to rule that the state agencies comply with the OIA, i.e., release the requested information. State agencies will normally comply with the Court's rulings. In the case that any state agency fails to do so, it will be deemed as a violation of the Court under the civil law. The penalty includes either fine or imprisonment, or both. The Court can also report the case to the Prime Minister, the Cabinet or the respective Minister so that executive or disciplinary measures can be applied against the agency/person.

No fee is required to file a lawsuit with the Administrative Court. Only when a plaintiff asks for compensation from the defendant is a fee required. No lawyer is needed for Administrative Court lawsuits because the judge will investigate the case and obtain documentation from the state agencies or the defendant (Section 24 (5) and Section 55 of the Establishment and Consideration of Administrative Court Act, 1999).

The complainant will get his/her expenses back only when s/he wins the case and payment of damages is requested in the lawsuit. However, the Court will not allow repayment of legal fees, if there are any, as the Administrative Court does not require a lawyer (Section 72, final clause).

The Court's rulings constitute the final decision of cases and are published in the Court's annual report. The Court also publishes a manual including selected appeal cases, revealing



only the names of the organizations involved but not the names of individuals who made the appeals. This is to educate the people.

An interview with a Chief Judge of the Chamber of the Central Administrative Court found the following issues with RTI-related appeals submitted to the Administrative Court.¹⁹

- Requesters who were denied access to information and wish to appeal will have to go through the appeals process at the IDT before they can submit an appeal to the Administrative Court.
- In some cases, those who appeal are not able to differentiate between the various categories of information, e.g. they confuse 'rules and regulations' with 'office procedures' or do not understand the differences between 'personal information' and 'general information.' Only the latter is accessible to the public. The judge will dismiss such cases.
- There is a lack of understanding among the public about (i) the powers and responsibilities of the OIC, OOIC, and IDTs; and (ii) the procedures, as required by the OIA.

Application (or Absence) of Sanctions

In some countries such as Romania, failing to provide information to the requester can result in a fine for the head of the institution and RTI officers. These fines are a percentage of their salaries and accrue daily.²⁰ This kind of sanction is believed to assure the accountability of the state officials in charge of the agencies and drive the responsible officials to disclose information to the requesters.

Unfortunately, Thailand's OIA does not provide such a sanction. When an IDT decides that an agency should disclose the information to the requester, the agency is supposed to comply with the decision and disclose the information. However, in case the agency fails to do so, there is no sanction against it. The OIA bestows on the IDT the authority to make a decision, but does not impose any sanction on the state agencies that do not abide by the decision. The refusal to disclose information may be subject to sanctions under either the criminal law, if deemed to be done in bad faith to damage the complainant, or the civil law for not complying with the IDT's decision.²¹

In practice, when a complaint is received because of a state agency's non-disclosure of information, the OOIC will advise the complainant to file a complaint with the higher agency that oversees the agency in question. For example, if a complaint concerns a refusal by the Board of Investment (BoI) to give access to information, the OOIC will advise the complainant to file a petition with the Ministry of Industry, which oversees the BoI.²²

Nor does the OIA impose any sanctions for non-compliance with the Administrative Court's ruling. However, in the case of the Administrative Court, the state agencies that do not comply with the Court's ruling will be regarded as violating the Court under the civil law *mutatis mutandis*. The Court will exercise its authority to sanction the violating agencies with a fine and/or imprisonment. Secondly, the Court can report the violation to the superior of the violating agencies (Prime Minister or the Cabinet or Minister) so that an administrative or disciplinary measure can be applied.²³

The OIA has a provision to sanction officials who disclose information under Section 15 (exemption) without an official order for disclosure, with a penalty of imprisonment for a term not exceeding one year or a fine not exceeding twenty thousand Baht, or both (Section 41). And any person who fails to comply with the order of the OIC issued under Section 32 of the

OIA, which authorizes the OIC to summon a person to testify or present any documentation or other evidence to the Commission, will be liable to imprisonment for a term not exceeding three months or a fine not exceeding five thousand Baht, or both (Section 40).

Moreover, the OIA does not provide any protection for whistle-blowers, i.e., officials who disclose information about any corruption or wrongdoing in the state agencies.

The above sanctions (or lack thereof) in Thailand's RTI law apply penalties for disclosure and no penalties for non-disclosure. This begs a question about the real intention motivating this law, i.e., whether the law is meant to promote or indeed inhibit the citizens' right to information and officials' disclosure of information in the possession of the state agencies.

4.4. IMPLEMENTATION CAPACITY OF THE OVERSIGHT AGENCY²⁴

Strengths

- There is a specialized agency to promote the implementation of OIA.
- The OOIC is well structured with clearly divided sections; specific staff are assigned to each section.
- The OOIC publishes capacity building information online to facilitate people's use of RTI.
- The state's implementation of the OIA is directly under the Prime Minister's Office. If the Prime Minister has a strong will to promote RTI, this will provide a good opportunity for RTI to flourish.

Weaknesses

- The OOIC is directly under the Office of the Permanent Secretary of the Prime Minister's Office and hence its independence is questionable.
- The OIC is chaired by a Minister and can be directly influenced by the government.
- There is a conflict of interest. The OIA relates to information in the possession of the state agencies. Thus, while the disclosure of this information may be in the interest of the citizens, it may not be in the interest of the government. Given this lack of independence from the government, the progress of RTI in Thailand can be at risk as it is highly dependent on the ruling political party.

The OOIC is the specialized agency for the oversight and promotion of the implementation of the Official Information Act, 1997. It was established within the first year after the OIA was promulgated and is under the Office of the Permanent Secretary of the Prime Minister's Office, in accordance with Section 6 of the Act.²⁵ The OOIC performs secretariat functions for both the OIC and the IDT. The OIA's Section 6 mandates the OOIC with the following tasks:

- Performing technical and secretarial work for the OIC and IDT;
- Coordinating with other state agencies; and
- Providing advice to the private sector (meaning non-state sectors) on how to comply with the OIC.

In practice, the OOIC also works to promote other state agencies' implementation of the OIA, including by providing them with training and technical advice. The OOIC also monitors



these agencies' implementation of the OIA through, for instance, annual reporting and visits to their offices.

The OOIC is not independent from the government as it is under the Office of the Permanent Secretary of the Prime Minister's Office. Besides, the OIC, for which the OOIC serves as a secretariat office, is headed by a Minister directly appointed by the Prime Minister. In reality, it is therefore unlikely that the OIC and OOIC will operate independently from the Minister and the Prime Minister. Section 28 of the OIA stipulates that the authority and duties of the OIC are to:

1. Supervise and give advice with regard to the performance of the duties of State officials and State agencies for the implementation of this Act;
2. Give advice to State officials or State agencies with regard to the implementation of this Act as requested;
3. Give recommendations on the enactment of the Royal Decrees and the issuance of the Ministerial Regulations or the Rules of the Cabinet under this Act;
4. Consider and give opinions on the complaints under Section 13;
5. Submit a report on the implementation of this Act to the Council of Ministers from time to time as appropriate but at least once a year;
6. Perform other duties provided in this Act;
7. Carry out other acts as entrusted by the Cabinet or the Prime Minister.

Human Resources

At its inception in 1998, the OOIC started with only 19 officials and this number later increased to 30. Since 2011, 10 more positions have been added, totaling 40 positions.

At present, however, the Office's actual staff amounts to only 38 persons. The OOIC comprises the following 6 sections: Policy and analysis (5 staff); appeals (8 staff); handling of complaints and issuing advice (9 staff); promotion and dissemination of RTI (5 staff); information technology development (6 staff); general administration (4 staff) and the director (1 staff).

Given the small staff, the OOIC recognizes the need for implementing agencies to have the capacity to handle OIA-related matters in order to lessen the OOIC's burden. To achieve this, a few campaigns and activities were launched. The state agencies' performance on information disclosure was integrated into officials' key performance indicators (KPIs) to provide them with incentives. In addition, an operations manual on RTI promotion and protection was published in 2010.²⁶

Other RTI-promotional activities conducted by OOIC include:

- Conducting training and a seminar on the implementation of the OIA and the promotion of RTI for state officials;
- Starting a project in 2011 that entailed visiting information centers at other state agencies to provide guidance on how to disclose official information and to develop a good practice information center model in each province nationwide;
- Updating OOIC's policies and plan annually, by integrating inputs from the annual reports on RTI implementation submitted to OOIC by state agencies throughout the country;²⁷

FIGURE 5. OOIC Website for Knowledge Management

- Providing a downloadable information center assessment check-list on the OOIC website; and
- Providing an example of an electronic information center online so that implementing agencies can take advantage of: <http://www.oic.go.th/infocenter/001/default.asp>.

Each year, the OOIC organizes an OIA test for state officials. In fiscal year 2011, there was a three-day test for 225 officials. Only 93 of these officials achieved the 60 percent pass mark, constituting less than half (41.33 percent) of all the officials who took the test. They were awarded a certificate by the Chairman of the OIC, who is the Minister of the Prime Minister's Office, at an OOIC Annual Seminar.

The OOIC has a website for knowledge management, <http://www.demooic.com/km/index.html>, to implement the Knowledge Management Strategy of the Office of the Permanent Secretary (OPS), which it is under. The strategy aims to promote offices under the OPS to become learning organizations. There also are annual plans and indicators to implement the strategy.

Leadership

Direction of the OOIC is provided by the OOIC's director and the Minister of the Prime Minister's Office, who is the OIC chair. Recruitment and removal of the OOIC director is in accordance with the regulations of the Civil Servants Bureau. After the selection process is completed by a recruitment committee, the chosen candidate is appointed by the Permanent Secretary, to whom the OOIC's director reports. No term limit applies to the director or any of the OOIC's officials.

The OOIC has a strategic plan with a work plan and indicators, and the staff participates in the planning process. The OOIC's mandate, which is to implement and promote the OIA, is given top priority by the director.



Responses to Requests

Whilst the OOIC is an oversight agency, it must comply with the OIA and Royal Decree on Criteria and Procedures for Good Governance, B.E. 2546 (2003), like all other government agencies. As such, it needs to provide information to the public both proactively and when requested, and has to have a one-stop-service center to facilitate visitors, including providing them with information.

As the OOIC is under the OPS of the Prime Minister's Office, the Information Center is a part of the OPS' One-Stop-Service Center. The Information Center has an official to assist visitors and respond to their queries. S/he also collects related fees. The OPS assigns specific officials to coordinate with other state agencies on information-related matters.

Requests for official information from the OOIC can be done either formally or informally. The OOIC website explains citizens' right to request information and provides instructions on how to request information, the request form and an example of a request. This information is applicable not only to OOIC. Citizens who wish to request information from other government agencies can follow this instruction and use the request form.

Although the OIA requires that a request be made, it does not require that the request be made in writing. However, making requests in writing benefits the requesters themselves. They will have proof of their request and, as such, can refer to it for a follow-up in case they do not hear from the OOIC within 15 days.

According to the Director of the OOIC,²⁸ the request should be written comprehensively, covering both details of the requester and details of the information one wishes to request. For example, if one wishes to obtain information about a contract of a *tambon* administrative organization (TAO), s/he should specify the title and the date of the contract. If the requested information is about the minutes of a TAO meeting, the subject and date of the meeting and the exact title of the committee which had the meeting should be written in the request.

In the request form, s/he needs to put down if s/he wishes only to see the document, or to have a copy of the document or also to have the copy certified. S/he should also write the purpose of his/her request although it is not required by law. The provision of the purpose will assist the IDT in considering the request and weighing the public's, stakeholders' and requester's interests.

The request is to be submitted to the General Administration Section of the Office of the Permanent Secretary, who will pass the request to the OOIC. The OOIC can respond directly to the requester.

There are five channels through which citizens can request information from the OOIC: visit the OPS One-Stop Service Center, postal mail, fax, electronic mail, and website www.opm.go.th.

The OOIC website says it responds to each query posted on its interactive web-board within 2 days. Interested persons can request OOIC publications for free, provided they pay the postal cost.

Records Management

The OOIC does not manage records by itself. This responsibility is the task of the Documentation Section of the OPS Information Center and overseen by the Legal Office.

Documents are managed by category and subject in two formats: paper and the website, www.opm.go.th/imageopm/nps/nps6100.doc. Both of them are accessible to the public.

The OOIC has just launched a new website to facilitate the visitor's search. <http://www.demooic.com/innovation/about.htm>.

Budget

The OOIC's mandate is to promote and implement the OIA, and its entire budget is for this purpose. The OIC gave policy recommendations for OOIC's strategic plan for 2012–2015 and proposed them to the Cabinet for approval. Once approved, the OOIC prepared projects, work plans and a budget for each strategy.

The OOIC's budget allocations for the following strategies are as follows:

1. Strategy to promote right to know and people's access to information—10.20 million Baht
2. Strategy to manage state agencies' information—222.66 million Baht
3. Strategy to promote transparency and fair use of state power—116.45 million Baht.
4. Strategy for integrative restructuring—27.82 million Baht

For fiscal year (FY) 2011, the OOIC received a budget of 23.34 million Baht. About half of the amount went to cover personnel costs (11.21 million Baht), 7.13 million was spent on its operations (office expenses, meetings, outreach and training) and 5 million for other activities, which in 2011 was mainly for a project to increase the government's credentials on transparency. The OOIC's annual operational budgets during FYs 2007–2011 remained roughly unchanged. For FY 2012, this budget was reduced due to critical floods in the country and the government re-allocated budgets from several agencies to restore the post-flood economy. The OOIC observed that it might be difficult to regain the budget in following years to pursue the proactive strategy and that the RTI work could be impeded.

"The government has not paid much attention to the RTI. The budget and personnel are not sufficient for proactive activities nationwide. In the past, the OOIC has not utilized electronic technology much. We are developing that area right now...We received a budget for upgrading our website and will try to keep our record electronically...begin to use tablets for our internal meetings to reduce the use of paper and also to have our staff become familiar with technology. We also use 'Line' (social media) for our work. Some senior officials feel this could be side-stepping the proper procedures. Older people are not adaptive to changes," said Pol.Lt.Col.Tienrat Vichiensan, the OOIC's Director.

4.5. COMPLIANCE WITH PROACTIVE DISCLOSURE REQUIREMENTS

Strengths

- Law and regulations are in place to promote proactive disclosure.
- Agencies comply with the law and proactively disclose the required information.

Weakness

- The degree of implementation varies among agencies.



Disclosure Requirements

State agencies and officials perform their tasks following the laws and regulations that govern their agencies. In Thailand, the OIA and the Cabinet Resolution of December 28, 2004 require state agencies to provide certain categories of information proactively to the public.

Sections 7 and 9 of the OIA identify information which is required to be disclosed to the public proactively. Section 7 requires state agencies to publish certain information in the Government Gazette. This information includes:

- (1) The agency's structure and operational organization;
- (2) A summary of its key responsibilities and *modus operandi*;
- (3) A contact address whereby the people can request information or advice on how to contact the agency;
- (4) Rules, Cabinet resolutions, orders, commands, regulations, plans, policies or interpretations affecting the public; and
- (5) Any other information as determined by the OIC.

According to Section 9, "State agencies shall make available at least the following official information for public inspection in accordance with the rules and procedures prescribed by the OIC:

- "(1) Resolutions or decisions which have direct impact on the non-state individuals including dissenting opinion and orders relating thereto;
- (2) Policies or interpretations which do not fall within the scope of the requirement of publication in the Government Gazette under section 7 (4);
- (3) Work plans, projects and annual expenditure estimates of the year of their preparation;
- (4) Manuals or orders relating to the work procedures of state officials which affect the rights and duties of private individuals;
- (5) Published materials to which a reference is made under Section 7, paragraph two;
- (6) Concession contracts, agreements of a monopolistic nature or joint venture agreements with private individuals for the provision of public services;
- (7) Cabinet's resolutions or resolutions of the committees which were appointed by a law or by a Cabinet; the list of technical reports, fact reports or any other information used for their consideration shall also be provided;
- (8) Other information as determined by the Official Information Commission."

Given the limited implementation of the OIA by state agencies in the early 2000s, the Cabinet made a Resolution on December 28, 2004, urging agencies to comply with the OIA. In particular, the Resolution required agencies that had a website to post the following information on their websites: bidding, tendering, decisions on procurement and all the information under Section 9 of the OIA.

Almost six years later, a group of CSOs²⁹ successfully encouraged the OIC to issue an OIC Announcement dated June 7, 2010 requiring that certain environmental and health information be proactively disclosed in accordance with Section 9(8) of the OIA.

Being the oversight agency does not make the OOIC immune from the OIA, the Cabinet's Resolution or the OIC Announcement. In fact, the OOIC provides information on Sections 7 and 9 of the OIA at the OPS's Information Center. It also proactively provides information in several other forms, including a quarterly newsletter, flyers, posters and postings on public relations boards at its own office building.

However, although the OOIC provides a wealth of information on its website,³⁰ it is not easy to locate the information one seeks. This is due to the way the information and data is managed and presented. It lacks a good classification system, either by subject or year. However, at the time of writing, the OOIC has just started a new website, hopefully with a better classification system.³¹

All implementing agencies are subject to the same aforementioned law and regulations, i.e., the OIA, the Cabinet's Resolution and the OIC's Announcement. Governed by the same rules, their activities regarding information disclosure are similar to those described above, but their priorities tend to vary.

Two Examples: The Ministry of Natural Resources and Environment and the Ministry of Agriculture and Cooperatives

The Ministry of Natural Resources and Environment (MoNRE) publishes information under OIA Section 7 in the Royal Gazette and posts the documents required to be made available for public access under Sections 7 and 9 on the first page of its website.³²

Each Department under MoNRE has its own website as well. For instance, the Office of Natural Resources and Environmental Policy and Planning (ONEP) posts the information required to be disclosed proactively on its website, <http://www.onep.go.th/information>. It also provides other information via social media, Facebook.com/onep.go.th, Twitter.com/oneptwitt, and a free mobile application "ThaiEnvi4Future."

Likewise, the Pollution Control Department (PCD) publishes information under OIA Section 7 in the Royal Gazette, places information under Sections 7 and 9 in its Information Office and also posts them on its website, www.pcd.go.th. PCD also reports water quality at 76 stations covering 25 water sources nationwide on website www.wqmonline.com and air quality on <http://air4thai.pcd.go.th/web/>. In addition, the Department's mobile application, Air4Thai, enables both iOS and Android users to access air quality information from monitoring stations nationwide free of charge.

Although water and air quality data is not among the information listed under Section 7 or Section 9 as being required to be disclosed to the public proactively, it is the information that the general public has requested from MoNRE the most.³³ Thus, MoNRE proactively provides the information because it is of public interest.

In accordance with the OIA, the Ministry of Agriculture and Cooperatives (MoAC) has assigned its Agricultural Information Division to serve as the Official Information Center and kept a space in the Ministry's library to provide the information that state agencies are required to make available for people's inspection (Sections 7 and 9 of the OIA).



MoAC also provides information on the agricultural database, agricultural information technology, plant and animal diseases, events, etc. on its website, www.moac.go.th. MoAC's Service Center, required by the Royal Decree on Criteria and Procedures for Good Governance, B.E. 2546 (2003), is online, <http://service.moac.go.th/main.php?filename=index>. People can also reach MoAC at its call center.

Apparently, websites have become one of the most essential means for government agencies to provide information proactively. The information disclosed is not limited to that required by law but also covers other information that the agencies consider interesting to the public.

4.6. ROLE OF CASE LAW

Strength

- The rulings of the Administrative Court have set a precedent.

Weakness

- Agency officials are still reluctant to disclose information and often apply judgment, granted by law, to refuse to disclose information, even when the requested information is not under either Sections 13 or 14 and there are prior similar cases with decisions that they can follow. This reluctance is to avoid any possible adverse impacts on them.

Although there have often been similar appeals, state officials have not made use of any appeal decision as a precedent. This is because they are fearful of possible prosecution.³⁴ The OOIC has compiled decisions of IDTs on both disclosure and non-disclosure cases for dissemination.

The situation is different at the Administrative Court, however. The following are some of the rulings which have set norms for ensuing considerations:³⁵

- The Court has interpreted certain government documentation to be the agency's operational guidelines, and not rules. As such, they are not required to be published in the Royal Gazette (ref. the ruling of the Supreme Administrative Court of 530/2554).
- The Court ruled that when a state agency or official applies its judgment not to disclose information, s/he has to check against some criteria, such as the conduct of state agencies according to law combined with public interest and the interest of the private individual, and that the information has to be in accordance with Section 15, clauses (1)-(7) only (ref. the Ruling of the Supreme Administrative Court of 22/2555).
- The Court has interpreted what information is considered to be 'personal' and that state agencies shall not disclose (ref. the ruling of the Supreme Administrative Court of 46/2554).
- The Court ruled that the entity authorized to consider appeals regarding information non-disclosure is the IDT, not the OIC (ref. the ruling of the Supreme Administrative Court of 205/2553).

5. Agency-Level Practices: Ministry of Natural Resources and Environment and Ministry of Agriculture and Cooperatives

This section covers two Ministries: Ministry of Natural Resources and Environment (MoNRE) and Ministry of Agriculture and Cooperatives (MoAC).

MoNRE was founded on October 2, 2002, although the management of natural resources and the environment in Thailand began much earlier. In fact, the National Environmental Quality Act, which governs the operations of MoNRE, was passed in 1992, the very same year that the UN hosted the UN Conference on Environment and Development. The founding of MoNRE in 2002 only marked a reorganization of this Ministry.

MoNRE's responsibilities include the protection of the nation's natural resources: water, oceans, minerals, and forests and the protection and restoration of the environment. For its organizational structure, see Annex 2.

MoAC is one of the oldest Ministries in the Thai government. It is responsible for the administration of agricultural policies, forestry, water resources provision, irrigation, and the promotion and development of farmers and cooperative systems, including manufacturing processes and agricultural products.

MoAC has under it 2 administrative offices, 13 departments, 5 enterprises and 3 state enterprises.³⁶

Each Ministry has an Office of the Permanent Secretary (OPS), which is responsible for the Information Center, and an Information Committee. Each Ministry also has under it several departments, agencies, state enterprises, and public companies. Some of these agencies have their own Information Centers and Information Committees.

5.1. LEADERSHIP

Strength

- MoNRE demonstrates leadership in promoting OIA implementation.

Weakness

- RTI is not given similar attention by other implementing agencies, e.g. MoAC.

The organizational structure for implementing RTI in MoNRE and MoAC is similar to that of the OOIC. Their Information Offices, which oversee the disclosure of official information, are under the OPS of their respective Ministry. And like any other civil servants, the OPS Heads have no term.

MoNRE has demonstrated its leadership in promoting RTI. On September 24, 2012, MoNRE signed an MoU with the OOIC to become a prototype model as a Ministerial Information Center under OIA implementation. For fiscal year 2014, MoNRE has included in its action



plans (i) the improvement of its Information Center to meet the OOIC's standards, (ii) the holding of capacity building workshops for MoNRE's management, division heads and information officials both in Bangkok and in the provinces, and (iii) the establishment of an information office within each department, state enterprise, company and public company under the Ministry in order to create a wide understanding of OIA and RTI among both officials and the general public.

At MoAC, however, RTI seems to be regarded as a task required by law and a set of regulations that the Ministry has to duly comply with, but it is not given high priority. This may have to do with the lack of understanding of RTI and OIA within MoAC.³⁷

5.2. INFORMATION CENTER AND HUMAN RESOURCES

Strength

- Each agency has officials assigned to the OIA-related tasks. These officials have been trained on the OIA by the OOIC.

Weaknesses

- The understanding of RTI among officials might be mainly limited to only Sections 7 and 9 of the OIA, which require proactive disclosure of certain information.
- Some agencies have a very limited number of qualified RTI officials.

The Royal Decree on Criteria and Procedures for Good Governance, B.E. 2546 (2003), requires all government agencies to set up a one-stop service center to facilitate people's contact with the agencies.

Section 30 states, *"The Permanent Secretary of each Ministry, with support of all departments in the Ministry which provide public service, shall establish a one-stop service center (OSSC) so as to facilitate people in complying with laws or other rules. The people shall ask for information, permission or approval in a matter under power and duty of all departments under the same Ministry by contacting officials at the OSSC."*

Section 31 requires the public body to appoint information officers for the gathering and processing of the requests.

"The OSSC under Section 30 shall have a coordinating officer for gathering the requests of people and then sending those requests to official of the government agency related therewith for further implementation. The OSSC shall provide people any form, information and documents related to authority and duty of all departments in the Ministry.

There shall be duty of related departments to provide, in writing, details of documents and evidences required in applying permission or approval in any matter to the coordinating officer of the OSSC. The coordinating officer shall inform people who come to the OSSC, at the first contact, to know about the requirements and follow up whether the requirements have been met, and shall also inform people about the consideration period.

The request applied to the OSSC under section 30 shall be deemed to be applied to related government agency as prescribed by law or rule."

As a consequence, the MoNRE established a Service Link Center (SLC) to function as its one-stop service center on September 22, 2006. The Ministry has also appointed an Official Information Committee to consider if any information can be disclosed or not under the OIA.

MoNRE's SLC carries out the following functions:

- Performs a public service by providing an SLC that integrates the various services of all the agencies under the Ministry
- Discloses information as determined by the OIA 1997
- Classifies documents to facilitate searching and provides information services to ministry officers and the general public
- Takes responsibility for books and documents in the library of the Permanent Secretary
- Performs other tasks as assigned

The operational requirements of the SLC include:

- Establishing a center for public service
- Developing an information service system and a complaints system
- Developing a tracking system for information requests and complaints

The Structure of the Center is composed of:

- Administration Office
 - General administration
 - Supplies
 - Planning and budget
- Technical Office
 - Information service
 - Approval and permission service
 - Complaints handling
 - News and environmental warning center
- Operations Office
 - Customer service
 - Operator
 - Coordination
 - Operational support

MoNRE has 9 officials handling the SLC. Capacity building for the staff is held regularly, and all of them have been trained on OIA implementation.

Likewise, MoAC has assigned its Agricultural Information Division to serve as the Official Information Center and provide a space in the Ministry's library to provide the information that state agencies are required to provide for people's inspection proactively (Sections 7 and 9 of the OIA). Only one librarian is assigned to be the Information Official and has received OIA training from the OOIC.



One legal official at the Legal Division is responsible for coordinating with other agencies under MoAC to obtain information requested by citizens or other state agencies. Both the Agricultural Information Division and Legal Division are under the OPS.

Other departments and agencies under MoAC have to set up their own information office or space to implement the OIA.³⁸

Both Ministries need more OIA training for their staff. They feel that their officials' knowledge and understanding on the OIA should be strengthened and that training should be provided regularly. MoNRE also sees an insufficient number of personnel as a barrier to their effective OIA implementation.³⁹

5.3. PERFORMANCE MONITORING SYSTEMS

State agencies report their RTI performance or their OIA implementation to the OOIC annually, using the OOIC-prepared template. The OOIC uses the information in these reports to adjust its strategy for the ensuing years.

The OOIC reports to the OIC and the OPS on the performance of each subcommittee under the OIC. OOIC staff themselves are evaluated twice a year.

In addition, the OOIC also reports its own performance to the Cabinet at least once a year. The Cabinet will consider the report and may have it disseminated to the wider public.⁴⁰

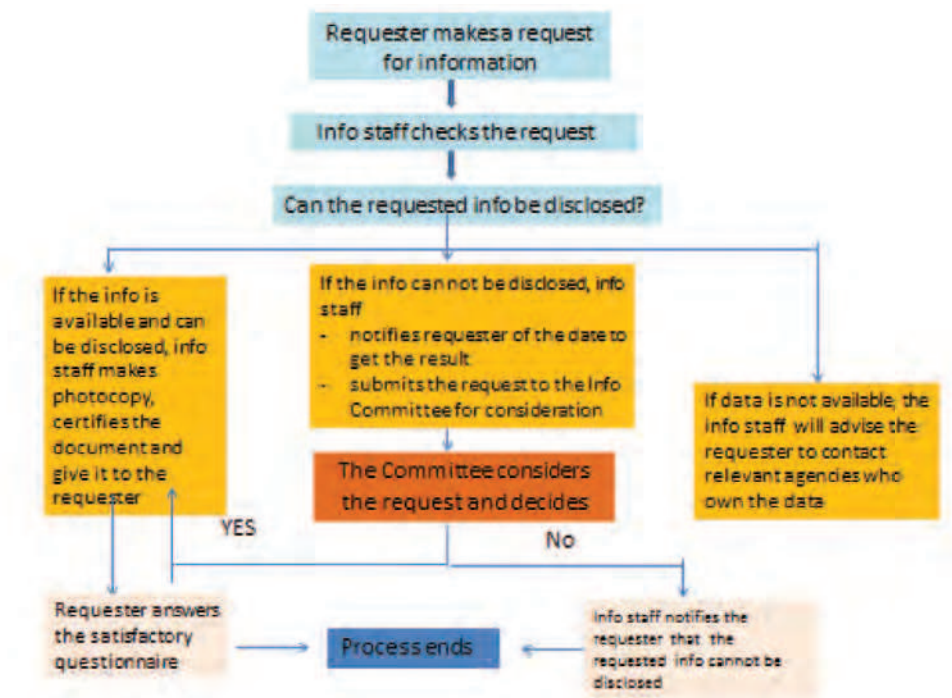
All government officials, including staff of MoNRE and MoAC, are evaluated by key performance indicators (KPIs) prepared by the Office of the Public Sector Development Commission (OPDC). During 2009–2011, OPDC included RTI in the KPI indicators. However, thereafter such indicators were removed as it was deemed that RTI indicators were already included in the good governance indicators of the KPI.⁴¹

5.4. RESPONSES TO REQUESTS

MoNRE's procedure for handling information requests is shown in the self-explanatory diagram on the following page (figure 6).

