Public Accountability Mechanisms (PAM) Initiative
World Bank Governance and Public Sector Group

Literature Review¹ and In-law indicators²:
Legal Framework for establishing Freedom of Information
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FREEDOM OF INFORMATION

Experts commonly support the notion that access to information is integral to a functioning democratic society pointing to, *inter alia*, its ability to promote participation, transparency and accountability. The spread of democratic ideals and democratic forms of government has contributed greatly to demands for transparency. Newly empowered citizens want to know what their newly elected officials are doing and voters, in general, are more likely to exercise independent judgments if they feel confident about their views, which requires that they be informed. Furthermore, experts explain that Freedom of Information (FOI)³ laws help “improve how government bodies work. Decisions that are known to be eventually made public are more likely to be based on objective and justifiable reasons.”⁴

In order to act as mechanism for ensuring transparency and an anti-corruption tool, access to information depends upon a legally entrenched right to access documents held by the government (and in some cases, by private bodies). The right to information can be protected through a variety of legal mechanisms, from explicit constitutional safeguards to individual departmental orders that allow for access. For example, information can be obtained through the provisions in citizens charters adopted voluntarily by departments or through executive orders. Ideally, even in countries with constitutional guarantees, legislation should still be passed which details the specific content and extent of the right.⁵

¹ Principal research and writing of this review was performed by Tammar Berger. For additional information about the PAM Initiative, please contact Stephanie E Trapnell at strapnell@worldbank.org, or Francesca Recanatini at frecanatini@worldbank.org. Visit the PAM website for 2010 FOI data on 90 countries: http://go.worldbank.org/3XIKAQINR0
² FOI In-law indicators (2013) are available in Annex 1 of this document. Indicators can serve as an entry point for discussions with country reformers. Grounding a discussion on transparency and accountability in concrete issues of measurement, and how a country or ministry produces data on its progress, can be an entry point to a more productive and substantive dialogue with governments. Indicators that identify important policies, procedures, resources, capacities, and impacts can serve as a roadmap for implementation. This also holds true for in-law indicators.
³ The review will use the term FOI to refer to the general right to information. One should note, however, that the literature uses terms such as “right to information” (RTI) and “access to information” depending on the regions of focus and/or date of publication. For the purposes of this review, these terms are interchangeable with the caveat that some minor difference do exist in definition.
Legislation sets a clear framework for putting in place systems and creating cultures of openness that are uniform across public bodies. Effective FOI regimes, regardless of differing forms of access or enforcement mechanisms, should successfully address several minimum standards, which are discussed below.

Awareness of the context in which freedom of information laws are to function is also key to determining the effectiveness of a FOI regime. For example, Rick Snell of the University of Tasmania points out that FOI systems must be aligned with their surrounding environments. He emphasizes that information, administrative and political environments continue to change and that FOI systems should adapt to them.\(^6\) Vishwanath and Kaufmann agree, discussing that after “having decided on the extent and nature of disclosure, it is important to tailor regulation policies to local circumstances. Accordingly, what disclosure policies are appropriate will depend on the specific institutional and market environment.”\(^7\) Jurisdictions with weak institutional and legal characteristics, often developing countries, create an environment in which the state is often best suited to provide information.\(^8\) As the private sector within a jurisdiction evolves, it becomes better equipped to assume or supplement the role of the state in information provision. In such evolving jurisdictions, the demand for transparency is often outpacing the means to ensure it, thus requiring the use of intermediary solutions, while institutional structures are strengthened to a level that may adequately safeguard the right.

**LEGAL FRAMEWORK**

*Right to information*

The UNDP views the implementation of the rights to freedom of expression and to access information as prerequisites for ensuring the voice and participation necessary for a democratic society.\(^9\) Furthermore, access to information and freedom of expression are international human rights norms,\(^10\) covered by Article 19 of both of the UN Declaration on Human Rights and the International Covenant on Civil and Political Rights.\(^11\) However, though considered an international norm, the right to information is a more narrowly defined concept and, in most cases, requires additional legislation.\(^12\)

All human rights regimes recognize a right to freedom of information or expression, although the scope of that right varies considerably. For example, the African Charter on Human and People’s Rights, which was adopted by the organization of African Unity in 1963, provides perhaps the least amount of protection for the freedom of information.\(^13\) Article 9 of the Charter protects freedom of information, declaring that "[e]very individual shall have the right to receive information" and that "[e]very individual shall have the right to express and disseminate his opinions within the law." Conversely, the European

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\(^9\) UNDP Practice Note: Access to Information. October 2003. (Page: 2)

\(^10\) Norms of international law have their source in either 1) *custom*, or customary international law (consistent state practice accompanied by *opinio juris*), 2) globally accepted standards of behavior (*peremptory norms* known as *jus cogens* or *ius cogens*), or 3) codifications contained in conventional agreements, generally termed *treaties*.


