Anti-Corruption Helpdesk Answer

Enforcement of the right to information: challenges and best practices

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Right to Information (RTI) laws play a crucial role in facilitating public access to information, which can strengthen the transparency and accountability of state institutions and support anti-corruption efforts. However, disparities in the degree of enforcement of RTI legislation hinder its ability to ensure citizen access and governmental accountability. This Helpdesk Answer explores the enforcement of RTI laws, highlighting the challenges faced and emerging best practices to address them across three primary models: judicial enforcement, non-judicial enforcement by Information Commission(er)s, and through softer means of ensuring compliance with RTI rulings such as non-binding decisions by Ombudsperson offices.

Caveat: In some jurisdictions, while oversight bodies do not have legally binding powers, they can still compel compliance with RTI laws through the issuing of recommendations. Hence, this Helpdesk answer includes oversight bodies without binding decision-making powers as models of soft enforcement. However, it does not cover criminal enforcement concerning non-disclosure of information, which is a consideration in many countries where violation of the right to information is a criminal offense. Additionally, while the political environment in each jurisdiction may influence the enforcement of RTI laws, this dimension is beyond the scope of this Helpdesk answer.

Query

What are the best practices for enforcing decisions made by an Information Commission(er) under right to information laws? What are some potential challenges that are faced during the enforcement of right to information decisions and the best ways to navigate them?

Main points

- RTI laws enable public access to information that can bolster transparency, accountability, and anti-corruption efforts. However, disparities in enforcement effectiveness undermine their potential to uphold citizen access and governmental accountability.
- RTI enforcement is necessary to ensure that information-holding entities comply with court rulings or binding decisions by Information Commission(er)s and disclose the required information.
- Even though Ombudspersons and Information Commission(er)s without binding decision powers lack formal enforcement power, their recommendations can still compel public bodies to comply with RTI laws.
- The mandates and powers of Courts, Information Commission(er)s and Ombudspersons can vary in terms of their ability to make binding decisions, their investigative powers, and the sanctions they can impose.
- The independence of Courts, Information Commission(er)s, and Ombudspersons is crucial in determining their effectiveness in enforcing compliance with RTI laws.
- In order to enforce RTI laws, Information Commission(er)s and Ombudspersons can employ either cooperative or confrontational tactics.

Contents

Background

The Right to Information (RTI) is a fundamental pillar of a functional democracy, facilitating access for citizens, media, and civil society to information held by public bodies. This access empowers stakeholders to gain a better understanding of their institutions and countries, safeguard other human rights, and hold public officials accountable. Research indicates that the implementation of RTI laws correlates positively with improved governance and reduced levels of corruption (Islam 2006; Mungiu-Pippidi 2013). Moreover, the latter study suggests that RTI laws may be more effective in combating corruption than other institutional measures such as anti-corruption agencies, Ombudspersons, and ratification of the UNCAC. The magnitude of this effect is attributed to the significant role RTI laws play in providing information to non-state actors—often more motivated than government bodies to curb corruption—that they can leverage to enhance their ability to monitor state actors (Mungiu-Pippidi 2013: 9).

The global adoption of RTI laws has seen significant growth, with 133 countries, encompassing 91% of the world's population, having enacted legislation to ensure this fundamental right by 2022 (Article 19 2022). The adoption of RTI laws is typically motivated by both internal calls for transparency and external pressures to meet international norms. Rooted in Article 19 of the Universal Declaration of Human Rights, the right to access public information is considered a fundamental human right and further enshrined in the International Covenant on Civil and Political Rights under article 19 (UN 1966).

Various other international and regional instruments advocate for its advancement. Target 16.10 of the UN Sustainable Development Goals urges all nations to implement legislation or policies ensuring the right to information. Article 10 of the UNCAC mandates state parties to establish procedures and regulations enabling the public to access information about the organisation, operations, and decision-making processes of their public administrations. However, it's important to note that UNCAC addresses only the states' obligations regarding this right, carefully avoiding any acknowledgment of the right itself upon which claims could be made. Regional bodies have further bolstered these efforts by including right to information in international human rights conventions (Council of Europe 1950; OAS 1969; OAU 1981), adopting treaties dedicated to this right (Council of Europe 2009) and adopting detailed RTI standards (OAS 2008; AU 2019).