Information can be requested from MoNRE in one of the three following ways: by visiting the Information Center (located in the library), phoning or writing. In 2013, there were 351 visitors to the Information Center and 2,417 requests via phone calls. No request was made for information under OIA Section 11 (information other than that required to be disclosed proactively under Sections 7 and 9). During the year, MoNRE refused two requests for information under Section 15 (exemption), which allows officials to use their judgment to disclose information.⁴²

Some people approach specific departments directly, instead of going to the Ministry's Information Center, to obtain the information they want. The Department of Environmental Quality Promotion (DEQP) also has an Information Center located in its library. In 2012, this Information Center received 8 requests from visitors and 293 requests by telephone.⁴³ The DEQP Secretary, who also is a member of DEQP Information Committee, said: "It is a mandate of the Department to disseminate information about the environment. Thus we readily provide information when asked." She added that "the Department's Information Committee has not held any meetings during the past two years as there was no dilemma about providing information."⁴⁴

FIGURE 6. MoNRE's Official Information Request Procedure

Source: Translated from http://slc.mnre.go.th/main.php?filename=data_service

The Office of Natural Resources and Environmental Policy and Planning (ONEP), another agency under MoNRE, also provides three similar ways to DEQP for people to request information. During FY 2011, ONEP Information Center received 2,771 requests from visitors, 172 requests via phone calls and 9 requests in writing.⁴⁵

Among the complaints MoNRE received during FYs 2010-2013, very few were about 'giving information/asking for information'. Specifically, only 4 out of a total of 581 complaints in 2010 were about this, 6 out of 1,060 in 2011, 7 out of 1,153 in 2012 and 11 out of 672 in 2013. That is an average of only 0.8 percent.

This could be interpreted to indicate that citizens are more or less satisfied with MoNRE's performance as regards providing information. However, one needs to realize that these statistics are based on electronic petitions only. Thai people do not have equal access to electronic communication. Urbanites have easier access than rural communities.

MoAC presents a different picture. An individual can make a request to MoAC's Information Center, which in return will help the requester by coordinating with the department from which the information is being requested. The Ministry has a request form for a requester to fill in, but it is not downloadable from the website.

Based on the 2013 Annual Report on OIA Implementation, which MoAC submitted to the OOIC, MoAC's Information Center provided information services to 92 visitors and received 50 requests for information under OIA Section 11 (information other than that required to be disclosed proactively under Sections 7 and 9). It also provided information to approximately



800 requesters via phone calls and 1,000 requesters via email. There were also roughly 64,000 visitors to its website, www.moac.go.th.⁴⁶

However, based on an interview with the Head of Strategic Planning and Public Relations at the Agricultural Information Division,⁴⁷ serving also as MoAC's Information Center, there has been no request pertaining to information under the OIA since the establishment of its Information Center in 2004 and the request form has never been used. "Information under the OIA" was understood to be information under Section 9 of the Act, which is required by law to be made available for the public's inspection. Among the information in this category is information about procurement, bidding and tendering. MoAC posts this information on its website for open access.⁴⁸

5.5. RECORDS MANAGEMENT⁴⁹

Strengths

- There is a law on records management for all state agencies to follow.
- A Cabinet Resolution requires each agency to submit its record of OIA implementation to the oversight agency at least once a year.
- Some agencies are beginning to keep digital records of their data.

Weakness

- In reality, agencies often have problems locating or retrieving the information.

When asked about records management, officials replied that all the documentation is managed according to the Permanent Secretary's Office Regulation on Administrative Work, B.E. 2526 (1983).

As regards information that is under OIA Section 7 (information required to be published in the Royal Gazette) and Section 9 (information to be made available for public inspection), all agencies under each Ministry send this information to the respective Ministry's Information Center to compile and make available to the public. At the same time, the information is also available at the respective departments; people can and often do request information directly from the departments which possess the information.

At the MoAC's Information Center located in the Ministry's library, the information under Sections 7 and 9 of the OIA are classified by the Section that the information falls under and by the clause of that Section, e.g. Section 7 (1), Section 7 (2), etc.⁵⁰

The OPSs and each department under MoNRE and MoAC keep a record of their OIA implementation, i.e., the number of requests received, the means by which requests were made, the information requested, etc., by filling in the report template that the OOIC has prepared for them, and individually submit the data annually to the OPS of the Prime Minister's Office. This annual submission is required by the Cabinet's Resolution dated January 21, 2003. Neither Ministry collects the reports prepared by departments. It is the OOIC which collects all these reports, but the OOIC does not analyze or reorganize the information to provide useful statistics.

MoNRE, however, submits its OIA implementation reports to the OPS of the Prime Minister's Office, which the OOIC is under, on a quarterly basis.⁵¹ Likewise, ONEP keeps a quarterly record of its OIA implementation.⁵²

5.6. BUDGET

Strength

- Although there is no budget line for RTI, MoNRE provides training on the OIA to officials and the general public.

Weakness

- Neither MoNRE nor MoAC has a budget line for RTI activities.

Although MoNRE's and MoAC's RTI performances are rather different, they do have one thing in common. Neither of them has a budget line for RTI or OIA implementation.

According to Dr. Wijarn Simachaya, a Deputy Permanent Secretary of MoNRE, the Ministry has no budget line for implementing OIA or promoting RTI. But there is a budget for training officials to improve their capacity. This includes training for the staff working on OIA implementation.⁵³

The money actually spent on RTI promotion is very small, as training is the only RTI activity that the Ministry undertakes. MoNRE's overall budget for FY 2013 totaled 33.3 billion Baht, while the OPS's budget was 1.3 billion Baht. The 2013 training on OIA for MoNRE's personnel cost the Ministry only 46,050 baht or 0.0034 percent of the OPS's budget.⁵⁴

Indeed, MoNRE did cite the lack of budget as a barrier to implementation of the OIA in an annual report it submitted to the OOIC.⁵⁵

MoAC's 4-year Operational Plan for FYs 2012–2015 allocates the Ministry's budget as follows: 191.60 million Baht for personnel development, 112.80 million Baht for dissemination and agricultural public relations and 160 million Baht for information technology and communication development.⁵⁶

5.7. TRAINING AND PUBLIC OUTREACH

Strengths

- The OOIC provides regular training for state agency officials.
- All of MoNRE's SLC staff have undergone the OIA training.
- In MoAC, the staff assigned to handle OIA-related matters has also received the OIA-training.
- The OOIC also provides training and speakers for public seminars on the OIA.
- All the agencies covered in this study disseminate their materials to the general public both online and in paper form.

Weaknesses

- The disseminated materials are about natural resources and the environment (in the case of MoNRE) and agriculture and related matters such as the water situation (in the case of MoAC), but not about people's RTI.
- MoAC has only one staff member assigned to handle OIA-related matters.



To date, RTI capacity building in government agencies in Thailand is undertaken in two forms—providing training and producing manuals.

The Cabinet Resolution of January 24, 2012 orders all Ministries, departments, provinces and local administrations to prepare training curricula on the OIA or to integrate the OIA-related issues into the existing training curricula on a continuous basis.

In reality, the OOIC, the oversight agency, takes responsibility for providing RTI or OIA training to government officials, and to a lesser extent, to the general public. The OOIC conducts four training sessions for state agency officials each year. Information Officials at all agencies are supposed to receive training from the OOIC.

Some agencies, e.g. MoNRE, also conduct training on OIA for their staff and the general public. MoNRE invited OOIC officials to speak to the 62 trainees at its workshop held in July 2013.⁵⁷ The Ministry also hosted training for interested people in February 2013.⁵⁸

During FY 2012, ONEP held a workshop on “The implementation of OIA 1997” to increase the capacity of its officials and staff, with 88 participants. ONEP also held a session on “Dissemination of public information pertaining to the environment and health” within each of its four meetings on “Environmental Impact Assessment: Information for the People.” The events were attended by a total of 552 persons.⁵⁹

With regard to manuals, in 2005, the OOIC published a Manual for Officials’ Implementation of the OIA, both in printed and digital forms, and this is downloadable from the OOIC website. (http://www.oic.go.th/handbook_officer.pdf). MoNRE has also produced an operations manual for officials of the Service Link Center, which can be downloaded from the Center’s website. (http://slc.mnre.go.th/ewt_dl_link.php?nid=60&filename=data_service)

Naturally, one is eager to learn of the outcome of these capacity building efforts or even the quality of the training courses and manuals. Unfortunately, no record of an assessment or evaluation of these activities exists. This is one of the improvements that the OOIC, MoNRE, ONEP and any other agencies conducting capacity building activities should pursue.

6. Capacity and Influence of Civil Society

6.1. INDIVIDUAL CITIZEN INVOLVEMENT/DEMAND FOR RTI

Strength

- Most people are aware that the OIA exists and that they can request official information.

Weakness

- Not many citizens have exercised their RTI.

A survey conducted by the OOIC in 2010 yielded hopeful results. Five thousand copies of the questionnaires were circulated to state agencies nationwide for the general public to answer. The OOIC received back 2,627 copies, constituting a good response of 52.54 percent. While 68.4 percent of all the respondents replied that they had never requested official information, 64.5 percent were aware of the Official Information Act. A high percentage (82.8%) said they would exercise their right to request information.

TABLE 2. OOIC Survey Results on Citizen Knowledge of RTI

Question	Yes (%)	No (%)
Are you aware of the OIA?	64.5	35.5
Do you know that state agencies provide the opportunity for people to monitor, investigate and inquire about information?	74.4	25.6
Do you think you will use the service in the future?	82.8	17.2
Do you know about the OIC?	24.9	75.1
Have you ever attended any activities organized by either the OIC or OOIC?	28.7	71.3

Source: Selected data from a Table on Opinions Regarding the Administration of the Official Information Commission in OOIC, Annual Report 2010, in Thai. <http://www.oic.go.th/FILEROOM/CABOICFORM05/DRAWER02/GENERAL/DATA0002/00002219.PDF>

6.2. CIVIL SOCIETY ORGANIZATIONS

Strengths

- Capable CSOs are a main driver for promoting RTI and empowering local communities.
- Cooperation between CSOs and state actors has led to the development of a successful model.

Weakness

- Some advocacy CSOs rely on funding support from outside Thailand.

Each of the three CSOs interviewed for this study has the capacity to implement the OIA. Although OIA is not their target area of work, they use the OIA to obtain official information for their litigation. All of them provide training to local communities on environmental issues and civic rights, including access to information, participation and access to justice, etc. They partner with other CSOs to build a powerful network to advocate for certain causes and have influenced implementation of the OIA.

This study interviewed the heads of three CSOs, ENLAWThai Foundation (ENLAW), Stop-Global Warming Association Thailand (ThaiSGWA) and the Sustainable Development Foundation (SDF).

Both ENLAW and ThaiSGWA provide *pro bono* legal assistance to local communities and the marginalized sector, particularly on disputes related to natural resources and the environment. They defend the impacted people and file lawsuits on behalf of the villagers against companies whose activities damage the environment and/or the communities. Several of their cases have involved bringing state agencies to the Administrative Court. In 2012, ThaiSGWA was named the Human Rights Organization of 2012 by the National Commission on Human Rights for the over 3,000 legal cases it had undertaken to defend the rights of local communities.

While their work involves making requests for official information, their primary focus is neither on RTI nor on corruption. Indeed, they are beneficiaries of the OIA and their requests have increased transparency in the issues that they investigate. Their objectives are to bring justice to the impacted communities. In the process of seeking justice, they seek information from state agencies by implementing either the OIA or the Constitution (Section 57).



Because they are often opponents of government agencies in court, neither EnLaw nor ThaiSGWA takes financial support from the state so as to remain independent and avoid a conflict of interest. EnLaw is supported by international donors and direct donations via its website, while ThaiSGWA does not receive any support from donors. ThaiSGWA receives a small amount of money offered to them by the villagers for whom they provide legal assistance as a token of appreciation. They are supported by other sources of income, e.g., payments for research.

The SDF is a little different. It does not conduct litigation, but is a development and natural resources and environment (NRE)-focused CSO. It is a partner of the Access Initiative⁶⁰ coalition in Thailand, which advocates democratic environmental governance. It works with grassroots communities to strengthen and empower them on issues ranging from livelihood improvement to the impacts of government policies on the local communities. Although RTI is not its focus, the SDF supports access principles to empower the communities. The SDF receives funds mainly from international donors, especially the EU and UNDP. It also receives funds indirectly from the government as an NGO member of the Environmental NGO Assembly, to which MoNRE's DEQP provides development funds. In an interview, the SDF's Executive Director made it clear that the Foundation's decisions are independent from their donors.

The SDF, EnLaw and ThaiSGWA provide training to communities, but do not necessarily focus only on RTI. The training is often on the environment, legal rights, environmental governance and certain techniques such as environmental impact assessment (EIA) and environmental and health impact assessment (EHIA). In fact, the training they provide is geared towards responding to the communities' needs in certain contexts.

Each of the three CSOs networks with other organizations in Thailand, such as with the Thailand Council of Lawyers, academics, other CSOs, community-based organizations, women's groups and local communities. The SDF and ENLAW also cooperate with CSOs in other countries. For example, ENLAW partners with Environmental Law Alliance Worldwide (ELAW) to seek technical information on the impacts of lead contamination and how to clean up the contaminated Klity Creek area, severely impacted by lead mining.⁶¹

SDF and ENLAW were among the 36 organizations collaborating with the Thailand Environment Institute in 2008 in their efforts to implement Article 9(8) of the OIA, making NRE and health-related information 'public information'. They prepared a list indicating the types of environmental and health information that government agencies should proactively make available to people and submitted a letter to the OIC, with a recommended list attached. Two years later, the OIC announced on June 7, 2010, that information on the environment and health must be available for people to inspect as stipulated in Section 9(8) of Thailand's Official Information Act B.E. 2540 (1997).

The CSOs have clearly played a key role in influencing implementation of the OIA. It is worth noting that this success was based on strong cooperation between the CSOs and the state sector. Had it not been for the advice and cooperation of the Official Information Commissioner and the OOIC, this particular success might have not been achieved.

6.3. MEDIA

Strength

- To a certain extent, the OIA enables the media to have access to official information and investigate corruption and wrongdoing within the state apparatus.

Weaknesses

- It takes a long time (months) to receive any response after a request is made.
- In most cases, the requesters have to appeal.
- The appeal process takes a long time and does not necessarily yield the expected result, i.e., the requester may still not get all the information requested.
- The reporters do not think it is worth spending more time appealing to the Administrative Court. This is because a news report has to be timely.

Three years after the promulgation of the OIA in 1997, Mr. Kavi Chongkittavorn, a senior reporter of the Nation newspaper, wrote about the public's and the media's enthusiasm for this law. He commented that the Act enabled reporters find out information and write investigative stories.⁶²

However, in recent years, Thailand has seen the proliferation of new media—cable and satellite television, internet-based television, digital radio and online newspapers, as they are cheaper to operate and freer to present alternative views than the traditional media. They have been able to increasingly draw audiences away from the traditional media, especially from a handful of terrestrial television stations known in Thailand as 'free TV', and as such attract more and more commercials. This makes it difficult for the traditional media to remain in business unless they adapt to the new challenging and competitive environment. Most of them chose to cut their costs, with the result that they can afford fewer qualified journalists than in the past.⁶³

Most media in Thailand are privately owned. There is no monopoly of media ownership, but the government has a strong voice among terrestrial television stations, the survival of which depends on commercials. The National Broadcasting Service of Thailand (NBT), in particular, echoes the government's voice.

This study interviewed two media advocates of RTI: Mr. Prasong Leartratanavisut, Executive Director of ISRA Institute Thai Press Development Foundation (ISRA Foundation), and Mr. Bunnaroth Buakli, senior reporter of ASTV Manager Newspaper. Mr. Prasong has been a long-time champion of RTI, well before he took up his present position at the ISRA Foundation. ASTV Manager Newspaper, manager.co.th, is the most popular non-tabloid news portal (as of 28 March 2010).⁶⁴ The two men are among the few widely known reporters who continue to implement the OIA today.

The ISRA Foundation cited the OIA when making a request to the Budget Bureau for the names of the companies which were commissioned for the 154 projects under the 120 billion Baht Integrated Flood Redress, Rehabilitation and Prevention Project,⁶⁵ because such information was not available on the Bureau's website. The information should be made available to the public proactively according to Section 7 of the OIA. About one month later, the ISRA Foundation received a reply from the Director of the Budget Bureau that this project was making use of the central budget and that the agencies and state enterprises requesting the budget were responsible for selecting the companies. As such, the ISRA Foundation should request the information from these agencies, not from the Budget Bureau.⁶⁶

One of Mr. Prasong's most recent uses of the OIA is the government's controversial rice pledging scheme. He did not receive all the information requested. This case is discussed in Annex 3.



In September 2012, the Chairman of the House of Representatives, who also is the Parliament's Chairman, took a few reporters to the UK for a field trip and to watch a football match. This trip became the talk of the town, and Mr. Bunnaroth used the OIA to request information about the trip from the Parliament. By January, he had not yet received any response. Mr. Bunnaroth then appealed to the OIC and, consequently, in April, he received a part of the information he had requested. Mr. Bunnaroth made another appeal to the OIC and is still waiting to hear the result. The not-yet-completed process has taken more than a year now.⁶⁷

The media use the OIA to unveil corruption and wrongdoing within the government. By reporting to people the information that they uncover, they have taken up the role of a 'watch-dog' and provided a check and balance mechanism. In a nutshell, the reporters use the OIA to report their stories so as to empower the people. This is clear in Mr. Bunnaroth's own words:

"...I see the importance of the Official Information Act, to be a tool for people to exercise their right. Not only is it democratic, international communities recognize this right [to information] as fundamental to a democratic society...Those who think about reforming Thailand want to reform only the upper structure – increasing politicians' power, increasing the power of the wealthy, removing the monitoring power of independent organizations, destroying those who are not members of their own political network ...You think Thailand will become a true democracy? No way. Because the heart of a democratic reform is to increase people's power in the lower structure."⁶⁸

6.4. PRIVATE SECTOR

Strength

- The private sector is aware of the OIA.

Weaknesses

- Private companies do not use the OIA to get information but to deny other companies access to their company's information.
- The private sector association does not give the OIA much weight.

There are several business associations in Thailand. The three main associations, whose members sit on several state committees, are the Federation of Thai Industries (FTI), the Thai Chamber of Commerce (TCC) and the Thai Bankers' Association (TBA). Spearheaded by the now deceased Dusit Nontanakorn, former President of the TCC, the private sector established the Anti-Corruption Organization of Thailand (ACT) in 2011. The ACT, with around twenty partner organizations from various sectors, has launched a series of anti-graft campaigns.

According to the Director of FTI's Legal Affairs, Secretary-General of the TBA and Director of ACT, while the associations are aware of the OIA, they have never used the law and do not see it being directly related to their work.

The FTI occasionally requests information, e.g., technical documentation and draft Ministerial regulations, etc., from state agencies, sometimes by using personal contacts and at other times by sending a formal letter. The FTI has received the information requested and therefore sees no need to use the OIA. The only exception is the Ministry of Finance, from which the FTI did not receive the draft Bill on tax management that it had requested. However, Mrs. Jongrak Chaisri, Director of FTI's Legal Affairs, said she has not studied the OIA thoroughly to judge if

the OIA could help her get the information. She added that the FTI encourages the state to disseminate information widely, consult with several sectors and hold hearings before enforcing any new laws.⁶⁹

In a similar fashion, Dr Twatchai Yongkittikul, Secretary-General of TBA, said the TBA has never used the OIA and was skeptical if using the Act could help get any official information, citing the government's rice pledging scheme as an example.⁷⁰ While ACT is an anti-graft organization, Dr Mana Nimitmongkol, its Director, said the organization had never used the OIA.⁷¹ The private sector has not lobbied for legislative changes that would impact the public's ability to obtain information through the OIA.⁷²

Private companies do not use the OIA to request official information either. But some companies use the OIA to deny other parties access to their company's information. The case described below exemplifies this point.

In September 2012, the Central Administrative Court ruled in favor of a grassroots group in a historic move that could set a precedent for people's access to business information. The Court ruled that a power plant developer must disclose its electricity purchase agreement to the group, which represents a community affected by one of the company's plants.

Gulf JP UT Co filed a complaint with the Central Administrative Court in 2009, asking the Court to nullify the decision made by the OIC and the Electricity Generating Authority of Thailand (EGAT), ordering the company to reveal the contents of the power purchase agreement it made with EGAT. The OIC and EGAT made their resolution after the People's Network against Power Plant Projects petitioned EGAT to reveal the power deal signed with the company, which is a developer of a 1,600-megawatt natural gas-fuelled power plant in Bang Khla district of Chachoengsao province in Central Thailand.

In September 2012, the Central Administrative Court dismissed the company's complaint, saying the 1997 Official Information Act guarantees the people's right of access to state information unless such disclosures will cause explicit damages to parties. In this case, the Court ruled that the disclosure of the power purchase agreement would not cause business damage to the company. The Court said the residents' request is due to their worries about the project's negative impacts on their livelihood and their wish to monitor state projects, and is not motivated by business concerns. The OIC and EGAT's resolution on the disclosure of the power purchase agreement is in line with the official information law and does not violate confidential business information law.⁷³

7. Broader Political Environment

7.1. POLITICAL WILL

Every law has an intention behind it. For the RTI law, it is based on the recognition of the civic right to know and to participate. As mentioned in Chapter 1, this recognition stemmed from the political disarray in the early 1990s, when people saw that they were being deceived by distorted information from the state and called for reform, leading to the eventual change in political leadership in 1992. In the Remarks at the end of The Official Information Act, 1997, the intention of having the Act was given:

"The reason for promulgating this Act is that in a democratic system, to give people a wide opportunity to receive information pertaining to the state's proceedings is essential.



This is so that the people will be able to express their opinion and exercise their political right correctly and in accordance with truth, which in return will promote having a government by the people...”

Indeed, the RTI law stands between the people and the state and manifests the state-people relationship. In Thailand, where civil servants are directly under the politicians, with no state workers union to help leverage the voice of officials, they are more or less at the mercy of the respective Ministers. The degree to which the OIA will be supported and implemented is therefore dependent on the willpower of those in the Cabinet, the Prime Minister and the ruling political party.

The current government has not expressed support for the OIA. This is evidenced by the case of the government’s rice pledging scheme, when the Ministry of Commerce did not release information about it to the public even when the OIA was used and an appeal was made to the Information Disclosure Tribunal (see Section 3.3 Functioning of Appeals/Courts.) Indeed, a study on Thailand’s RTI cites the unwillingness of state agencies to provide information as a key barrier to the effectiveness of the Act.⁷⁴

7.2. OPEN GOVERNMENT PARTNERSHIP

Whilst eligible to participate in the US-launched Open Government Partnership program, no Thai state agency participates in the program.

The Thai government has, however, participated in a number of international declarations, conventions and treaties that promote access to information, procedural rights, social justice and human rights. During the past two years in office, the government has made the following commitments:

- The International Convention on the Protection of All Persons from Enforced Disappearance, on January 9, 2012.
- The UN’s “Every Woman Every Child” Global Strategy for Women’s and Children’s Health on March 25, 2012.
- Party to the Optional Protocol to the Convention on the Rights of the Child on a communications procedure on September 25, 2012.
- ASEAN Human Rights Declaration on November 18, 2012.

Thailand is currently a party to 7 core treaties, namely: (1) International Covenant on Civil and Political Rights (ICCPR); (2) International Covenant on Economic, Social and Cultural Rights (ICESCR); (3) Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and its Optional Protocol; (4) Convention on the Rights of the Child (CRC) and its two Optional Protocols on the Sale of Children, Child Prostitution and Child Pornography and on the Involvement of Children in Armed Conflict; (5) International Convention on the Elimination of All Forms of Racial Discrimination (CERD); (6) Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); and (7) Convention on the Rights of Persons with Disabilities (CRPD). Should Thailand ratify the Convention on the Protection of All Persons from Enforced Disappearance, this will be the eighth core international human rights treaty to which Thailand is a party. The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW) is the ninth and the only remaining instrument to which Thailand is not yet a signatory or party.

Thailand is also a party to the UN Convention against Corruption.

It must be noted that if these protocols have no sanctions or monitoring mechanisms, it cannot be assumed that the signing of these documentations implies the government's openness or commitment to openness.

8. Conclusion and Recommendations

8.1. SUMMARY OF KEY FINDINGS/MESSAGES

One can conclude from this study that Thailand's RTI law, i.e., the Official Information Act, 1997, is received differently by different sectors. State agencies are required to comply with the OIA and other related regulations. Thus, they have appointed an Information Committee and set up or assigned a space in their libraries to be the 'Official Information Center.' The OIA does not give clear guidelines as to what information should be disclosed or withheld, but leaves it to officials' judgment. However, officials are reluctant to provide requested information as the OIA does not have a provision to protect them.

The private sector has not used the OIA to obtain information because companies have no difficulty accessing the information they want. Their personal contact with the agencies allows them to avoid the time-consuming formal request process. CSOs and the media are the sectors which have made the best use of the Act. However, its use among the media has been declining as it takes a long time to obtain information, while their reports often need to be completed quickly. And in some cases, the requested information never arrived.

The Royal Decree on Criteria and Procedures for Good Governance, B.E.2546 (2003) and the Cabinet's Resolution of January 24, 2012 require officials to either disclose the requested information as soon as possible and within 15 days after receiving the request or inform the requester within 15 days of the date they can have the requested information if it will take more than 15 days. Despite these 'laws', it actually takes at least a month to get any response from the officials after a request is made. In several cases, it took several months.

8.2. ISSUES GOING FORWARD

Some barriers to the effective implementation of this Act have to do with the law itself. However, the previous attempts to amend the Act, even when initiated by Official Information Commissioners, were less than successful. Another barrier has to do with the political will. This depends on the true commitment of the Prime Minister and the Cabinet to transparency and accountability.

Other factors involve Thailand's political culture, in particular the state's culture of secrecy and the patronage system, i.e., the patron-client relationship that is deeply rooted in Thai culture, which makes the state reluctant to draft a Bill to support full openness of official information. It also allows certain sectors of people to have easier access to information than others.

A key question at the present time is whether desirable changes are likely to occur. Thailand is witnessing a large-scale confrontation between two political factions. One faction is calling for national reforms. One of the proposed reform areas is the elimination of corruption. If this reform were to materialize, it may have significant and desirable impacts on the OIA.

Annex 1. Methodology

This study undertook desk research, including a review of various legislation—the Constitution of Thailand (1997, 2007), laws, Ministerial regulations, royal decrees, and regulations—as well as websites and RTI-related studies. It also applied the World Bank PAM indicators and conducted interviews.

The interviews were conducted with a Deputy Permanent Secretary of the Ministry of Natural Resources and Environment (MoNRE); the Official Information Commissioner; the Director and an official of the Office of the Official Information Commission (OOIC); Chief officials overseeing the Information Centers of MoNRE and the Ministry of Agriculture and Cooperatives and their Information Officials; 4 media representatives (ISRA Foundation, ASTV Manager Newspaper and Thai PBS Television); 3 CSOs (EnLaw, Siam Stop Global Warming Association, and Sustainable Development Foundation); executives from the three top private sector associations in Thailand; two Senior Judges of the Administrative Courts; and the Executive Director of the Anti-Corruption Organization of Thailand.