\(^12\) UNDP Practice Note 3.

Convention for the Protection of Human Rights and Fundamental Freedoms, Article 10, and the American Convention on Human Rights, Article 13, protect the freedom of expression with provisions substantially similar to those contained in the Universal Declaration and the ICCPR. The European Convention, however, states that this right may be limited "in the interests of national security,... for the prevention of disorder or crime,... for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary." The American Convention also contains the caveat that the exercise of the right to freedom of expression may be limited as necessary for "the protection of national security, public order, or public health or morals." Despite these qualifying provisions in the various human rights instruments, it is generally recognized that freedom of information is a superior right, and, according to the European Court of Human Rights does not present a choice for law makers "between two conflicting principles but with a principle of freedom of expression that is subject to a number of exceptions which must be narrowly interpreted."

The concepts of right to information and good governance are intertwined and, in many ways, are two paths to the same goal: to strengthen, stabilize and broaden the working of the democratic system. As a general principle, decision makers should be held accountable for their decisions in order to ensure good governance. Similarly, the right to information and increased levels of transparency serves the public interest by not only contributing to good governance, but also to well-functioning markets. However, while recognizing the need for an overarching legislative framework to facilitate the right to information, one should note that with or without such laws, the responsibility for transparency and accountability in government lies with its public officials, who should afford all efforts to provide information, in a timely and accurate manner, to the public, in order to strengthen good governance and democracy in a country where both could likely be in short supply.

**Constitutional right**

It is increasingly common for countries to include “right to know” provisions in their national constitution. Over 80 countries have constitutional provisions granting their citizens the right to access information, a number that has substantially increased over the past ten years. Right of access provisions are included in most new constitutions from countries in transition, especially in Latin America and Central and Eastern Europe. However, while numerous countries include “right to know’ provisions, the inclusion of the more narrowly defined right to official information exists in fewer constitutions. At least 43, and arguably 50, of the aforementioned expressly guarantee a “right” to "information” or “documents,” or else impose an obligation on the government to make information

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14 American Convention on Human Rights ([available online](http://www.cidh.org/Basicos/English/Basic3.American%20Convention.htm))


16 American Convention 28.


available to the public. The top courts of an additional five countries have interpreted the constitution to recognize the right implicitly.\(^{20}\)

Existing constitutions in older countries have recently been amended to specifically outline the public’s right of access to information, such as in Finland and Norway. One of the most expansive FOI provisions can be found in the South African constitution.\(^{21}\) Finally, even in a number of jurisdictions where the right to information is not explicitly stated in the constitution, including India, Japan, Korea, Pakistan, Israel, and France, “the highest courts have found that there is a right of access to information found in the constitution, typically as an element of free expression or freedom of the press.”\(^{22}\)

Including FOI as a constitutional right provides a certain level of import and certainty as national constitutions define the fundamental political principles and establish the structure, procedures, powers and duties, of a government. The inclusion with other fundamental rights guaranteed to the people by the constitution, the right to information might be viewed as a deep-seated and unquestionable right. Constitutional provisions can be effective where there is a mature legal system capable of giving effect to constitutional rights in law. In many countries this is not the case and a constitutional provision will be empty of meaning.

**Legislation**

The laws and regulations that make up any FOI framework are intended to ensure that information remains available to all that seek it.\(^{23}\) Existence of a legal framework outlining the right to know is critical to an effective transparency regime\(^{24}\) and governments, thus, impose disclosure requirements upon themselves in order to increase transparency. FOI laws, such as the United States Freedom of Information Act of 1972, require “the government to make accessible to citizens an exhaustive array of records of government actions and debates.”\(^{25}\) Similar legislation has recently been adopted in South Africa, Namibia, Mozambique and Malaysia.\(^{26}\) FOI laws adopted early by trend-setting nations served as reference models for FOI laws to follow, thus many FOI laws have similar characteristics. The US Freedom of Information Act has been very influential, just as Canada and Australia’s national, provincial and state laws have been with countries based on the Westminster tradition.\(^{27}\)

FOI experts generally posit that as much information should be made available to the public as is possible, that exceptions should be limited and legitimate, and that various mechanisms are to be included in the legal framework, including procedures for appealing decisions. The British Council clearly outlines the aforementioned by stating that all FOI laws should have the following three characteristics:

First, FOI legislation “should assume that the maximum information possible is disclosed...a presumption that all information held by public bodies is open.”\(^{28}\) Second, “any exceptions should apply only in very

\(^{20}\) Open Society Justice Initiative, *Constitutional Protections of the Right to Information* (available online: http://right2info.org/constitutional-protections-of-the-right-to-

\(^{21}\) Banisar, 17.

\(^{22}\) Ibid.


\(^{23}\) Vishwanath 19.

\(^{24}\) Ibid.