RTI laws vary across jurisdictions but should universally adhere to the principle of maximum disclosure with clearly defined exceptions, constrained by rigorous 'harm' and 'public interest' tests (Article 19 1999). RTI frameworks impose two essential and complementary obligations on governments. Firstly, the duty to proactively publish and

disseminate critical information and copies of documents concerning the exercise of public authority and disposal of public assets and funds. Secondly, the obligation to receive and respond to information requests, either by facilitating public access to information and (original) documents or by providing copies of information and documents held by public entities (Access Info 2014: 30).

There can be many differences in scope and procedural guidelines between RTI laws in different countries (Chene 2012). The scope of these laws may vary in terms of who can request information, the types of information accessible, exemptions criteria, and the public institutions subject to the law. Procedurally, while specifics vary, RTI laws should clearly outline protocols for submitting requests, responding to requests, appealing denials, overseeing the provision of information, and, if necessary, imposing sanctions for those who wilfully obstruct access to information, including through the unauthorised destruction of public information or do not comply with the decisions made by the enforcement or oversight body.

A notable trend in the right to information is that the strongest legal frameworks for ensuring public access to information are often implemented in emerging democracies (Karanicolas & Kwoka 2022: 657). This fact could be the result of RTI laws being subject to regulatory innovations during the last few decades. Emerging democracies, which often have newly adopted RTI laws incorporating these innovations, contrast with traditional RTI countries that seldom reform their already functioning systems. However, while the adoption of RTI laws represents a crucial step towards transparency, the effective contribution of the right to information towards its stated goals relies on robust implementation. AbouAssi and Nabatchi found that in the US, the percentage of fully denied Freedom of Access requests fluctuated between 30% and 45% between 2008 and 2016 (2019: Table 4). In India, while denial rates are relatively low, ranging between 5% and 14% annually, the increase in RTI requests has also led to a rise in backlogged cases, which have fluctuated between 7% and 32% (Relly et. al. 2020: Table 2). Weak or ineffective enforcement mechanisms can result in unlawful denials or contribute to 'administrative silence,' where public bodies disregard information requests without issuing formal denials (Neuman 2009:1).

As Pearlman (2010: 130) argues, “the most liberal RTI laws are essentially useless if there’s no practical means of enforcing them”. Enforcement of RTI laws becomes critical when there is a discrepancy between the information requested by citizens and what is provided by public bodies. This discrepancy can manifest in three ways: outright denial of access to requested information, partial disclosure of requested information, or where requests are simply ignored. In any of these situations, the requesting party has the right to appeal to a designated body (International Conference on the Right to Public Information, 2008).

Enforcement of RTI laws is triggered by the final decision of the dispute stemming from the requester’s appeal. For a decision to be final, appeals can go through a three-tier system (Chin 2021:48). At the first tier, internal review, RTI requesters whose designated information officer did not provide the sought information can appeal to a designated

officer or a higher instance decision-making body or position within the public body from which information was requested. If the requester does not receive the information within the stipulated time or disagrees with the decision at this level, they can escalate to the second tier.

The second tier typically involves an external oversight body of the entity that refused to provide the requested information, or a public body designated to review RTI decisions such as an Information Commission(er) or Ombudsperson. In some legal systems the requestor can already apply to a court following the initial decision of the body from which they requested the information. If the legal system does have a second-tier body, requesters must go through internal and external reviews before one can appeal to a court, the third and final tier of the appeal system (Chin 2021: 48). Once all the appeal resources are exhausted and a final decision is reached then the RTI law can be enforced.

Enforcement of RTI puts into effect a court's ruling or a legally binding decision of a non-judicial oversight, namely an Information Commission(er). In some jurisdictions, while oversight bodies do not have legally binding powers, they can still compel observance of RTI laws through the issuing of recommendations. Hence, this Helpdesk answer considers oversight bodies without binding decision-making powers as models of soft enforcement. However, it does not cover criminal enforcement concerning non-disclosure of information, which is a consideration in many countries where violation of the right to information is a criminal offence.