List of Interviewees

Dr. Anong Chanamool

Secretary, Office of Secretary, Department of Environmental Quality Promotion, MoNRE

Mr. Bunnaroth Buaklee

Senior Reporter/Columnist, ASTV Manager

Ms. Jariya Narkkheaw

Librarian, MoAC's Library

Mrs. Jongrak Chaisri

Director of Legal Affairs, the Federation of Thai Industries (FTI)

Dr. Mana Nimitmongkol

Director, Anti-Corruption Organization of Thailand (ACT)

Ms. Nattaya Vaelweerakoupt

Social and Public Policy News Editor, Thai Public Broadcasting Service (THAI PBS)

Mr. Niwat Maneekhut

Director of Information and Communication and Technology Center, Ministry of Natural Resources and Environment (MoNRE)

Ms. Panisa Luangvormeth

Director of Information Technology Development Group, Office of Official Information Commission (OOIC)

Ms. Pasiya Chuadee

Computer Technical Officer, Office of Official Information Commission (OOIC)

Mr. Prasong Lertratanawisute
Executive Director, Isra Institute Thai Press Development Foundation

Dr. Rangsikorn Upapong,
Senior Judge of the chamber of the Central Administrative Court

Mrs. Ravadee Prasertcharoensuk
Director, Sustainable Development Foundation (SDF)

Mr. Somchai Meenuchanart
Director of Information and Service Link Center, Ministry of Natural Resources
and Environment (MoNRE)

Mr. Srisuwan Janya
President, Stop Global Warming Association Thailand (THAISGWA)

Mr. Surachai Trongngam
Director, Environmental Litigation and Advocacy for the Wants (EnLaw)

Pol. Lt. Col. Tienrat Vichiensan
Director, Office of Official Information Commission (OOIC)

Ms. Thaninpan Pawawattananusorn
Chief, Strategic Plan and Public Relations, Agricultural Information Division,
Ministry of Agriculture and Cooperatives (MoAC)

Mr. Thienchai Na nakorn
Official Information Commissioner (OIC)

Ms. Thirakarn Ditwinyu
Chief, Legal and regulations section, Ministry of Agriculture and Cooperatives (MoAC)

Dr. Twatchai Yongkittikul
Secretary General, the Thai Bankers' Association (TBA)

Dr. Wijarn Simachaya
Deputy Permanent Secretary, Ministry of Natural Resources and Environment (MoNRE)

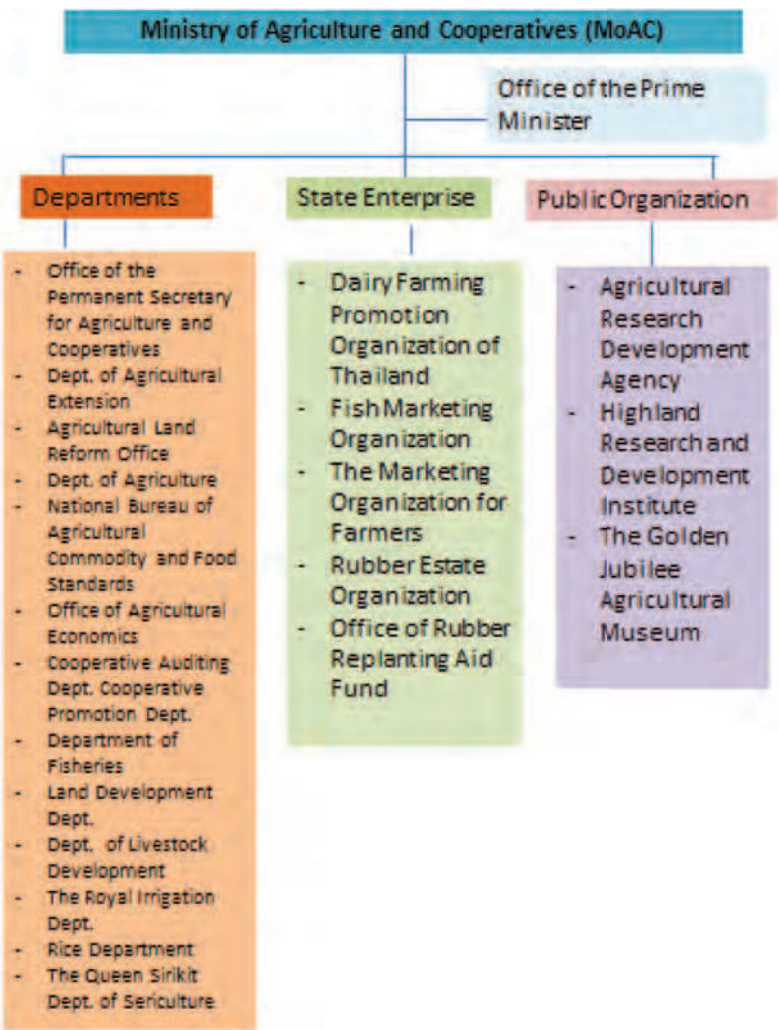
A senior judge of the chamber of the Central Administrative Court, who wishes to remain
anonymous.

Annex 2. Charts of Organizations Included in the Study

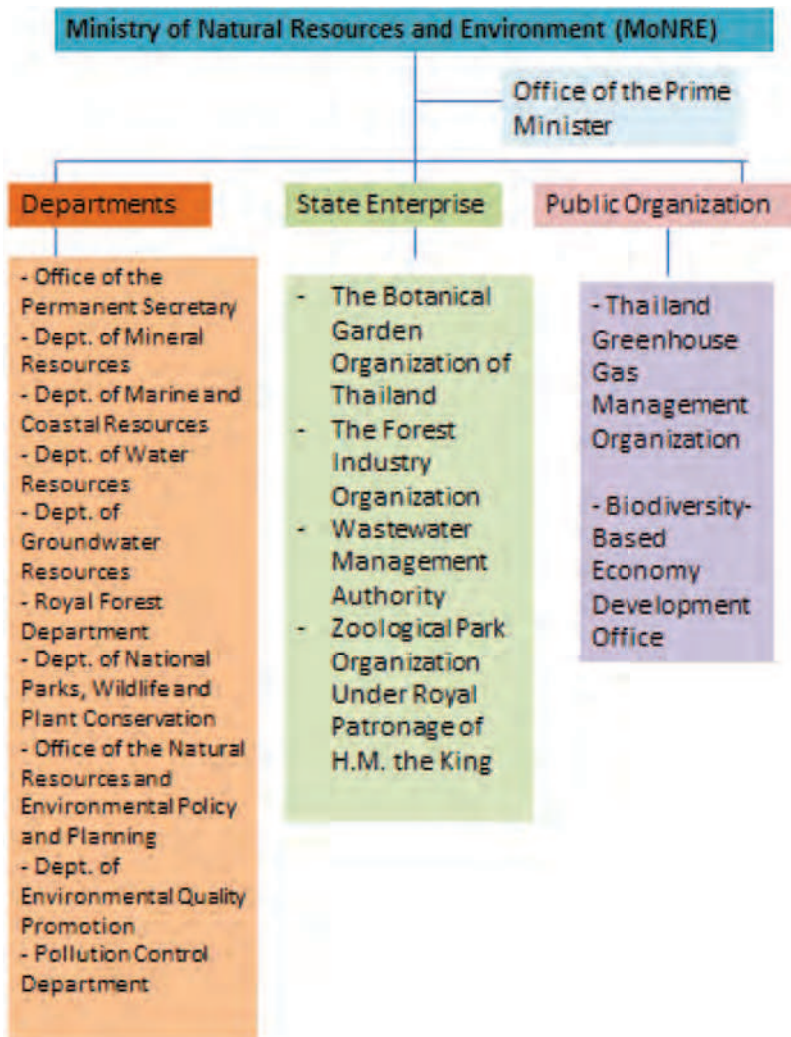
1. Organization Chart of the Office of the Official Information Commission



2. Organization Chart of the Ministry of Agriculture and Cooperatives



3. Organization Chart of the Ministry of Natural Resources and Environment



Annex 3. The Government's Rice Pledging Scheme

Ironically, the harm test and public interest test may not necessarily be in the best interest of the public. This is the case for the national rice pledging scheme that the Thai government has been carrying out.

After becoming Prime Minister in 2011, Ms. Yingluck Shinnawatra continued the scheme that her brother, the self-exiled fugitive and former Prime Minister Thaksin Shinnawatra, started when he was in office. Under this scheme, farmers could pledge their rice with the government at a price that was 30–50 percent higher than the market price. Not surprisingly, farmers readily embraced the scheme. No farmers returned the money to the government to reclaim their rice. The government de facto bought the rice from the farmers at an unreasonably high price, thus bypassing the existing private trading system.

Unsurprisingly, this scheme was highly criticized by all, including retired officials of the Ministry of Commerce, the agency overseeing international trade, rice economists, and the former Minister of Finance. Their criticisms were along the same lines. The scheme was clearly going to have serious business implications because it was not possible to sell rice at a price higher than what the government had paid the farmers, which was much higher than market price. According to the government, it would stockpile rice until its price in the world market rose, and then it would sell the rice. This was how Thailand would make a profit.

The counter-argument was that, similar to other produce, rice is a perishable commodity. Stockpiling rice for a long time could only reduce its fragrance, cause the rice to become rotten, and depreciate its value. Moreover, although Thailand was the world's number one exporter of rice, its market share was not so substantive that stockpiling instead of selling its rice would impact the market price.

Thai people were concerned that this populist scheme would eventually incur monumental public debt and bring the nation's rice economy into chaos. But the government assured the public that they had successfully exported the rice, not through the normal trading channels, but through innovative government-to-government (G-to-G) agreements.

The case caught the public's attention and the ISRA Institute Thai Press Development Foundation found that the information released by government agencies to the public lacked clarity. This caused confusion among the public, and the ISRA Foundation made use of the OIA to submit a request to the Permanent Secretary of the Ministry of Commerce in 2012 for information on the amount of rice stored in the government warehouses, the amount sold and other rice export-related information during FY 2011/2012.

Later, the ISRA Foundation received information from the Department of Foreign Trade on the amount of rice sold domestically, but not the amount exported or the names of the warehouses and rice millers at which the pledged rice was stocked. The justification for withholding the rest of the requested information was to protect the nation's rice trading security and relations between Thailand and the trading partner countries.

The ISRA Foundation submitted an appeal to an Information Disclosure Tribunal. The Tribunal ruled in support of the Department's non-disclosure, citing the reasoning of the Department of Foreign Trade that the requested information was with another agency and that the Department had no authority to obtain the information from that agency.

The ISRA Foundation did not bring the case to the Administrative Court as it would be time-consuming. However, on September 30, 2013, it submitted another request for information relating to the scheme. One month passed by without any response, and so the Foundation filed another complaint.⁷⁵

The fact that the information on the rice pledging scheme was not disclosed to the public when requested in 2011 has indeed gravely harmed the people and undermined Thailand's public governance. As it turned out, by February 2014, Ms. Yingluck's caretaker government could not pay the more than 100 billion Baht to the vast number of rice farmers who were participating in the scheme nationwide. By this time, eleven farmers had hanged themselves as they did not have the money to bail themselves out of their overwhelming debts due to the delayed payments. Angry farmers from several provinces have held rallies in Bangkok to demand that the government pay them the overdue money.⁷⁶

In the meantime, the National Anti-Corruption Commission investigated the scheme and could not find evidence of the existence of any of the six G-to-G rice trade contracts the government had earlier announced. The Commission then charged the Minister of Commerce and a few officials with corrupt practices. On February 18, 2014, the NACC summoned Ms. Yingluck to appear before them regarding the charges against her for neglect of duty. Ms. Yingluck had presided over the National Rice Policy Committee and had earlier received warnings from the Commission that the rice scheme was fostering corruption and causing financial losses. But she ignored the warnings and failed to take any action to prevent or stop it.⁷⁷

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21. Interview with Mr. Thienchai Na Nakorn, Official Information Commissioner.
22. Interview with Pol. Lt. Col. Tienrat Vichiensan, Director of Office of Official Information Commission.
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24. Information in this section is from the OOIC website and its annual reports.
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27. For fiscal year 2012, OOIC received via its website annual RTI-implementation reports from 2,432 state agencies, comprising only 29.20 percent of all the 8,329 state agencies under the Official Information Act enforcement (*OOIC Annual Report 2012*), <http://www.oic.go.th/FILEROOM/CABOICFORM05/DRAWER02/GENERAL/DATA0002/00002568.PDF>.
28. Interview with Pol. Lt. Col. Tienrat Vichiensan, Director of Office of Official Information Commission.
29. This was a group of 36 organizations led by Thailand Environment Institute. Prior to submitting a letter to the OIC, the Institute and partner organizations hosted a workshop to publicly discuss the information which should be disclosed proactively under OIA's Section 9(8). See Nicro, Somrudee and Noipan, Varakorn, eds. 2012. *Access to information: Environment and health-related information which should be open to the public according to Article 9(8) of the Official Information Act, 1997*, in Thai. Nonthaburi: Thailand Environment Institute.
30. www.oic.go.th
31. <http://www.demooic.com/innovation/about.htm>
32. http://slc.mnre.go.th/main.php?filename=data_service
33. MoNRE's report on their handling of complaints submitted to them via e-petition during fiscal year 2013, covering June 1, 2012-September 30, 2013, reveals that of all the 30 complaint subjects, MoNRE received petitions relating to the following issues the most—pollution sources, forests, watch-dog reporting, and behavior of officials, in that order.
34. Interview with Pol. Lt. Col. Tienrat Vichiensan, Director of Office of Official Information Commission.
35. Interview with Dr.Rangsikorn Upapong, Senior Judge of the Chamber of the Central Administrative Court, Administrative Court.
36. See Annex 2.
37. In the 2013 OIA Implementation Report which MoAC submitted to the OOIC (unpublished document), officials' lack of understanding of law and the OIA was cited as a barrier to the implementation of the OIA at the Ministry.
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39. The 2013 OIA Implementation Reports which both MoNRE and MoAC submitted to the OOIC, unpublished documents.
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47. Interview with Ms. Thaninpan Pawawattananusorn, Chief of Strategic Plan and Public Relations, Agricultural Information Division, on February 12, 2014.

48. Ms. Thaninpan also reasoned that since there has been no request, there is no need to add more personnel to the existing one information official.
49. This section is drawn mainly from interviews with Ms. Thaninpan Pawawattananusorn, Chief of Strategic Plan and Public Relations, Agricultural Information Division, MoAC, on February 12, 2014, and Mr. Somchai Meenuchanart, Director of Information and Service Link Center, MoNRE, on March 14, 2014.
50. Interview with Ms. Jariya Narkkheaw, Librarian, MoAC's library, on March 13, 2014.
51. Interview with Mr. Somchai Meenuchanart, Director of Information and Service Link Center, MoNRE, on March 14, 2014.
52. See ONEP, Summary List of Request for Official Information in the First Quarter (October 2013–December 2013), in Thai (http://www.onep.go.th/information/images/pdf/result1_57.pdf).
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58. See Memo from Director of Information Service Link Center to the Permanent Secretary of MoNRE on reporting the result of the training on "Disseminating knowledge and understanding on OIA 1997 to the people" dated Feb 13, 2013, unpublished document, in Thai.
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61. For the incident, see Napat Pilukna, "Brief of the historic case, the Klity: until the final verdict," *Prachathai*, May 11, 2013. In Thai. Accessed November 15, 2013. <http://prachatai.com/journal/2013/05/46684>.
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66. See Isranews, "The Bureau of the Budget stated no authority to disclose the information about private companies outsourced 1.2 million baht for dealing with flooding," Isranews Agency, November 29, 2012, in Thai.
67. See Bunnaroth Buaklee, "Appeal for information: the President of the House of Representatives' study trip to the UK." *ASTV Manager*, May 13. In Thai. Also see his other information request in Bunnaroth Buaklee, "Call for Parliament to reveal the information on free travelling of the MPs. in Thai." *ASTV Manager*, September 16, 2013. Accessed December 15, 2013. <http://www.manager.co.th/Columnist/ViewNews.aspx?NewsID=9560000116699&Html=1&TabID=2&>Office of the Official Information Commission, Thailand. 2013. Accessed December 28, 2013. <http://www.demooic.com>. <http://www.manager.co.th/columnist/ViewNews.aspx?NewsID=9560000056954>. Accessed December 15, 2013.
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Implementing Right to Information A Case Study of the United States

Shannon Alexander with Patrice McDermott



WORLD BANK GROUP

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Abbreviations and Acronyms

ABA	American Bar Association
ACLU	American Civil Liberties Union
AFL-CIO	American Federation of Labor and Congress of Industrial Organizations
AG	Attorney General
AP	Associated Press
ASAP	American Society of Access Professionals
ASNE	American Society of Newspaper Editors
CIA	Central Intelligence Agency
CFO	Chief FOIA Officer
CJOG	Coalition of Journalists for Open Government
CREW	Citizens for Responsibility and Ethics in Washington
CSO	Civil society organization
DC	District of Columbia
DHS	Department of Homeland Security
DOD	Department of Defense
DOJ	Department of Justice
DOT	Department of Transportation
E-FOIA	Electronic Freedom of Information Act
E.O.	Executive Order
EOUSA	Executive Office for United States Attorney
EPA	Environmental Protection Agency
FAA	Federal Aviation Administration
FAQ	Frequently asked questions
FBI	Federal Bureau of Investigation
FOIA	Freedom of Information Act
FRA	Federal Records Act
FSNE	Florida Society of Newspaper Editors
FY	Fiscal year
GAO	Government Accountability Office
GRS	General Records Schedule
ICE	Immigration and Customs Enforcement
ISCAP	Interagency Security Classification Appeals Panel
LEP	Limited English Proficiency
NAP	National Action Plan



NARA	National Archives and Record Administration
NPR	National Public Radio
OGIS	Office of Government Information Services
OIP	Office of Information Policy
OMB	Office of Management and Budget
OPM	Office of Personnel Management
NLRB	National Labor Review Board
POGO	Project On Government Oversight
SAO	Senior Agency Official
TRAC	Transactional Records Access Clearinghouse
USCIS	United States Citizenship and Immigration Services
USDA	United States Department of Agriculture
WPA	Whistleblower Protection Act
WSJ	Wall Street Journal



Implementing Right to Information

A Case Study of the United States

1. Introduction and Findings

1.1. INTRODUCTION

The 4th of July in the United States is synonymous with freedom: freedom from taxation without representation; freedom from British rule; and the Freedom of Information Act (FOIA). On July 4, 1966, the FOIA became the world's third right to know law. Fittingly, the FOIA is an example of the benefits and limitations of the new system of checks and balances built into the form of government the US created: Congress imposed the law on the Executive branch—while exempting itself from the law's mandates—and it is left to the Judicial branch to enforce the law. As a result, the FOIA has needed the help of the press, civil society and savvy politicians to survive overwhelming agency opposition, reticent Presidents, and ongoing implementation challenges.

This case study explores the battles for the FOIA's passage and subsequent amendments as well as the challenges for effective implementation of the Act. The case study is divided into eight sections. Section 1 includes this introduction and the key findings of the study. The findings briefly discuss the major drivers of success and challenges in federal agencies' implementation of the FOIA. Section 2 examines the legislative history of the FOIA, from the overwhelming Congressional support for its initial enactment to the creation of an oft-requested FOIA Ombudsman in 2007. Section 3 explores the FOIA's scope and discusses the content of the Act including provisions regarding fees, deadlines and exemptions. It also introduces the agencies charged with FOIA oversight: The Office of Information Policy (OIP) and The Office of Government Oversight (OGIS).

Section 4 examines compliance with the FOIA across the federal government. Agencies' use of exemptions, response rates and application of the harm test are examined. Section 4 also describes both the legal requirements and agencies' progress on guaranteeing access to individuals who require accommodations in order to use the FOIA. It further examines the government's proactive disclosure and open data policy. Finally, it reviews FOIA appeals, sanctions



and litigation. These subsections discuss the protocol for filing and processing an appeal and the FOIA's sanctions provision and its lack of use. The last subsection looks at FOIA litigation, one of the most important tools that requesters have to ensure compliance with the Act.

Section 5 analyzes agency level practices and compliance with the FOIA. It begins by discussing leadership, specifically three non-legislative instruments that can have a significant effect on FOIA implementation: Executive Orders, Presidential Memoranda and Attorney General Guidelines. Section 5 continues by detailing government-wide FOIA staffing, promotion and public awareness efforts. Four agencies are examined to provide examples of these efforts: the Department of Justice (DOJ), National Archives and Records Administration (NARA), Environmental Protection Agency (EPA) and United States Department of Agriculture (USDA). These agencies' response rates are presented in chart form. Section 5 also delves into records management in the federal government and explains how outdated regulations and record keeping practices frustrate timely disclosure of records. It ends by describing agencies' budgeting process for the FOIA and the benefits and detriments to their approach.

Section 6 explores the role politics plays in the FOIA, specifically how the FOIA has been both a tool for partisan efforts and a legislative topic where politics are set aside. This case study ends with Section 7's analysis of certain stakeholders' influence on FOIA implementation in the United States. This includes civil society organizations that do everything from auditing government performance to suggesting legislative language. The analysis also extends to the media. While they do not use the FOIA as often as many assume, the press are the original FOIA agitators and continually use the Act to inform their reporting and to explore or expose government actions. Three media organizations are briefly examined to illustrate the press's role in strengthening the FOIA and the public's right to information. While they are not part of civil society, the private sector's use of FOIA is also examined. Section 8 features the case study's conclusion.

These eight sections ultimately reveal that the FOIA, and its subsequent amendments, are instrumental in realizing the right to information. The public recognizes this. In 2012, use of the FOIA hit an all-time high with agencies receiving 651,254 requests.¹ Clearly, the public, businesses and the press are aware of their right to information under the FOIA. Government disclosure has improved over the nearly half century that the FOIA has been in effect. In particular, proactive disclosure has markedly increased with the rise of the internet. Websites like Data.gov and USAspending.gov put some information right at the public's fingertips. Nonetheless, the execution of the right to information is marred by implementation challenges including slow processing, overuse of exemptions, a relatively weak ombudsman, limited resources and an ingrained bureaucratic tendency toward secrecy.

1.2. FINDINGS

There are several key drivers of both success and challenges in federal agencies' implementation of the FOIA.

Factors That Drive FOIA's Success:

- The FOIA is fairly comprehensive and broad in scope;
- The FOIA is fairly easy to access and does not require individuals to justify their reasons for making a request;

- There are mechanisms in place to hold agencies accountable for failing to comply fully with the FOIA including tracking for individual requests and required Annual and Chief FOIA Officer reports;
- Litigation has clarified the FOIA's provisions and provided requesters with including disclosure of records and awards of attorneys' fees;
- Civil society organizations, the media and Congress persistently advocate for better agency implementation of the FOIA and an improved FOIA;
- Agencies use social media, blogs and websites in public awareness campaigns; and
- The FOIA is used quite frequently.

Factors That Drive Challenges with Implementing the FOIA:

- Agency processing of FOIA requests is marred by delays;
- Agencies overuse exemptions, particularly exemptions three and five;
- OGIS is a relatively weak ombudsman;
- FOIA is not considered a high priority in comparison to other legislation;
- Resources for FOIA are limited;
- An ingrained bureaucratic tendency toward protecting agency information persists;
- The current contentious political climate frustrates efforts to improve the FOIA;
- The DOJ has competing roles regarding the FOIA because it serves as the FOIA oversight institution as well as a FOIA litigator and a FOIA processor;
- Agencies face serious records management challenges;
- Sanctions are rarely applied;
- Litigation is costly and discourages requesters from enforcing their rights under the FOIA; and
- No independent agency is in charge of overseeing FOIA implementation.

2. Passage of ATI Legislation

The United States' Freedom of Information Act (FOIA) had an inauspicious beginning. In 1955, Representative John Moss created a committee to advocate for the creation of right to information legislation.² In this pursuit, Moss brought together politicians, journalists, attorneys and civil society organizations (CSOs). It took more than a decade of inquiries, testimony, hearings and bargaining to pass the bill. Early FOIA supporters included the American Bar Association, the United States Chamber of Commerce, various committees composed of journalists, editors and broadcasters.³ The fruit of their labor was 1966's FOIA. FOIA described what information government agencies are required to make available to the public, namely: rules, opinions and policy statements. It listed various exemptions to disclosure including: matters required to be secret by Executive Order due to national defense or foreign policy concerns, internal personnel rules and practices, and trade secrets.⁴



The FOIA faced strong opposition from the Johnson administration and Executive branch agencies including the Department of Justice (DOJ) and the United States' legal and law enforcement department. FOIA opponents objected that the FOIA would unconstitutionally violate separation of powers, encroach on Executive power and eliminate agency discretion regarding document disclosure. However, bipartisan support of the bill was strong and these protestations did not impede the act's adoption into law.

The media and long suffering politicians who championed FOIA celebrated its passage. However, every federal agency opposed it.⁵ Indeed, so severe was then President Lyndon Johnson's aversion to the FOIA, that he "had to be dragged kicking and screaming" to sign it.⁶ This is significant because Johnson was a man who usually reveled in the pomp and circumstance of the Office. For example, he enjoyed holding sentimental bill signing ceremonies. When Johnson signed the Elementary and Secondary Education Act, he did so sitting next to his childhood schoolteacher outside of his former elementary school in Johnson City, Texas.⁷ By contrast, Johnson held no such celebration when he signed the FOIA, going so far as to scrawl "no ceremony" at the bottom of a memo that advocated for one.⁸

Johnson also chose to attach a signing statement to the bill. A signing statement is a tool at Presidents' disposal, which allows them to comment on, or even object to, the legislation they are signing. While Johnson did not explicitly object to the FOIA, his language diminished the legislation's purpose. His emphasis on caution over disclosure was evident from the signing statement's first substantive lines:

"This legislation springs from one of our most essential principles: A democracy works best when the people have all the information *that the security of the Nation permits*. No one should be able to pull curtains of secrecy around decisions which can be revealed *without injury to the public interest*." (emphasis added)⁹

Johnson ended the signing statement on a more amiable note expressing profound pride that the United States was "an open society in which the people's right to know is cherished and guarded."¹⁰

At the heart of Johnson's signing statement was an uneasy juxtaposition: a citizen's right to information held by the government and the "necessary" restrictions on that right. This tension has endured through the FOIA's many amendments and its shaping via numerous Executive Orders, Attorney General (AG) Guidelines and judicial decisions.

The FOIA has been amended multiple times since its inception. Each alteration has reflected the societal and political climate at the time. This was especially evident the first time the Act was amended. In 1974, the United States was still reeling from the Watergate scandal, an event steeped in secrecy, obstruction and deception. Watergate began with a break-in of Democratic National Committee headquarters, transitioned into a massive cover-up and culminated in President Richard Nixon's resignation. When Nixon's Vice President, Gerald Ford, was sworn in as President on August 9, 1974, he promised honesty, openness and candor; he assured Americans that the national nightmare of Watergate, with its disturbing implications, was over.¹¹

Approximately one month into office, Ford promptly pardoned Nixon, granting him full and unconditional immunity from any illegal acts he may have committed during his presidency. Ford's pardon of Nixon damaged his reputation and decimated his public approval rating.¹² Congressional reactions were generally divided along political lines: most Republicans

supported Ford's decision and most Democrats derided it.¹³ In the midst of this anger, wariness and partisanship, legislators worked on amending the FOIA.

Beyond the scandal and the strained atmosphere, there was another problem: the FOIA simply was not working. By 1974, even the DOJ admitted that agency compliance with FOIA was lackluster.¹⁴ Top agency officials did not prioritize the FOIA.¹⁵ There were substantial delays in processing requests and appeals.¹⁶ Moreover, the FOIA was costly for requesters: agencies used fees as an "effective bureaucratic tool" to deny requesters information; one witness described an \$85,000 Department of Agriculture FOIA bill.¹⁷ Appeals could cost thousands of dollars in legal fees.¹⁸ Congress hoped that addressing these deterrents would encourage more members of the news media to use FOIA.¹⁹ While they were major supporters of the concept, media use of the law was low.²⁰

Consequently, the amendments sought to strengthen the FOIA by clarifying certain provisions. These provisions were reworked to improve administration and compliance, strengthen the public's remedies against agencies and officials who violate the FOIA, increase Congressional oversight and expedite handling of requests.²¹ For the first time, agencies were subjected to administrative processing deadlines—10 days for requests and 20 for appeals.²² The bill also established the award of attorneys' fees for requesters who prevailed in Court, *in camera* (private) inspection by judges of documents covered by certain exemptions and *de novo* (new) judicial review of an agency's decision to withhold information.²³

In many respects, the opposition to amending the FOIA was identical to the opposition during its creation. The DOJ and President Ford were especially critical of the bill. The DOJ objected to nearly every provision, calling the amendments "too inflexible" and denouncing parts of the bill as raising "serious questions of constitutionality."²⁴

Ford, a former attorney himself, was more precise in his objections. He expressed concern for federal employees' personal liability and the competence of the judiciary to review classified documents *in camera*; he indicated that the amendments would weaken the safeguarding of military secrets, individual privacy and crime fighting.²⁵ Despite these concerns, President Ford promised to meet Congress "more than halfway" to reach a compromise so that the amendments could move forward.²⁶ Although Congress altered several provisions to placate Ford before they passed the legislation, the President insisted that "significant problems" remained unresolved.²⁷ Ford vetoed the bill, acting on the urging of many federal agency heads and advisors including former FOIA advocate Donald Rumsfeld, future Vice President Dick Cheney and future Supreme Court Justice Antonin Scalia.²⁸

After his veto, President Ford was excoriated in the Press. The *Philadelphia Inquirer* called Ford's concerns about constitutionality and national security logistically flimsy and "offensive in their insensitivity to public dismay."²⁹ Ford's veto of the amendments forced the bill back to the legislature, where overriding the veto required two-thirds of both the House and the Senate to vote in favor of the amendments. They did so and the FOIA was amended for the first time. Public use of the FOIA increased markedly following these amendments, vindicating its supporters.³⁰

Just two years later, the FOIA was amended again through the Government in Sunshine Act. These amendments faced less opposition than their predecessors. The Government in Sunshine Act made federal agency meetings open to the public, with a few exceptions. When the Act passed, President Ford was happy to sign the legislation, remarking that the public had the right to know what government does, why they do it and what processes they use.³¹



The FOIA was not amended again until Ronald Reagan's presidency and his infamous War on Drugs. This time, the FOIA changes were proposed via the Anti-Drug Abuse Act of 1986. On the surface, including the FOIA in a drug bill was an unusual way to make changes to the Act. The logic behind the move was law enforcement's and Congress's fears that organized crime syndicates and drug traffickers would use the FOIA to learn the identities of investigation targets and confidential informants.³² As a result, the 1986 amendments focused primarily on the law enforcement exemption (Exemption 7).