\(^{25}\) Vishwanath 20.

limited circumstances, and these circumstances should be defined in law rather than left ambiguous.”

Third, “there should be an effective and efficient appeals mechanism in the event of an information request being denied.”

The importance of FOI legislation and a functioning regulatory regime is highlighted by a recent Open Society Justice Initiative (OSI) study, which found that information requests were successful more frequently in countries that contain FOI laws than in countries that do not, giving an indication that FOI laws have a positive effect, at least on the nations included in the study. The study went on to show that requests made to governments of countries with dedicated FOI laws produced responses almost three times as often, with information produced 33% of the time rather than the 12% success rate in countries without such laws.

Some authors go further and call for laws and regulations outlining the procedures for implementing and applying the FOI legislation to be more detailed. The case of South Africa, where civil servants are accustomed to following laws with great deference and where it proved critical to provide for all the implementation mechanisms within the law and limit discretion, demonstrated the importance of providing for all implementation mechanisms within the legal framework. Greater precision in the language of the law, thus allows for greater accountability of government departments in implementation. “In other words, it is easier to demand and get adequate implementation of systems and procedures where the law is clear and specific, with sufficient level of detail, than where it is vague or too general.”

Conflicting laws and lack of clarity as to the consistent implementation of FOI laws pose additional legislative challenges in many systems. A common example of such conflict is the potential for other extant legislation dealing with information (ie: covering archiving, official secrets, the armed forces, banking, or public administration). Requiring the canvassing of the multitude of laws that may touch on the issue of information would be not only be difficult, but could also ultimately prove prohibitively time-consuming for both the requester and the civil servant who must respond. In the state of Sinaloa, Mexico, the relatively advanced access to information law came into effect in April of 2002, before the federal legislation was passed. The failure to explicitly define the primacy of the law was a flaw that plagued the system during the initial phase. Implementers, therefore, encountered problems such as delays, confusion and opportunity to subvert the objectives of openness and have requested an amendment that will address these issues. A similar situation debilitates access to information in Jamaica, where its Information Officers have joined civil society efforts to amend the country’s Access to Information Act to “unquestionably apply as supreme over all requests.

**Right to appeal**

In his work for the Carter Center, Shekhar Singh posits “perhaps the most critical element of an effective transparency regime is the existence of a reasonable right to information law with provisions for an

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29 British Council 8.
30 British Council 9.
32 Ibid.
34 Ibid.
36 Neuman 190.
independent appellate mechanism, for stringent penalties, and with strong suo moto provisions." The author goes on to stress the importance of fairness and independence in relation to such bodies. Transparency regimes must be spelled out in the legal framework and must also provide for mechanisms that allow the people to challenge the system and the government that created it. Citizens must be provided the opportunity to resolve any disputes or complaints through negotiation rather than social upheaval. Social institutions and structures that promote collective support, in addition to good faith in an effective system, appear to aid the process.

Simply guaranteeing the right to appeal does not necessarily ensure that access to information is adequately protected. In his piece, Administrative Discretion and the Access to Information Act: An “Internal Law” on Open Government?, Alasdair Roberts argues that the success of an FOI law in securing the right to information depends greatly on the political executives and officials who are charged with administering it. Should government institutions refuse to provide adequate resources for implementation, Roberts argues that “statutory entitlements could be undermined if government institutions refuse to commit adequate resources for implementation, or consistently exercise discretionary powers granted by the law in ways that are inimical to aims of the legislation.” Political will, commitment of resources, and, as Gopakumar Krishnan argues in a 2001 publication, an independent judiciary are necessary for a functional FOI regime. Krishnan contends that in order to be successful, access to information legislation must be implemented in a system in which an independent judiciary is in place as “an independent judiciary is more likely to make decisions that may appear to go against the government’s interests.”

Internal Assessment Mechanism
Singh also discusses the need for systems to include an internal assessment mechanism. He posits that such mechanisms help ensure that the transparency regime becomes progressively more effective over time, and prescribes the creation of an effective feedback mechanism to identify problems with the law and with its implementation and allow officials to correct them. Snell echoes this sentiment, suggesting that agencies should regularly review both their information reservoirs and the “quality and effectiveness of the information flow between them and citizens.” He further argues that the core questions for government agencies to ask themselves should be ‘How can we improve our information holdings and how can we make them more accessible.’

