

Access to Information **WORKING PAPER SERIES**

**Enforcement Models**  
*Content and Context*

**Laura Neuman**

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# **Enforcement Models:**

## *Content and Context*

Laura Neuman

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# About the Author

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# Introduction

*Concepts of justice must have hands and feet to carry out justice in every case in the shortest possible time and the lowest possible cost.*

—*Warren E. Burger, Chief Justice of the United States*

Access to public information is a fundamental human right and intrinsically linked to democracy, governance, and the fight against corruption. With a free flow of information, citizens can more actively participate in priority setting and hold their government accountable. The benefits of an access to information (ATI) regime extend beyond citizens to the state itself, as it supports greater efficiency and effectiveness as well as better decision making. However, history has shown that to give meaning to the right of access to information, it must be enforceable and enforced. To meet this mandate, governments, international organizations, and civil society are now focusing on the best means to ensure well-constructed and functioning enforcement systems.

As has been previously posited, in the establishment of an information regime, four distinct phases emerge: passage of the law, implementation, use, and enforcement.<sup>1</sup> Though the passage of the law may receive the most consideration, and implementation provides the greatest challenge for government, it is perhaps the enforcement phase that is the most critical for the ultimate success of the right of access to information. If there is a widespread belief that the access to information law will not be enforced, this right to information becomes meaningless. Weak or ineffectual enforcement mechanisms can lead to arbitrary denials or encourage agency silence, whereby no explicit denial is made, but rather the government agencies ignore the request for information or pretend that the law does not exist.<sup>2</sup> Compelling adherence to the tenets and principles of the legislation

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1. See Laura Neuman, “Access to Information Laws: Pieces of the Puzzle,” in *The Promotion of Democracy through Access to Information: Bolivia*, Atlanta, GA: Carter Center, 2004.

2. Ibid.



is paramount to its overall effectiveness, particularly in cases with poor implementation or flagging political commitment.

Enforcement of the law or regulation governing access to information includes receiving appeals when the requester is denied all or partial access or there is a dispute over cost, investigating the complaints, and issuing a finding. In some cases enforcement also may include mediation or other forms of alternative dispute resolution. 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, this paper focuses solely on those entities or parts of the body responsible for resolving disputes.

Although jurisdictions around the world have varied in the design of their enforcement mechanisms, there is a growing recognition that the optimal system would be:

- independent from political influence,
- accessible to requesters without the need for legal representation,
- absent overly formalistic requisites,
- affordable,
- timely, and
- preferably specialist, as ATI laws are complex, necessitating delicate public interest balancing tests.

More specifically, advocates have called for legal provisions that guarantee “a right to appeal any decision, any failure to provide information, or any other infringement of the right of access to information 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.”<sup>3</sup>

Though it is clear that there must be a right of appeal, scant analysis or scholarship has been done that reflects upon the specific cultural and political contexts that have guided enforcement model design and the conditions that are necessary for a system to satisfy the principles described above. This paper begins this necessary conversation by defining three distinct models for enforcing ATI legislation, the considerations applied in designing and selecting the models, and some of the key factors related to the proper functioning of the system, through the use of illustrative case examples. It does not serve as an exhaustive study of enforcement, nor does it comprehensively evaluate the functioning of the procedures in specific jurisdictions. Though this paper focuses on

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3. See Carter Center, “Atlanta Declaration and Plan of Action for the Advancement of the Right of Access to Information,” International Conference on the Right to Public Information, Atlanta, GA, February 27–29, 2008.

the influence of particular political, economic, or cultural contexts, it does not distinguish among high-, middle-, or low-income countries. Rather, it strives to present the variables present in shaping an enforcement system. The case examples cited tend to include middle-income countries with a relatively more mature political development. This will, of course, influence not only the choice of enforcement model, as discussed below, but also its success. Though, ultimately, evidence will likely support the advocates' proposition that an independent intermediary body with compulsory powers is the most desirable, this paper explores some of the contingencies that lead to this conclusion.



# Models of Enforcement

In most jurisdictions with an ATI law, a requester that has received a negative decision may seek internal review, whether that decision is for a complete or partial denial of information, lack of response, or other determination ripe for appeal.<sup>4</sup> This often entails a review of the decision by a more senior administrator or minister within the same agency that made the initial negative determination. In many jurisdictions, internal appeals are mandatory before the aggrieved requester is eligible for external review.

Following an internal review, if still dissatisfied, the information requester is given the opportunity for appeal to an external body. In general, three main models are used to respond to external appeals in the first instance:

- Judicial review
- An information commission(er) or appeals tribunal with the power to issue binding orders
- An information commission(er) or ombudsman with the power to make recommendations

In a very few jurisdictions, such as the Australia Federal Freedom of Information Act, hybrid models are used that do not fit neatly into one of the three categories above. There, for instance, requesters may appeal procedural shortcomings in relation to the processing of their request to the ombudsman, but they have to file an appeal with the Administrative Appeals Tribunal if they want to challenge the substantive decision by the agency in its application of the act's exemptions.<sup>5</sup> In Hungary, the aggrieved requester has a choice of venue when submitting an appeal, as the law pro-

4. A few countries do not provide internal review of initial decisions, such as France, but these are unique cases.

5. The United Kingdom enforcement model is unique but would not fall under the working definition of "hybrid." In the first instance, following an internal review by the agency, a requester must submit an appeal to the information commissioner. The information commissioner has the power to order an agency to take action or uphold the agency decision. If either of the parties is dissatisfied with the decision, an appeal may be taken to the Information Appeals Tribunal. Finally, once all of the administrative appeals have been exhausted, there is a right to judicial review, but only on a point of law. The courts do not consider the issue of information withholding *de novo*. In reviewing the existing legal frameworks, the United Kingdom appears to be the only jurisdiction with both an information commissioner with binding order-making powers and an Information Appeals Tribunal. As discussed later in the paper, this bi-level system in the United Kingdom has led to a high percentage of appeals of the information commissioner's decisions.

vides the alternative to go directly to court, where the decision is binding, or submit a complaint to the information ombudsman for a recommendation. In most jurisdictions, however, upon a negative internal appeal decision, the aggrieved party is specifically directed to submit an appeal to one of the above three entities.

Additionally, almost every jurisdiction provides for further rights to review beyond the information commission(er) or initial judicial review. If the agency denial is upheld by the court or quasi-judicial officer(s) in the first instance, or if the internal ruling is overturned, the requester or agency may seek further judicial review. However, this is not universal. For example, an aggrieved administrative agency in Mexico does not have the right to judicial review of a decision by the Federal Institute for Access to Public Information (IFAI). Furthermore, it may be that the judicial review of an information commissioner's or tribunal's decision by a superior court is restricted to considering points of law, such as jurisdictional matters, rather than reexamining the merits of the entire case, thus giving the commissioner's decision great weight and deference.

Although there are a number of variations among all of the countries with access to information legislation, this paper limits its focus to the three models described above and does not explore the internal review process or additional judicial or quasi-judicial remedies beyond the initial independent determination. The descriptions presented below provide some common characteristics of each model, but as always one cannot fully generalize, as there will be variances depending on the particularities of the country in which the enforcement mechanism is applied.

## Judicial Proceedings

The first model provides for appeals directly to the judiciary. This model is used in countries such as South Africa, Bulgaria, and the United States at the federal level. When a request for information is denied, the requester must appeal to the federal court in the United States, to an administrative court in Bulgaria, or to the High Court in South Africa. The main benefits of such a model are that the courts have the power to order the release of information if inappropriately denied, possess wide-ranging powers of investigation, have clearly established mechanisms for punishing agency noncompliance, and may determine the procedural and substantive matters *de novo*. In other words, though the courts may give some deference to the agency that has made the initial decision, they address the case as if it is the first determination.

However, in practice this model has a number of disadvantages. As discussed above, the main principles for an effective enforcement model provide that it must be timely, affordable, and accessible. For most citizens, the courts are neither accessible nor affordable. Often, for successful litigation under the judicial model, the information requester may need to hire an attorney or advocate and pay the many court costs. In most jurisdictions, the court calendars are overwhelmed, and it may be months or years before the case is heard and even longer before the written decision is received,

perhaps making moot the need for the information. For example, as mentioned above, requesters in Hungary have the option to go directly to court for a binding order or to the less powerful information ombudsman. Most choose the information ombudsman route specifically because the courts take so long to determine cases.