Models of Enforcement

In the institutional design of various jurisdictions, the enforcement function is frequently integrated with the oversight or supervision role of the RTI regime. Assigning enforcement responsibilities to oversight bodies such as Information Commission(er)s, rather than the courts, typically offers requesters a less time-consuming, costly, and intimidating process compared to judicial avenues (Holsen & Pasquier 2015: 38, Allan & Currie 2007: 507, Rowat 1993: 219). In instances where the oversight function and the enforcement function are fused in one body, this is typically assigned additional responsibilities, including ensuring the effective operation of the RTI regime through capacity building for civil servants, raising public awareness, and reporting (Neuman 2009: 2).

Oversight and enforcement of RTI obligations are crucial because, despite strong public interest in a robust and effective right of access, agencies that hold the requested information and their political leadership may have interests in withholding documents or information, especially when disclosures could prove compromising (Karanicolas & Kwoka, 2022).

The way countries receive RTI appeals, decide on the dispute, and enforce these decisions varies across different jurisdictions. Despite the differences, the involved bodies should ensure high levels of independence, accessibility, and expertise. This section explores three models of institutional design that countries have taken to ensure the enforcement and oversight of their RTI regimes.

Judicial enforcement through Courts

The first model, direct judicial proceedings, is implemented in countries where appeals by requestors against instances of non-compliance on the part of public authorities are directed straight to the judiciary. This bypasses the need for a three-tier appeal system. This is the case of Vietnam[1], Bulgaria[2] , and the United States[3], at the federal level. A significant advantage of this model is that courts wield substantial enforcement powers, including the authority to compel information disclosures and rely on rigorous disclosure measures o to decide whether to penalise non-compliance (Neuman 2009:6).

However, the main disadvantage of this model lies in its accessibility, particularly in terms of costs, timeliness, and approachability (Holsen & Pasquier 2015: 38). Pursuing

[1] Law on Access to Information, No.:104/2016/QH13 (Vietnam)
[2] Access to Public Information Act, SG No.104/05.12.2008, art. 40 (Bulgaria)
[3] Freedom of Information Act, 5 U.S.C. § 552(a)(4)(B)2016 (United States)

legal action can be daunting for citizens, who may also face financial burdens and significant time investments, especially if courts are overburdened. This lack of accessibility can create perverse incentives within the RTI regime: if public officials perceive that citizen find judicial proceedings impractical, they may feel less compelled to respond promptly to information requests. While this risk is possible in all models, it becomes more relevant when the judicial proceedings is the only avenue available for solving a RTI dispute (Holsen & Pasquier 2015: 38, Allan & Currie 2007: 507, Rowat 1993: 219).

To mitigate some of these disadvantages, certain countries, such as Azerbaijan[4], have adopted a hybrid model by incorporating an Ombudsperson into their RTI framework in parallel to the judicial route. Hence, citizens have a choice between two possible avenues of enforcement instead of one. In most jurisdictions, however, upon a negative internal appeal decision, the aggrieved party is specifically directed to submit an appeal to either a court or an external body.

A similar hybrid approach can be observed in the United States, where the Office of Government Information Services (OGIS) offers dispute resolution services as a non-exclusive alternative to litigation. As part of the OPEN Government Act of 2007, the FOIA was amended to create OGIS to undertake the voluntary process of mediation, between the parties themselves, requester and Federal Agencies. Resolving FOIA disputes through mediation holds the potential to reduce litigation, thereby saving time and money for agencies and requesters alike (US DOJ 2011).

However, the primary appeals process under the US RTI regime remains judicial in nature, as it relies on courts (RTI Ratings USA Country Report 2017: Rating 37). According to the DOJ Office of Information Policy's Court Decision Overview, since 2013, US federal courts have ruled in more than 700 RTI cases. On receiving a complaint, a district court of the United States has jurisdiction to determine the matter and compel the public institution withholding records to provide any information improperly withheld from the complainant. The court also has the right to examine the contents of such agency records and assess the technical feasibility of the disclosure to determine its decision[5]. The decision can either be enforced by a judicial order, an enforceable written agreement, or a consent decree[6]. In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee[7].