SCOPE AND COVERAGE

Until recently, the right to freedom of expression, codified in the leading human rights treaties, was most often interpreted to provide only a right to seek, receive, or impart information free from

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37 Suo Moto, meaning “on its own motion,” is an Indian legal term, approximately equivalent to the English term Sua Sponte. It is used, for example, where a government agency acts on its own cognizance.
38 Singh 2.
39 Ibid.
40 Singh 3.
43 Ibid.
44 Snell 2.
45 Ibid.
government interference or, at most, a right to receive government-held information that was necessary to protect a fundamental right.\textsuperscript{46} However, during the last two decades, the number of countries that have granted constitutional status to the right (either expressly or implicitly, as interpreted by their top courts) has increased to 50;\textsuperscript{47} and, at least eighty countries have national-level right to information laws or regulations in force – including the population giants of China and India, most countries in Europe and Central Asia, more than half of the countries in Latin America, more than a dozen in Asia and the Pacific, five countries in Africa, and two in the Middle East.\textsuperscript{48}

Yet, despite the rapid evolution of the norm, the configuration and parameters of the right to information remain unsettled.\textsuperscript{49} Experts and law-makers still debate what should be the scope of bodies and information covered, the scope of permissible exceptions to the right, and even the scope of rights-holders (“everyone,” only citizens, or some intermediate category) remain.\textsuperscript{50} For example, older laws typically provide for access to records, official documents and files, whereas newer laws often provide for the right to access all information. Most laws now broadly define the right to information to include all mediums of information.\textsuperscript{51} Special cases exist, such as in Sweden where the term “official documents” excludes drafts or those documents used in preparation but not in the final decision.\textsuperscript{52} The Right to Information Act in India broadens the coverage and allows for “individuals to demand samples such as food that is distributed or materials used to make roads.”\textsuperscript{53}

Further complicating the issue of coverage is the multitude of sources of information. According to David Banisar, the right to information generally only applies to information that is recorded, leaving out information that has been orally transmitted. He states that a better practice is to require that all known information be made available. The expert cites the case of Denmark, where authorities are required to take note of any information of importance received orally. Also in New Zealand, where “the right to information has been interpreted to mean that information which is known to the agency but not yet

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  \item \textsuperscript{46} See \textit{example} Leander v. Sweden, 9 Eur. Ct. H.R.433, 26(1987). “The right to [sic] freedom to receive information basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him. Article 10 [of the European Convention on Human Rights] does not, in circumstances such as those of the present case, confer on the individual a right of access … nor does it embody an obligation on the Government to impart … information to the individual.” Article 10 provides, in relevant part, that “[e]veryone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authorities and regardless of frontiers.” The Court held that the Government’s refusal to allow the applicant access to files that it cited as the basis for dismissing him, while it did not interfere with his rights under Article 10, did interfere with his right to respect for private life; however, it further concluded that the interference was justified under the circumstances. \textit{Leader} has been cited frequently. See Gaskin v. United Kingdom, 12 Eur. Ct. H.R. 36, 7 (1989); Guerra and Ors. v. Italy, 89 Eur. Ct. H.R.19 (1998);
  \item \textsuperscript{47} For a list of the 50 countries, see http://right2info.org/constitutional-protectios-of-the-right-to.
  \item \textsuperscript{48} Roger Vleugels has compiled a list of 86 countries that had adopted FOI laws or regulations by September 2008. See http://right2info.org/laws/Vleugels-Overview-86-FOIA-Countries-9.08.pdf. However, even according to his list, six of those countries are not fully independent. In addition, the Cayman Islands, which he counts, generally are considered a territory of the United Kingdom and thus not fully independent. See, \textit{e.g.}, the CIA \texttt{FACTBOOK}, https://www.cia.gov/library/publications/the-world-factbook/geos/cj.html. Moreover, Bangladesh’s Right to Information Ordinance 2008, which Vleugels does not count, was adopted and entered into force on October 20, 2008. See \textit{Gov’t of the People’s Rep. of Bangl. Ministry of Law, Justice and Parliamentary Affairs, Bangl. Gazette, Oct. 20, 2008}(pin cite needed).
  \item \textsuperscript{49} See Justice Initiative, Transparency and Silence: A Survey of Access to Information Law and Practices in Fourteen Countries 27 (2006), for a review of common elements and differences among RTI laws, including concerning their coverage, exemptions, enforcement mechanisms, and ease of access.
  \item \textsuperscript{50} See generally Ackerman & Sandoval, \textit{The Global Explosion of Freedom of Information Laws}, 58 \textit{Admin. L. Rev.} 85, 97 (2006), for
  \item \textsuperscript{51} Banisar 22.
  \item \textsuperscript{52} See Leander v. Sweden.
  \item \textsuperscript{53} Banisar 22.
\end{itemize}
recorded, must be recorded if it is relevant to the request.” The practice of making all information is “beneficial to future reviews of decision-making as it limits the ability of officials to omit information to avoid disclosure and thus encourages better file creation and recordkeeping.”