The cost, the delay, and the difficulty for citizens in accessing the courts have a chilling effect on the utilization of this enforcement mechanism. With all these obstacles, 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, as they recognize that most persons will not be able to effectively question their decisions. Moreover, in many newer democracies there is often a lack of trust in a judiciary that may not yet have matured into a strong, independent branch of the state. Finally, consideration must be given to the litigation costs for the government (and taxpayer) and the burden on the court system.<sup>6</sup>

## Information Commission(er) or Tribunal: Order-Making Powers

In the second model, external appeals are made first to an ATI commission(er) or specific appeals tribunal with the power to issue rulings and binding orders. This model is present in a host of jurisdictions, including Mexico, Scotland, and India, and often is considered the best of the three models in meeting the principles presented above. Appeals to bodies such as an information commissioner or tribunal are often more accessible, as there is no need for legal representation, it is affordable (there are no court costs or other fees),<sup>7</sup> and in the best cases, it is highly independent. This system can allow the decision makers to become specialists in the area of access to information. 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 appeals to the courts. 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.

6. In a 2002 case in South Africa that went to the High Court, the auditor-general theorized that they had spent over 300,000 rand (close to US\$30,000) in defending their decision to deny information. See the Open Democracy Advice Centre, "The Promotion of Access to Information Act: Commissioner Research on the Feasibility of the Establishment of an Information Commissioner's Office," Cape Town, 2003.

7. In some jurisdictions, such as Ireland, there are application fees for submitting certain types of cases to the information commissioner for review. For example, if the request is for personal information or the agency has failed to respond, then the application fee is waived. In other cases the application fee may be £50 or £150, depending on the nature of the appeal. For comparison, the Circuit Court application fee is £60 or £65, depending on the type of case, £60 for notice of trial plus £11 for every affidavit filed, £50 for official stamp of an unstamped document given as evidence, and £5 for every copy, and the Supreme Court application fee is £125 plus additional costs for filings and copies. See the Courts Service of Ireland, Circuit Court Fees, Order Schedule One and Two, and Supreme Court and High Court Fees, Order Schedule One, Part Two, <http://www.courts.ie/courts.ie/library3.nsf/PageCurrentWebLookUpTopNav/Home>.

This model lends itself to the principles of independence, affordability, accessibility, timeliness, and specialization, but as with any model, these benefits are not always realized. There are some additional disadvantages. As with judicial actions, quasi-judicial proceedings, such as those before a body with order-making powers, may become overly formalistic and legalistic. In Jamaica, for example, the appeals tribunal is in some ways more onerous than a judicial court, with necessity for prescribed submissions, and the requirement that appellants notify in writing all of the findings of fact, findings of law, grounds for appeal, witness lists, etc. Decisions contain jargon, which may be challenging for requesters to understand, and the administration may be slower than the commissioner model, with fewer powers, as more exhaustive investigations must be undertaken, due process requirements must be fulfilled, and lengthy judgments must be written and issued. These models may be more costly for the state as new institutions are established and staffed, and technical procedures (such as summons and notice, in-camera reviews, and hearings) are met to satisfy legal necessities. Finally, although the proceedings are called “binding,” in the face of agency noncompliance, there remains the need for judicial involvement and, in the most extreme cases, police engagement.

## Information Commissioner or Ombudsman: Recommendation Power

As in the system before, the third model uses an information commissioner or ombudsman,<sup>8</sup> but in this case there are more limited faculties for enforcement. In this design, found at the federal level in Canada, Hungary, Sweden, and New Zealand, the intermediary body responsible for enforcement is vested solely with the power to issue recommendations to the relevant administrative agency or public functionary. These commissioners or ombudsmen often possess weaker powers of investigation, such as investigating cases *sua sponte* (without prompting from an outside party), and with no order-making powers they tend to emphasize negotiation and mediation. Benefits of this model include a lack of formalism, thereby encouraging accessibility for complainants, and it can be the speediest, as the investigations are generally limited to unsworn representations.<sup>9</sup> The abridged powers may encourage less adversarial relations between the recommender and the implementer, with the ombudsmen relying more on resolution through persuasion and dialogue, thus potentially leading to greater compliance. Finally, the independence of ombudsmen may be augmented by their status as officers of the legislature (Parliament) rather than as a quasi-independent part of the executive, which often is the case for information commission(er)s with order-making powers.

8. For purposes of this paper, the terms *information commissioner with recommendation powers* and *ombudsman* are used interchangeably.

9. In Hungary, the annual report from 2001 indicated that the information and data protection commissioner took an average of only 52.6 days to fully process a case and issue a recommendation. See Laura Neuman, “Mechanisms for Monitoring and Enforcing the Right to Information Around the World,” in *Access to Information: Building a Culture of Transparency*, Atlanta, GA: Carter Center, 2006.

But without the “stick” of order-making powers, recommendations may not be followed.<sup>10</sup> Over time, even those bodies vested with the more limited powers of investigation and recommendation may become increasingly formalistic, contentious, and slow. Moreover, with this model a body of rulings may not be created that can guide future agency determinations on disclosure.<sup>11</sup> Emphasis often is placed on mediation and negotiated resolution, notwithstanding that one of the parties (requester or agency) might clearly be correct in its assertions. With fewer powers of investigation and order, there may be more limited resources, and if the ombudsman has a shared mandate to receive complaints on a variety of issues, he or she may have less time dedicated to freedom of information and potentially less specialization. According to John McMillan, “Ombudsman investigations have customarily focused on the way in which a decision is made, and less on the merits of the decisions under investigations.”<sup>12</sup> For freedom of information cases, this raises a unique problem for the ombudsmen, who often are viewed as “champions of open government,” while at the same time the law confers great discretion on the agency, to which the ombudsmen must give some deference. “It is a difficult question for an Ombudsman’s office whether it should pressure an agency to exercise those discretions in favour of public access, even though a contrary decision is legally and reasonably open to an agency.”<sup>13</sup>

Moreover, the commissioner or ombudsman may be restricted to those complaints that are registered, with no faculty to initiate inquiries *sua sponte* or deal with systemic problems.<sup>14</sup> In a 2002 review of the Canadian Access to Information Act, the task force found that “giving the Commissioner power to make binding recommendations may well provide more incentive to departments to respect the negotiated undertaking to respond within a certain time-frame . . . It is more rules-based and less ad hoc . . . This results in a consistent body of jurisprudence that assists both institutions and requesters in determining how the Act should be interpreted and applied.”<sup>15</sup>

10. This is not always the case. For example, since 1987, there has been 100 percent compliance with all New Zealand ombudsmen recommendations on access to official information. Prior to that, noncompliance was only due to individual ministers exercising the veto power provided in the legislation.

11. Some jurisdictions, such as New Zealand, may publish “case notes,” which can be relied upon by government agencies as a decision-making guide.

12. McMillan, John. 2008. Speech given at the Australia Pacific Ombudsman Region Meeting, March 27. Melbourne, Australia. [http://www.ombudsman.gov.au/commonwealth/publish.nsf/Content/speeches\\_2008\\_02](http://www.ombudsman.gov.au/commonwealth/publish.nsf/Content/speeches_2008_02).

13. Ibid.

14. This is not the case for all ombudsmen. See Australia and New Zealand case studies for examples of ombudsmen with *sua sponte* powers.

15. Access to Information Review Task Force, “Ensuring Compliance: The Redress Process, in *Access to Information: Making It Work for Canadians*, 2002.