The exemption was extended to permit law enforcement agencies, like the Federal Bureau of Investigation (FBI), to deny the existence of records related to "an ongoing and undisclosed criminal investigation; informant records maintained under an informant's name or personal identifier; or classified records of the FBI pertaining to foreign intelligence, counterintelligence or international terrorism investigations, in response to a FOIA request."³³ These provisions are known as exclusions.

In addition to expanding the law enforcement exemptions, legislators revised the FOIA's fee provisions. Under the bill, every agency was required to create regulations specifying fee schedules and to establish guidelines for determining reduced and waived fees.³⁴ These requirements were intended to encourage the liberal grant of waivers and to challenge the DOJ's "unduly restrictive" waiver policy.³⁵ In order to make it easier for noncommercial requesters to obtain documents under FOIA, agencies were also directed to not charge requesters for the first two hours of search time and for the first 100 copies of a request.³⁶ The Anti-Drug Abuse Act of 1986, including the changes to the FOIA, passed in both houses and was signed into law by President Reagan.

A decade later, the rise of electronic media and resources was the impetus for the Electronic Freedom of Information Act Amendments of 1996 ("E-FOIA"). Congress hoped that keeping abreast of technology would make the FOIA more efficient, accessible and uniform.³⁷ Delays were another target for this round of FOIA alterations. Vermont Senator Patrick Leahy dismissed the 10-day processing deadline as a "joke"; he argued that the routine failure to comply with the time limits bred public contempt and poor agency morale.³⁸ This time, the Administration agreed that the FOIA needed work. Both President Bill Clinton and DOJ Attorney General Janet Reno acknowledged that the FOIA had delay problems and encouraged agencies to reduce them.³⁹

The E-FOIA explicitly required that records subject to the FOIA be available in electronic form when they are maintained electronically.⁴⁰ It afforded requestors the flexibility to choose their records' format, either paper or electronic media, and directed agencies to make a "reasonable effort" to comply with format requests.⁴¹ The bill also introduced a multi-track processing system, which allowed agencies to create processes to quickly handle small or compelling requests.⁴² As the 10-day processing deadline was clearly insufficient for agencies, it was extended to 20 days.⁴³ Additionally, the Act required agencies to release frequently requested records.⁴⁴ The E-FOIA passed with much less resistance than previous amendments and received a hearty endorsement in President Clinton's signing statement.⁴⁵

The FOIA's next comprehensive modification was accomplished via the Openness Promotes Effectiveness in our National Government Act of 2007 (OPEN Government Act of 2007). The OPEN Government Act followed the terrorist attacks of September 11, 2001 ("9/11") and the political reactions to the tragedy, which included an increased emphasis on national security. Senator Leahy took the helm once again and lambasted the Bush administration for "lax FOIA enforcement and a near obsession with Government secrecy" which combined to

weaken the FOIA and undercut the public's right to information.⁴⁶ In addition to over-classifying documents as "secret," many agencies were slow to implement the changes from the E-FOIA.⁴⁷ Lack of enforcement was another major challenge.⁴⁸ No agency, government official or government entity was responsible for ensuring that agencies and their employees complied with the FOIA.

The OPEN Government Act of 2007 emphasized the presumption of openness standard.⁴⁹ Many parts of the Act sought to clarify and reinforce provisions already in place like those addressing fee waivers, attorneys' fees, disciplinary action for federal employees who arbitrarily or capriciously denied requests, proactive public disclosure, deadlines for processing applications, and agency reporting requirements.⁵⁰ The OPEN Government Act also introduced an Office of Government Information Services (OGIS) within the National Archives and Records Administration (NARA), which would serve as the FOIA ombudsman.⁵¹

In a meticulous fashion, the DOJ objected to almost every section of the bill, dismissing many of the provisions as redundant or unnecessary.⁵² Despite these objections, the bill was approved in the House and the Senate. In one of his final acts as President of the United States, George W. Bush signed the bill into law on December 31, 2007.

While the OPEN Government Act of 2007 was the last comprehensive amendment of the FOIA, the OPEN FOIA Act of 2009 addressed a discrete but important issue. Exemption (b)(3) of the FOIA covers all information withheld under other statutes. The OPEN FOIA Act requires proposed legislation to specifically state that it will create a (b)(3) exemption.⁵³ (B)(3) exemptions are discussed further in Section 3.

3. Key Provisions of the Law

3.1. SCOPE OF COVERAGE

The FOIA's twelve sections cover what entities within the government are subject to the law, who can make requests, what may be discretionarily released, what must be mandatorily withheld, timelines for disclosure, and exemptions. The FOIA also details requirements for agencies and government officials including the drafting of regulations and annual reports.

Anyone may file a FOIA request. Judicial and legislative interpretation of "person" includes American citizens, residents, foreign nationals, minors, prisoners, corporations, the media, universities and other organizations. A FOIA requester need not give a reason or justification for his or her records request, although these may become relevant for future litigation. In order to file a request, a person must follow the proper filing procedure and reasonably describe the information they are seeking. However, an agency is not required to create documents or records in order to fulfill a FOIA request.⁵⁴

Requesters have access to records held by most, but not all, of the Federal Government. Executive and military departments, Government corporations and Government controlled corporations, other executive branch establishments, some parts of the Executive Office of the President, and independent agencies are all subject to the FOIA.⁵⁵ However, several key actors are not subject to the FOIA, including: Congress and its support offices and agencies, such as the Government Accountability Office (GAO), the Government Printing Office and the Library of Congress, the federal courts, and the parts of the Executive Office of the President that function only to advise and assist the President. A few interviewees found this troubling



and expressed a desire to make Congress, the Courts and all of the Executive Office of the President subject to the FOIA.⁵⁶

The FOIA is not limited to records in an agency's possession; if another entity is housing an agency's records, they are still subject to the FOIA. Records held or maintained by a private company on behalf of a covered government entity are also subject to the FOIA.

Private citizens and corporations (save those referenced above) are also exempt from the FOIA even if they are the recipients of large government contracts and perform quasi-governmental functions. Perhaps the most apt example of this is the private prison industry. Since 2007, the U.S. government has paid private prison companies billions of dollars to house more than 100,000 state and federal inmates, including immigrant and juvenile detainees.⁵⁷ Nonetheless, these corporations are not subject to the FOIA. Allegations of inmate mistreatment, abuse and deaths have spurred a movement to close this loophole.⁵⁸ In response, the private prison industry has pumped millions of dollars into successful lobbying efforts that have prevented any legislation that would subject their records to disclosure.⁵⁹

For entities that are subject to the FOIA, the first section, (a), describes exactly which records they must make available for disclosure. This can be accomplished in several ways. The first is by listing the information in the Federal Register, which publicizes federal government rules, proposed rules and notices. According to the FOIA, the following must be published in the Federal Register:

- Descriptions of the agency's central and field organization;
- Descriptions of the places, employees, members and methods an agency may use to obtain information, submit requests or obtain decisions;
- Statements about the "general course and method" of how an agency handles its functions including the nature and requirements of all available informal and formal procedures;
- Rules of procedure;
- Descriptions of the forms available or the places where forms can be obtained;
- Instructions regarding the scope and content of all papers, reports or examinations; substantive rules of general applicability adopted/authorized by law;
- Statements of general policies or interpretations of general applicability formulated or adopted by the agency; and
- Any amendment, revision or repealing of the aforementioned.⁶⁰

Federal Register aside, agencies must make these records available for inspection and copying by the public:

- Final opinions and orders made in adjudications, including concurring and dissenting opinions;
- Policy statements and interpretations that have been adopted by the agency but are not published in the Federal Register;
- Administrative staff manuals and instructions to staff that affect members of the public;
- Copies of all previously released records that may become or are likely to become the subject of subsequent requests because of their subject matter; and
- A general index of previously released records.⁶¹

Although the language in this provision is relatively straightforward, exemptions and litigation have had a significant impact on what can be released under (a) and are discussed in subsequent sections.

3.2. PROCEDURES FOR ACCESS

The majority of agencies have several means of accepting requests including post, email, website form and fax. After a person sends his or her request, the agency should send a receipt notice with a tracking number if processing the request will take more than 10 days.⁶² This number can then be used to obtain an update on the request's status, either via the agency's website or phone.⁶³ Status updates should include the date the agency received the request and an estimated date of completion.⁶⁴

Requesters can specify their desired format. Agencies are supposed to dispense the information in the format requested as either paper or electronic copies (a CD-ROM or email attachment), if the record is "readily producible" in that format.⁶⁵ However, requesters report that agencies do not always fulfill their format requests; they also criticize agencies for wasting money by sending large paper documents when a CD-ROM would be less expensive and an email virtually free.⁶⁶

Advocates want a simplified procedure. They would prefer to have a central location where they can make and track requests to any agency and receive responses. Such a portal does not yet exist for all agencies. FOIAonline accepts requests for the Environmental Protection Agency (EPA), Department of Commerce (save the US Patent and Trademark Office), National Archives and Records Administration's Office of General Counsel, Merit Systems Protection Board, and Federal Labor Relations Authority.⁶⁷

Civil society organizations have designed their own initiatives to make FOIA requests easier for members of the public. The Center for Investigative Reporting raised more than \$53,000 from 2,071 contributors to launch its FOIA Machine initiative.⁶⁸ The FOIA Machine is free to use and compiles FOIA procedure, rules, exemptions and best practices in one place.⁶⁹ The platform also lets users track requests via dashboard, receive alerts, share "request blue-prints" and obtain support and expert advice from the FOIA Machine's community.⁷⁰ Reporters Committee for Freedom of the Press runs iFOIA.⁷¹ iFOIA uses a Request-generator Wizard to produce customized FOIA requests that can be tracked.⁷² It also permits users to add attachments, keep an archive of sent and received documents and set reminders and follow-ups for submitted requests.

3.3. EXEMPTIONS

The use of exemptions has always been a point of contention between the requester community, agencies and the Executive branch. FOIA has nine exemptions. Exemptions are identified by their location in the FOIA, see 5 U.S.C. § 552(b)(1)-(9). They concern matters:

- (1) kept secret via specific authorization of an Executive Order in the interest of national security or foreign policy that are properly classified pursuant to an Executive Order;
- (2) related solely to an agency's internal personnel rules and practices;
- (3) specifically exempted from disclosure by statute; statutes enacted after the OPEN FOIA Act of 2009 must cite paragraph three in order to be included amongst these statutes;



- (4) Trade secrets and privileged or confidential commercial or financial information;
- (5) Inter-agency or intra-agency memoranda or letters that would be unavailable, under law, to a party in litigation with the agency;
- (6) Personnel, medical files and similar files, which if disclosed, would constitute a "clearly unwarranted invasion of personal privacy";
- (7) records or information compiled for law enforcement purposes, specifically that could "reasonably be expected to" or would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy (D) disclose a confidential source's identity (E) disclose techniques, procedures or guidelines for law enforcement investigations or prosecutions if disclosure "could reasonably be expected to risk circumvention of the law", or (F) endanger any individual's life or physical safety;
- (8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or
- (9) geological and geophysical information and data, including maps, about wells.⁷³

Agencies can elect to release information even when a certain exemption applies. However, agencies are constrained in exercising discretion in regard to exemption 1 and 3, and limited in regard to exemptions 4, 6 and 7(C).⁷⁴

While agencies may invoke exemptions, they must provide requesters with segregable portions of the record indicating where the exempt portions have been removed and the exemptions invoked.⁷⁵ Any denial, in whole or in part, obligates the agency to make reasonable efforts to provide the requester with information about the quantity of denied records unless doing so is protected by the invoked exemption.⁷⁶

Public Interest Balancing Test

Exemption 6 has been interpreted to include a public interest balancing test: once it has been established that information meets the threshold requirement of Exemption 6, the focus of the inquiry turns to whether disclosure of the records at issue "would constitute a clearly unwarranted invasion of personal privacy." This requires a balancing of the public's right to disclosure against the individual's right to privacy.⁷⁷ Exemption 7(C) has a very attenuated public interest balancing test: when a requester asserts government misconduct as the public interest in disclosure, that requester must make a "meaningful evidentiary showing" that the public interest in disclosure is sufficiently compelling to, on balance, outweigh legitimate privacy interests.⁷⁸

Harms Test

Under exemption 4, a harms test is applied: a commercial or financial matter is "confidential" if it meets any one of a three-part test: (1) impairs the Government's ability to obtain necessary information in the future; or (2) causes substantial harm to the competitive position of the person from whom the information was obtained (actual competition need not be demonstrated; only evidence of competition and the likelihood of substantial competitive injury is all that

needs to be shown); or (3) whether disclosure of the information will harm an “identifiable” private or governmental interest which the Congress sought to protect.⁷⁹

Exemption 7(A) also contains a harms test: it requires a two-step analysis focusing on (1) whether a law enforcement proceeding is pending or prospective, and (2) whether release of information about it could reasonably be expected to cause some articulable harm. Further, it is well established that in order to satisfy the “pending/prospective” requirement, an agency must be able to point to a specific pending or contemplated law enforcement proceeding.⁸⁰

3.4. FEES

All fees collected for processing a FOIA request must be based on “reasonable standard charges.”⁸¹ Fees should never include the costs associated with resolving policy or legal issues that might arise while processing the request.⁸² However, the extent of what agencies may charge depends on who is requesting the documents. Agencies may always collect fees for photocopying, after a specified number of free pages. This is the only charge they can levy against educational requesters, non-commercial scientific institutions and representatives from the news media who will use the information for scholarly purposes.⁸³ Other non-commercial requesters can be charged for document search and duplication.⁸⁴ No non-commercial applicants should be charged for the first two hours of search time and the first 100 pages of duplication.⁸⁵ Commercial requesters may be charged for duplication, search time and review.⁸⁶

Agencies are encouraged to not charge fees or to lower their fees in several circumstances. They should release documents at a reduced charge or no charge if disclosure is not primarily in the requester’s commercial interest but rather, in the public interest, and “likely” to contribute significantly to the public’s understanding of governmental operations and activities.⁸⁷ Agencies cannot assess fees if they fail to comply with the time limits set for processing requests unless “unusual or exceptional circumstances” apply.⁸⁸ If an agency has unusual or exceptional circumstances, the deadline to process the request is extended by 10 days. Currently, agencies that claim such circumstances charge fees, even if they fail to meet the extended deadline. Advocates consider this practice contrary to congressional intent.

In litigation, fee disputes are reviewed *de novo* (anew) by the appropriate district court. FOIA fees only cover a fraction of the cost for administering the program. In 2012, agencies spent approximately \$430 million on the FOIA and collected approximately \$4.7 million in fees.⁸⁹ Fees charged by agencies go into the general Treasury, not into the agencies’ coffers.

Interviewees believe that some agencies use the threat of large fees to discourage requests and that they fail to grant fee waivers as often as they should.⁹⁰ In one case, Immigration and Customs Enforcement (ICE), denied a fee waiver request and levied a \$10,000 fee against a chapter of one of the United States’ most prominent nonprofits: the American Civil Liberties Union (ACLU).⁹¹ Citing a “growing trend of fee waiver denials to public interest advocacy organizations for FOIA requests on important topics,” the ACLU of Southern California subsequently sued.⁹²

CSOs and media advocates have several suggestions for avoiding litigation over fee waivers. One is to encourage agencies to keep a list of individuals and organizations that have already been granted fee waivers in the past, so that they are readily granted waivers when they file new FOIA requests. Another is to grant fee waivers for all organizations with Internal Revenue Service (IRS) 501(c)(3) status.⁹³ This status, which exempts certain organizations from



some federal taxes, requires an application process. Eligible organizations include those that are religious, educational, scientific, literary and charitable.

3.5. TIMELINES

The FOIA establishes deadlines by which agencies must process requests and appeals. Agencies have 20 business days to determine if they are going to comply with a request, notify the requester of this determination and the reasons why, gather and review the relevant records, and alert the requester of their right to appeal an adverse decision to the head of the agency.⁹⁴ After receipt of an appeal, agencies again have 20 days to make a decision regarding the appeal; if denial of the records is upheld in whole or in part, the agency must also alert the requester of their right to judicial review.⁹⁵

The 20-day period begins as soon as the request is received by the appropriate component but no later than 10 days from receipt by any agency component.⁹⁶ This 10-day limit can be paused or “tolled”: 1) when the agency makes a single “reasonable” inquiry to the requester for information, tolling the 20 days while waiting for the information; 2) to clarify a fee assessment with a requester; and 3) when the agency needs to consult with another agency or components that have a substantial interest in the information.⁹⁷ To aid with this process, every agency must have a FOIA liaison to assist customers in any disputes with the agency.⁹⁸

The 20-day time limit can be extended in unusual circumstances, but only for a maximum of 10 days unless the agency has notified the requester that the request cannot be processed within the time limit and has given the requester an opportunity to limit the request’s scope.⁹⁹ Unusual circumstances include the need to:

- search for and collect the requested records from facilities located separately from the office processing the request;
- search for, collect and examine “voluminous amounts” of separate and distinct records stemming from a single request; and
- consult with another agency with “substantial interest” in determining the request or two of more of the agency’s own components that have a subject matter interest in the request.¹⁰⁰

Expedition of requests is available for those who submit a certified statement describing a “compelling need.” A compelling need is one involving an imminent threat to an individual’s life or safety or urgency to inform the public of actual or alleged federal activities.¹⁰¹ The agency must alert the requester of the decision regarding expedition within 10 days.¹⁰²

It behooves requesters to tailor their requests if an agency encourages them to do so. A requester’s refusal to “reasonably modify” a request or to arrange for an alternative time frame will be a factor in determining the existence of exceptional circumstances.¹⁰³ This, in turn, may affect future litigation. Exceptional circumstances, however, do not include delays that result from “predictable workload” unless the agency can demonstrate that it has made reasonable progress in reducing its backlog of pending requests.¹⁰⁴

3.6. DESIGNATING AND SUSTAINING OVERSIGHT

Many federal agencies have the power to enforce legislation through fines, criminal charges, detention or other sanctions. They do not depend wholly, or even primarily, on the judiciary

to enforce the legislation. As advocates observe, this has not historically been the case for the FOIA. During a Senate Hearing for the 2007 OPEN Government Act, one advocate observed that for the FOIA, “there is no Federal, State, or local agency that enforces it. It depends on the public to make it work with the tools provided by Congress and an independent judiciary that is willing to remind agencies of their obligations.”¹⁰⁵

FOIA oversight generally has several layers. On the intra-agency level, the Chief FOIA Officer (CFO) is responsible for agency-wide compliance with the FOIA. The CFO must hold a senior position at the agency and is mandated to monitor FOIA implementation, designate FOIA liaisons, keep the head of agency and the Attorney General of the U.S. informed of agency performance, and make recommendations to the agency head about adjustments to agency practices, policies, personnel and funding.¹⁰⁶

A second layer at the agency level is the FOIA liaisons. Liaisons serve as officials with whom requesters can raise concerns. They are responsible for making the FOIA more efficient by assisting in delay reduction, increasing transparency and assisting in dispute resolution.¹⁰⁷

Above the intra-agency level, Congress has designated two offices with responsibility for guiding agency compliance with the FOIA: OIP (under the DOJ) and NARA’s Office of Government Information Services (OGIS). Their oversight capacities will be discussed in section four.

4. Legal Environment and Compliance

4.1. USE OF EXEMPTIONS

Nearly all of the interviewees identified overuse of exemptions as one of the biggest impediments to successful FOIA implementation.¹⁰⁸ Exemption 5 (deliberative process) and those created through other statutes, known as (b)(3)s, are generally cited as the most problematic.¹⁰⁹ Exemption (b)(3) incorporates into the FOIA provisions other laws that restrict the availability of information to the public. FOIA requesters and civil society advocates express concern over the (b)(3) exemption statutes because their proliferation, broad scope and enthusiastic use create “an insurmountable barrier” to disclosure.¹¹⁰ The use of this exemption is often obfuscated: while the DOJ publishes a list of all the (b)(3)s used by agencies in any one year, the list includes only those and is not comprehensive. Additionally, these provisions appear in bills on issues not directly related to the FOIA and, thus, are not generally referred to the committees that oversee the FOIA and have the expertise on public access concerns. For FOIA advocates, the legislative process surrounding these provisions can be difficult to be involved in and to follow, and advocates often learn about new legislation far too late to mount effective opposition.¹¹¹

Exemption 5 has become one of the “biggest roadblocks” for civil society groups in litigation.¹¹² This exemption is perceived as keeping information from the public that is especially relevant for understanding or exposing government policies and practices.¹¹³

In order to remedy the obstacles caused by exemptions, especially 3 and 5, advocates have suggested incorporating sunsets and balancing tests.¹¹⁴ Adding a sunset provision to FOIA provisions would force Congress to reexamine and reauthorize the provision, or it would expire. In the case of (b)(3)s, the hundreds of statutes used to withhold documents would have to be individually reauthorized. Balancing tests would require the agency to consider the



public interest in disclosure over the interests in withholding the records. In the case of litigation, a balancing test would permit a judge to compare the public interest with the agency interest to determine which takes precedence. Currently, there is no counterbalance to the government interest assertion under Exemption 5. Permitting evidence of public interest as a foil might require more time in litigation, but would also likely increase disclosure of important intra- and interagency documents.¹¹⁵

4.2. RESPONSE RATES

Delays are a major challenge.¹¹⁶ One interviewee labeled them the “single most frustrating [FOIA] issue.”¹¹⁷ Agencies struggle to disclose records within the 20-day deadline. According to the Office of Information Policy’s (OIP) 2012 Summary of Agencies’ Annual FOIA Reports, processing averages were 22.66 days for simple requests, 40.2 days for expedited requests and 82.35 for complex requests.¹¹⁸ Complex requests are those that involve either voluminous amounts of materials or will be time consuming to process.¹¹⁹ The OIP report also revealed that the ten oldest FOIA requests in the federal system were filed between 2001 and 2003; 2012 marked the first year without unprocessed requests from the 1990s.¹²⁰

While requesters are understandably disturbed by the time it takes to process FOIA requests, advocates agree that there will always be delays due to lack of resources and the FOIA’s relatively low priority when compared to other issues.¹²¹ As one interviewee stated, “FOIA is never going to have the resources it needs to do away with delay. We’re going to have to live with it.”¹²²

4.3. ACCESS FOR INDIVIDUALS REQUIRING ACCOMMODATIONS

Of course, these procedures for access do not accommodate everyone. People with disabilities and Limited English Proficiency (LEP) may require additional assistance in order to fully access information using the FOIA.

Section 508 of the Rehabilitation Act of 1973 requires federal agencies to make their electronic technology accessible to those with disabilities.¹²³ This includes software, operating systems, web-based information and applications, telecommunications products, videos, multimedia and self-contained closed products.¹²⁴ Compliance with Section 508 is mixed. A DOJ Survey revealed that approximately 70 percent of components surveyed had established formal, written accessibility policies.¹²⁵ More than 80 percent reported either complying with Section 508’s requirements for the web, web forms and web-based applications or not complying because the requirements were not applicable.¹²⁶

As websites are required to be accessible to persons with disabilities, some FOIA advocates worry that agencies may use this to justify their slow development of efficient FOIA websites and portals. Currently, both FOIAonline¹²⁷ and FOIA.Gov¹²⁸ contend that they are Section 508 compliant. FOIA.Gov is a website maintained by the Department of Justice to display FOIA data and educate the public on FOIA. FOIAonline allows individuals to submit FOIA requests to participating agencies and track those requests.

Protection for individuals with LEP is not as concrete or widespread. Agencies are not strictly required by law to maintain FOIA websites in another language, though some do. Title VI of the Civil Rights Act and Executive Order 13166 cover language access. Title VI bars discrimination against people based on their national origin. Executive Order 13166 requires

agencies to comply with Title VI by creating systems that limited English proficiency individuals can use to “meaningfully access” agencies’ services.¹²⁹ Like Section 508, compliance with language accommodations is mixed. A GAO report revealed that agencies themselves are tasked with determining if they require an LEP plan and recipient guidance for those who provide services to LEP populations.¹³⁰ There is no DOJ oversight. As a result, the number of agencies that still must complete their guidance and plans cannot be determined.¹³¹

A significant portion of the United States population, approximately 25 million individuals, has limited English proficiency.¹³² Of these, more than 60 percent are Spanish speaking.¹³³ The government recognizes the need for Spanish websites and many agencies maintain a more limited Spanish website in addition to the original English website. The same is not true for agencies’ FOIA websites. FOIA.Gov has a FOIA en Español section that explains the FOIA and answers frequently asked questions (FAQ) on the Act. The FAQs explain what the FOIA is, how to file a request, exemptions, how to file an appeal and other basic information.¹³⁴ However, the button “*explore datos de la FOIA*” (explore FOIA data) leads to the English data site. FOIAonline is not available in Spanish.

Agencies that interact more frequently with Spanish speakers fare better. Many immigrants use the FOIA and the Privacy Act to access their immigration files from United States Citizenship and Immigration Services (USCIS). The Privacy Act allows individuals to seek their personal records from agencies. USCIS has published a Spanish FOIA guide.¹³⁵ It also provides a form for FOIA and Privacy Act Requests. While individuals can access information about the form in Spanish, the form itself is only available in English.

Finally, the rise of technology has led to challenges for another group of potential requesters: those without access to computers. While these individuals can still mail or fax in their FOIA requests, the process can be more time consuming for them. They also do not have access to data that is immediately available, at no cost, on agency websites.

4.4. PROACTIVE DISCLOSURE AND OPEN DATA

In January of 2009, President Obama issued a Memorandum that urged agencies not to wait for specific requests before disclosing information, and encouraged them to use modern technology to facilitate timely disclosures; he ordered the Office of Management and Budget (OMB) to update guidance to “increase and improve information dissemination to the public.”¹³⁶ Attorney General Holder’s FOIA Guidelines echoed the President’s memorandum, noting that proactive disclosure could benefit agencies by decreasing the need for individual requests and reducing backlogs.¹³⁷ Civil society tends to agree. The internationally minded Carter Center maintains that proactive disclosure can foster confidence in the system.¹³⁸

The primacy of proactive disclosure in any open government plan is underscored by its location in OMB’s 2009 Open Government Directive.¹³⁹ The Directive’s first goal is simple: publish government information online. OMB believes that this method of disclosure will increase accountability, promote informed public participation and create economic opportunity.¹⁴⁰ The Directive encourages agencies to publish the information in an open format. Open format means that the information is independent of platforms, machine-readable and without restrictions that would impede its re-use.¹⁴¹ To jumpstart agencies’ release of information online, the Directive required them to identify and publish three “high value” datasets, in an open format, on Data.gov within forty-five days.¹⁴²



Data.gov was launched in May 2009 as an integral part of President Obama's Open Government Initiative. The goal of the site is to improve transparency by giving the public better access to datasets that are created and held by the federal government. The government also hopes that use of Data.gov will foster innovative ideas via creative use of the data. At the time of this case study, Data.gov featured more than 87,000 datasets, 349 citizen developed apps and eight galleries.¹⁴³

Another website, FOIA.gov (not to be confused with FOIAonline) was launched by the DOJ approximately a year later during Sunshine Week 2010. FOIA.gov hosts FOIA data and resources, including links to agency FOIA request sites. It is an interactive site. Users can search, sort and use data to compare agencies and time periods.¹⁴⁴

Data.gov and FOIA.gov are helpful tools for releasing a certain type of data. However, their presence does not extinguish agencies' proactive disclosure obligations under the FOIA. The FOIA's frequently-requested records provision obliges agencies to release records that have already been requested and released and that they have a reason to believe will be requested again.¹⁴⁵ This has been interpreted to encompass a "rule of three" under which agencies should post a released record if they anticipate that it, or an essentially similar record, will be requested three times.¹⁴⁶ FOIA advocates do not think this goes far enough. Many propose a "release to one, release to all" policy. FOIA advocates also want agencies to disclose information of likely interest before it is requested.¹⁴⁷ They urge the administration to make proactive disclosure the default and to establish a list of the types of information that, at a minimum, should be disclosed.¹⁴⁸

Proactive release of records requires a location where they can be placed and accessed. After the E-FOIA required agencies to make records electronically available, many created FOIA electronic reading rooms and FOIA libraries. Perhaps the most famous is "The Vault", the FBI's electronic reading room. The Vault features records sorted into intriguing categories like civil rights, unexplained phenomena and gangster era. Recent releases include documents about Libyan dictator Muammar Qadhafi, Los Angeles Police brutality victim Rodney King and Hawaii Senator Daniel Inouye.¹⁴⁹

Agencies' compliance with proactive disclosure is discussed in their Annual Reports and CFO reports. Proactive disclosure is described by OIP as "taking affirmative steps to identify records likely to be of interest to the public and then proactively posting those records online in advance of a formal FOIA request."¹⁵⁰ In assessing if agencies have taken steps to increase proactive disclosure, OIP uses the following indicators: adding materials to the website, enhanced usability of the website and other efforts to increase proactive disclosures.¹⁵¹ The USDA, DOJ, EPA and NARA all met this milestone in 2012. In fact, most agencies did. Every agency, save one, reported an increase in the amount of materials it posted online.¹⁵²

The USDA, DOJ, EPA and NARA have all employed tactics to increase or improve their proactive disclosure. Both NARA and the DOJ release materials via their social media pages. The USDA has launched "Know Your Farmer, Know Your Food," which allows users to search for and map federally supported local food projects, farmers markets, meat processors and more.¹⁵³ The EPA and NARA worked together to launch FOIAonline.¹⁵⁴ The EPA has also launched MyPropertyInfo, which has been met by accolades from the real estate community.¹⁵⁵ MyPropertyInfo combines multiple EPA databases and allows direct access to site-specific information regarding a property's environmental history. The results are identical to the ones customers would receive by filing a FOIA request.¹⁵⁶

4.5. IMPLEMENTATION CAPACITY OF OVERSIGHT AGENCIES

Office of Information Policy (OIP)

In 1982, the DOJ merged its Office of Information Law and Policy and the Office of Privacy and Information Appeals to create OIP.¹⁵⁷ OIP became, and remains, responsible for providing guidance to agencies concerning compliance with the FOIA. It has also been tasked with ensuring that every agency subject to the FOIA implements the President's FOIA Memorandum and the AG's FOIA Guidelines.