Finally, in addressing the issue of the coverage of governmental bodies, Sandra Coliver explains in Right to Information and the Increasing Scope of Bodies Covered by National Laws, that the basic principle set forth in international instruments and case law does not clearly define what constitutes public authorities for purposes of the right to information. She points out that “the narrowest approach, somewhat surprisingly—at least to those who think that the US has one of the strongest freedom of information (“FOI”) laws in the world—is illustrated by the United States’ FOI Act (“FOIA”), which, by its terms, applies only to executive agencies of the federal government.” However, since 1990, the scope of bodies covered by the right to information laws has been steadily increasing. For example, the most expansive law is India’s Right to Information Act 2005 which applies to all public authorities at the national, regional and local level (even though India is a federal system) including all executive and administrative bodies; all legislative and judicial bodies; state-owned (or otherwise controlled) companies; and private bodies that perform public functions or receive substantial government funds.

In some less exclusive jurisdictions, such as Ireland, included in the law is a “positive list of bodies that are covered. This does provide for a clear list of which bodies are covered and which are not.” The problem associated with this model is that the list must be updated by parliament or through regulation every time a new body is created or altered in any way, a process that can be time consuming or not consistently undertaken. This process also creates an opportunity for the government to refuse to include new or amended bodies in the legislations. Such is the case in Ireland, where police are not included, and Canada, where controversy has ensued regarding access to information from privatized or newly created bodies.

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54 Banisar, 22.
55 Ibid.
56 Coliver, Sandra, The Right to Information and the Increasing Scope of Bodies Covered by National Laws.
58 Except in the states of Jammu and Kashmir, which are covered by a separate Act.
59 See Right to Information Act, No. 22 of 2005; India Code [code #] (1993), v. 15. This applies to “any authority or body or institution of self-government established or constituted: a) by or under the Constitution; b) by any other law made by Parliament; c) by any other law made by State Legislature; d) by notification issued or made by the appropriate Government.” Art. 2(h), available at http://www.righttoinformation.gov.in/rti-act.pdf. South Africa’s Promotion of Access to Information Act 2 of 2000 s. [sec no]. This applies to any “public body” defined in Art 1 to mean (a) any department of state or administration in the national or provincial sphere of government or any municipality in the local sphere of government, or (b) any other functionary or institution when (i) exercising a power or performing a public function in terms of the Constitution or a provincial constitution; (ii) exercising a power or performing a public function in terms of any legislation. www.info.gov.za/gazette/acts/2000/a2-00.pdf.
60 Sweden’s Freedom of the Press Act 1949:105, as amended through 2003 (of constitutional status), Chapter II, Arts. 1 and 5, http://www.riksdagen.se/templates/R_Page6313.aspx; information regarding access to judicial information and information held by private parties was supplied by Dr. Gunnar Persson, a lawyer with Advokatfirman Öberg & Associés AB, www.obergassociates.eu.
61 Banisar 20.
62 Ibid.
**Proactive Disclosure**

Many national FOI laws today require government agencies to routinely release certain types of information via their websites. Such is the case in Poland, where its Law on Access to Public Information requires public bodies to “publish detailed information about their policies, legal organization, principles of operation, contents of administrative acts and decisions, and public assets in a Public Information Bulletin on their web sites.”

Estonia’s Public Information Act requires national and local government departments and other holders of public information to “maintain websites and post an extensive list of information on the Web including statistics on crime and economics; enabling statutes and structural units of agencies; job descriptions of officials, their addresses, qualifications and salary rates; information relating to health or safety; budgets and draft budgets; information on the state of the environment; and draft acts, regulations and plans including explanatory memoranda.” The requirement also states that the information must be up-to-date and accurate. “The Council of the European Union automatically makes available most of the documents it creates, including any document released under its access regulations, in its electronic register.”

While FOI laws often include a feature making it a duty of government agencies to actively release certain categories of information. Information generally includes details of “government structures and key officials, texts of laws and regulations, current proposals and policies, forms and decisions. Newer FOI laws tend to proscribe a listing of certain categories of information.” However, of perhaps more importance, is that the information made available must be relevant. “Depositors need information to ensure safety of deposits; investors need information about liabilities and risks; and the public about current economic conditions, policies, and so forth.” Additionally, the information must be “of good quality and reliable, timely, complete, fair, consistent and represented in clear and simple terms.”

Some form of verification system must be put in place to ensure that the information provided is of high quality. This can be done by external agency, auditing body, or organization responsible for standard-setting. Verifying bodies and watchdog organizations, anywhere from credit bureaus to members of academia, help strengthen a framework and work to deter falsified information and dishonest reporting.

It has been noted that active provision of relevant information is also beneficial to the related public institutions. Affirmative publication “can reduce the administrative burden of answering routine requests” and “can directly improve the efficiency of the bodies.” In its 2003 Annual Report, the Council of the EU noted that as ‘the number of documents directly accessible to the public increases, the number of documents requested decreases.’ Similarly, in their 2002 review of agencies, the US Department of Justice Department reported “that many had substantially reduced the number of requests by putting documents of public interest on their web sites.”