## Considerations in Selecting the Enforcement Model

Emerging international standards for ATI legislation, coupled with the mounting influence of coordinated civil society campaigns, have translated into greater pressure for countries to select the second model for enforcement, information commission(er)s with order power. However, preceding any determination of which model will work best, decision makers should reflect sufficiently on the specific political, legal, and bureaucratic contexts in which this system must function. For example, it has become commonplace to cite Mexico's Federal Institute for Access to Public Information as the gold standard for enforcement; yet provocatively, one of the IFAI commissioners recently suggested that Canada, a jurisdiction with no order-making powers, was in fact more effective because of its unique culture of bureaucratic compliance. Moreover, after just one set of new appointments since its initiation, IFAI is raising concerns that the institute is becoming politicized. This serves as a powerful reminder of the necessity to look beyond the title and listed powers of the body to the environment and context in which it performs.

Myriad reasons may support selecting a certain model of enforcement, ranging from the specific political context, legal history, and bureaucratic culture, to a consideration of other national experiences and trends, to diffusion and policy transfer. In some countries, bias against creating a new institution or concern over the additional costs was the overriding determinant in selecting the enforcement model. And finally, as will be demonstrated by the Indian case—which took advantage of an important political moment and colleagues newly appointed in key positions—timing is crucial.

In many jurisdictions the “politics of policy” was decisive in the selection of the enforcement model. The time, in political terms, at which the access to information policy was introduced, the discussion and negotiation, the players involved, and the underlying motivation for the policy serve

as a framework for the selection of the enforcement model.<sup>16</sup> For a number of countries, the passage of an ATI law marked a change in the political direction from dictatorship, tyranny, or one-party rule. In such cases, such as Mexico, political pressure from civil society played a critical role in encouraging a model of enforcement that was both strong and accessible. In countries where the ATI law fundamentally changes the relationship between the state and its citizens, rather than enhancing existing mature political systems, there may be greater need for an enforcement model with “teeth,” as is found in information commission(er)s with order-making power.<sup>17</sup>

In at least one jurisdiction, the inclusion of an independent information commissioner with order-making powers was used as a salve to stave off criticism related to other parts of the law, particularly the exemptions section. The Scottish government, for example, was quick to point out that an independent information commissioner would ensure that feared discretionality or overreaching in the government’s application of exemptions would not be tolerated, thus neutralizing some of the complaints about the breadth of exemptions. In other cases, weaker enforcement mechanisms were selected in response to a political backlash concerned with the menacing right of access to information. Political expediencies cannot be underestimated as the root cause for many critical enforcement design decisions.

The legal framework and tradition in which the right to information exists are a second factor in the creation of an enforcement system. For some countries, such as the United States, there was not a history of an ombudsman but rather administrative remedies with the right of judicial review. The record of parliamentary ombudsmen for other areas of law also played a role in their selection or disregard. In jurisdictions that had positive experiences, there seemed to be a greater acceptance of the ombudsman for resolving ATI disputes in the first instance. However, in those countries, where previously they had witnessed weak and ineffectual ombudsmen, such as the United Kingdom, there was reticence to rely on recommendation powers alone to resolve conflicts.

The legal particularities of the state also play a role. Legal prescriptions over the autonomous nature of the body, the scope of its coverage (that is, can an information commissioner order a private company to act under the ATI law or must the order come through a more formal judicial proceeding, or similarly can a parliamentary ombudsman have jurisdiction over the large number of bodies not accountable to Parliament, such as national health service doctors and schools?), and separation of powers are additional determinants woven into the fabric of the decision in the selection and creation of a suitable enforcement system.

Bureaucratic culture may be the single most important factor in designing an enforcement model appropriate for the specific country needs. If there is a strong tradition of adherence to the rule of law and clear mandates for applying laws, such as in Canada, then a body with recommendation powers may be sufficient to provide the guidance necessary for the administration to prop-

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16. Inter-American Development Bank, “The Politics of Policies: Economic and Social Progress in Latin America,” 2006.

17. I would like to thank a peer reviewer for this comment.

erly execute its functions. Conversely, if there has not been a consistent practice of administrative conformity with regulations, and this is coupled with a deeply rooted history of secrecy, such as in India, a more powerful entity with powers to sanction noncompliance may emerge. Bureaucratic capacities, that is, level of facility and development, certainly play a significant role in implementation and oversight of the law, and may be an element considered in determining enforcement needs.

Cost is a factor that often is cited by governments as paramount in decisions related to the development of the enforcement scheme.<sup>18</sup> Information commission(er)s with order powers are more costly to administer than similar bodies that possess only the power to recommend action. With order powers comes a host of additional legal requirements, including satisfying due process mandates. Entities with order powers must provide a more extensive rationale for their decisions, which entails more exhaustive investigations. Unlike those bodies with recommendation power, which accept unsworn representations and submissions on their face, information commission(er)s with order powers, such as in Connecticut, and tribunals must have sworn evidence and examine the underlying factuality of every statement made.<sup>19</sup> Hearings can be costly, and the time necessary to complete the more detailed investigations and draft the decisions may overshadow the benefits. Additionally, in a number of cases an institutional backlash against the creation of a new body led to the demise of the notion of an information commission (with or without order-making powers).

“In considering which body should exercise the external review function it may be necessary to consider what other functions need to be exercised either by that body or another intermediate body, external to the government, in fostering the administration of freedom of information.”<sup>20</sup> In jurisdictions that sought to marry oversight tasks (such as training, receipt of compliance reports, public education, and others) with enforcement charges, a judicial remedy alone would be impossible. Appeals tribunals, likewise, would not satisfy these requirements. However, when the breadth of responsibilities of some information commission(er)s is considered, conflicts of interest have been raised as an issue. If the body is advising the agency, then that body may not be in a position to also provide quasi-judicial hearings and rulings unless sufficient safeguards are created. Recognition of these requirements has played a role in the enforcement design.

Finally, other country experiences and international or regional trends cannot be underestimated as important inputs in the analysis of the appropriate enforcement model. Two phenomena may explain the development and selection of the three main models of enforcement: *policy*

18. For example, in both Nicaragua and Honduras, when the enforcement model recently was discussed, the issue of costs was consistently raised as a concern. Moreover, according to Mitchell Pearlman, former executive director of the Connecticut Freedom of Information Commission, one of the key reasons that Connecticut is only one of two U.S. states (New Jersey is theoretically the other) with order-making powers is directly related to the costs of that system. After reviewing the Connecticut experience, most other states determined that this system is too costly. (Phone interview with M. Pearlman, March 2008.)

19. Ibid.

20. Independent Review Panel, “Enhancing Open and Accountable Government,” discussion paper, Review of the Freedom of Information Act 1992, Queensland, Australia, 2008, <http://www.foireview.qld.gov.au/FOIDiscussionpaper240108.pdf>.

*convergence*, whereby states become more alike as they develop similar structures and processes, and *voluntary policy transfer*, a “process(es) by which knowledge about policies, administrative arrangements, institutions and ideas in one political system (past or present) is used in the development of policies, administrative arrangements, institutions and ideas in another political system.”<sup>21</sup> “Policy communities are key agents in the process of cross-national learning. They take relevant information about policy from the experiences of other jurisdictions and adapt [them] to their own national context.”<sup>22</sup>

This tendency to learn from other states and adapt that knowledge to one’s own has been seen in the establishment of all modern ATI regimes, even, to a lesser extent, in China. In every recent jurisdiction, there has been a period of comparative study and often missions to see firsthand the functioning of other ATI regimes. The country, state, or province examined may have great bearing on the ultimate model design. For example, in the case of Mexico (described in greater detail below), the legislative drafters visited the state of Connecticut and reviewed the pending UK law, both of which contained a binding enforcement power. A visit by the first Hungarian commissioner to the parliament of the German state of Brandenburg in 1997 greatly contributed to the adoption of a similar joint freedom-of-information and data-protection commissioner in some German states.

In terms of global trends, a review and analysis of the laws promulgated in the past decade have demonstrated a proclivity to establish an independent commission(er) with order-making powers, as well as the continuing prominence of judicial review. Older laws (even those in the early 1990s), with the exception of those of the United States and Australia as discussed above, leaned more heavily toward the parliamentary ombudsman or information commissioner with recommendation power only, whereas the newer laws have embraced the commission model with order-making powers. When analyzed geographically, there appears to be a bias in Eastern Europe toward information commissioners with recommendation powers only,<sup>23</sup> whereas the more recent Latin American and Caribbean laws have tended toward commissions with order-making powers.<sup>24</sup>

As the following country case examples illustrate, myriad variables influence the selection and ultimate design of an enforcement model. No one feature appeared as the determining factor, but rather, when all the counterbalancing issues were seen together, the enforcement model emerged.