Furthermore, the court might refer the case to the Special Counsel, an independent federal investigative and prosecutorial agency, to initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the initial withholding of information. The Special Counsel,

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[4] Law on the right to access to information" № 1024-IIQ, adopted on 30 September 2005, art. 27-1. (Azerbaijan)
[5] The Freedom of Information Act, 5 U.S.C. § 552, (a)4(B)2016 (USA)
[6] The Freedom of Information Act, 5 U.S.C. § 552, (a)4(G) 2016 (USA)
[7] The Freedom of Information Act, 5 U.S.C. § 552, (a)4(E)(ii)(I) 2016 (USA)

after investigation and consideration of the evidence submitted, is expected to submit his findings and recommendations to the administrative authority of the information holding body, which is required to take the corrective action that the Special Counsel recommends[8]. If the public institution holding the requested information appeals against a Court's ruling, the case can continue to escalate in the judicial system all the way to the highest courts before reaching enforcement.

Non-judicial enforcement through Information Commission(er)s

In a second model of enforcement, the binding decisions regarding RTI disputes come from a non-judicial body external to the information-holding public institution, namely Information Commission(er)s. While they can have other mandates, Information Commission(er)s primarily focus on resolving citizen disputes arising from administrative failures to comply with right to information regulations (Holsen & Pasquier 2015: 38).

Information Commissions are likely the most common model for RTI enforcement, as seen in countries like Mexico[9], India[10], Indonesia[11], Serbia[12], and the United Kingdom[13]. Most countries opt for a single national Information Commissions, while countries like Mexico and India have created Information Commissions at the federal state level. This model allows appellants to turn to a more accessible, specialised body that, in the best cases, is also highly independent. Information Commissions with the authority to issue binding rulings have the power to impose sanctions on public institutions to compel these bodies to disclose the requested information or documents.

Under this model, commission decisions are generally enforced in two ways (Karanicolas & Kwoka 2022: 682). In a first approach, RTI legislation may grant the Commission(er) the power to impose direct sanctions for violating their orders. For example, in Nepal[14] the Information Commission can directly level fines for noncompliance with their decisions and impose broader measures, without the need for any intervention from the courts at all. A second approach requires the courts involvement to impose a fine decided by the Commission(er). In Pakistan[15] a failure to comply with the Information Commission's ruling is treated as contempt of court; in

[8] The Freedom of Information Act, 5 U.S.C. § 552, section 4(F)(i) 2016 (USA)
[9] General Act of Transparency and Access to Public Information], Diario Oficial de la Federación [DOF] 04-05-2015, últimas reformas DOF 20-05-2021, art. 157 (Mexico)
[10] Right to Information Act, 2005, § 19(7) (India)
[11] Public Information Disclosure Act, Act No. 14 of 2008, Ch. 8, art. 39 (Indonesia)
[12] Law on Free Access to Information of Public Importance, Official Gazette RS No. 120/04, art. 28 (Serbia)
[13] Freedom of Information Act 2000, c. 36, §§ 50, 54 (UK)
[14] Right to Information Act, 2064 (2007), Act No. 4 of the Year 2064, ch. 5, § 32(5) (Nepal)
[15] Act to Provide for the Right of Access to Information in Transparent and Effective Manner, Subject Only to Reasonable Restrictions Imposed by Law (Right of Access to Information Act) Act No. 34 of 2017, § 20(2) (Pakistan)

Sierra Leone[16] the Commission is required to file its order with a relevant court before the decision becomes binding. Although this method requires the additional step of coordinating with the judiciary, it ensures more procedural fairness for public institutions by necessitating court involvement before any fine is imposed.

Unlike traditional monetary penalties paid by individual offenders, RTI fines can be imposed on the public institutions withholding information. In Ghana[17] for example, the imposition of the fines is against the public institution, which allow for personal fines on officials who do not compel with the decision of their Commissions. Fines on institutions withholding information could have little effect on improving RTI compliance if they simply shift funds within the public budget. A government could just top-up the budget of the offending institution to make up for the cost of fines or even deduct an equivalent amount from the budget of the oversight body issuing the fine. In contrast, some RTI regimes, such as those in India[18] and Bangladesh[19], allow for personal fines on officials who undermine the law.