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64 *Ibid.*
66 Banisar 25.
67 Vishwanath 4.
69 Banisar 25.
Implementing active or proactive disclosure minimizes the number of requests on the basis that the most important information, which is of relevance to the public, should already be in the public domain. However, several significant challenges exist. The first challenge is designing a system that most effectively collects, collates and publishes the information. In an effort to meet this challenge, the Information Commissioner in the UK produced guidance notes on the content and structure of publication schemes to assist public authorities to properly implement their proactive disclosure schemes.\(^72\) The second significant challenge involves the method by which the information is disclosed. While electronic dissemination is the most efficient, it has been noted that a digital divide remains in some countries between urban and rural citizens. Mexico, however, was able to get past this divide through liaising with other federal public bodies with a local presence (such as schools and hospitals) and encouraging them to support the disclosure through posting on boards or providing free use of a public computer.\(^74\)

**PROCEDURES FOR ACCESSING INFORMATION**

*Standardization*
FOI experts often recommend that systems strive for consistency in responses to information requests.\(^74\) Such consistency may be achieved through the training of officials, civil servants and relevant personnel and by creating transparent internal procedures for processing information requests. Creating such a system might include designating specific officials that will manage responses to information requests and a system for tracking such requests.\(^75\) Furthermore, OSJI recommends that “national and local legislatures should adopt laws and implementation regulations that provide all persons access to information held by government bodies and bodies performing public functions.”\(^76\) Additionally, the group’s publication advises national governments to make clear to officials, civil servants, and all other public sector personnel that discrimination in treatment of FOI requests and in provision of information is unacceptable and will result in both disciplinary and legal consequences.\(^77\)

*Form of Requests – Paper or Electronic*
How a right to information law should be promoted will vary from country to country, depending on the organization of the civil service, the effectiveness of the internal information systems of the government, the general levels of literacy and the degree of awareness of the general public. However, the law itself should set out the procedures by which people request information and how requests should be responded to, how to maintain and access records.\(^78\) At a minimum, experts point to consistency and efficiency as requirements for effective request system for FOI. Consistency may be bolstered by the use of new technology such as electronic filing and publication. Access to information frameworks are increasingly making use of electronic systems for both filing requests and for disclosure.\(^79\)

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\(^73\) Ibid.
\(^74\) See e.g. Open Society Justice Initiative, *Constitutional Protections of the Right to Information* (available online: [http://right2info.org/constitutional-protections-of-the-right-to](http://right2info.org/constitutional-protections-of-the-right-to))
\(^76\) Ibid.
\(^77\) Ibid.
\(^79\) Banisar, 25.
**EXEMPTIONS TO DISCLOSURE REQUIREMENTS**

*Exemptions to Coverage*

“Nearly all FOI laws contain provisions setting out categories of information that can be withheld from release.”

FOI systems must walk the fine line of facilitating adequate access to quality information while also protecting information that is deemed confidential and sensitive. Common exemptions are found in almost all laws and tend to include measures to protect “national security and international relations, personal privacy, commercial confidentiality, law enforcement and public order, information received in confidence, and internal discussions.” For instance, many FOI laws allow intelligence and/or security services to be exempted, but only pursuant to an order of the relevant Minister. The United States has a more demanding process for allowing exemption of intelligence information: only “operational files” of intelligence agencies may be exempted from the FOIA, and only by a statute duly passed by both Houses.

Another trend emerging concurrently in FOI laws is the specific prohibition on certain information from being withheld. FOI laws in India, Albania and Romania expressly provide that information about human rights violations, violations of law in general, and/or corruption cannot be withheld. The Mexican Federal Transparency and Access to Information Law provides that “information may not be classified when the investigation of grave violations of fundamental rights or crimes against humanity is at stake.” The UNECE treaty limits the ability of bodies to claim commercial confidentiality as a reason for withholding environmental information.

Critics have argued that FOI legal frameworks have been weakened by a growing trend of internal practices “designed to ensure that governments are not embarrassed or surprised by the release of certain kinds of politically sensitive information.” It is, however, difficult to verify that such internal