21. C. Knill, “Introduction: Cross-National Policy Convergence: Concepts, Approaches and Explanatory Factors,” *Journal of European Public Policy* 12, no. 5 (2005): 764–74.

22. C. Bennett 1997, “Understanding Ripple Effects: The Cross-National Adoption of Policy Instruments for Bureaucratic Accountability,” *Governance: An International Journal of Policy and Administration* 10, no. 3 (1997).

23. There also appears to be a new trend in Europe to establish a common supervisory institution to deal with both access to information and data protection rights. In addition to Hungary, discussed in further detail below, this can be seen in the British commissioner, the Estonian Data Protection Inspectorate, and the Latvian State Data Inspectorate.

24. Examples of recent ATI regimes with information commission(er)s with binding powers in Latin America and the Caribbean include Antigua and Barbados, the Cayman Islands, Chile, Honduras, Jamaica, and Nicaragua, among others.

# Country Case Studies

## Model One: South Africa

South Africa passed the Promotion for Access to Information Act (PAIA) in 2000, and the law came into effect in March 2001. The PAIA gave meaning to the right to information elucidated in the 1993 Interim Constitution's Bill of Rights and incorporated in the final 1996 South African Constitution. "South African public administration in the apartheid era was characterised by secrecy and restrictive measures to prevent or limit the public and the media from gaining access to and disseminating information held by government institutions. This state of affairs led to abuse of power, human rights violations and corruption."<sup>25</sup>

Established in large part in response to the secrecy of the apartheid era, enabling legislation for the constitutional right to information was identified as a priority action. The PAIA may be considered one of the most advanced laws in terms of its far-reaching scope, as it goes further than any other law in covering private bodies when that information is required for the exercise or protection of any rights. Nevertheless, its progressive nature does not extend to the manner of enforcement. In South Africa, no independent administrative procedures exist for dispute resolution. Rather, the only recourse for an aggrieved requester is to appeal to the High Court.

In October 1994, the government of South Africa established a five-member task force to provide recommendations and oversight for the passage of a new open democracy bill. "The Task Group had the brief of considering the legislative changes that would be needed to build what the interim Constitution called an 'open and democratic society' on the unsuitable foundation of the authoritarian and secretive apartheid state."<sup>26</sup> Although there was some criticism of the composition of the task group as being overly represented by lawyers,<sup>27</sup> there appears to have been relatively

25. Benita de Giorgio, "The Open Democracy Bill: A Preliminary Investigation into Its Provisions and Their Implications for Public Administration," Department of Public Administration, University of South Africa, 1998.

26. K. Allen and I. Currie, "Enforcing Access to Information and Privacy Rights: Evaluating Proposals for an Information Protection Regulator for South Africa," *South African Journal on Human Rights*, 23, 2007.

27. Freedom of Expression Institute, "The Open Democracy Act: Process v Product," South Africa, May 1995.

good coordination between the task group and other key stakeholder groups.<sup>28</sup> By early 1995, the task group had published a lengthy (150-page) policy proposal calling for an open democracy act.

In the original draft, the task group called for the formation of an information court to deal with complaints, grievances, and appeals related to the right of access to information. Originally, this was to be a separate specialist court. This recommendation drew complaints from the chief justice and other judges, fearing an erosion of their control.<sup>29</sup> As an initial compromise, the name of the court remained, but rather than be established parallel to the courts, it was included within the existing judicial structure with specialized procedures.

“If the internal appeal is unsuccessful the requester would be entitled to appeal to an Information Court. This was envisaged as a superior court, established in each division of the High Court and staffed by High Court judges but operating under rules designed to ensure that they were accessible, cheap, simple, informal and expeditious.”<sup>30</sup> The task force had also considered an information tribunal but was concerned that this would be even more expensive, and thus less likely to garner the necessary political support.<sup>31</sup>

The establishment of an information court was met with mixed reviews. While civil society advocates applauded the measure as allowing for greater accessibility and more timely decisions, the judiciary remained anxious about eroding power, and other sectors were alarmed that it would be a costly addition to a system already overloaded with new institutions.<sup>32</sup> Although there was interest in an information commissioner, Johnny de Lange, member of Parliament and chair of the ad hoc parliamentary committee, said that the minister “did not want to commit to it, because there are enormous financial implications.”<sup>33</sup>

The draft Open Democracy Act was submitted to the Cabinet in 1996, before being presented to Parliament. In Cabinet deliberations the enforcement provisions of the bill were modified and the information court was removed. Thus, by October 1997, when the Open Democracy Act was officially published for comment before being introduced to Parliament, the provision for an information court had been abandoned and replaced with the only recourse as a right of appeal being directly to the High Court. Submissions to Parliament in 1999 called for the reestablishment of an

28. For a more detailed discussion of the role of civil society and the functioning of the Open Democracy Task Group in South Africa, see 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,” Access to Information Working Paper Series, World Bank Institute, Washington, DC, forthcoming.

29. See Open Democracy Advice Centre, “The Promotion of Access to Information Act: Commissioned Research on the Feasibility of the Establishment of an Information Commissioner’s Office,” South Africa, 2003.

30. Allen and Currie, 2007, p. 567.

31. Ibid.

32. Interview with Richard Calland, founder and executive director of the Open Democracy Advice Centre, South Africa.

33. Allen and Currie, 2007, p. 569, footnote 39.

independent intermediary appeals body, akin to an information tribunal or commission, but these failed; instead, the final report of the ad hoc parliamentary committee included a statement that the idea of an enforcement body should be investigated by the Department of Justice and Constitutional Affairs. Although cursory, periodic discussion of the idea has taken place in government, this investigation has yet to be properly completed. At present, there are ongoing efforts to reform the PAIA to include an enforcement mechanism that more closely meets the ideal.

## Model Two: Mexico

In Mexico, the Federal Institute for Access to Public Information (IFAI) is tasked with serving as an independent enforcement body, receiving appeals following internal review decisions. If IFAI upholds the agency determination to deny release of information, or any other agency decision, the requester has a right to judicial review. If the five-member board of IFAI finds in favor of the requester, it has the power to order the agency to act in accordance with its ruling. Interestingly, if IFAI overturns the agency's decision, the order is binding and final. In other words, the agency has no right of judicial review.

The Federal Transparency and Access to Public Government Information Law was passed in June 2002. The legislation, which gives meaning to the 1977 constitutional right to information in Mexico, is considered one of the most successful in terms of implementation and enforcement, with unique features such as the right to request information electronically and the deemed approval of a request in the face of administrative silence. No one area of the ATI regime in Mexico is more lauded than the design and realization of IFAI.

The passage of the law giving access to public information came at a time of great transformation in Mexico. For more than 70 years, the Institutional Revolutionary Party (PRI) ruled; this changed in 2000 with the election of Vicente Fox, of the National Action Party (PAN).

For years, Mexican citizens were denied access to the most basic information regarding the institutions and even the rules that governed their daily lives. In addition to infringing upon their right of access to official information, this lack of transparency severely undermined their ability to counter the abusive practices that state agents and institutions routinely committed against them.<sup>34</sup>

During the campaign, the PAN had run on a platform of transparency and anticorruption and made promises to establish an ATI law, and the establishment of the right-to-information regime was in direct response to civil society pressures. The law that was ultimately passed unanimously by both houses of Congress represented a

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34. Human Rights Watch, "Lost In Transition: Bold Ambitions, Limited Results for Human Rights under Fox," Human Rights Watch, New York, 2006.



compromise between two proposals presented to the Congress during 2001. The first was the product of the civil society coalition, the Grupo Oaxaca,<sup>35</sup> presented to Congress in October and adopted and sponsored on December 6 by members of every party represented in the House of Deputies except those of President Vicente Fox's National Action Party. The second proposal was the Mexican government's, presented to Congress on December 1.<sup>36</sup>

Although the final law was considered a "compromise law," in many ways it most resembled the civil society product. Prior to these bills entering Congress, there already had been a number of draft versions formulated by political leaders in light of the civil society demands. Over time, with each new draft from the executive, the various sections of the law in contention were rising to the standards set by the Grupo Oaxaca proposal,<sup>37</sup> including the scope of powers and manner of selection of the intermediary enforcement body.