OIP's oversight mechanisms include publishing reports, conducting trainings, answering inquiries from agencies and the requesting public, and issuing guidance. Agencies send their Annual FOIA and Chief FOIA Officer reports to OIP for review. OIP then releases an annual summary of these reports, which includes an evaluation of agencies' compliance efforts. OIP also publishes and regularly updates the DOJ's Guide to the Freedom of Information Act.¹⁵⁸ The guide describes, in great detail, all of the FOIA's provisions and explains how judicial decisions, Executive Orders and other memoranda influence each provision.

In addition to being responsible for evaluating agencies' compliance with the FOIA, OIP handles the DOJ's obligations under the FOIA. It adjudicates administrative appeals, processes initial records requests for several Attorney General offices, conducts the litigation defense of "certain FOIA matters" and provides staff to the Office's Department of Review Committee, which reviews classified DOJ documents.¹⁵⁹

Consequently, the office tasked with encouraging agency compliance with the FOIA also handles requests, appeals and some litigation for its parent department. This means that OIP's contact with requesters is somewhat incongruous. In its quest to improve FOIA compliance via outreach, the Office conducts town hall meetings, trainings and roundtables with the requester community. However, the Office's relationship with requesters is often more contentious during appeals or litigation.

FOIA advocates question OIP's ability and willingness to honestly evaluate agency implementation of the FOIA. The Office is perceived as soft-pedaling its evaluations in order to maintain a good relationship with other agencies.¹⁶⁰ Advocates point to OIP's language in reports, which they believe downplays agencies' deficiencies. As one civil society coalition remarked, "OIP acts more like a cheerleader celebrating every time an agency does something right than as the schoolmarm making sure all of the agencies did their homework."¹⁶¹

FOIA advocates' unease also extends to the Department of Justice as a whole. For them, the DOJ's competing roles of FOIA oversight institution, FOIA litigator and FOIA processor are not ideal.¹⁶² These concerns are heightened by the belief that the DOJ has failed to provide a good example for other agencies regarding compliance with the FOIA, Presidential Memo and AG Guidelines.

The DOJ has not updated its regulations to reflect the Obama Administration's open government agenda. It has been drafting regulations but has not yet completed them. This has been problematic not only for FOIA advocates, but also for members of Congress. In February 2013, the House of Representatives Committee on Oversight and Government Reform sent a letter to OIP expressing concern on a number of issues, including agencies' outdated regulations. The Committee formally requested that OIP answer 23 questions including why the DOJ had failed to update its own regulations.¹⁶³



In response, OIP held a briefing for Committee staff but did not send a written response to the questions. The Committee sent another letter in June of 2013 stating that the staff briefing had failed to answer the letter's substantive questions and calling OIP's failure to respond in writing "extremely disappointing" in light of its "primary mission" of FOIA oversight.¹⁶⁴ The letter again requested a response to the 23 questions and an explanation for the delay. Less than a week later, OIP responded to the 23 questions. Although they did not address the four-month delay, OIP noted that the resources and time required to "promulgate regulations" indicated that they were not intended to be modified frequently.¹⁶⁵ However, the Office wrote that "passage of time" necessitated a revision to the DOJ's guidelines and stated that they expected to publish them "later this year."¹⁶⁶

The requester community's grievances with the DOJ do not begin or end with its decade old regulations. In 2012, the National Security Archive at the George Washington University "awarded" the DOJ its Rosemary Award for Worst Government Performance. The "honor" was repeated in 2013. The Archive based its decision on several observations of DOJ behavior it deemed unacceptable, including:

- Insisting that the Department of Justice does not "embrace" the principle of narrowly construing exemptions during Supreme Court oral arguments;
- Developing regulations that would permit the DOJ to lie to requesters about the existence of records. This provision was ultimately withdrawn due to public outcry;
- Developing regulations that would inhibit the ability of elementary students and secondary school students, bloggers and new media to obtain fee waivers;
- Failing to alter its litigation policy to support openness. The DOJ has not attempted to review its litigation so that the President and AG's guidelines could be applied;
- Failing to order agencies to upgrade their FOIA regulations; and
- Publishing "misleading" statistics about FOIA responsiveness for three years.¹⁶⁷

According to the National Security Archive's FOIA Coordinator, Nate Jones, "The Department of Justice—which is responsible for enforcing the FOIA government-wide—was supposed to be the change agent and role model for President Obama's FOIA reforms. But, despite the President's clear instructions, the DOJ has embraced a 'FOIA-as-usual mindset' that has failed to transform the decades-old FOIA policies within its department, much less throughout the government."¹⁶⁸

Office of Government Information Services—The FOIA Ombudsman (OGIS)

Frustration with OIP's performance and lack of oversight were part of the reason why civil society pushed for the creation of a FOIA ombudsman. The fruit of this labor, OGIS, was incorporated into the statute in 2007. Under the FOIA, OGIS is responsible for:

- Reviewing agencies' policies, procedures and compliance;
- Recommending policy changes to Congress and the President;
- Offering mediation services for dispute resolution for requesters and agencies; and
- Issuing advisory opinions, at the discretion of the office, if mediation does not settle the dispute.¹⁶⁹

Like the FOIA itself, OGIS had an inauspicious beginning. After the OPEN Government Act passed in 2007, President George W. Bush attempted to move OGIS's functions from NARA to the DOJ by burying a provision in the Budget.¹⁷⁰ The move was brought to Congress's attention by Senator Leahy who reminded his colleagues, "When Senator Cornyn and I drafted the OPEN Government Act, we intentionally placed this critical office in the National Archives, so that OGIS would be free from the influence of the Federal agency that litigates FOIA disputes—the Department of Justice."¹⁷¹ President Bush's attempt to move (and according to some FOIA advocates, eliminate) OGIS was thwarted and the office was launched within NARA.

FOIA advocates' conception of the ombudsman is borrowed from the original Swedish model. In 1809, the Swedish constitution granted the *Riksdag* (Parliament) power to appoint a fully independent government official to ensure that public authorities complied with Swedish law.¹⁷² The Swedish word "ombudsman" loosely translates into "representative" with "*ombud*" literally meaning "agent." The world's first ombudsman had prosecutorial powers to conduct inquiries, release critical observations and indict or launch disciplinary proceedings against an offender.¹⁷³ FOIA advocates hoped that OGIS would both hold agencies accountable for their failures under the FOIA and mediate disputes between requesters and agencies in order to avoid litigation.

It was clear before OGIS began operating that it would not be an ombudsman in the traditional Swedish sense. In a statement to the Senate Judiciary Committee, OGIS's founding Director clarified that while some had been referring to OGIS as the FOIA ombudsman, they viewed themselves as a pre-litigation mediator and a source of information.¹⁷⁴ The Office has no prosecutorial powers. It cannot compel either agencies or requesters to enter into mediation, which must be voluntary for all parties. In addition, OGIS cannot compel an agency to comply with its mediation recommendations and these recommendations do not receive any type of formal judicial notice.

Despite these limitations, OGIS has been busy. In its first three years, the Office has assisted almost 2,000 requesters with 1,125 cases and 875 "quick hits," inquiries that are quickly answered.¹⁷⁵ Requesters warmly welcome OGIS but some agencies regarded them as the "FOIA police" and were reluctant to share information with them or to work with them to settle disputes.¹⁷⁶

The Office itself has struggled with how to best fulfill its role. OGIS's Director has repeatedly expressed her awareness of the "inherent tension" between OGIS's "two fairly different statutory missions."¹⁷⁷ The Office does not feel it has the resources to perform both its mediation and review functions.¹⁷⁸ OGIS believes that two separate staffs, one for each function, would minimize any tension resulting from publicly criticizing an agency with whom it may also mediate.¹⁷⁹

To date, OGIS has focused on providing mediation services, conducting trainings and issuing best practice guides. It has not published a single advisory opinion and does not conduct comprehensive reviews of agencies' compliance with the FOIA. OGIS's focus on mediation has led some to assert that they are failing to fulfill their mandate. A 2013 Government Accountability Report put it succinctly, "Until OGIS establishes a methodology and time frame for proactively reviewing agencies' FOIA policies, procedures, and compliance, the Office will not be positioned to effectively execute its responsibilities as required by the act."¹⁸⁰



For their part, CSOs are disappointed in OGIS's reticence to "name and shame" agencies. Advocates recognize the tension in OGIS's mandate. They agree the agency should have more resources and many praise OGIS's mediation efforts. Moreover, the Office Director regularly connects with advocates; the two sides meet to discuss OGIS's difficulties, progress and future. Nonetheless, advocates consistently implore the office to do more.

The majority of interviewees want OGIS to leverage the power they currently have and write advisory opinions.¹⁸¹ They also acknowledge that OGIS may require some restructuring and have made other suggestions for strengthening the office including: granting OGIS the power to sue on behalf of requesters, lobbying Congress to give the office more resources, giving advisory opinions precedential value and making mediation mandatory for agencies but optional for requesters.¹⁸² One interviewee recognized the formation of OGIS as one of civil society's major accomplishments; she also observed that, as civil society rarely speaks with one voice, OGIS should be given time to grow into its role.¹⁸³

Finally, OIP and OGIS have a somewhat shared mandate. This has strained the offices' relationship in the past. In its first-year report, OGIS frankly noted the issue, admitting that the two offices have "an intersection of duties" that can enhance services for both offices "but that has created tension."¹⁸⁴ Civil society and Congress are cognizant of this tension and seek to minimize it when possible by calling attention to behavior that may muddle the respective offices' mandates. For instance, in 2008, the DOJ proposed modifications to its FOIA and Privacy Act records' systems in which the Department suggested that OIP serve as an "ombudsman" in disputes between requesters and agencies.¹⁸⁵ In response, Senators Leahy and Cornyn penned a letter to Attorney General Holder arguing that this type of change would create unnecessary confusion for agencies and requesters because OGIS was designated as the FOIA ombudsman.¹⁸⁶ Civil society quickly followed with a letter of their own cautioning OIP to "limit any assistance to resolving disputes within DOJ involving DOJ components, and leave all other agencies and disputes to OGIS."¹⁸⁷ The DOJ promised to change the language of the proposed modifications.¹⁸⁸

This incident underscores interviewees' contention that the DOJ is not sufficiently supportive of OGIS.¹⁸⁹ They point to the power discrepancy as particularly harmful to the FOIA. OIP has the power and resources of the government's FOIA litigator: the DOJ.¹⁹⁰ OGIS does not. Despite this, OGIS and OIP have managed to work together on a number of initiatives including conducting FOIA requester roundtables and presenting at training sessions.¹⁹¹

4.6. FILING AN APPEAL

There are a number of reasons why a requester may be dissatisfied with the FOIA process. Denial of records, agency failure to process the request within the time limits, denial of a fee waiver, denial of expedited processing, and inadequacy of search are common grounds for appeal. When this occurs the requester can file an administrative appeal, in writing, with the agency component that processed the request.

Agencies' Appeals Processing

After the agency has received the appeal, the FOIA allots 20 days for processing it.¹⁹² The 20-day period begins on the date that the request is initially received by the appropriate agency component and no later than 10 days after it is initially received by any of the agency's

components.¹⁹³ An agency can only pause the 20-day requirement in two cases. First, the 20 days may be tolled (paused or delayed) when the agency needs more information from the requester; it may then make a single request for information from the requester.¹⁹⁴ Second, an agency may also toll the 20 days if it must clarify a fee assessment issue.¹⁹⁵ In both cases, the 20 days is paused while the agency waits for this information or clarification. As soon as the agency is provided with what it requires, the tolling stops.¹⁹⁶

The 20-day time limit can be extended under three “unusual circumstances”: 1) the need to search and collect the requested records from facilities separate from the request office; 2) the need to search for, collect and examine “a voluminous amount of separate and distinct records” demanded in a single request; and 3) the need to consult with two or more components in the same agency or with another agency.¹⁹⁷ Under these unusual circumstances, the agency is kept to a 10-day extension. Additional time is permissible if the agency notifies the requester that the request cannot be processed within the 20-day time limit and gives the requester an opportunity to narrow his or her search or agree to an alternative time frame.¹⁹⁸ As in the case of initial FOIA requests, the requester’s refusal on appeal to “reasonably modify the request or arrange an alternative time frame” will be considered a factor in determining if unusual circumstances exist.¹⁹⁹

4.7. SANCTIONS

The FOIA’s sanctions provision has been the subject of debate since its proposed incorporation into the Act. Congress hoped that the possibility of imposing sanctions for failure to comply with FOIA would “make it crystal clear that this law be strictly adhered to by all Federal agency personnel.”²⁰⁰ After the sanctions provision was incorporated into the 1974 amendments, some in the legal community questioned its suitability. In an article about the FOIA, then University of Chicago Law Professor (now Supreme Court Justice) Antonin Scalia, quipped that it was rare for a federal official to “be subjected to a disciplinary investigation even for malicious baby-snatching under color of law, much less mere negligence. But if he should happen to trifle with an FOIA request, stand back!”²⁰¹

The FOIA’s sanctions clause, 4(F)(i), discusses potential disciplinary and civil consequences for individual federal employees who wrongfully withhold documents under the FOIA. Several things must occur for this to happen: the agency’s withholding is judged improper, fees are assessed against the agency and the Court issues a finding stating that the circumstances of the withholding have raised questions concerning whether personnel acted arbitrarily and capriciously. The FOIA then directs a Special Counsel to investigate, consider the evidence and submit conclusions and recommendations to the agency’s administrative authorities. These authorities should follow the Special Counsel’s advice on corrective action.

In addition to the clause in FOIA, the Whistleblower Protection Act (WPA) also authorizes sanctions.²⁰² Under section (a)(3), the Office of Special Counsel may investigate any allegation of arbitrary and capricious withholding under FOIA. The Special Counsel may take corrective or disciplinary action as provided by the statute. Corrective action includes placing the harmed individual in the position they would have been had the prohibited withholding not occurred, reimbursing attorneys’ fees, other “reasonable and foreseeable consequential damages” and compensatory damages.²⁰³ Disciplinary action includes removal, demotion, a five-year bar from federal employment, suspension, reprimand, or civil penalty of less than \$1,000.²⁰⁴



Justice Scalia's colorful fears about the use of FOIA sanctions have been misplaced. In the 37 years since the sanctions provision was established, no sanctions have been imposed on a federal employee for arbitrarily and capriciously withholding a document in violation of the FOIA.²⁰⁵ In fact, referrals to the Special Counsel or agencies' disciplinary boards have been extremely rare. The first case involving the sanctions clause occurred shortly after the amendment was passed. In *Holly v. Acree*, the District of Columbia (DC) Court found that an agency employee had acted arbitrarily and capriciously in withholding records and awarded the plaintiff attorneys' fees.²⁰⁶

Nearly a quarter century later, in 2000, the DC District Court referred an Assistant United States Attorney to the DOJ's Office of Professional Responsibility. This attorney had destroyed the majority of the files at issue in a FOIA litigation based on his stated belief that they could be destroyed after the plaintiff's criminal appeals had finished.²⁰⁷ In ordering his conduct be reviewed by the Office of Professional Responsibility, the Court stated, "At the very least, [his] actions demonstrate a dangerous and reckless disregard for his agency's statutory duty under the Freedom of Information Act. At worst, [he] may have perjured himself."²⁰⁸

The DOJ's mistakes did not end there. As a result of the files' destruction, the plaintiff and defendant agreed to a schedule for the reconstruction of the files. The Court found that the Attorney in Charge of the Executive Office for United States Attorneys' FOIA and Privacy Act made only a " cursory " attempt to reconstruct the files due to her concern over the cost of the extra copies. The Court held, "not only do Defendant's actions constitute bad faith sufficient to justify sanctions in this case, but they are sufficiently flagrant to compel imposition of sanctions."²⁰⁹ It then fined the DOJ \$10,000 to be paid to the DC Bar Foundation for distribution of non-profit legal services.²¹⁰

As noted in the DOJ's FOIA Guide, agencies' "bad faith" actions generally do not trigger a referral to a special counsel or disciplinary board. Instead they are often included in the evaluation as to whether a plaintiff will be granted attorneys' fees.²¹¹ The government's failure hold individual employees accountable for flagrantly violating the law has led FOIA advocates to denounce the sanctions provision as "toothless."²¹² They do not blame the Office of the Special Counsel, but rather the federal courts that refuse to refer cases to the Office.²¹³

However, one interviewee contended that imposing sanctions might not be necessary to create change. He pointed out that even the threat of sanctions could make a difference; he recalled that the sanctions provision was the "driving force" of the DOJ's increased training following the 1974 amendment.²¹⁴ Advocates have suggested that one solution to bolster sanctions may be to involve OGIS in the sanctions process. They propose that the ombudsman be empowered to receive and screen sanctions applications without a court finding.²¹⁵

4.8. LITIGATION

In 1974, while debating the necessity of sanctions, Senator Edward Kennedy remarked that, "The only mechanism for enforcing the mandates of the Freedom of Information Act has been for individuals to go to court for an injunction on a case-by-case basis, with great cost and delay. This is an expensive and not always effective approach."²¹⁶ However, many FOIA advocates argue that it is an extremely effective, if inefficient, approach. As one interviewee bluntly stated, "without Courts, the Freedom of Information Act would be worthless."²¹⁷

In order to file in federal court, a complainant must have exhausted administrative remedies, usually by filing an appeal with the agency. Administrative remedies are also exhausted when an agency fails to comply with time limits and there are no exceptional circumstances or exercises of due diligence on the agency's part.²¹⁸ The FOIA grants jurisdiction to the District Court where the complainant resides or has his/her principle place of business, the location of the agency records, or the District of Columbia.²¹⁹ The agency has 30 days from receipt of service to answer unless the court determines there was good cause for a delay.²²⁰

Generally in a FOIA suit, both sides file for summary judgment. Summary judgment is a device used in civil litigation to avoid trial. It is appropriate when there is no dispute over the material facts and one party is entitled to win as a matter of law. The matter is reviewed *de novo* and the court has an opportunity to examine the documents *in camera* (privately) to determine if withholding was appropriate.²²¹

The Court can assess reasonable attorneys' fees and litigation costs when a complainant has "substantially prevailed."²²² For claims that are "not insubstantial," a complainant will have prevailed upon the execution of a judicial order, enforceable written agreement, consent degree or voluntary unilateral change in an agency's position.²²³ Before the "voluntary unilateral change" language was added in the 2007 amendment to the FOIA, agencies would routinely release information just before a judgment, depriving the complainant of his or her ability to collect attorneys' fees.

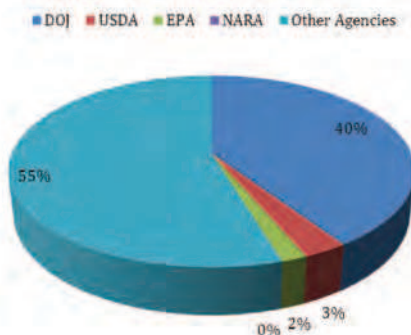
An individual who is representing himself or herself cannot collect attorneys' fees. However, many people elect to represent themselves because hiring a FOIA attorney can be cost prohibitive. FOIA litigation is also notoriously time consuming. Consequently, fee awards can be massive. Recently, the FBI was ordered to pay a journalist \$470,459.75 in attorneys' fees after he substantially prevailed in two long-running FOIA suits.²²⁴

While FOIA fees (for search and duplication) feed into the General Fund of the Treasury, each agency is individually responsible for paying litigants' attorneys' fees. This is in addition to reimbursing plaintiffs for general litigation costs. It costs \$400 for a plaintiff to file a FOIA suit in the District of Columbia, the court system that handles the lion's share of FOIA litigation.²²⁵

In terms of agencies, the DOJ shoulders the largest litigation burden by far. In FY2012, its litigation costs were 55% of all litigation costs. This is not simply because the DOJ handles all of the litigation for federal agencies. In their Annual Reports, the majority of agencies report litigation related costs. The DOJ also receives a large proportion of FOIA appeals; almost 30% of appeals filed with the government in 2012 were lodged with the DOJ.²²⁶

If the agency or requester is not satisfied with the lawsuit's outcome, s/he may appeal to the regional Court of Appeals and to the Supreme Court. The Supreme Court may decline to take the case. If so, the decision of the lower court stands.

Litigation remains a popular and costly means of solving FOIA conflicts. Nonetheless, four decades of FOIA litigation has provided much needed clarity for many of the statute's ambiguities. Litigation has established that agencies must disclose segregable information.²²⁷ It has mandated that agencies include a detailed index, now known as the Vaughn Index, describing what records they have withheld and the reason for those withholdings.²²⁸ Litigation clarified that corporations do not have "personal privacy" under exemption 7(C).²²⁹ It has enabled the government to employ the *Glomar* response, which allows agencies to refuse to confirm or deny the existence of a record.²³⁰

FIGURE 1. FY 2012 Litigation Costs

Litigation can make a noticeable difference in agency practice. For example, the 2011 *Milner* case held that Exemption 2 was limited only to records relating to employee relations and human resources.²³¹ The Navy attempted to use Exemption 2 to withhold information about the handling and treatment of explosives. The Supreme Court ruled that this was not the same as matters concerning personnel and employees. As a result of *Milner*, use of Exemption 2 declined drastically, decreasing 62% from FY2010 to FY2011.²³² For more information on key FOIA case law, please see Annex 3.

As FOIA litigation is such a large part of implementing the legislation, at least one organization has created a tool to help the public keep track of FOIA cases. The Transactional Records Access Clearinghouse's (TRAC) FOIA Project allows users to create a chart of agencies' and components' FOIA litigation by filings, closing or pending lawsuits.²³³ Users can also map cases and search cases by plaintiff, agency sued, judge's name, district, docket and attorneys' names.

The government also keeps careful track of litigation outcomes. The DOJ's Guide to the Freedom of Information Act is exceptionally comprehensive. The Guide contains nearly 1000 pages of discussion on how litigation, OIP and DOJ Guidance, Executive Orders and Presidential Memoranda affect the way agencies should interpret and implement the FOIA.

According to FOIA advocates, the litigation system is ripe for reform. Several problems stem from the fact that the DOJ defends most of the agencies in their FOIA litigation. Following President Obama's and AG Holder's memoranda, there is no evidence available to suggest that the DOJ has, to date, declined to represent an agency in FOIA litigation. Interviewees criticize DOJ attorneys' overreliance on the sued agency for information and their lack of familiarity with the request.²³⁴ Interviewees are also concerned about the lack of independent review and DOJ attorneys' tendency to delay the litigation process.²³⁵ Ultimately, they point to a stark contrast between the DOJ's repeated statements about commitment to open government and their actual actions in FOIA litigations.

The DOJ currently represents the Central Intelligence Agency (CIA) in a dispute with the National Security Archive over the CIA's withholding of a 30-year old draft history of the 1961

Bay of Pigs.²³⁶ One part of the five-part history was disclosed as part of the Kennedy Assassination Records Act in 1998. The CIA gave the National Security Archive three parts after the inception of litigation. It continues to withhold the part of the report that scrutinizes the CIA's actions during the Bay of Pigs.

Some believe this is in direct contravention of the DOJ's insistence that "[A]gencies must keep in mind the President's directive that records cannot be withheld merely to protect public officials from embarrassment, or 'because errors and failures might be revealed, or because of speculative or abstract fears.' Rather, agencies should only withhold records, or portions of records, when they reasonably foresee that disclosure would harm an interest protected by one of the exemptions or when disclosure is prohibited by law."²³⁷

To fix the system, interviewees suggest a systematic litigation review. One prominent litigator remarked that her organization is repeatedly litigating and winning the same issues; a systematic litigation review could reveal these trends.²³⁸ On a macro level, she believes it would also demonstrate that top DOJ Officials care about the current openness agenda.

Such a review was last conducted under AG Reno. She required the DOJ to examine its pending FOIA cases based on her new foreseeable harm standard. Under Reno's standard, the DOJ would only defend the use of an exemption in cases where the agency could reasonably foresee that disclosure would harm an interest protected by the exemption. According to the DOJ itself, the review resulted in greater disclosure and a "narrowing of the scope of records and issues contested in the case."²³⁹

4.9. EXECUTIVE ORDERS, PRESIDENTIAL AND ATTORNEY GENERAL MEMORANDA

Executive Orders

Executive Orders (E.O.s) are directives from the President, often addressed to agencies, which have the full force of the law when issued under valid legislative or constitutional authority and properly published.²⁴⁰ E.O.s can be on a variety of topics from discrimination to national security. Several Presidents have employed E.O.s to shape FOIA and to limit or expand the Act's influence on topics including business practices and national security.

A newer Executive Order can supersede or amend an older one. National security classification is an excellent example of this. Over a 21-year period, beginning in 1982, national security classification has been addressed in four Executive Orders. President Ronald Reagan wrote E.O. 12356, the first E.O. for national security classification, during the reawakened Cold War.²⁴¹ The Clinton Administration's E.O. 12958 revoked E.O. 12356.²⁴² Then, E.O. 12958 was amended by the George W. Bush Administration's E.O. 13292.²⁴³ Finally, the Obama Administration's E.O. 13526 revoked both E.O. 12958 and 13292.²⁴⁴

Executive Orders are not without their challenges. Interviewees cited their unenforceability as a major challenge.²⁴⁵ However, E.O.s can be exceptionally effective, especially when narrowly tailored. Executive Order 12600 has been described as "the most significant amendment to exemption 4."²⁴⁶ E.O. 12600 requires agencies to alert submitters when a requester has asked for records containing documents that the submitter has identified as confidential business information.²⁴⁷



Presidential and Attorney General Memoranda

In addition to issuing Executive Orders, the president may also release Presidential Memoranda. The two types of presidential instruments are very closely related in that they enjoy the full force of law if certain conditions are fulfilled; both are used to compel agency action.²⁴⁸ Cabinet officials may also release instruments with the power to establish new standards in the execution and implementation of legislation. In the case of the FOIA, several United States Attorneys General have issued memoranda and guidelines.

The AG serves as both the head of the Department of Justice and the country's chief law enforcement officer. The AG's position at the DOJ is especially relevant for FOIA because of the DOJ's paradoxical FOIA tasks. The DOJ's Civil Division defends agencies against requesters in FOIA litigation while OIP is charged with issuing guidance on agency compliance with the Act. In order to effectuate a larger policy change, AG Memoranda may accompany Presidential Memoranda. This trend was evident with President Clinton and AG Janet Reno, who simultaneously released FOIA memoranda on October 4, 1993.

President Clinton called for a new commitment to the FOIA and its underlying principles of openness in his Memorandum to the heads of departments and agencies.²⁴⁹ He stressed that this commitment to openness could not be limited to simply responding to requests but should also include proactive disclosure.²⁵⁰ For her part, AG Reno's memorandum immediately insisted on ensuring that a presumption of openness be applied in every disclosure decision.²⁵¹ More drastically, her memorandum repealed the litigation standard established in the DOJ's 1981 Guidelines for FOIA litigation. Reno eliminated the DOJ practice of defending an agency's withholding if there was "substantial legal basis" to do so.²⁵² Instead, the presumption of disclosure would be applied in deciding whether or not to defend a decision.²⁵³ The new DOJ policy would only defend the use of an exemption if the agency "reasonably foresees that disclosure would be harmful."²⁵⁴ Her memorandum also strongly encouraged FOIA officers to make discretionary disclosures.²⁵⁵

The Clinton/Reno strategy was duplicated by President Obama and his AG, Eric Holder. President Obama wasted no time and he issued two memoranda on his first day in office: one on the FOIA and another on transparency and open government. The FOIA memorandum instructed, "in the face of doubt, openness prevails."²⁵⁶ Information could not be kept from the public simply because of its potential to embarrass public officials, "speculative or abstract fears" or protection of the personal interests of Government officials.²⁵⁷ He then directed the AG to release new guidelines governing the FOIA. President Obama's second instrument, the transparency and open government memorandum, discussed what government "should be": transparent, participatory and collaborative.²⁵⁸ CSOs warmly welcomed these memoranda as signaling "a serious commitment to transparency and accountability in government."²⁵⁹

Three months later, AG Holder released the new FOIA guidelines via memorandum. The memo opened with the presumption of openness, cautioning that an agency should not withhold information just because it can do so legally and that agencies must consider partial disclosures when full disclosures are not possible.²⁶⁰ He reinstated the Reno standard of defending a withholding only if the "foreseeable harm" standard could be met or if disclosure was prohibited by law; he advised that DOJ attorneys take this standard into account regarding pending cases.²⁶¹ However, he did not call for a systematic review of the DOJ's practices in defending agencies' decisions to withhold information, as AG Reno had done.