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80 Banisar 22.
81 Snell 1.
82 Banisar 22.
83 Example, section 24 of India’s RTI Act provides that the Central Government and any state governments may, by notification in the Official Gazette, add any intelligence or security organization to Schedule II, which lists exempted bodies. The Central Government had exempted 26 paramilitary forces, revenue and military intelligence organizations in this manner as of June 2007. Most states have partially exempted the intelligence wing of their police departments and other similar bodies from the Act. See The Right to Information Act, 2005, No. 22, Acts of Parliament, 2005, available at http://www.righttoinformation.gov.in/rti-act.pdf.
84 “Operational files” of several intelligence agencies—including the Central Intelligence Agency, the National Geospatial-Intelligence Agency, the National Reconnaissance Office and the National Security Agency—are exempted from the FOIA. India’s RTI Act requires that “information pertaining to allegations of corruption and human rights violations shall not be excluded.” The Right to Information Act, No. 22 of 2005, India Code (2005), Sec. 24(2) and Sec. 24(4), available at http://www.righttoinformation.gov.in/rti-act.pdf. Such information shall be provided within 45 days from the date of the receipt of the request after the approval of the Central Information Commission, regarding information held by a Central government agency, or the approval of the State Information Commission, regarding state information. Romania’s RTI law provides that “information that favors or conceals the violation of the law by a public authority or institution” cannot be classified and should be disclosed in the public interest. Law no. 544/2001 of the 12th of October 2001 on Free Access to Information of Public Interest, Article 13, www.ijnet.org/Director.aspx?P=MediaLaws&ID=25335&LID=1. Albania’s Law on Classified Information reads as follows: “[c]lassification shall be prohibited when made with the intent of: covering up violations of the law, or failures or the ineffectiveness of the state administration; depriving a person, organization or institution of the right of access [to the relevant information]; or preventing or delaying the disclosure of information whose protection is not justified by national security interests.” Sec. 10 of Law No. 8457 of Feb 11, 1999 on Prohibition of Classification.
85 Banisar 23.
86 Roberts 1.
practices are in use and to assess the effect they have on access to information. Some authors point to this as an argument for more attention to be paid to enhancing procedures for legally challenging exemptions rather than focusing solely on the exemptions themselves. This argument is rooted in the idea that if governments are wont to withhold information, they will do so regardless of how precise law-makers were in outlining the exceptions in the law. It is further argued that providing proper legal tools with which to challenge exceptions, forcing the public entity to prove rightful withholding of information, would increase the value of the system.

**Public Interest Test**
Some transparency legal frameworks include a “public interest test,” a test that forces public authorities to balance the importance of withholding certain information against the public interest in disclosing such information. These tests allow for the release of information that otherwise might be withheld, if resounding public benefit can be demonstrated through its release. The “public interest test” is commonly used in cases that might “reveal wrongdoing or corruption or to prevent harm to individuals or the environment.”

Exceptions in the best interest of the public have also been noted, referred to as “The Crying Fire in a Crowded Theatre Exception” in Stiglitz’s publication. If the disclosure of information might result in a grim situation, authorities may not be concerned with whether or not to disclose information, but rather with how to safely make the information public. Economic matters often fall under this category, with the release of economic indicators having the power to either rally or depress the market.

**Harm Test**
Most FOI experts contend that FOI legal frameworks should clearly state that relevant bodies are only allowed to withhold specific information in cases where there is legitimate risk that release of the information would cause harm, and that harm is not outweighed by public benefit. Additionally, it should be made known to public bodies and their officials that cases of access to information should be handled with a presumption of openness. It is further recommended that any exemptions and refusals of requests should be made in writing, including the reason for non-disclosure, and be provided to the requestor and a notification of the refusal should be sent to the oversight body.

The aforementioned ‘harm-test’ approach is found in many FOI laws and requires that harm must be shown before the information can be withheld. The test for harm varies depending on the type of protected information, with privacy, protecting internal decision-making, and national security generally receiving the highest level of protection. The privacy exception is regarded as the most important and convincing means of winning exception as the government is responsible for guarding great amounts of personal information. Closely related is the confidentiality exception, as a certain degree of confidentiality is often required to facilitate a trusting relationship with the government. Exceptions granted for issues pertaining to national security are easily justified as in the best interest of the country in question, often a matter of national survival and defense. However, this exception has become diluted as it has been extended to cover up mistakes or other misappropriations of the rule.

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88 Ibid.
90 Banisar 23.
91 Stiglitz 19.
92 Transparency & Silence, OSI 19.
93 Stiglitz 19.
Most FOI laws require information to be released once the perceived harm has been lessened. Laws may also prescribe fixed time limits on how long an exemption may be applied, such as Mexico where the Federal Transparency Act limits exemptions to a length of twelve years.94

**Appeals**

Most jurisdictions use a phased approach to appeal and review. The first level of appeal is generally an internal review that sees mixed results but is inexpensive and can be expedient. However, internal review tends to uphold denials and often results in further delays. “In the UK, 77 percent of requests for internal reviews to national bodies were denied in full in 2005.”95 Upon completion of internal appeal the case progresses to an external body, often the Ombudsman. “In over 20 countries, the Ombudsman (usually an independent officer appointed by the Parliament) can be asked to review the decision as part of their general powers overseeing the administration of the government.”96 While Ombudsmen generally do not hold the power to pass down binding decisions, the office is generally respected and influential and their findings are generally followed.

National courts are generally the ultimate arbiters of appeal, typically having the power to review records and pass down binding decisions. In countries that have Information Commissions, the national courts’ jurisdiction may be limited to legal issues. National courts in other jurisdictions are part of “a less efficient system…where the courts serve as the only external point of review, such as in the United States and Bulgaria.” 97 The higher costs and significant delays associated with the national courts, along with their general deference towards government agencies, effectively prevents many requestors from bringing cases.