As part of the drafting process, members of both the Grupo Oaxaca as well as government officials visited, and examined the ATI laws of Canada, the United Kingdom (whose law had been passed but had not gone into effect), the United States, and a number of U.S. states, including Connecticut.<sup>38</sup> The jurisdictions with intermediary enforcement bodies vested with order-making powers struck the civil society coalition as the most desirable for Mexico, given the country's history of one-party rule and bureaucratic mistrust. Although, with the election of the PAN, the executive and legislative branches of government had new faces, the judiciary remained largely unchanged. There was a lack of trust in a judicial remedy for appeals in the first instance, owing not only to lingering questions of independence but also to their incapacity to resolve cases quickly.<sup>39</sup> Traditionally, the courts in Mexico had restricted access for "common" people, as it was expensive and required lawyers. For all of those reasons, the Grupo Oaxaca and other transparency advocates encouraged an enforcement model that was less rooted in the judiciary. The Grupo Oaxaca's submission to Congress stated that their proposal "contains flexible, simple, free procedures to settle the controversies that may arise between a private individual and authorities. Two types of appeals [internal and IFAI], which attempt to resolve differences and restrictions on rights in the individual's favor without the need to go to court, have been developed for this purpose."<sup>40</sup>

There was, however, a jurisdictional problem with IFAI as an enforcement body. Because of clear constitutional restrictions, IFAI would be limited in its scope of enforcement to only the

35. Grupo Oaxaca was a coalition of academics, representatives of the media, and civil society that campaigned for the passage of the ATI law. For additional information regarding the formation and functioning, see 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," publication forthcoming.

36. Katherine Doyle, "Mexico's New Freedom of Information Law," National Security Archives, <http://www.gwu.edu/%7Eensarchiv/NSAEBB/NSAEBB68/index4.html>, 2002.

37. Ernesto Villanueva, "La reforma legal de la información en México," Biblioteca Virtual Luis Angel Arango, <http://www.lablaa.org/blaavirtual/educacion/medios/medios7a.htm>, March 2006.

38. Interview with Juan Pablo Guerrero, commissioner of IFAI, Mexico, May 2008.

39. Ibid.

40. Grupo Oaxaca proposal submitted to Congress, October 11, 2001, "Summary of Motives."

executive branch. For some, this was reason enough to argue against vesting the body with order-making powers. Ultimately, it was agreed to establish IFAI, even though it would enjoy only limited jurisdiction, and to assess over time the possibility of a constitutional amendment to reconceive IFAI as an autonomous agency with authority over all branches of government.

## Model Two: Scotland

In 2002, two years after the passage of similar legislation in the United Kingdom, the Freedom of Information (FOI) Act of Scotland was passed. It entered into force on January 1, 2005. Drafted along similar lines as the UK legislation, although not exactly the same,<sup>41</sup> the Scottish FOI Act created an information commissioner vested with the power to issue binding orders.

Following a referendum in 1979, the Scottish Parliament was established in 1998, allowing for some increased self-governance. Leading the Scottish Parliament is the first minister. When Parliament began to function in 1999, it was initially led by a Labour Party/Liberal Democrat coalition, with the first minister from Labour and the deputy first minister representing the Liberal Democrats. As part of the Liberal Democrats' 1999 manifesto (on which they campaigned), the party promised to "end excessive secrecy by passing a Freedom of Information Act which establishes citizens' rights to all but the most sensitive records."<sup>42</sup> Making good on this promise, in June 1999, the deputy first minister presented a nonstatutory Code of Practice on Access to Scottish Executive Information, which served as a precursor to the FOI Act and remained in place until the binding law came into effect. Before Parliament, the deputy first minister pledged to present a draft bill that "will enshrine in primary legislation the people's right to have access to information. It is important that people recognise that we are serious about this commitment. By introducing primary legislation to this Parliament we will leave no one in any doubt."<sup>43</sup>

In the consultation paper "An Open Scotland: Freedom of Information," issued by the executive in November 1999, they proposed an independent review and appeals mechanism with an information commissioner. The commissioner would have the power to order the disclosure of information, but for certain documents the final decision would rest with the first minister, who could issue a ministerial certificate after consulting Cabinet, which would make the document exempt. The proposal contained a second tier of appeals to an information appeals tribunal similar to the UK FOI Act. Responses to this proposal included concerns over the potential breadth of the ministerial certificates, as well as some suggesting that a final appeal to an information appeals tribunal

41. Under the UK Freedom of Information Act there is a possible two step appeals process, with recourse first to an information commissioner and then to an information tribunal.

42. Scottish liberal party manifesto, <http://www.psr.keele.ac.uk/area/uk/ass/libdem/parl.htm>, 1999.

43. Statement of Jim Wallace before the Scottish Parliament, *Official Report*, June 23 1999.

would simply add an additional bureaucratic roadblock.<sup>44</sup> In the drafts of the bill, the information commissioner remained, as did the ministerial certificates, but the tribunal idea was ultimately vacated for reasons of cost.<sup>45</sup>

There are a number of reasons that the Scottish Parliament selected the enforcement model of an information commissioner with order-making powers.<sup>46</sup> First, it was the unambiguous inclination of the Liberal Democrats and the deputy first minister, who presented the code and the FOI bill. As mentioned above, the party had been campaigning on the issue for a number of years. Moreover, the leading nongovernmental organization (NGO)—The Campaign for Freedom of Information—and the trade unions had served an advisory role to the party, thus influencing the contents of the code and draft FOI bill. The notion of the independent information commissioner became the salve whenever challenged on the breadth of exemptions or any perceived weaknesses in the law, with the argument that this entity would serve as a counterbalance to any possible backsliding into the historical culture of secrecy.

While writing the bill, drafters visited Canada, Ireland, and New Zealand, and of course were well aware of the draft UK legislation, which likewise was contemplating an information commissioner. Although there had been no history of independent commissioners, there was great political pressure to design a system that, on its face, was at least as strong as those of the United Kingdom and Ireland.<sup>47</sup> The Parliament of Scotland was intent on passing the best freedom-of-information act possible, and at a minimum a better law than Whitehall's.

Additionally, these jurisdictions had past experiences with ombudsmen, leading to the determination that in this case it would not function. For example, Britain's previous prime minister, John Major, had introduced a voluntary ATI Code of Practice, with a parliamentary ombudsman overseeing its functioning and receiving complaints. When issuing recommendations to the civil service, she was largely ignored. The culture of respecting an ombudsman's recommendations simply did not exist.

Finally, use of the model was based on recognition of the bureaucratic culture in Scotland. When public authorities are ordered to take action, they will comply. However, if the decision is left up to them, as is the case with recommendations, then there was some evidence to suggest that compliance may not occur at the same rate.

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44. Scottish Executive, "Summary of Responses to the Consultation Paper 'An Open Scotland: Freedom of Information, A Consultation,'" May 2000, <http://www.cfoi.org.uk/pdf/scotrespsummary.pdf>.

45. The effect of not having a tribunal is evident. Only 4 percent of the Scottish information commissioner's decisions have been appealed to the Court of Session. By contrast, 25 percent of the UK information commissioner's decisions have been appealed to the information tribunal in England. Interview with Kevin Dunion, information commissioner, Scotland, April 2008.

46. Ibid.

47. The Irish information commissioner falls under the second model, with powers to order agencies to act.

## Model Two: India

In 2002, after years of struggle and campaigning, the India Freedom of Information Act was passed. However, “the law was weak and subjected to widespread criticism, and it never came into force due to the failure of the government to notify it in the Official Gazette.”<sup>48</sup> Advocates for the right to information renewed their efforts, and in late 2004 a new draft of the bill, now called Right to Information Act, was submitted to Parliament. After heated debates and countless amendments, the bill was passed in June 2005 and contained the hard-fought benefit of an information commissioner with order-making powers.