AG Holder also stated that the FOIA was everyone's responsibility, not simply that of FOIA staff. "Unnecessary bureaucratic hurdles," wrote Holder, "have no place in 'the new era of open government' that the President has proclaimed."²⁶² Finally the memorandum addressed delays, encouraged proactive disclosure and reminded agencies of their obligation to use tracking numbers as required by the OPEN Government Act of 2007.²⁶³

Agency Compliance with Executive and AG Memoranda

The history of Presidential directives and Attorney General Guidelines clearly demonstrates inconsistencies in FOIA implementation and policy. With policies changing, sometimes drastically with each new administration, the effectiveness of these documents varies. A memorandum written by AG John Ashcroft illustrates this problem perfectly. Shortly after the September 11th terrorist attacks, George W. Bush's AG, John Ashcroft, issued a FOIA memorandum that repealed several standards established in AG Reno's memorandum. Ashcroft encouraged agencies to release documents under FOIA only after they had thoroughly reviewed the request in light of various exemptions; he assured agencies that the DOJ would defend them in their refusals to disclose in the majority of cases.²⁶⁴ Response to the memorandum was fast and furious with one journalist writing, "...without fanfare the attorney general simply quashed the FOIA."²⁶⁵

Following the issuance of the Ashcroft Memorandum, the National Security Archive at the George Washington University conducted an audit of 33 departments and agencies.²⁶⁶ Their audit revealed that only 15% (five departments or agencies) widely disseminated the Ashcroft memorandum and had "significant changes in regulations, guidance or training materials."²⁶⁷ Eight (24%) carried out some implementation activities including disseminating the memo and incorporating it into FOIA procedures and regulations.²⁶⁸ On the other hand, more than half (52%) stated they were aware of and had disseminated the report but had made little change in regulations, guidance or training materials to reflect the new policy.²⁶⁹ Three agencies (9%) stated there was little to no dissemination of the memo and they had not implemented any changes.²⁷⁰ Although concerns over this memo were not misplaced, agency inaction saved the Act from being "quashed."

More than a decade later, agencies have demonstrated a similar reticence or inability to adopt a different Executive policy. Many agencies have not changed their regulations to reflect President Obama's and AG Holder's memoranda.²⁷¹

Federal regulations detail how the agency will execute the law. Under the FOIA, agencies must create regulations concerning fees, the aggregation of certain records, multi-track processing and expedited processing of records.²⁷² The agency should notify the public and solicit public comments before publishing the regulations.²⁷³ Failure to update regulations results in agencies charging improper fees and then being sued over the discrepancy.²⁷⁴ While the DOJ is supposed guide agencies' compliance with the FOIA, including updating of regulations, it also represents them during litigation. FOIA advocates regularly have noted this fundamental tension in the DOJ's roles in relation to the Act.

The failure of a large number of agencies to incorporate the Obama-Holder principles in their regulations may explain why agencies' release rates have remained relatively flat since 2009; agencies have fully or partially released approximately 93%–94% of records processed for exemptions.²⁷⁵ When the average requests processed percentages of the different



administrations are compared, Obama (94.7%) has a higher release average than both George W. Bush (93.2%) and Clinton (88.9%).²⁷⁶ However, a much larger portion of Obama's average is partial releases, 50.3% compared to 30.4% for Bush and 16.5% for Clinton.²⁷⁷ Partial releases are a double-edged sword. While it is true the entire record has not been withheld, partial releases are sometimes employed to provide information that is not helpful to requestors but that increases overall disclosure numbers.²⁷⁸

Nonetheless, OIP has noted several accomplishments in its summaries of the agency's Chief FOIA Officer Reports. While only 52 agencies out of 94 reported having a system in place for discretionary disclosure in their 2010 report, that number increased to 97 out of 99 by the 2012 report.²⁷⁹ Also, while the release rate of records screened for exemptions has changed little since 2009, that rate was only 60% in 2008.²⁸⁰

Progress under the Obama Administration has been piecemeal. Government-wide improvements across agencies have been scarce due to inconsistent enforcement, staff turnover, congressional inaction and uncertain funding.²⁸¹ Slow FOIA progress under the Obama initiatives also bolsters interviewees' contention that "there's a bureaucratic imperative towards secrecy."²⁸² On the flip side, they argue that there is no firmly imbedded culture of openness.²⁸³ Many interviewees also believe that the Obama administration has not followed up sufficiently on its transparency mandate because no one has "ownership" for the agenda.²⁸⁴ They suggest that a DOJ or White House official be designated to oversee the implementation of the administration's open government efforts.²⁸⁵

5. Agency Level Practices

Relying on the public and the judiciary to enforce the FOIA has led to incomplete and uneven execution of the law. Some agencies carry out their duties under the FOIA better than others. In order to illustrate this point, this section of the case study will present information on the federal system overall and four departments and agencies within that system: the United States Department of Agriculture (USDA), DOJ, Environmental Protection Agency (EPA) and National Archives and Records Administration (NARA).

5.1. LEADERSHIP

The OPEN Government Act of 2007 required each agency to designate as Chief FOIA Officer (CFO) a senior official of the agency (at the Assistant Secretary or equivalent level). The CFO has agency-wide responsibility for efficient and appropriate compliance with the FOIA and is tasked to: monitor implementation of the FOIA throughout the agency; keep the head of the agency, the chief legal officer of the agency, and the Attorney General appropriately informed of the agency's performance in implementing FOIA in the agency; recommend to the head of the agency such adjustments to agency practices, policies, personnel, and funding as may be necessary to improve its implementation of this section. The CFOs are required to submit annual reports to the Attorney General.²⁸⁶

5.2. HUMAN RESOURCES AND PERSONNEL

During Fiscal Year (FY) 2012, the federal government employed 4,065 "full-time" FOIA staff government-wide.²⁸⁷ In this context, "full-time" refers to both full-time employees and the

cumulative percentage of the time other staff spend on FOIA as part of their duties.²⁸⁸ This was a marked decrease from FY2011, when the government employed 4,396 full time FOIA staff,²⁸⁹ breaking a steady growth trend, from FY2008 (3,691) to FY2011 (4,396).²⁹⁰ Much of the 2012 discrepancy is due to staff reductions at the Department of Defense (DOD), from 1035 to 719 in FY2012.²⁹¹

Despite the increase in staff between 2008 and 2011, a survey of FOIA professionals, conducted by Citizens for Responsibility and Ethics in Washington (CREW), revealed that 54% labeled lack of staffing as a “serious” or “very serious” problem.²⁹² As one frustrated responder wrote, “We don’t need to be told how and when to apply exemptions; we don’t need anyone to explain the presumption of openness that has always existed under the FOIA. We need staffing and funding.”²⁹³

Most FOIA advocates believe that FOIA professionals have good intentions and do not act with malice when they process requests. They see the problem as one of motivation and culture. There is very little incentive to disclose documents that may be embarrassing, revealing or controversial. As two interviewees noted, there is less potential for trouble if an employee withholds and no reward if she or he discloses.²⁹⁴ The media is another consideration. As one interviewee pointed out, while the press story of “they didn’t disclose this” has a limited shelf life, the “look what we found out!” story can linger.²⁹⁵ Moreover, some interviewees believe there is a natural government imperative toward secrecy and against transparency.²⁹⁶ They contend that no matter what administration is in charge, the impulse to deny, rather than disclose, is ever present.

There are several ways to foster a cultural change toward greater openness. One is for top-level officials to adopt proper implementation of the FOIA as a priority. This includes White House officials and agency CFOs and Directors. Interviewees believe that “buy-in” from higher-ups can stimulate a shift in a department or agency.²⁹⁷ Two additional solutions that will be explored below are (i) increasing public awareness so that requesters can hold agencies accountable, and (ii) increasing agency FOIA staff training so that employees are applying the presumption of openness.

5.3. TRAINING AND PUBLIC AWARENESS BUILDING ACTIVITIES

The public awareness and staff training activities of the USDA, DOJ, EPA and NARA are discussed briefly below. Regarding public awareness, all four of these entities have FOIA pages where requesters can find information about filing a request. For training, all four were given a green light for meeting the staff-training milestone in OIP’s latest assessment of the CFO’s Annual Reports. Once again, their achievements echo a system-wide trend: 88 of 99 agencies scored green on staff training.²⁹⁸

DOJ

The DOJ uses Facebook, Twitter and YouTube pages to reach the public.²⁹⁹ Some of its social media is targeted at FOIA requesters. For example, its YouTube page features a section called “All About the Freedom of Information Act” which contains seventeen FOIA videos covering everything from “What is the FOIA?” to “What is a consultation?”³⁰⁰ In addition, OIP operates FOIAPost as a blog and on Twitter.³⁰¹ The Office’s tweets include links to training details, blog posts, the travel schedule of OIP’s Director and summaries of Court decisions.

The DOJ is cognizant of the fact that, as the parent agency of OIP, it has a special responsibility to the FOIA. Over a three-year period, OIP has conducted hundreds of training sessions,



conferences and seminars attended by thousands of federal employees and members of the public. It offers video-conference training for those unable to attend.³⁰² Training descriptions, dates, locations and materials are available online.³⁰³ In 2012, OIP launched its Director's Lecture Series and held three specialized sessions: "Focusing on FOIA Fundamentals," "Achieving FOIA Goals," and "Tracking Agency Progress to Implement the FOIA Guidelines."³⁰⁴

The DOJ, through OIP, has sought out and maintained a fruitful relationship with the American Society of Access Professionals (ASAP). Founded in 1980, ASAP is a non-profit NGO that serves as a forum to bring FOIA and Privacy Act personnel together with the requester community.³⁰⁵ ASAP provides various training and educational programs for FOIA professionals and the public. OIP's training efforts earned it ASAP's Director's Award for Superior Public Service in December 2012.³⁰⁶

OIP has also worked with OGIS to hold FOIA Roundtables on: Providing Records in Electronic Formats, Maximizing the Administrative Appeal Process, and FOIA Fees and Fee Waivers among other topics. FOIA Roundtables are open to the public and are publicized on both offices' websites.

NARA

Like the DOJ, NARA uses social media to inform the public about its FOIA-related services. The agency operates Facebook, Twitter and YouTube pages as well as a blog—NARAtions, the blog of the United States National Archives.³⁰⁷ NARA's YouTube site features videos for its Media Access to Government Information Conference (MAGIC).³⁰⁸ Beyond the general NARA sites, OGIS's website provides resources for requesters and agencies including best practices, FOIA guides and links to FOIA focused civil society websites.³⁰⁹ OGIS also operates a blog that includes numerous entries on subjects that are highly relevant to the requester community and agencies.³¹⁰

OGIS's trainings tend to focus on dispute resolution. In its first year, OGIS gave 43 presentations, 41 of which were attended by agencies, NGOs, academic groups, state organizations and international organizations.³¹¹ OGIS's reports indicate that the Office has learned from its previous experiences. Noticing that agencies were more likely to work with OGIS via informal mediation, it focused its trainings less on mediation and more on techniques to improve customer service/communication.³¹² In 2011, OGIS began offering agency-specific dispute resolution training.³¹³ That year, the Office partnered with civil society and the media to conduct trainings and seminars including at a National Public Radio (NPR) staff training, the American Bar Association (ABA) Annual Meeting and Sunshine Week activities.³¹⁴

OGIS also enjoys a close relationship with ASAP. Its first year, the ombudsman worked with ASAP to hold orientation sessions to familiarize FOIA liaisons with OGIS.³¹⁵ In 2013, OGIS's Director was awarded ASAP's highest honor: the President's Award for Distinguished Public Service.³¹⁶

EPA

Unlike the DOJ, OIP, NARA and OGIS, the EPA does not have much information about the FOIA on its Facebook, Twitter and YouTube pages.³¹⁷ A search for FOIA-related discussions on the EPA's Blog, Greenversations, revealed a post on MyPropertyInfo, which will be discussed in the subsequent section on proactive disclosure.³¹⁸

The EPA has lauded its “robust” training program for employees whose primary duties are to handle FOIA requests or who require general FOIA training.³¹⁹ In its most recent CFO report, the EPA describes a plethora of trainings and meetings including: attendance at DOJ, NARA and ASAP trainings; conducting a fall training for FOIA coordinators and Officers attended by 450 staff from twelve departments and agencies; holding monthly meetings between FOIA Officers and FOIA Coordinators to provide guidance and give updates; and holding monthly meetings between the Office of General Counsel, regional FOIA counterparts and EPA professionals.³²⁰

Beyond training, the EPA has demonstrated a willingness to disseminate and execute the President’s and AG’s Guidelines. In 2010, Regional FOIA officers and FOIA Coordinators met on a monthly basis to discuss new FOIA Guidelines.³²¹ In 2012, the EPA convened a Freedom of Information Act Workgroup to examine the EPA’s administration of FOIA. The Workgroup was challenged to determine what the agency could do to “increase openness, transparency and accountability.”³²² The Workgroup revealed that some EPA employees lacked even a basic understanding of the FOIA; it recommended that the agency institute mandatory annual FOIA training for all of its employees.³²³

USDA

The USDA’s use of social media to connect with FOIA requesters is similar to that of the EPA. Like all of the aforementioned agencies, the USDA has Facebook, Twitter and YouTube pages.³²⁴ It also has a blog.³²⁵ The USDA has used this blog to publicize proactive disclosure activities.³²⁶

In its CFO Report, the USDA notes that its employees have consistently attended DOJ trainings; they have also conducted various FOIA trainings for their own staff.³²⁷ In 2011, USDA employees participated in an eclectic mix of seminars including: “Freedom of Information Act for Attorneys and Access Professionals,” “Overview of the Privacy Act,” “FOIA Fee Summit and FOIA Exemption 2 Briefing after the Supreme Court’s Ruling in *Milner v. Department of the Navy*.”³²⁸ Employees also attended a brown bag session with OGIS.³²⁹

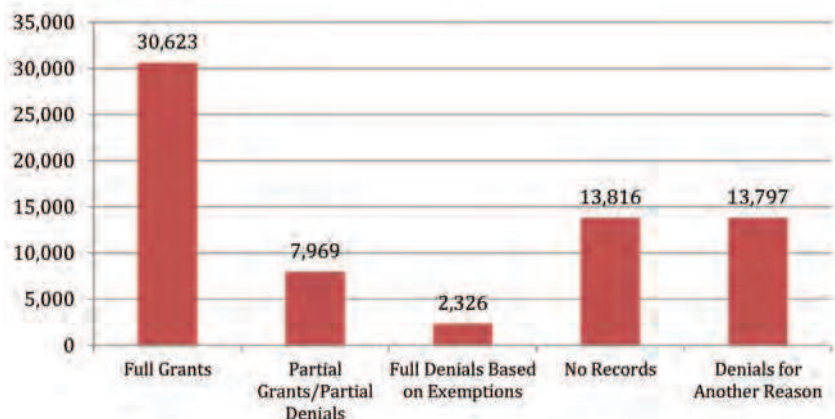
The USDA has looked inward to examine its own challenges in implementing the FOIA. On January 6, 2012, USDA created a USDA-wide internal FOIA Council to provide a “centralized forum” for the USDA’s FOIA community. Its goals include streamlining inter and intra agency FOIA operations, strengthening the USDA’s FOIA regulations, policies and procedures, providing internal FOIA training and announcing DOJ, OGIS and other external training opportunities.³³⁰ The Council meets monthly, while its subcommittees meet every week or fortnight.³³¹

5.4. RESPONSES TO REQUESTS

DOJ

The DOJ’s Annual Report for FY 2012 states that the agency’s processing times average 18.93 days for simple requests, 100.21 days for complex requests and 189.79 days for expedited requests.³³² The DOJ’s processing time for simple requests falls just under the 20-day limit imposed by FOIA.

The DOJ released information and records, either partially or fully, in response to approximately 57% of the requests it received. It did not rely heavily on exemptions, invoking them in

**FIGURE 2.** Disposition of Processed Requests (DOJ)

response to only 3% of requests. The DOJ denied a large portion of requests because it could not locate responsive records. The disposition of all processed requests is shown in figures 2 and 3.³³³

NARA

NARA's Annual Report for FY 2012 states that the agency's processing times average 57.5 days for simple requests, 917 days for complex requests and 10 days for expedited requests.³³⁴

NARA's average processing time for simple requests exceeds FOIA's 20-day deadline by more than 30 days. NARA's processing times are extreme: its 917 day average for processing complex requests is exceptionally high while its 10-day average for processing expedited requests is quite low.

Of the four agencies and departments discussed in this case study, NARA has the lowest release rate: it discloses information in response to approximately 15% of the requests it receives. However, it should be noted that in the overwhelming majority of cases, NARA denied the request because it could not locate responsive records. The agency rarely relies on exemptions and invokes them less; it does so in response to less than 1% of requests. The disposition of all processed requests is shown in figures 4 and 5.³³⁵

EPA

The EPA's Annual Report for FY 2012 states that the agency's processing times average 16.93 days for simple requests, 45.91 days for complex requests and 111.8 days for expedited requests.³³⁶ The EPA met the FOIA standard for processing simple requests in less than 20 days.

The EPA released records, either partially or fully, in response to approximately 58% of the requests it received. It invoked exemptions for 7 percent of the requests, just shy of its percentage for partial release of records. A large portion of requests were denied because no records could be located that fulfilled the request. The disposition of all processed requests is shown in figures 6 and 7.³³⁷

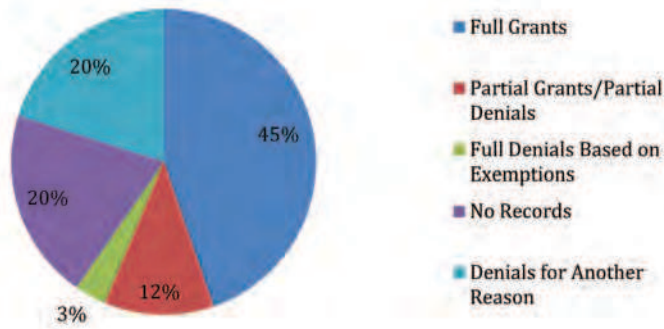
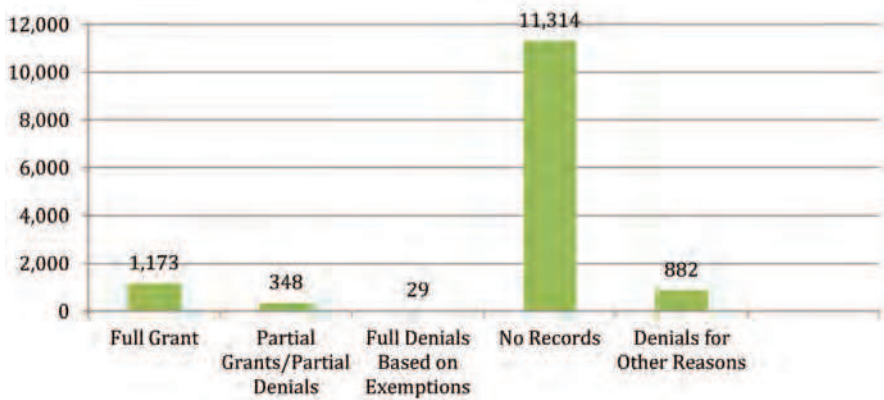
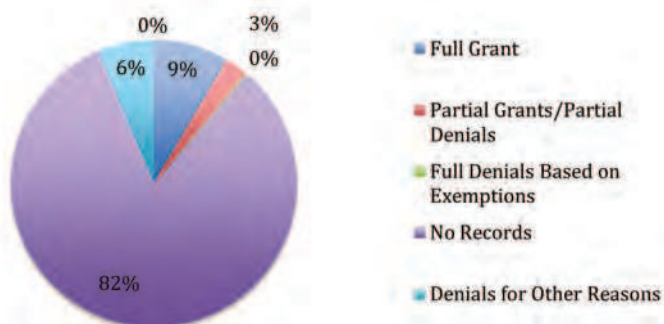
FIGURE 3. Disposition of Process Requests (DOJ)**FIGURE 4.** Disposition of Processed Records (NARA)**FIGURE 5.** Disposition of Processed Records (NARA)



FIGURE 6. Disposition of Processed Requests (EPA)

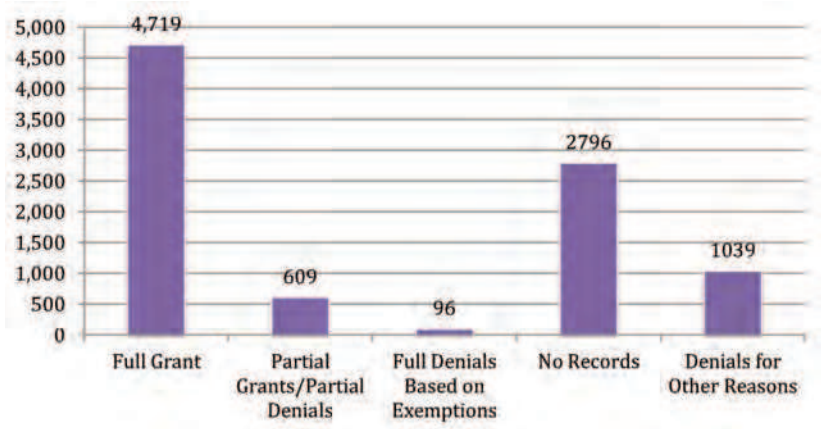
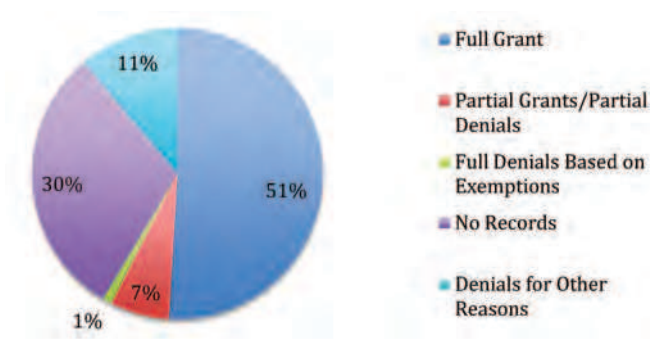


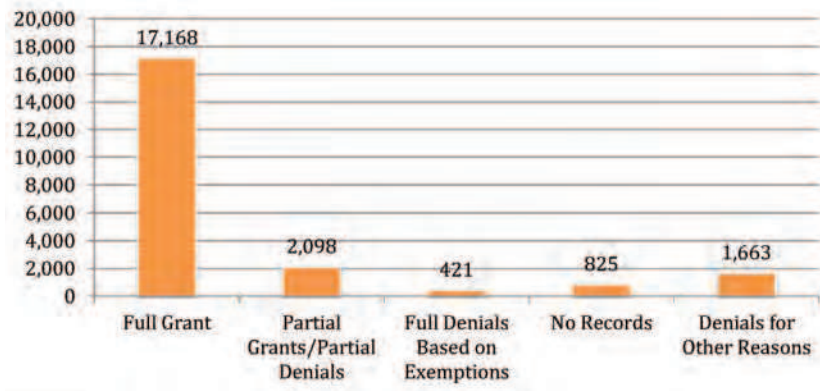
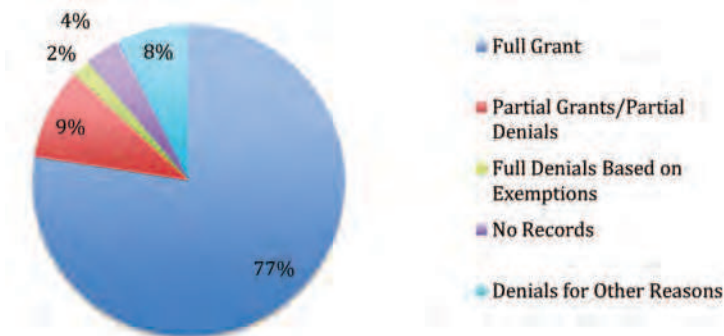
FIGURE 7. Disposition of Processed Requests (EPA)



USDA

The USDA's Annual Report for fiscal year 2012 states that the agency's processing times average 31.9 days for simple requests, 83.33 days for complex requests and 24.89 days for expedited requests.³³⁸ The USDA exceeds the FOIA's 20-day processing limit by more than 10 working days.

Of the agencies and departments featured in this case study, the USDA has the highest release rate. The agency released records, either partially or fully, in response to approximately 86% of the requests it received. It also relied on exemptions sparingly compared to the other agencies discussed in this section. The disposition of all processed requests is shown in figures 8 and 9.³³⁹

FIGURE 8. Disposition of Processed Requests (USDA)**FIGURE 9.** Disposition of Processed Requests (USDA)

5.5. RESPONSES TO APPEALS

Agencies' Protocols

Administrative Appeals are a substantial part of the FOIA process for agencies:

	Appeals Pending at Start of FY12	Appeals Received	Appeals Processed	Appeals Pending at End of FY12 ³⁴⁰
All	3,011	11,899	11,789	3,120
USDA	169	210	180	199
DOJ	501	3,569	3,412	658
EPA	106	215	246	75
NARA	6	61	60	7



Depending on the agency, appeals can be dispatched to agencies in a number of ways. Many agencies can receive appeals via post, fax, email and/or online portals. Agency staff reviews appeals. They decide whether to fully or partially uphold, or reverse the agency's initial determination. The background of the staff engaged in appeals reviews varies. For example, at the DOJ, only OIP attorneys process FOIA appeals.³⁴¹ This is unique. Most agencies do not require staff to have a legal background to process appeals.

It is advisable for requesters to check with the agency to determine the deadline and the appeals process, as time limits for filing the appeal vary, with many deadlines falling between 30 and 60 days. Most agencies have resources to assist requesters in filing their appeals. Some agencies' guides advise requesters on the administrative appeals process and the best way to file an appeal. Many, including the USDA, DOJ, EPA and NARA, publish an online FOIA Reference Guide.³⁴²

- **USDA**—Requesters have 45 days from the date of the initial denial letter to file an appeal. The Department's Reference Guide does not advise requesters on how to file an appeal.
- **DOJ**—OIP adjudicates the administrative appeals for most of the DOJ's components. The DOJ has the longest appeals deadline. OIP must receive the appeal within 60 days of the initial determination letter. Requesters should state their grounds for appeal; they do not need to explain the reasons why they are appealing but the Guide mentions that such information may aid the adjudicator.³⁴³ There is no need to send any disclosed documents to OIP unless the appeal is related to the documents. Requesters can submit their appeals via a portal on OIP's website.³⁴⁴ In its guide, the DOJ recommends that requesters using the post write "Freedom of Information Appeal" on both their letter and the envelope. They further counsel all requesters to identify the component, include a request number (if given) and state the date of component action.
- **EPA**—The EPA's deadline is amongst the shortest. The agency must receive the appeal within 30 days of the denial letter's date. The EPA advises the requester to include the original request's tracking number, copies of the initial letter and the agency's response and the reasons for the appeal. The agency also recommends that requesters engage in a little self-help. As an example, they suggest that if the reason for the appeal is that the requester believes there are additional records that the agency has not located, the requester should state why they think the records exist and where they believe the records may be located.
- **NARA**—NARA requires appeals to be received within 35 days of the date on their denial letter. Like OIP, they advise the requester to mark "FOIA Appeal" on both the letter and the envelope. The FOIA Guide recommends that the requester explain why NARA should reverse their initial decision, why the requester believes the search was inadequate and/or why the requester believes that the records are subject to FOIA. The requester can include copies of any documents that were released in order to aid NARA in their decision.