Consequently, some countries have created special tribunals responsible for reviewing decisions. These tribunals “act more informally than a court and should function better for appeals due to their specialized nature.” 98 Australia’s Administrative Appeals Tribunal and Japan’s external Information Disclosure Review Board hear numerous appeals each year. The UK is the only country that has both a Commission and a review panel, the latter having successfully encouraged greater openness by overruling the Information Commission in a number of cases.

**ENFORCEMENT MECHANISM**

Krishnan points out that the enforcement of FOI laws is a common stumbling block to protecting access to information rights, “[q]uite often the legal provisions exist on paper, but its impacts on the ground are weak.”99 It therefore follows that effective enforcement mechanisms are of utmost importance if an FOI system is going to prove successful.100 The enforcement system should allow for effective monitoring, improvements in accountability and punishments for offenders.101 As such, recently enacted FOI laws have adapted new provisions such as “information commissioners with enforcement powers,

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94 Ibid.
95 Ibid.
96 Ibid.
97 Ibid.
98 Ibid.
101 See Vishwanath.
public interest tests and greater coverage of bodies” and older FOI laws are increasingly being revised so as to include these provisions. 102

The effectiveness of transparency regimes, and ultimately their benefit to the general public of a jurisdiction, relies on the enforcement of a number of aspects of the legal framework. Determinants of the accessibility of a framework include “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.” 103

Enforcement Bodies
Enforcement mechanisms may include a number of instruments, such as administrative reviews, court reviews and oversight by independent entities. The effectiveness of each method varies greatly, and it is generally accepted by experts that “independent commissions are the most effective system of oversight.” 104 Jurisdictions are increasingly creating such independent information commissions to manage FOI related issues. These commissions may be part of the legislative body, an independent part of any number of government bodies, attached to the Executive Office (such as in Thailand) or a completely independent body. Such commissions may also be combined with the jurisdiction’s Data Protection Commission, such as in the UK, Germany, Switzerland and Slovenia. Germany and Canada have also done this on the sub-national level. 105

The commissions carry varying levels of power, and are responsible for an array of functions. The Canadian and French commissions are similar to Ombudsmen in their powers, while the commissions in Slovenia, Serbia, Ireland and the UK have the power to issue binding decisions but are subject to appeals by Ministers in special cases. In addition to handling appeals, Information Commissioners are often additionally responsible for “general oversight of the system, training, proposing changes, and public awareness. In Antigua and Barbuda, the Commissioner can also receive information from whistleblowers.” 106

DEADLINES FOR RELEASE OF INFORMATION

In the fast-paced, ever-changing ethos of politics and media, timely access to information is of utmost importance to any number of legitimate requestors. 107 Experts commonly point to the “need to enforce timely, equitable dissemination of information” 108 and stress that access to information should be consistent and equal across the board. The consensus that timely completion of requests is integral to any FOI system is illustrated in a 1997 white paper on access to information released by the Canadian federal government, which stated that “the essence of the so called ‘freedom of information’ idea is not simply access to government documents, but timely access.” 109

102 Banisar 20.
104 Banisar 23.
105 Ibid.
106 Banisar 24.
108 Vishwanath 3.
109 (Canada. Secretary of State 1977: 21)
SANCTIONS FOR NON-COMPLIANCE

An important tool to tackle the culture of secrecy is to provide for penalties for those who willfully obstruct access to information. Almost all FOI laws include “provisions for imposing sanctions on public authorities and employees in cases where information is unlawfully withheld.” It is generally supported that “sanctions are a necessary part of every law to show the seriousness of failure to comply.” As illustrated in Toby Mendel’s comparative study of Freedom of Information laws, this holds true for FOI laws, as there are often cases when the institution or its representative unreasonably refuse to release information, alter documents or destroy information. Sanctions may be levied against the institution itself or, in the form of administrative or criminal sanctions, against specific employees. In some cases, all three are applied as demonstrated by Poland’s Law on Access to Public Information, which allows for violators to be fined, have his or her freedom restricted, or be imprisoned for up to one year.

The experience with criminal penalties in some countries with longer-standing right to information laws suggests that prosecutions tend to be rare, but that the sanctions still send an important message to officials that obstruction will not be tolerated. This stumbling block in the administering of sanctions is most often due to the reluctance of many government bodies to impose penalties on their own employees for following general policies. This results in the rarity of jail sentences. Alternatively, sanctions may be put in place to compensate the requestor of information at the expense of the entity that violated the FOI law. Such is the case in the United States, where “the courts can award legal costs to requestors when it is found that the documents should not have been withheld.”

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111 See Roberts 23.
112 Banisar 24.
113 See generally, Mendel.
114 Banisar 24.
115 ibid.
116 ibid.
118 Banisar 25.

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