The elections of 2004 provided a window of opportunity for ATI advocates. The United Progressive Alliance (UPA), a centrist coalition of political parties under the leadership of the Indian National Congress party headed by Sonia Gandhi, cobbled together a majority and began to rule India. In May 2004, the UPA issued the National Common Minimum Programme of the Government of India. In this program, they pledged that “the Right to Information Act will be made more progressive, participatory and meaningful.”<sup>49</sup> To monitor the implementation of the program, the UPA instituted a National Advisory Council (NAC).

In the original draft of the law, there were no provisions for external independent review. As highlighted by the 2nd National Convention on the Right to Information, held in Delhi, October 2004,

The Bill does not provide for any penalties in case of non compliance, nor does it have an independent appeal mechanism. The first appeal is to the next higher authority and the second appeal to the central or state government, as the case maybe, and the courts have been barred from intervening, entrenching the right in a system already ridden with a culture of secrecy and wide scale corruption.<sup>50</sup>

In seeking a strengthened bill, the National Campaign for People’s Right to Information (NCPRI) advocated for the inclusion of an Information Commission vested with powers to order action and to sanction noncompliance.<sup>51</sup>

The Indian Right to Information Act evolved through the work of several committed non-governmental groups.<sup>52</sup> Following the failure of the 2002 act to be published in the Gazette and

48. Toby Mendel, *Freedom of Information: A Comparative Legal Survey*, 2nd ed., Paris: UNESCO, 2008.

49. National Common Minimum Programme of the Government of India, May 2004, <http://pmindia.nic.in/cmp.pdf>.

50. Neelabh Mishra, “A Battle Half Won for Right to Information,” *Combat Law*, Issue 6, February 2003.

51. Formed in 1997, the National Campaign for People’s Right to Information is a collective of interested persons, including human rights activists, lawyers, journalists, and academics, advocating for the right of access to information nationally and supporting state action.

52. Interview with Shekhar Singh, founder and former executive director of the NCPRI, April 2008.

legally enacted, the NCPRI studied enforcement models from around the world, and examined the effectiveness of India's various state laws. Critical to this group was an independent body with the power to sanction noncompliance. It was their belief that no information would be released without penalties for failure to do so, and that only an independent body would have the steadfastness to impose penalties. In this case, the desire for an independent enforcement body revolved less around appeals and much more around the capacity to ensure adherence with the nascent culture of openness.

"In August 2004, the NCPRI formulated a set of suggested amendments to the 2002 Freedom of Information Act, designed to strengthen the Act and make it more effective . . . The suggested amendments were forwarded to the NAC, which endorsed most of them and forwarded them to the Prime Minister of India for further action."<sup>53</sup> Fortuitously, a number of the members of the NAC were right-to-know activists committed to the passage of a strong and effective law. When some of the provisions that they had endorsed were amended or deleted by the government of India, including the penalty provisions for noncompliance, the NAC members wrote directly to and met with the prime minister.<sup>54</sup>

The executive, fearful of the negative responses from the civil service and the power of the Information Commission, argued against the commission. Civil society responded vehemently in support of an independent commission, which was timely and less burdensome than the overwhelmed court system.<sup>55</sup> Ultimately, the Information Commission, possessing the power to impose penalties and the same powers as a civil court for enforcing attendance, summoning documents, recording evidence, and issuing decisions, remained as a cornerstone of the new Right to Information Act of 2005.

## Model Three: Hungary

The value and necessity for access to information was considered even before the "rule of law revolution" in 1989 that saw the change from Russian-dominated communism to an independent Hungary. Throughout the decade, the democratic opposition (also called "dissidents") were issuing memorandums to the political class demanding expanded rights. Led by philosophers steeped in liberal democracy theory, one of their memorandums focused on the need for freedom of information, as well as on the right of personal data protection called "information self-determination." The

53. S. Singh, "India: Grassroots Initiatives," in *The Right to Know: Transparency for an Open World*, ed. Ann Florini, New York: Columbia University Press, 2007.

54. Ibid.

55. Throughout the NCPRI's advocacy for RTI amendments, one of the group's critical demands was a "provision for a non-court independent appeals mechanism which is quick and cheap. This appellate authority should have a comprehensive mandate, including the ability to compel release and impose sanctions for non-compliance," National Campaign for People's Right to Information, Statement, July 16, 2004.

demand for access to information was, unsurprisingly, ignored. And yet at approximately the same time, the government was quietly acknowledging awareness of the issue through an informatics project led by the Hungarian State Statistics Office. Although clearly centered on matters of data protection, some elements of the right to information made their way into the consideration. As Ivan Szekely, a leader in the Hungarian movement for access to information, wrote, “the first really substantial step, and one that remains seminal today, was taken by an informal multidisciplinary group that had grown up under the wing of KSH, the Central Statistical Office, in the 1980s . . . The KSH group collected and analyzed western debates, publications, laws, and legal practice, notably including international documents and initiatives pertaining to the protection of personal data and freedom of information.”<sup>56</sup> The outcome was two versions of a bill that combined the right to information and data protection.

In 1988, two events took place that would shape the direction of the Hungarian freedom-of-information enforcement regime. Laszlo Solyom, the founder of the Hungarian Democratic Forum, the first president of the original Constitutional Court, and now the president of Hungary, wrote an important article titled “Freedom of Information: A New Freedom” for a Hungarian political science review. That same year, Laszlo Majtenyi, who was to become Hungary’s first data protection and freedom of information ombudsman in 1995, visited Norway for a three-month study tour, ostensibly to focus on maritime law. However, while in this Scandinavian nation, he became fascinated with the ombudsman institution and began writing about its benefits. Additional review of existing ATI laws, particularly Canada’s, solidified the belief that an Information ombudsman or commissioner with recommendation powers would best serve Hungary’s needs. Moreover, at that time many European nations enjoyed specialized data protection ombudsmen. The Hungarian twist was to combine that function with the right-to-information enforcement under a joint protector to ensure that freedoms were not curtailed.<sup>57</sup>

After the fall of communism, the existing constitution was significantly modified, counting more than 100 amendments.<sup>58</sup> One of the additions was the right to information. Even before the end of the communist era and its revised constitution, the foundation for a freedom of information act, including the analysis, deliberation, and legal considerations, had been laid. Thus, when the minister of justice organized a working group to draft the freedom of information act, they reached back to the work of the KSH group. One of the original early drafts became the framework for Hungary’s combined Data Protection and Freedom of Information Act 1992, and many of its

56. Ivan Szekely is the former chief counselor for the Hungarian Data Protection and Access to Information Ombudsman. Ivan Szekely, “Hungary,” in *Global Privacy Protection: The First Generation*, James B. Rule and Graham Greenleaf, eds. Edward Elgar Publishing, 2009, p. 178.

57. L. Majtenyi, “Freedom of Information, the Hungarian Model,” speech delivered at the 4th International Conference on Information Society, October 21, 2001, Vilnius Lithuania, organized by the Brandenburg State Commissioner for Data Protection and Access to Information, 2001. See also L. Majtenyi, “Ensuring Data Protection in East-Central Europe,” *Social Research* 69, no. 1 (Spring 2002): 151–76.

58. For more information regarding the constitutional reforms, see Reuters, “Hungary Purges Stalinism from Its Constitution,” *New York Times*, October 19, 1989.

members became the implementation and enforcement arm.<sup>59</sup> The technical proponents for access to information were joined by important human rights organizations, civil liberty proponents, and environmental activists to advocate the passage of the contemporary legislation.

The rule of law revolution created a unique platform for the passage of bills, such as the freedom of information act. As the Russian troops pulled out, allowing for independence after 40 years, there was enthusiasm for new rights and institutions. Hungary's Parliament was feverishly establishing new specialized courts, such as the new Supreme Court and independent Constitutional Court, as well as innovative ombudsman offices, including a general ombudsman, ombudsman for ethnic and minority issues, and of course the data protection and FOI ombudsman.<sup>60</sup> As Laszlo Majtenyi recounts, "the Hungarian politicians wanted everything that existed in Western Europe, the United States and Canada, they wanted the full Christmas tree with all the ornaments."