Agency	Deadline	Guidance Components				
		Method of Receipt	Tracking Number	Original Response Letter	Grounds for Appeal	Explanation
USDA	45 days	mail	no guidance provided			
DOJ	60 days	mail, online portal	advised	not required	required	not required
EPA	30 days	mail, fax or email	advised	advised	advised	recommended
NARA	35 days	mail	n/a	allowed	advised	advised

- **Non-Governmental Entities**—Various nonprofits and organizations also publish guides on how to submit FOIA appeals. The Reporters Committee for Freedom of the Press, who publish a comprehensive Federal FOIA Appeals Guide for journalists and other requesters, recommends that requesters take the following steps in their appeals:
 - Clearly state that this is a formal appeal to a denial pursuant to FOIA;
 - Summarize the request and the response received;
 - Attach all relevant correspondence from the initial request letter to the final adverse decision;
 - Provide current contact information;
 - Express a willingness to resolve the dispute; and
 - State that a response is expected within 20 days as required by the FOIA.³⁴⁵

To aid requesters, the Reporters Committee provides an appeal letter template on their website including sample letters based on the exemptions cited in the initial denial.³⁴⁶

Disposition of Appeals

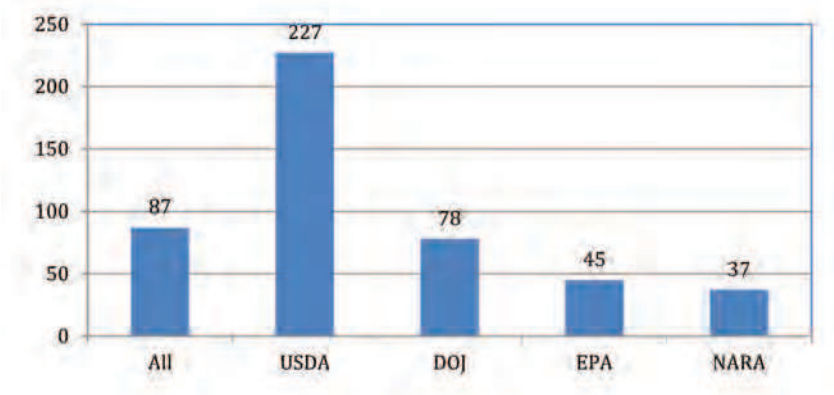
Agencies tend to take much longer than the 20 days afforded by the statute to process their administrative appeals as shown in figure 10.

The USDA's high average is due in part to the Food and Safety Inspection Service, which took an average of 705 days to process administrative appeals.³⁴⁷

Agencies tend to affirm their initial decision or close the appeal more often than they partially or completely reverse.³⁴⁸ See figures 11 through 14.



FIGURE 10. Average Administrative Appeal Processing (Time in Days)



	Affirmed	Partially Affirmed/ Partially Denied	Completely Reversed	Closed for Other Reasons ³⁴⁹
USDA	45	45	26	64
DOJ	1976	180	387	869
EPA	97	45	36	68
NARA	45	6	9	0

FIGURE 11. FY2012 USDA Disposition of Appeals

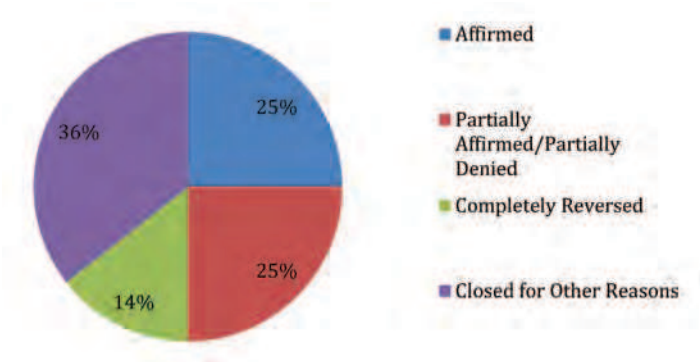


FIGURE 12. FY2012 DOJ Disposition of Appeals

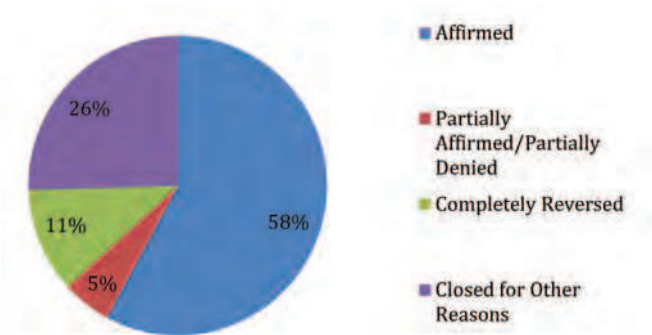
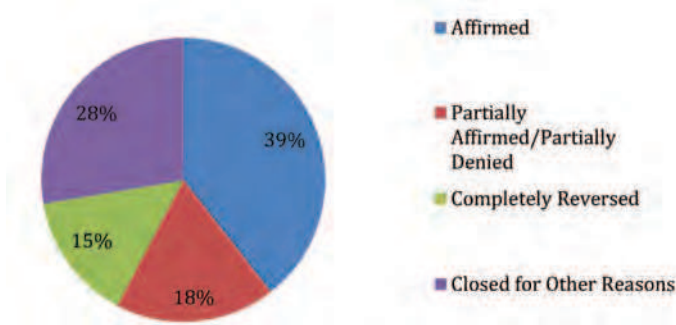
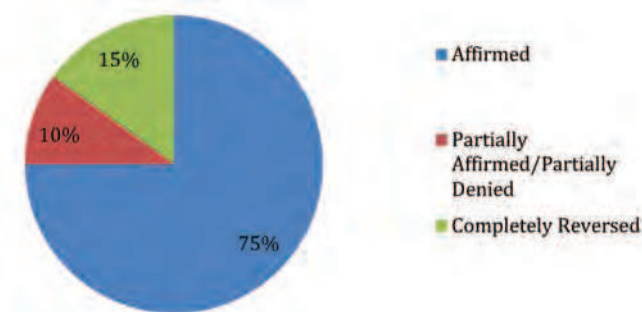


FIGURE 13. FY2012 EPA Disposition of Appeals**FIGURE 14.** FY2012 NARA Disposition of Appeals

While NARA had the largest proportion of affirmed appeals compared to the other agencies in this section, it should be noted that NARA also had the fewest number of appeals to process. In addition, they did not close a single case for “other reasons.”

Reasons Given for Denials on Appeal

Exemptions, “no records,” “request withdrawn” and “other” were among the most commonly cited reasons for partially or fully denied appeals. “Other” referred to a number of reasons including that the agency had already performed an adequate search and untimely appeal.

Agencies rely heavily on exemptions during the administrative appeals process. The exemptions most often invoked by the DOJ were: Exemptions 6 (personal privacy), 7(C) (law enforcement – personal privacy) and 7(E) (law enforcement technique and procedures).³⁵⁰ The USDA relied on Exemptions 3 (prohibited by other legislation), 6 and 7(B) (law enforcement – right to a fair trial).³⁵¹ The EPA used 4 (trade secrets), 5 (privileged agency information) and 6 most often.³⁵² NARA often withheld documents on appeal using Exemptions 1 (national security), 5 and 6.³⁵³

The way that agencies use exemptions in the Appeals process has been criticized. Some requesters complain that the administrative appeals process is potentially misleading. They point out that the initial denial and subsequent appeal often use a form letter that lists several exemptions, which “may” apply to the request. This means that during the appeals process,



the requester is left somewhat in the dark as to the specific reasons for the withholding. This also becomes relevant in litigation. If the request for records is partially or fully denied in the appeal, the agency must alert the requester of the right to judicial review. Many of the exemptions cited in the form letters or listed in first denials are subsequently dropped upon litigation.

In addition, simply citing an exemption is not necessarily helpful to requesters as they prepare their appeals. One interviewee wants agencies to explain their rationale when they redact a document as opposed to merely placing the exemption where the redaction occurred, "Such transparency would make it easier to understand why the records were redacted, force FOIA officers to have to defend their decisions, and help requesters to better file administrative appeals."³⁵⁴

Advocates believe there may be a better system for processing appeals that will reduce the need for litigation. They point to the Interagency Security Classification Appeals Panel (ISCAP) as a model for moving the review of FOIA Appeals outside the involved agency, without litigation (at least initially). ISCAP was established by E.O. 12958 in 1995; the Panel's functions were amended slightly in 2009's E.O. 13526. ISCAP was set up to:

- decide on appeals by persons who have filed classification challenges;
- approve, deny, or amend agency exemptions from automatic declassification;
- decide on appeals by persons or entities who have filed requests for mandatory classification review; and
- appropriately inform senior agency officials and the public of final Panel decisions on appeals.³⁵⁵

Agencies must abide by the ISCAP's decisions. FOIA advocates are impressed with the Panel's record: ISCAP has partially or fully overturned more than 65% of federal classification decisions. It has then released these records on its website.³⁵⁶ Advocates believe that a FOIA panel, based on the ISCAP model, would help address core FOIA issues without tying up District Courts' time and resources.³⁵⁷

5.6. RECORDS MANAGEMENT

The collection, retention and preservation of federal records are not regulated by the FOIA. Instead, the Federal Records Act (FRA), a law nearly two decades older than the FOIA, governs records.³⁵⁸ Records are defined as:

"all books, papers, maps, photographs, machine readable materials, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of data in them."³⁵⁹

The FRA instructs agency heads to create and preserve records that adequately document the "organization, functions, policies, decisions, procedures, and essential transactions of the agency."³⁶⁰

Part of the challenge of records management is the “records” themselves. A Congressional Research Service report explains that a record can be “a sheet of paper, several linear feet of paper, a map, a digital document, a vast database, or a VHS videocassette”; each requiring specific archival protocols.³⁶¹ Adding to the difficulty, most federal records are now “born digital” and use many types of technology and platforms.³⁶² Increased use of electronic records requires agencies to take additional steps to ensure that the records they produce are authentic, trustworthy, accurate, usable, stored properly and protected from corruption and/or destruction.³⁶³ As a result, federal agencies have struggled to fully comply with the FRA.

Under the FRA, agencies and departments must cooperate with the Office of Management and Budget (OMB) and NARA to apply “standards, procedures, and techniques” designed to improve records management, promote the maintenance and security of appropriate records, and facilitate the segregation and disposal of records with temporary value.³⁶⁴

NARA provides oversight and guidance for records management. Every agency’s records schedules must be approved by NARA. These schedules identify records as temporary or permanent and describe instructions for the disposition of records when the agency no longer requires them. Disposition refers to the action taken for records that are not currently needed; it encompasses both the transfer of permanent records to the National Archives for preservation and a schedule for destruction of temporary records . No records may be destroyed without the authorization of the Archivist of the United States.

The Archives also issues the General Records Schedules (GRS), which authorize the disposal of common temporary administrative records, without further approval. Regrettably, until very recently, NARA had instructed agencies that they could treat email under a GRS, which has resulted in 20 years of chaos and in lost email records that should have been permanently preserved. Based on the agency self-assessments (discussed below) that revealed high risk in agencies of improper destruction of electronic records, NARA issued in September 2013 Bulletin 2013-03, *Guidance for agency employees on the management of Federal records, including email accounts, and the protection of Federal records from unauthorized removal*.³⁶⁵ The Bulletin reaffirmed that emails can be federal records. It also clarified employees’ record-keeping responsibility when using personal email or more than one federal email address.

The current Archivist, David Ferreiro, was aware that many agencies have had incomplete (at best) compliance with the FRA and with NARA guidance, particularly regarding electronic records. Thus, in 2009, NARA dispensed its first mandatory records management self-assessment to 242 agencies and their components with the goal of compiling data to determine agencies’ compliance with records management statutory and regulatory requirements.³⁶⁶ On a scale from 0 to 100, NARA categorized agencies as having a low (90–100), moderate (60–89) or high level (59 and below) risk of improper disposition of records.³⁶⁷

	% Low Risk	% Moderate Risk	% High Risk
2009	21	43	36
2010	5	NA	NA
2011	10	45	45

The evaluation was based on five categories: program management, records disposition, vital records, electronic records and email records. The first four of these would be included in all subsequent reports, with additional categories varying by year.



In 2010, NARA attributed the difference in the percentage of low risk agencies between 2009 and 2010 as a reflection of “changes in the nature and number of the questions” as 2010 included a larger number of questions and more multiple-choice questions.³⁶⁸ However, while the percentage of low risk agencies doubled from 2010 to 2011, the percentage of moderate and high-risk agencies has remained relatively steady.

Moreover, several problems were mentioned in more than one report, namely the lack of records management resources, a policy of printing out and filing emails as a means of preserving them, a belief that compliance monitoring was the IT staff’s responsibility, lack of an established performance metrics (a way of reporting on a program’s process), and lack of senior level training.

Compliance with the FRA is mixed for the agencies we have highlighted for this case study. In its 2011 report, the last time that NARA included aggregate scores in their evaluation, the risk averages were DOJ: 56, EPA: 75, NARA: 46 and USDA: 52.³⁶⁹ The agencies’ and departments’ poor performances were reflective of the entire federal system; that year not a single agency’s or department’s averages placed them in the low risk category.

The most recent report only includes the averages for the EPA: 93 and NARA: 70.³⁷⁰ The manually tabulated averages for the DOJ and USDA were 80.75 and 87.25 respectively. While only the EPA is considered “low” risk, each agency markedly improved their averages.

Records Management, Open Government and the FOIA

In his November 28, 2011 Presidential Memorandum on managing government records, President Obama noted that improving records management has several benefits: improved performance, promotion of openness and accountability, preservation of records for the enjoyment of future generations, cost minimization and more efficient operations.³⁷¹ Properly managed records, he wrote, are “the backbone of open Government.”³⁷²

In accordance with the FRA and the President’s Managing Government Records memorandum, OMB and NARA issued a Records Management Directive in 2011 to assist agencies with their records management. The Directive set two goals: to require electronic records-keeping to ensure transparency, efficiency and accountability; and to demonstrate compliance with federal records management statutes and regulations.

In order to realize the first goal, agencies were instructed to meet two targets: 1) manage all permanent electronic records in an electronic format by 2019; and 2) manage both permanent and temporary emails in an accessible electronic format by 2016.³⁷³ Beginning one year after the date of the directive, agencies were required to report their progress to NARA and OMB on an annual basis.³⁷⁴

In order to accomplish the second goal, agencies were required to designate a Senior Agency Official (SAO) whose responsibility it is to oversee a review of the agency’s records management system.³⁷⁵ OMB, the Office of Personnel Management (OPM) and NARA also set benchmarks for themselves to assist agencies including an overhaul of the GRS by December 31, 2017.³⁷⁶

Records management problems are at the core of some of the requester community’s greatest criticism of agencies’ FOIA implementation. One issue is preservation of records that might be responsive to a FOIA request when the records have been legally scheduled for destruction. In July 2013, OIP and OGIS sponsored a FOIA Roundtable on Electronic Records. The directors of both offices attended along with agency employees, frequent requesters and private industry. Frequent requesters protested the agency practice of destroying documents

before a FOIA request could be filed. They described filing timely requests for records and explicitly stating the time sensitive nature of the records, only to have those records destroyed before the request could be acted upon due to backlog issues.³⁷⁷

NARA and OIP officials responded that: agencies should be conducting a cursory review when they receive a request to determine if there are time-associated materials relevant to the request;³⁷⁸ and the FOIA analyst should communicate with the records employees. Several agencies' protocols for these types of requests were shared: the Department of Transportation's (DOT) Office of the Secretary of Transportation sends an immediate request to the location where they believe the records may be located so that the record can be flagged and pulled;³⁷⁹ and the Federal Aviation Administration (FAA), some of whose records have a very short shelf life, has knowledgeable analysts who attempt to get the records as soon as possible.³⁸⁰

While not necessarily indicative of general agency practice, the DOT Office of the Secretary of Transportation and FAA's protocols for time sensitive records are good practice. They reflect good communication. FOIA advocates contend that this is not the case for many agencies where FOIA personnel have little to no contact with records management personnel. This means that agencies are not especially aware of their ability to locate electronic messages like emails.

For the requester community, the preservation of emails is a particular concern. In an August 2013 bulletin, NARA introduced an approach known as "Capstone," an email management system (but not a particular technology or software program), which permits agencies to automatically capture records from top officials' accounts that should be preserved.³⁸¹ The approach allows agencies to designate the email accounts of other employees who are likely to create or receive email records that should be permanently preserved. With Capstone, users would no longer have to print out and file emails, which remains a popular, if ineffective, way of creating an official email record. According to NARA, Capstone provides some other advantages: optimizing access to federal records responsive for discovery of FOIA requests; preserving permanent email records that are to be transferred to NARA; and reducing the risk of unauthorized destruction of email.^{382, 383}

NARA is clear that there also are risks associated with Capstone, however. Agencies must choose the appropriate Capstone accounts and should be aware that personal and non-record email may be collected and will have to be dealt with. This raises questions as to whether end users will be permitted to delete certain personal emails or non-records from their account and, if so, how that will be appropriately accomplished.³⁸⁴

For the most part, civil society has applauded NARA's recent records management efforts, due in large part to the new Archivist. Advocates are especially optimistic about Capstone.³⁸⁵ While agencies are not required to use Capstone, FOIA advocates hope they will do so.³⁸⁶

5.7. BUDGET

There is no specific line item for the FOIA in agencies' budgets. Instead, the FOIA is funded from agencies' administrative budgets. FOIA advocates are split on whether this is a benefit or a detriment.

Advocates who believe that FOIA funding should remain undefined fear that a line item would make the FOIA more vulnerable to budget cuts. As one interviewee mused, "I can just see members of Congress saying 'Of course public information is important but is it as important as health care? Or veterans' benefits? Or food stamps?' And the answer for all of the



constituencies of those various programs is: No, it’s not. To the academic, abstract question, ‘Do you believe in transparency and FOIA?’ everybody says yes. ‘Do you think it should take funds away from my program?’ The answer is no.”³⁸⁷

Others argue that the reality is that the FOIA is a government-wide statutory requirement on agencies that they cannot refuse to fund or to fulfill. So, a line item might provide clarity on how an agency prioritizes meeting this obligation. Some advocates believe that agencies should request a specific amount of money for the FOIA in order to create a baseline for appropriations.³⁸⁸ This way, the FOIA would not need to compete with other administrative activities for funds from a general pot.

The cost to administer the FOIA depends on the agency. Regardless of the expenditures, agencies cannot depend on FOIA fees to offset costs. The quantity of fees collected is always dwarfed by processing and litigation costs. In any case, as previously mentioned, agencies do not keep their FOIA fees.

For the agencies and departments we have focused on in this case study, FOIA administration costs and fees vary a great deal:

	DOJ ³⁸⁹	USDA ³⁹⁰	NARA ³⁹¹	EPA ³⁹²	All Agencies ³⁹³
Processing Costs	\$57,896,288.63	\$11,153,996.88	\$3,078,553.00	\$17,602,417.00	\$405,464,199.93
Litigation Costs	\$9,804,330.02	\$721,936.86	0	\$416,100.00	\$24,160,095.47
Total Costs	\$67,700,618.65	\$11,875,933.74	\$3,078,553.00	\$18,018,517.00	\$429,624,295.40
Fees Collected	\$82,593.99	\$44,987.08	\$203.70	\$385,722.02	\$4,788,879.89
Fees’ Percentage of Costs	.14%	0.40%	0.01%	2.19%	1.1%

Although there is no consensus on how to handle the budgeting issue, FOIA advocates and agency employees cite limited resources as a serious obstacle to effective FOIA implementation.³⁹⁴

6. Capacity and Influence of Civil Society

In the United States, politicians solicit and receive guidance from a variety of sources. Advocates, corporations and constituents lobby representatives; some even provide suggested legislative language. Congress often calls FOIA experts to testify in hearings in order to illustrate why reforms are (or are not) necessary and to participate in meetings. Civil society engagement in the creation, implementation and strengthening of the FOIA primarily has involved organizations representing the news media and a wide range of organizations focused on good government and government accountability. These organizations frequently work together both to promote improvements to the FOIA and to block legislation that would expand the types of information agencies are allowed to withhold from the public.

To date, CSOs have achieved many successes in their bid to strengthen the FOIA. As noted in the previous section, advocates blocked the DOJ’s attempt to include misrepresentation in its regulations. They have also heavily influenced the content of several pieces of legislation, including the creation of OGIS in the most recent comprehensive FOIA amendments.

Moreover, CSOs continuously endeavor to raise public and Congressional awareness of transparency issues and build support for the FOIA. For example, each year, groups sponsor events and release reports during Sunshine Week, a national initiative coordinated by Reporters Committee for Freedom of the Press and the American Society of Newspaper Editors (ASNE).

6.1. CIVIL SOCIETY AND CONGRESS

Representatives of CSOs were heavily involved in the FOIA's last comprehensive amendment, the OPEN Government Act of 2007. Advocates who collaborated with Congress persisted in expressing their desire for a FOIA Ombudsman, which had become a distinct possibility and had interest from the key congressional offices. Tom Curley, President and CEO of the Associated Press represented the Sunshine in Government Initiative when he testified in support of the early version of the bill authored by Senators Leahy and Cornyn. He noted the FOIA's weak enforcement, long processing times and the agency practice of releasing documents just before a judgment (which, as noted previously, served to deny the award of attorneys' fees to requesters). Curley asserted that a strong FOIA ombudsman was a legislative priority for the entities he represented.³⁹⁵ Following the bill's passage and OGIS's creation, civil society was successful in lobbying to keep OGIS funded under NARA.

6.2. CIVIL SOCIETY AS A WATCHDOG

Beyond lending support to the Act's inception and amendments, civil society has acted as a FOIA watchdog. Advocates are alert to actions that may affect the scope and usefulness of the Act. In 2011, the DOJ attempted to include the right to mislead requesters about the presence of a record in its regulations. The ACLU, CREW and OpenTheGovernment.Org wrote an eleven-page letter to OIP. These groups urged the DOJ to abandon the proposed section, "because the new rule is antithetical to the transparency goals of FOIA, because it authorizes actual false public statements by the government, and because [it] will distort the judicial review process."³⁹⁶

The provision in the DOJ's regulations also outraged Members of Congress. In his letter to AG Holder, Senate Judiciary Committee Ranking Member Chuck Grassley noted that he shared concerns of these "institutional FOIA requesters" and stated that the proposed section "stands in stark contrast to both the President's and your prior statements about FOIA, transparency, and open government."³⁹⁷ These efforts influenced the DOJ's decision to reconsider the controversial provision. In their response to Senator Grassley, the DOJ remarked that they had received a "number of comments" on their proposed regulations and that the section in question fell short of the Department's transparency goals; they stated that this provision would not be included when the Department issues their final regulations.³⁹⁸

Legislators depend on civil society to sound the alarm when a bill has already been passed but implementation has been poor or stalled. The George Washington University's National Security Archives conducts numerous audits of FOIA implementation. Legislators, the AG and other FOIA advocates have cited their studies. The Archive's work has also directly influenced agency behavior. For example, a metric they created to solicit the "ten oldest requests" from agencies has been subsequently adopted by agencies to help identify their backlogs.³⁹⁹ Senator Patrick Leahy cited one of the Archive's recent audits when he pressed for improved FOIA implementation: "The audit released today by the National Security Archive makes clear that the overwhelming majority of federal agencies are neither fulfilling the President's promise of



an open and transparent government for the American people, nor complying with the vital reforms to the FOIA process that Congress demanded by enacting the Leahy-Cornyn OPEN Government Act.”⁴⁰⁰

Senator Leahy, Senator Cornyn and their staffs are strong proponents of the FOIA. As a result, CSOs have enjoyed a long and productive relationship with these offices. The groups work together on legislation; they highlight problems and stimulate discussions. One interviewee described the process of working with politicians for whom the FOIA is a top priority.⁴⁰¹ First, there is a mutual cultivation of the relationship; FOIA advocates and legislators’ staffs seek one another out and establish a rapport. Then, when a bill is proposed, the deal making begins. Advocates send the legislative staff a wish list and may draft provisions to reflect their aspirations. The legislative staff work with the Member on a draft a bill, which often includes part of civil society’s wish list. The legislator presenting the bill will get a response, and frequently pushback, from the administration and agencies on the proposed legislation. At that point, the staff will reach out to civil society for a response. According to the interviewee, this collaborative process is simply common sense because, “the FOIA was written to serve the interests of the people so it’s natural to hear from the public.”⁴⁰²

6.3. SUNSHINE WEEK

In 2002, the Florida Society of Newspaper Editors (FSNE) launched Sunshine Sunday in response to Florida legislators’ attempt to add new exemptions to the State’s information law.⁴⁰³ The FSNE held three Sunshine Sundays, during which they increased legislative and public awareness of the proposed exemptions. They estimated that at least 300 exemptions were defeated as a result.

After several States started their own Sunshine activities, the ASNE launched the national Sunshine Week in 2005. Sunshine Week is a non-profit and non-partisan event held in mid-March every year to coincide with President James Madison’s birthday. Madison famously opined, “A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.”⁴⁰⁴

The goal of Sunshine Week is to realize the spirit of Madison’s words by increasing public awareness and encouraging individuals to become actively involved with the government.⁴⁰⁵ Over this week, media, politicians, non-profits, libraries, universities and others interested in open government participate in various events. Participants can attend conferences, tutorials and panel discussions. CSOs seize the opportunity to release reports, write editorials and appear on the news to discuss pressing transparency and FOIA issues.

6.4. LEVERAGING FOIA

In addition to shaping the content and implementation of the FOIA, CSOs also use the Act to reveal government and private misdeeds. A few examples include:

- CREW used the FOIA to gather tax returns of “dark money groups” that spend hundreds of millions of dollars in elections without disclosing donor identities.⁴⁰⁶
- The ACLU utilized the FOIA to expose the FBI’s practice of targeting certain communities for investigation based on their race, religion and nationality.⁴⁰⁷

- ProPublica uncovered records via the FOIA that revealed a glaring disparity in Presidential Pardons. The documents showed that, even when the crimes were comparable, whites were four times more likely than minorities to receive a Presidential pardon.⁴⁰⁸
- The Center for Public Integrity's iWatch News and National Public Radio used the FOIA to publish the EPA's internal Clean Air Act watch list of "serious and chronic violators of the Act."⁴⁰⁹

In fact, much of the litigation that CSOs engage in is over disputes for records, like these, that they hope will reveal information of interest to the public.

6.5. MEDIA

It is impossible to discuss civil society's influence on the FOIA without examining the media's relationship role in establishing, supporting and utilizing the Act. As mentioned previously, the media heavily advocated for the FOIA. One of the FOIA's architects was a journalist turned attorney. Dr. Harold L. Cross was serving as legal counsel to the ASNE when he penned "The People's Right to Know: Legal Access to Public Records and Proceedings."⁴¹⁰ This 1953 book is widely viewed as the blueprint for the FOIA. Congress gave Dr. Cross credit for "providing broad outlines for legislative action to guarantee public access to government information."⁴¹¹ Even after Cross provided a plan for the FOIA and Congress approved it, the press was needed to convince President Johnson to sign the Act. Only last minute calls from several newspaper editors convinced Johnson to sign the FOIA.⁴¹²

Like other FOIA advocates, the media is often galvanized to push for legislative action. When President Ford vetoed the 1974 amendments, a maelstrom of editorials and articles followed. Members of Congress read some of these editorials into the Congressional Record, in order to build support for overriding the veto. The editors' and journalists' lively words contributed to the debate and reflected some of the public's disappointment in President Ford:

- *Detroit Free Press*, October 26, 1974 "Ford Lapses on Promise to Open Up Government": "The president said he would submit proposals of his own to Congress. We hope he will do so, and soon, for there are good reasons otherwise why Congress should try to override this veto. While it is true that newsmen and newswomen are among those who have been pressing for passage of the amendments, all of the public has a stake in them."⁴¹³
- *Charlotte Observer*, October 28, 1974 "Keep it Secret—This Veto Does Just That": "Take away Linus's blanket and this unusually mild mannered inhabitant of the Peanuts Comic Strip becomes a tiger. Bureaucrats sometimes react similarly when someone threatens to take away their precious 'top secret' classification stamps. In their effort to keep information from the people, they now have received a boost from President Ford."⁴¹⁴

While many automatically associate the media with the FOIA (and vice versa), the last available non-governmental audit reveals that only about 6% of requesters are representatives of the media.⁴¹⁵ Federal agencies do not have readily available statistics on who makes FOIA requests. One could potentially determine the proportion of media requests by examining fee waiver statistics. However, as these data are not required by Congress or the DOJ, many agencies do not compile them. Instead, those who are curious about this information may review the FOIA logs of individual agency components.⁴¹⁶



Despite this 6% figure, the media's relationship with the FOIA attracts a great deal of attention. Interviewees cited fear of media exposure as one of the contributing factors to persistent bureaucratic secrecy.⁴¹⁷ The public associates the FOIA with unearthing and dispensing information about the government. Journalists also use their trade to discuss the pitfalls of FOIA implementation. Three standouts in both regards are the Associated Press, National Public Radio and ProPublica.

The Associated Press

For the Associated Press ("AP"), FOIA is a means of ensuring that the public has access to the information it has a right to know.⁴¹⁸ The AP identifies itself as an aggressive advocate of government transparency and accountability. Their reporters, editors and counsel take three key actions as they utilize and defend the FOIA:

1. Assert relevant rights under federal and state constitutions and Freedom of Information laws to obtain access to news—going to court, if necessary, to enforce those rights;
2. Monitor compliance by government agencies and officials with FOI laws and report infractions and shortcomings; and
3. Defend the statutory and constitutional rights of journalists to do their work free of government interference or intrusion.⁴¹⁹

The AP conducts both internal and external FOIA training; they have advocated for strengthening the FOIA and have engaged OGIS for certain appeals denied by agencies. Of course, the AP has also broken several key stories using the FOIA:

- By examining and analyzing more than 5,600 data elements, the AP concluded that the Obama Administration had markedly increased its use of the national security exemption to withhold documents.⁴²⁰
- Several months after Hurricane Katrina, the AP wrote about an Army Corps of Engineers list, which revealed that 122 levees were in jeopardy of failing.⁴²¹
- Another of the AP's FOIA requests uncovered videotaped briefings on Hurricane Katrina from August 28, 2006. In one of the briefings, the head of the National Hurricane Center informed the President that New Orleans's levees were "a very, very grave concern."⁴²² Hurricane Katrina hit the Gulf Coast on August 29, 2006, decimating the levees. More than 1,800 people lost their lives in the storm and subsequent flooding.
- The DOD released 2,300 pages of testimony to the AP regarding the death of former professional football player and Army Ranger Pat Tillman. Tillman's death was originally attributed to enemy fire but was later revealed to be the result of friendly fire.⁴²³

National Public Radio

National Public Radio's (NPR) *On The Media* program is broadcast on more than 300 public radio stations.⁴²⁴ The program has won various awards for its investigative and feature reporting including a Peabody, the National Press Club's Arthur Rowse Award for Press Criticisms and more than one Edward R. Murrow Award for outstanding contributions to public radio.⁴²⁵

On The Media has paid close attention to the FOIA. The show has interviewed FOIA advocates in civil society and Congress, and has followed the global right to know movement:

- A Bright Sun-Shiney Day: An interview with Senator John Cornyn on the Faster FOIA Act introduced in 2005.⁴²⁶
- Extreme Makeover: FOIA Edition: an interview with OGIS's inaugural director, Miriam Nisbet.⁴²⁷
- The Government vs. The Freedom of Information Act: A discussion with ACLU Attorney Michael German on the DOJ's attempt to codify *Glomar* in its regulations.⁴²⁸
- Freedom of Information Laws Around the World: a discussion with Martha Mendoza of the Associated Press on the implementation of freedom of information legislation around the world.⁴²⁹
- Mexico's Illuminating Information Laws: Brooke Gladstone of *On the Media* and Kate Doyle of the National Security Archive discuss Mexico's freedom of information law.⁴³⁰

ProPublica

Compared to the AP and NPR, ProPublica is a relatively new kid on the block. Established in 2007, the newsroom is a non-profit that focuses on investigative journalism, particularly those stories in the public interest. The organization is funded via foundation and private donations. ProPublica partners with traditional news organizations to publish its stories, free of charge.⁴³¹ The newsroom won the 2011 Pulitzer Prize for National Reporting and the 2010 Pulitzer Prize for Investigative Reporting.⁴³² Both were the first time the prizes were awarded for non-print (electronic) publications. In 2013, ProPublica's partnership with NPR's *This American Life* culminated in a Peabody Award.⁴³³

In addition to its reporting, ProPublica has designed a (b)(3) statute tracking tool by compiling data from the Sunshine in Government Initiative.⁴³⁴ The tool tracks the use of (b)(3)s by agencies; users can elect to narrow the list by agency or statute.⁴³⁵ The newsroom has published stories about the FOIA and has used the Act in its investigative journalism:

- Talking with the Former FOIA Czar: A conversation with former OIP Director Dan Metcalf.⁴³⁶
- FOIA Eyes Only: How Buried Statutes Are Keeping Information Secret—a discussion of the b(3) exemption.⁴³⁷
- Agencies Move to Restrict FOIA Access in Last Minute Regs. This story detailed various agencies' efforts to make it more difficult to access records as the George W. Bush administration wound down.⁴³⁸
- Revealed: America's Arms Sales to Bahrain Amid Bloody Crackdown. The DOD released records to ProPublica, following a FOIA request, on arms sales to Bahrain between February 2011 and February 2012.⁴³⁹
- By the Numbers: A Revealing Look at the Mortgage Mod Meltdown. This series used previously unreleased records from the Treasury Department obtained via a FOIA request. It exposed how actions by the government, mortgage industry and the Home Affordable Modification Program led to precarious financial situations for homeowners.⁴⁴⁰



Clearly the media's relationship with the FOIA is not all sunshine. Journalists have very predictable criticisms of the Act's implementation. Slow processing times, overuse of exemptions and uneven application of fee waivers and expedition requests make it difficult for investigative journalists to produce in-depth, timely pieces.⁴⁴¹

6.6. PRIVATE SECTOR

The United States government arguably has the capacity to collect and report data on who is making FOIA requests. Agencies are not required, however, to report this information in any of their annual reports. Moreover, there is no standardized procedure for recording the "type" of requester. What one agency tags as a non-profit organization, another agency may tag as "other."

In order to get a general picture of who is making FOIA requests, an interested party would have to locate (or, in some cases, formally request), examine and analyze FOIA logs and other data from various agencies. To date, no individual or organization has compiled and examined the FOIA logs for every entity subject to the FOIA. Nonetheless, less detailed reviews have revealed that private industry's use of the FOIA trumps that of the media, NGOs and individuals.

The Coalition of Journalists for Open Government (CJOG) released one of the most comprehensive reviews of who is using FOIA. While the study was released some time ago, in 2006, it provides valuable insight into who is likely using the FOIA. CJOG analyzed 6,439 FOIA requests to eleven cabinet agencies and six large agencies.⁴⁴² The review revealed that more than 60% of requests came from those with commercial interests; of those, 25% were filed by professional data brokers working on behalf of clients.⁴⁴³ Approximately a third were filed by "other," which CJOG interpreted as being composed primarily of private citizens.⁴⁴⁴ The final 6% were media requests.⁴⁴⁵

A recent study conducted by the Wall Street Journal (WSJ) backs up CJOG's conclusions. In 2013, the Wall Street Journal reviewed 100,000 FOIA requests filed over the past five years. Their review revealed that investors use FOIA to "troll for all kinds of information" that may aid them in making investment decisions.⁴⁴⁶ Hedge funds and third party organizations "increasingly" use FOIA in order to obtain important investment information.⁴⁴⁷ The paper noted that the EPA, Department of Energy and Securities and Exchange Commissions were all popular targets for investor requesters.⁴⁴⁸

Some of these third party organizations are hired to obfuscate requesters' identities. FOIA logs will often list the requester's full name. One company, FOI Services Inc., made 10% of the 50,000 requests submitted to the Federal Drug Administration during the five-year period examined by the WSJ.⁴⁴⁹ The company's Senior Vice admitted requesters often use their firm to "blind" their requests.

Of course, private industry does not simply use the FOIA in order to increase profits. One interviewee remarked that corporations also use the FOIA to "learn how to obey the law better, how to keep government accountable for equal enforcement and to ensure that decisions that are made are based on a factual foundation."⁴⁵⁰ He further explained that FOIA is good for business, remarking that, "Disclosure is good for competition. There is no question about that."⁴⁵¹

7. Broader Political Environment

7.1. POLITICAL ENVIRONMENT

In his long fight to establish the FOIA, Representative John Moss denounced efforts to frame the issues in “the gaudy colors of partisan politics... Government information problems are political problems—bipartisan or nonpartisan, public problems, political problems, but not partisan problems.”⁴⁵² The Democrat from California began to lobby for a right to know law under the Eisenhower administration (Republican) and finally achieved success under the Johnson administration (Democratic). For Moss, ensuring the public’s right to know was decidedly nonpartisan. For other politicians, this has not been the case. One interviewee observed that while Moss was “evenhanded,” the FOIA is “often used by the opposition party to beat the administration over the head.”⁴⁵³ Indeed, some politicians who support the FOIA while another party occupies the White House then become less enamored of the law when a member of their own party holds the Presidency.

Partisan Politics and the FOIA

Darrell Issa, a California Republican and Chair of the House Committee on Oversight and Government Reform, is an example of how politicians can become zealous advocates for transparency when a different party holds the White House. It is important to note that Representative Henry Waxman, a California Democrat with a long history of support for transparency and accountability, was also an ardent advocate in his role as Chair when George W. Bush was president.

Some form of the House Committee on Oversight and Government Reform has existed since 1816. In its role as the House of Representatives investigatory body, the Oversight and Government Reform Committee has subpoena power and can compel the administration to produce documents or employees for testimony. The Committee’s primary responsibility is oversight “of virtually everything the government does.”⁴⁵⁴ The Committee’s jurisdiction also includes legislative responsibility for the FOIA. Issa was appointed to the Committee in 2008 and became Chair in 2010, when Republicans gained a majority in the House of Representatives.

As the Chair, Issa is somewhat of a Chief Inquisitor who has enthusiastically taken the Obama administration to task over a number of issues from the its response to the attacks on the United States embassy in Benghazi to governmental transparency. Issa, in cooperation with the Ranking Member of the Committee Elijah Cummings, demanded that OIP provide the Committee with answers regarding FOIA implementation shortcomings. He has requested FOIA logs and other data from 180 agencies in order to evaluate potential political interference with the Act. He has ordered the testimony of various government employees related to compliance with the FOIA.

By nature, Issa’s position is arguably “political.” Some advocates believe his support of the FOIA is political as well. Left-leaning news blog DailyKos has accused Issa of using the FOIA as a “gambit to embarrass President Obama” and discussed Issa’s alleged silence when “President Bush made freedom of information the exception to the rule.”⁴⁵⁵ ThinkProgress.Org, also



left-leaning, pointed to Issa's support of a blanket expansion of the Department of Homeland Security's (DHS) ability to withhold information under the FOIA.⁴⁵⁶ Nonetheless, some members of civil society have praised Issa for some of his work on transparency. Nate Jones of the National Security Archive welcomed Issa's data investigation and was hopeful it would spark a bipartisan effort to improve FOIA implementation.⁴⁵⁷ The Project On Government Oversight (POGO) honored Issa with its Good Governance Award in 2010 for his "instrumental" role in "promoting government transparency and accountability."⁴⁵⁸

Senators Leahy and Cornyn: A Bi-Partisan FOIA Partnership

In addition to politicians like Issa, there are those who have been steadfast in their support of the FOIA, regardless of the administration in power. In the United States Senate, the FOIA is championed by the dynamic bipartisan duo of Patrick Leahy and John Cornyn. Leahy, a Democrat from Vermont and Cornyn, a Republican from Texas, have worked together on FOIA issues since 2005. They have written and sponsored several bills together including the OPEN Government Act of 2007.

Both men serve on the Senate Judiciary Committee. Senate Committees are bodies, organized by topic, that investigate, fact-find, build consensus and make recommendations.⁴⁵⁹ The Judiciary Committee is one of the oldest and most prominent. It was founded in 1816 and is responsible for a plethora of tasks, including conducting pre-vote hearings on the nomination of federal judges and DOJ oversight. Chairs share party affiliation with the Senate majority and are either the senior most member of the Committee (if a Democrat) or elected by secret ballot (if Republican).⁴⁶⁰ Leahy has served as its Chair on three separate occasions (2001, 2001–2003 and 2007–Present). Through their Committee work both men have made speeches, solicited testimony from civil society advocates and sitting State Attorneys General, introduced legislation and kept the FOIA in the legislative spotlight.

Senator Leahy has been committed to the FOIA since his election to the Senate nearly four decades ago in 1974. He has worked to curtail efforts to weaken the FOIA even when those efforts involve another committee or piece of legislation. Recently, Senator Leahy led an effort to stop an amendment to the Farm Bill that would have barred the disclosure of basic information about owners of livestock and agriculture operations.⁴⁶¹

It is relatively common for agencies and business interests to attempt to exempt certain information from public disclosure via another piece of legislation. Generally, these provisions do not directly modify the FOIA. Rather, they state "notwithstanding any other provision of law," which has the effect of creating an exemption. Since they do not directly modify the FOIA, they are not sent to the Judiciary Committee in the Senate (or the House Committee on Oversight and Government Reform) for review. As a result, FOIA advocates in civil society and the Congress must be especially attentive to language like the above or any reference to 5 USC 552 (the US Code citation for FOIA) in all bills, not simply those with a transparency agenda.

The amendment eventually failed, as did the Farm Bill (for other reasons). Civil society groups praised Leahy for his attention to the matter, "Senator Leahy has repeatedly shown his commitment to defending FOIA on nitty-gritty issues, and we appreciate his commitment to government transparency and his staff's hard work and responsiveness in defending the public's right to know what its government is doing."⁴⁶² Senator Leahy and his staff continue to lead the effort to stop the efforts to limit public access.

Leahy's partner in the FOIA, John Cornyn, was elected to the Senate in 2002. In the years preceding his election, Cornyn served as Texas's Attorney General. In that role, he was responsible for enforcing the state's Freedom of Information Act. Among the States' FOIAs, Texas's is one of the country's most robust. During his tenure as Texas's AG, Cornyn was credited with the Office's "unprecedented" number of rulings, decreased processing times and establishment of a statewide, toll-free, open-government hotline.⁴⁶³ Cornyn included FOIA in his platform when he campaigned for Senate saying the law needed "teeth" to improve compliance and that it should be extended to cover the legislative branch; he also openly disagreed with a blanket exemption for the DHS proposed by the administration of his friend, President George W. Bush.⁴⁶⁴ When Cornyn was elected to the Senate, he continued to advocate for greater transparency, asserting, "I have long been looking forward to bringing a little of our Texas sunshine to Washington."⁴⁶⁵

Both Senators have received individual honors and awards for their work with the FOIA. They have also been recognized for their partnership. In 2005, POGO presented them with the organization's first Bi-Partisan Leadership Award. The Award is given to members of Congress "who work together across the aisle to promote a more open, honest and accountable government." Leahy and Cornyn persistently work to frame the FOIA as a bi-partisan issue. As they wrote in a joint Sunshine Week Op-ed, "As the recent legislative success with the OPEN Government Act shows us, open government is not a Democratic issue or a Republican issue. It is an American value and a virtue that all Americans can embrace."⁴⁶⁶ Civil society advocates agree. They work often and eagerly with both Senators' staffs. Nonetheless, the contentious political climate in Washington DC during President Obama's second term worries FOIA advocates. They fear the environment has become so partisan that even a long established bi-partisan partnership like Leahy and Cornyn's may not be enough to pass legislation to strengthen the FOIA.

However, some look to turn the partisan environment to their advantage. For them, partisan support for the FOIA is better than no support at all. One interviewee who worked extensively with politicians on Capitol Hill remarked, "One of the things you learn when you're working on the Hill is you never ask questions of anyone who supports you. Because you can use all of the help you can get for whatever reason."⁴⁶⁷

Legislation may not be enough to improve implementation without buy-in from the administration in power. This, according to one interviewee is not "partisan politics" but rather, bureaucracy.⁴⁶⁸ Professor David Vladeck supports this contention. Vladeck believes that a particular problem plagues all right to information laws, not just the FOIA. These laws are always "subject to political manipulation by administrations that want to limit public access to government held information."⁴⁶⁹ Even administrations that vocally support the FOIA and increased transparency have a difficult time keeping their promises. One interviewee remarked that she had high hopes for the Obama administration, but she believes that the administration has been unable to live up to the standards it has set because it ultimately realized that "transparency does not have a lot of rewards."⁴⁷⁰

7.2. OPEN GOVERNMENT PARTNERSHIP

The Open Government Partnership (OGP) is an international effort to make governments more transparent and collaborative. It grew out of a 2010 speech made by President Obama to the United Nations General Assembly. OGP was launched in 2011 and has grown from 8 countries



to 62 participating countries. In order to participate in OGP, governments must exhibit a demonstrated commitment to open government in four key areas including having an access to information law.

National Action Plan

The OGP initiative requires the delivery of a country action plan developed with public consultation. The first US National Action Plan (NAP) addressed three broad challenges (Increase Public Integrity, Manage Public Resources Effectively, and Improve Public Services) and included 26 concrete commitments to help achieve 17 larger goals. Those related to the U.S. FOIA were very modest: create a job series for FOIA professionals; and expand the use of technology for FOIA. They were modestly implemented.

The Obama Administration has been much more ambitious in the second NAP. In terms of FOIA implementation, they have committed to steps they previously resisted, including to:

- **Improve the Customer Experience through a Consolidated Online FOIA Service.** The Administration will launch a consolidated request portal that allows the public to submit a request to any Federal agency from a single website and includes additional tools to improve the customer experience. The U.S. Government will establish a FOIA task force that will review current practices, seek public input, and determine the best way to implement this consolidated FOIA service.
- **Develop Common FOIA Regulations and Practices for Federal Agencies.** Certain steps in the FOIA process are generally shared across Federal agencies. The Administration will initiate an interagency process to determine the feasibility and the potential content of a core FOIA regulation that is both applicable to all agencies and retains flexibility for agency-specific requirements.
- **Improve Internal Agency FOIA Processes.** Over the past few years, several agencies have analyzed existing FOIA practices and used this information to make dramatic improvements in their backlogs and processing times, as well as to increase the proactive release of information in the public interest. The U.S. Government will scale these targeted efforts to improve the efficiency of agencies with the biggest backlogs, and to share lessons learned to further improve internal agency FOIA processes.
- **Establish a FOIA Modernization Advisory Committee.** The United States will establish a formal FOIA Advisory Committee, comprised of government and non-governmental members of the FOIA community, to foster dialog between the Administration and the requester community, solicit public comments, and develop consensus recommendations for improving FOIA administration and proactive disclosures.

If fully and appropriately implemented, these commitments could greatly improve the public's experience with FOIA. They will not, however, directly address many of the problems with FOIA experienced by requesters. Some of these, such as the overuse of certain exemptions or the vagaries in the imposition of fees, may be addressed by the Advisory Committee.

8. Conclusion

The Freedom of Information Act is so imbedded in the collective American psyche that it is difficult to imagine the United States without the law. Indeed, a substantial part of the population (those born after 1967) has never lived in a FOIA-free United States. Civil society and the media deserve a great deal of credit for their persistent promotion, protection and use of the Act. These efforts, combined with those of FOIA advocates in the United States Congress, have strengthened the FOIA, which remains a powerful tool for promoting transparency.

As one of the oldest right to information laws, the United States' FOIA has served as a model for other nations' right to know legislation. Though an international survey placed it near the middle of the pack when compared to newer laws, advocates do not believe that the straight text of the Act is the most pressing issue for the FOIA. Rather, advocates pinpoint implementation as the biggest challenge facing the FOIA, especially:

- Lack of a universal FOIA portal;
- Overuse of exemptions, particularly Exemptions 3 and 5;
- Use of fees to discourage requests and reluctance to grant fee waivers to established non-profit and media organizations;
- Processing delays;
- Uneven application of President Obama's Memorandum and the Attorney General's Guidelines;
- Lack of meaningful oversight;
- An underfunded and understaffed Ombudsman;
- Outdated FOIA regulations;
- Poor records management;
- Lack of sanctions for agencies and employees that wrongfully withhold records; and
- Overreliance on litigation as a means of enforcing compliance with the FOIA.

Unfortunately, perhaps the most difficult obstacle is the most abstract: culture. Many interviewees believe that it will take a profound cultural change to significantly improve FOIA implementation. Top-level officials, including the President, must lead the charge to change the culture from one that defends secrecy to one that embraces transparency. Such promotion would have to occur regardless of the potential embarrassment that might result from disclosing information. The Obama Administration's Open Government Initiative is a start, but more is required for the FOIA to reach its full potential.

Annex 1. Methodology

This case study focuses on the right to information in the United States and is limited to the implementation of the Freedom of Information Act. The Freedom of Information Act is the United States' most prominent and comprehensive right to know law. While another right to information law—the Privacy Act—is mentioned briefly, it is limited in scope and not examined in this case study.

The study is based on extensive desk research of primary and secondary materials including federal agency reports, Executive branch memoranda, newspaper articles, academic journals, non-governmental and media assessments and reports, and Congressional documents. The study also draws on interviews with stakeholders and government officials.

The study focuses on four institutions in order to illustrate agencies' strengths and weaknesses in implementing the FOIA: the agency most closely aligned with oversight of the Freedom of Information Act, the Office of Information Policy within the Department of Justice; the ombudsman, the Office of Government Information Services within the National Archives and Records Administration; the department responsible for agriculture oversight, The United States Department of Agriculture; and the agency responsible for environmental oversight: the Environmental Protection Agency.

Annex 2. Chart of Organizations Included in Study

Civil Society

The American Civil Liberties Union

The Center for Public Integrity (iWatch News)

Citizens for Responsibility and Ethics in Washington

Media

The Associated Press

National Public Radio

ProPublica

Annex 3. Key FOIA Case Law

- *EPA v. Mink* (1973). Congresswoman Mink filed a FOIA request seeking information on scheduled underground nuclear tests. The EPA applied for summary judgment based on Exemptions 1 and 5. The Supreme Court held that agencies were required to disclose information that was severable and did not compromise the privacy of the other documents. *Mink* provided the impetus for agencies' separation and redaction of documents.
- *Vaughn v. Rosen* (1973). Professor Vaughn was conducting research on the Civil Service Commission. He filed a FOIA for evaluations of personnel management programs. The Director declined to disclose. The D.C. Court took note of a procedural problem with FOIA, namely the plaintiff's lack of knowledge, which "seriously distorts the traditional adversary nature of our legal system's form of dispute resolution. Ordinarily, the facts relevant to a dispute are more or less equally available to adverse parties." The Court held that agencies must create an index that lists the withheld documents and explains why they are being withheld. This list is known as the Vaughn Index. Another case, *Crooker v. Central Intelligence Agency*, held that agencies are not required to create and furnish a Vaughn Index at the administrative level. The Vaughn Index remains a crucial element of FOIA litigation.
- *Critical Mass Energy Project v. NRC* (1992). Critical Mass Energy Project requested reports held by the Nuclear Regulatory Commission that were given to them by the Institute of Nuclear Power Operations with the caveat that they be treated as confidential. Reaffirming an earlier opinion, *National Parks and Conservation Association v. Morton*, the D.C. Court held that in order to be exempt, the information requested 1) "would customarily not be released to the public by the person from whom it was obtained" and 2) Disclosure would harm a specific interest Congress sought to protect in enacting the exemption. The Court also concluded, "...when information is obtained under duress, the Government's interest is in ensuring its continued reliability; when that information is volunteered, the Government's interest is in ensuring its continued availability." The *Critical Mass* test is still employed by Courts.
- *National Labor Review Board v. Sears, Roebuck and Co.* (1975). Department store Sears requested memoranda regarding unfair labor practices from the National Labor Review Board ("NLRB"). NLRB's General Counsel maintained that the memos were not final and were interagency memos withheld under Exemption 5. The Supreme Court held that Exemption 5 applies to documents that normally would not be available to the adverse party during civil discovery. They recognized that the purpose of the exemption was to prevent injury to agency decisions. Thus, a distinction must be made between pre-decisional communications (privileged) and communications designed to explain the decision after it is made (not privileged). The Court additionally held that exemption 5 "can never" apply to final decisions but that it does apply to attorney prepared memoranda written

in anticipation of litigation that explains the attorney's theory of the case and litigation strategy. *Sears* is also cited for the Court's statement of what the FOIA requires, namely "The Act does not compel agencies to write opinions in cases in which they would not otherwise be required to do so. It only requires disclosure of certain documents which the law requires the agency to prepare or which the agency has decided for its own reasons to create." *Sears* continues to provide necessary guidance on one of FOIA's most employed exemptions.

- *Phillippi v. Central Intelligence Agency* (1976). In 1975, several media outlets reported that the United States government was conducting a secret operation that involved a large research vessel—the Hughes Glomar Explorer. Subsequently, reports also began to surface accusing the CIA of pressuring reporters not to write about the Explorer. Journalist Harriet Ann Phillippi filed a FOIA seeking documents concerning alleged CIA efforts to discourage reporting on a sunken Soviet submarine. The CIA denied her request on two grounds. First, they claimed any records involving the Explorer would be classified. Second, they argued that the existence or non-existence of the records "would relate to information pertaining to intelligence sources and methods which the Director of Central Intelligence has the responsibility to protect from unauthorized disclosure." The case then became about whether it is permissible for agencies to refuse to deny or confirm the presence of records under the FOIA. The D.C. Court of Appeals held that they could. As a result of this case, the terms "glomarize" and "Glomar response" now refer to cases where an agency declines to deny or confirm the existence of records.
- *Department of the Air Force v. Rose* (1976). Law review editors sought summaries of the United States Air Force Academy's Honors and Ethics hearings. While the hearings were confidential, the summaries were posted on Air Force Academy bulletin boards and distributed to Air Force Academy faculty and officials. For discretion cases and cases where the cadet was not guilty, names were withheld. For cases where the cadet was guilty, names were disclosed but only after he or she had left the Academy. The Air Force withheld the summaries by invoking Exemptions 2 and 6. The Supreme Court held that exemptions must be construed narrowly. They explained that Exemption 2 generally does not apply to matters involving an important or genuine public interest. In this case, the public has a "substantial concern" with the discipline and procedures that affect Air Force training. The Court also held that Exemption 6 does not create a blanket exemption for personnel files. In order to justify withholding, agencies must demonstrate that disclosure would constitute "a clearly unwarranted invasion of personal privacy." The concept of narrow interpretation of exemptions is the basis for Courts' analysis of exemptions.
- *Kissinger v. Reporters Committee for Freedom of the Press* (1980). During his tenures as the President's National Security Affairs Adviser and Secretary of State Henry Kissinger's secretaries monitored and transcribed his phone conversations. The notes were moved from Kissinger's office at the Department of State to a private estate before he donated them to the Library of Congress. The donation was subject to a restriction on public access to the notes for a specific period. A reporter filed a FOIA request when the notes were still at the State Department. The State Department declined the request on three grounds. First, some of the requested notes were made when Kissinger was serving as a Presidential assistant and were not subject to the FOIA. Second, the requested notes from his Secretary of State post were not agency records. Third, the notes' location at the Library of Congress

terminated the State Department's custody and control. The Supreme Court held that the Executive Office of the President is not the same thing as the Office of the President. The immediate advisers within the Office of the President are not subject to the FOIA. The Court also held that an agency's failure to sue a third party for records is not the same as withholding. This case was the first of many that clearly delineated who in the Presidential offices was subject to the FOIA.

- *United States Department of Justice v. Landano* (1993). Landano filed a FOIA with the FBI seeking information related to his murder conviction. The FBI denied his request, stating the information was protected under exemption 7(D). The Supreme Court held that the government was not entitled to a presumption that all sources supplying information in a criminal investigation are confidential within the meaning of 7(D). A source is only confidential if information is given with the understanding that the FBI will not divulge the source's identity unless required for law enforcement purposes. Moreover, only a narrow set of circumstances can be the basis for inferring confidentiality including the nature of the crime, the source's relation to the crime and whether the source was paid. *Landano* remains highly relevant for suits involving the withholding of documents for law enforcement purposes.
- *Federal Communications Commission v. AT&T* (2011). AT&T participated in a FCC program related to enhancing school access to telecommunications and information services. AT&T admitted that they might have overcharged the government for this program. The FCC investigated and the parties resolved the matter with a \$500,000 settlement. CompTel, a trade association that represents some of AT&T's competitors, filed a FOIA for "all pleadings and correspondence" in the case. The FCC's Investigation Bureau insisted that some of the documents were protected from disclosure under Exemptions 4 and 7(C) (for individuals within AT&T but not the corporation itself). The Supreme Court held that corporations do not have "personal privacy" for the purposes of Exemption 7(C). In another case, the Supreme Court held that a corporation was indeed a "person" for political contribution purposes. *FCC v. AT&T* prevented this holding from being applied to FOIA.
- *Citizens for Responsibility and Ethics in Washington v. Federal Election Commission* (FEC) (2013). CREW submitted a FOIA request to the FEC and, through conversations, agreed to exclude some categories of documents. Two months later, CREW had not received any documents or a more specific statement regarding what the FEC would produce or where it would claim exemptions. CREW filed suit in District Court alleging that the FEC failed to respond in a timely fashion to their requests and that the agency was wrongfully withholding records. A month later, the FEC gave CREW 835 pages. A letter accompanied the disclosures that stated the FEC was continuing to process their request and CREW would receive more records on a rolling basis. The letter also stated that this was not a final agency decision and was, therefore, not subject to appeal. The Court of Appeals held that for an agency to make a "determination" within the statutory timelines, thus triggering administrative exhaustion, they do not need to produce the documents. However, "the agency must at least indicate within the relevant time period the scope of the documents it will produce and the exemptions it will claim with respect to any withheld documents." *CREW v. FEC* was the first case to detail exactly what an agency is required to do within the 20-day limit provided in the FOIA.⁴⁷¹
- *Milner v. Department of the Navy* (2011). A Puget Sound resident submitted a FOIA request to the Navy for all Explosive Safety Quantity Distance information related to Indian

Island, a base in the Sound. The Navy refused to disclose data, invoking Exemption 2, and stating such a disclosure would “threaten the security of the base and surrounding community.” The Supreme Court disagreed, holding that, “Exemption 2, consistent with the plain meaning of the term ‘personnel rules and practices,’ encompasses only records relating to issues of employee relations and human resources.” As mentioned previously, agency invocation of Exemption 2 dropped significantly after *Milner*.⁴⁷²

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