But from the beginning, the civil servants disliked the idea of a freedom of information ombudsman.<sup>61</sup> Though the political times had changed, in many ways the Hungarian bureaucratic traditions had remained static. Nevertheless, there appeared to be a relatively high degree of compliance. Although the ombudsman's recommendations were not binding, through their "simple declarations of law, valuing what is reasonable and just," they are sometimes considered more powerful than legal obligations.<sup>62</sup> Vested with wide powers for investigation, the ombudsman's office can enter agency premises, and unlike other similar bodies with recommendation power only, the Hungarian ombudsman has one order-making power: to mandate declassification of documents (to which the only recourse is to concede or file a judicial appeal). All legislation that can affect the right to data protection and freedom of information must be reviewed by the ombudsman, an innovative and powerful tool in preserving the rights. Moreover, the Hungarian ombudsman enjoys great legitimacy, having been appointed by two-thirds of Parliament, and serves in a high-ranking position. If vested with any more powers, the office would have been akin to a judge rather than an ombudsman. Sitting within the parliamentary structure, the office is not a part of the bureaucracy, thus offering it greater independence.

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59. Drawn from communication with Ivan Szekely, July 2008. See also I. Szekely, "Freedom of Information or Freedom without Information," Ten Years of Parliamentary Commissioner for Data Protection and Freedom of Information.

60. Drawn from communications with Laszlo Majtenyi, July 2008.

61. Ibid.

62. L. Majtenyi, "Freedom of Information, the Hungarian Model," speech delivered at the 4th International Conference on Information Society, October 21, 2001, Vilnius Lithuania, organized by the Brandenburg State Commissioner for Data Protection and Access to Information, 2001.



# Key Factors for Success

Notwithstanding the enforcement model ultimately selected, a number of characteristics influence the overall effectiveness of the body in ensuring that the right of access to information is properly upheld and the policy objectives of the law are achieved. While many of these considerations were mentioned in the case studies, this paper does not undertake a comprehensive application of the myriad elements to any specific model, provide an exhaustive exploration, or focus on Model One: Judicial Enforcement. Rather, this section outlines a sampling of factors and their relevance for success of the commissioner models.

## Independence

Perhaps most critical to the overall legitimacy of an external enforcement model is its independence (perceived and real). For any model to meet its objectives it must be considered sufficiently sovereign to make the difficult decisions surrounding release of information. It is essential that the commission “be able to operate free from political interference and to withstand the influence of vested interests.”<sup>63</sup> A series of factors determine the overall independence of the entity, including the manner of selecting the commission(er)s, their term limit and procedures for dismissal, the branch of government from which they receive their powers and to whom they report, and autonomy in budgeting.<sup>64</sup>

The mechanics for determining the composition and appointment is often one of the most hotly debated topics in the establishment of the information commission(er). If the candidate is selected in a partisan manner, trust in the body will quickly erode. The selection process and threshold assents for appointment are integral to the perceived legitimacy of the commission. Selection may occur in a number of ways. Most common are through executive appointment, sometimes in partnership with the leader of the opposition, such as in Jamaica. In Mexico, the initial government

63. B. Stewart, “A comparative survey of data protection authorities—Part 2: Independence and functions”, in *Privacy law and Policy Reporter*, 39, 2004.

64. See appendices 1 and 2 for examples of appointment, term and dismissal provisions.



drafts of the freedom of information law called for the exclusive right of executive appointment. Through negotiations, this was amended to allow the Senate to object, providing some counter-balance to potential partisan appointments. Canada likewise has executive nominations for the information commissioner, but Parliament must affirmatively approve the selection. A final manner for executive appointment is found in Ireland and India, where Parliament or a special nominating committee presents the president with a list of potential candidates from which he or she may select the information commissioner.

The second common form of appointment is through congressional or parliamentary selection. In some cases the commissioner or ombudsman is elected wholly by Parliament with no executive branch involvement, as can be seen in Hungary and Sweden. In other cases, the executive branch presents a closed list of candidates to the legislature for selection. In New Zealand, a recruitment agency creates a short list of candidates from submitted applications. The Officers of Parliament Committee interviews the selected applicants, and when they have reached a bipartisan agreement, the one candidate's name is recommended to the whole House for unanimous approval. The governor-general then appoints the ombudsman in line with the House of Representatives' recommendation.

In any scenario of parliamentary engagement, whether taking a more engaged role in determining the list of candidates or simply voting on the presented applicants, the threshold level of support necessary for appointment may be determinative of the candidate's considered legitimacy. For example, in Hungary the data protection and freedom of information ombudsman has enjoyed great authority because his appointment must be approved with a two-thirds parliamentary vote. In contrast, however, the Honduran legislation provides a similar recipe for approval, yet the antecedents of defining the closed list of nominees led to civil society's rejection of the commissioners.

Once appointed, the term and potential for dismissal become foremost considerations for continuing independence. Periods of appointment are in many respects a balancing act. If term limits are too short, then the commissioner may be more concerned with pleasing those responsible for subsequent appointments than in serving the duties of his or her post. On the other hand, if terms are too long, then officers may be less responsive to the shifting trends of openness and needs of all constituencies. In general, term limits for commissioners range from five to seven years, though Japan has only a three-year term, with some potential for reappointment. The length of term is relevant to ensure not only sufficient independence but also the functioning of the commission. As previously noted, enforcing the right of access to information often necessitates some specialization, which takes time to acquire. Thus, shorter terms could signify less proficiency in the body.

As the basic principles on the independence of the judiciary provide, members of the enforcement body (whether commissioner or judges) "shall be subject to suspension or removal only for

reasons of incapacity or behaviour that renders them unfit to discharge their duties.”<sup>65</sup> Such behaviors could include criminal actions leading to conviction or imprisonment, infirmity that affects the individual’s functioning, or in some cases financial insolvency. (See Appendices 1 and 2) The removal process should be free from political influence or threat, and to the greatest extent possible should not be within the control of a singular individual such as the president, but rather should require congressional approval. Finally, any dismissal process should provide for the right of appeal.

A number of other provisions in different laws enhance independence, including prerequisites for being appointed as a member—such as having expertise and having a strong moral record—conditions on membership—for example, against individuals with strong political connections from being appointed . . . and funding mechanisms—including by linking salaries of members to pre-existing civil service grades, such as those of the judicial service.<sup>66</sup>

Lastly, budget sovereignty is a significant component to overall independence and autonomy. If the commission is vested with its own line item in the budget, it is less obliged to a specific ministry or agency for proposing and promoting its financial needs. In cases, for example, where an executive branch ministry must submit the commission’s budget for legislative approval, there is an inherent dependency created with that “host” agency.

## Compliance

“Political will within a democratic framework and managerial effectiveness within a bureaucracy both require clear incentives for action and disincentives for inaction.”<sup>67</sup> Nowhere is this more relevant than for the enforcement body. Those commission(er)s with strong sanctions for noncompliance possess a commanding tool to ensure conformity with their decision. In India, failure of an agency to comply with the decision can result in stiff fines, and a public official can be recommended for disciplinary action. Scotland’s Information Commissioner Kevin Dunion stated in a 2004 information commissioners’ meeting in South Africa that, in cases of noncompliance, “I can go to court if the authority ultimately refuses to provide the information, and the penalty for not complying with my decision is that the official can go to jail for two years or face an unlimited

65. Basic Principles on the Independence of the Judiciary, Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985. See also, Principles relating to the Status and Functioning of National Institutions for Protection and Promotion of Human Rights (Paris Principles), endorsed by the Commission on Human Rights in March 1992 (resolution 1992/54) and by the General Assembly in its resolution A/RES/48/134 of 20 December 1993.

66. Mendel, T, “Freedom of Information: A Comparative Legal Study”, UNESCO 2008.

67. L. Neuman, and R. Calland, “Making the Law Work: The Challenges of Implementation,” *The Right to Know: Transparency for an Open World*, ed. A. Florini, New York: Columbia University Press, 2007.

fine.”<sup>68</sup> In some jurisdictions, noncompliance with an order is akin to contempt of court, whereas in others, such as Mexico, it remains an administrative matter.

Mexico is unique in barring aggrieved agencies from appealing the commission’s order. It also is exceptional in the way it deals with agency noncompliance. Failure to abide by an IFAI order takes an administrative route, remaining within the executive branch and placing the responsibility for ensuring compliance in the same political arena where the order was ignored. In a politicized context or a particularly charged case, this could lead to disregard of commission decisions, with little recourse for ensuring that orders are carried out.

## Additional Dynamics

The positive functioning of the information commission(er) or ombudsman is dependent on a host of variables beyond independence and measures to ensure compliance. Perhaps the most interesting feature to consider is the very individuals that assume the post. Factors such as their own character, how they view their mandate, their reputation prior to assuming the position, and their seniority all play a role in the manner in which they develop and discharge their duties. In Hungary, the ombudsman office was widely considered a success because of the strength, personality, and integrity of the first man that held the position. With his commitment to transparency, he institutionalized an office dedicated to ensuring integrity and openness. A similar argument could be made for the first information commissioner of Scotland. Previously the head of an environmental nongovernmental organization, he brought to the post his dedication, legitimacy, and immunity to political pressures.

The partnerships that the commissioner forges can enhance the overall accomplishments. Where commissions have enjoyed the support of civil society and the media, the potential for erosion of independence may be lessened, or at a minimum recognized. In circumstances where the commissioner has a positive working relationship with the public servants, there may be less hostility and confrontation, leading to greater compliance with both recommendations and orders. On the other hand, relationships that are too close could raise government suspicions that the commission(er) is no longer serving as a neutral arbiter of complaints.

Finally, pragmatic issues related to design and functioning of the commission’s office can be pivotal to its success. In cases where the commissioners are not well paid or the job is not full-time, there may be a tendency to diminish its value as an enforcement body. In Jamaica, for example, the five appeals tribunal members meet only periodically, with no set schedule, and do not receive sufficient compensation for their efforts. As the time between their sessions lengthens, and delays in decisions increase, their authority and confidence wanes. Similarly, an enforcement body that is poorly staffed or organized can have a deleterious effect on its overall positive functioning.

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68. Remarks by Kevin Dunion at the 2nd International Information Commissioners Conference, Capetown, South Africa, 1-3 February 2004.

## Conclusion

Numerous factors may influence the enforcement model chosen, and several further considerations will likely determine its overall effectiveness and success in enforcing the right to information.

Issues such as political context, legal history, and bureaucratic culture characterize the selection deliberation, while questions of independence, compliance, staffing, organization, salary, and the personality, vision, and seniority of the individuals charged with the responsibility of applying the enforcement model will determine its sustainability and overall legitimacy.

Given these diverse considerations, rather than promote a “one size fits all” system, this paper advocates a model that strives to meet the principles of independence, accessibility, affordability, timeliness, and specialization. These should be seen as primary standards against which any enforcement model would be tested. Each system must cultivate an enforcement model that will cope best with the political and institutional demands of the particular country or context.

Further research is necessary to determine under what conditions these models, once selected, thrive and to identify indicators and undertake a systematic evaluation of the enforcement body’s effectiveness in meeting the primary standards and upholding the right to information. Studies on the impact of marrying the freedom-of-information enforcement body with data protection and oversight roles should be undertaken, to identify whether this strengthens or dilutes its capacity and authority. Moreover, questions regarding the number of commissioners chosen, the profile of the commissioners, and the commission’s interaction with the legislature and public administration merit additional consideration.

Of course, as with any part of establishing an ATI regime, disconnects remain between the legislative mandate and the practice. Enforcement, as with passage and implementation, remains highly dependent on political will and commitment—particularly in developing nations with less bureaucratic maturity. But ultimately, additional research and practice likely will prove that an intermediary body, such as an information commission(er), charged with order-making powers is best placed to meet these primary standards and to respond effectively to the enforcement needs of most political, legal, and bureaucratic environments.



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# Appendix 1

## Appointment, Dismissal, and Terms of Information Commission(ers) with Order Power

Country	Body	Appointment	Dismissal	Term
India	Central Information Commission with one chief commissioner and up to 10 information commissioners	Appointed by the president upon recommendation of a committee consisting of the prime minister, leader of the opposition, and a cabinet minister appointed by the prime minister	Dismissed by the president upon a decision of the Supreme Court, and the president may suspend the commissioner while the court considers. The president may remove a commissioner who has been deemed insolvent; has been convicted of an offense involving moral turpitude; engages in paid employment; is unfit to continue by reason of infirmity of body or mind; or has acquired financial or other interests which are likely to affect his or her functions as a commissioner.	5-year nonrenewable term; commissioners may not hold office after age 65
Honduras	Three commissioners with one president of the commission	Elected by Congress with a two-thirds vote, with nominations from the president, the attorney general, the Human Rights Commission, the National Convergence Forum, and the Superior Court of Accounts	Commissioners can be replaced if their actions conflict with the nature of the functions of the institute.	5-year term
Jamaica	Appeals Tribunal with five members	Appointed by the governor-general after consultation with the prime minister and leader of the opposition	Members may resign in writing at any time or be removed by the governor-general, after consultation with the prime minister and leader of the opposition, for being of unsound mind or unable to perform his or her functions; for becoming bankrupt; upon being sentenced to death or imprisonment; for conviction of any crime of dishonesty; or for failing to carry out his or her functions.	5-year nonrenewable term

*(continued)*



### Appointment, Dismissal, and Terms of Information Commission(ers) with Order Power (Continued)

Country	Body	Appointment	Dismissal	Term
Mexico	Federal Institute of Access to Information (IFAI), with five commissioners	Nominated by the executive branch, whose nominations may be vetoed by a majority vote of either the Senate or the Permanent Commission within 30 days	Commissioners may be removed for serious or repeated violations of the Constitution or the law, where their actions or failure to act undermine the work of IFAI or if they have been convicted of a crime subject to imprisonment.	7-year term with possibility of renewal
Scotland	Information commissioner	Appointed by Her Majesty on the nomination of the Parliament	The commissioner may request to resign and is required to vacate office beyond the age of 65. Her Majesty may remove the commissioner from office with a two-thirds vote of Parliament.	Up to 5-year term with possibility of renewal up to 5 years, with third term possible only in special circumstances

# Appendix 2

## Appointment, Dismissal, and Terms of Information Commission(ers) with Recommendation Power

Country	Body	Appointment	Dismissal	Term
Canada	Information commissioner with one or more assistant information commissioners	Appointed by governor in council after consultation with the leader of every recognized party and approval by resolution of the Senate and House of Commons	May be removed by the governor in council at any time upon address of the Senate and House of Commons.	7-year term with possibility of renewal up to 7 years; assistant has 5-year term with possibility of renewal up to 5 years
Hungary	Parliamentary commissioner for data protection and freedom of information	Elected by Parliament by a two-thirds vote of the members of Parliament, with power by the president to recommend	Mandate of the commissioner may be terminated by a two-thirds vote of Parliament in the case of: expiry of term; death; resignation; conflict of interest; and removal from office. A parliamentary committee for conflict of interest matters may request removal from office.	6-year term with possibility of renewal
Japan	Information Review Board with 15 members; appeals are considered in three-member panels; five members serving full-time as chairpersons of the panels	Members appointed by prime minister from among people of "superior judgment" who have been approved by both houses of Parliament	The prime minister may dismiss members with approval from both houses of Parliament. Grounds for dismissal include incapacity, misconduct, or contravention of official duties.	3-year term with possibility of renewal
New Zealand	One or more ombudsmen, with chief ombudsman; all officers of Parliament and commissioners for investigations	Appointed by the governor-general on recommendation of the House of Representatives	Ombudsmen may be removed or suspended from office by the governor-general upon an address from the House of Representatives, for inability to perform the functions of the office, bankruptcy, neglect of duty, or misconduct.	5-year term with the possibility of renewal

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