In addition to the power to impose fines, some Information Commission(er)s can also impose broader measures to enforce compliance with their decision. These measures can include reviewing classified documents and inspecting the premises of the information holding bodies. For example, in Canada, the Information Commission has the power to issue summons to enforce the attendance of persons and compel them to give oral or written evidence on oath, to examine and inspect information, receive evidence on affidavit, to bring in any information from any office and issue summons for witnesses or documents[20].

While Information Commission(er)s can often issue binding decisions, in most jurisdictions, the public institution withholding information, or the requester can still appeal to the judicial branch. Even when some jurisdictions explicitly state that the Information Commission decisions are final, many of them still leave room to appeal to the judicial branch. For example, in Indonesia[21], either party has up to 14 days to state by writing their dissatisfaction with the final decision of the Information Commission in order to present a judicial appeal. In Mexico[22], the information holding bodies can appeal against a decision of the Information Commission. In these instances, the Legal Advisor of the Government needs to file a motion for review before the Supreme Court of Justice and must convince the Supreme Court that the Information Commission's decision may put national security at risk.

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[16] Right to Access Information Act, 2013, Act. No. 2 of 2013, § 32(6) (Sierra Leone)
[17] Right to Information Act, 2019, section 43(2) (Ghana)
[18] Right to Information Act, 2005, Ch. 8 (India)
[19] Act to Make Provisions for Ensuring Free Flow of Information and People's Right to Information (Right to Information Act, 2009), Act No. 20 of 2009, § 27 (Bangladesh)
[20] Access to Information Act, Current to September 9, 2020, article 36 (1) (Canada)
[21] Public Information Disclosure Act, Act No. 14 of 2008, Ch. 8, art. 39 (Indonesia)
[22] General Act of Transparency and Access to Public Information], Diario Oficial de la Federación [DOF] 04-05-2015, últimas reformas DOF 20-05-2021, art. 157 (Mexico)

Soft enforcement through bodies without binding decision-making powers

The third model involves an Ombudsperson or an Information Commission(er) without the authority to issue binding decisions. In this model, if an internal review is not satisfactory, the requester can also appeal to an external body. The external body can be a specialised Commission(er), like in Germany[23] or Switzerland[24], or a general human rights Ombudsperson, like in Finland[25], Sweden[26] or Moldova[27]. However, the crux of this model is that the Ombudsperson or Information Commission(er) can only issue recommendations to the relevant administrative agency or public official. While this model offers no enforcement power, as it relies on convention and persuasion, the review body may be able to secure compliance with its recommendations through various tactics considered in the final part of this Helpdesk Answer.

Neuman (2009) suggests that reduced powers might foster more cooperative relationships between the external review body issuing the recommendation and the public institution holding the information. In theory, appeals bodies that focus more on resolving issues through persuasion and dialogue could lead to higher compliance with their decisions. Holsen and Pasquier (2015) found that approximately the same percentage of appeal cases result in the disclosure of information in both Switzerland, where the commissioner lacks binding decision power, and Scotland, where the commissioner has authority to issue binding decisions. They also noted that in Germany, although the Information Commissioner does not have binding decision power, if compelled to file a formal complaint, his actions carry significant weight. This is because the complaint escalates the case to the top level of a ministry, requiring consideration by the minister. Since the Commissioner is regarded as the minister's equal, this dynamic is often cooperative and on equal grounds, further elevating the chances of compliance.

In Sweden, the Parliamentary Ombudsmen have the authority to issue statements and advisory opinions if the refusal by a public authority to comply with an RTI request conflicts with laws on right to information. In the role of extra-ordinary prosecutor, the ombudsmen may initiate legal proceedings against an official who, disregarding the obligations of his office or his mandate, has committed a criminal offence other than an offence against the Freedom of the Press Act and the right to freedom of expression (Riksdagens Ombudsman 2023).

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[23] Federal Act Governing Access to Information held by the Federal Government, Sept. 5, 2005, Bundesgesetzblatt, Tiel I [BGBL. I] at 2722, § 12, no. 3 (Germany)
[24] (Switzerland)
[25] Parliamentary Ombudsman Act, Act No. 197/2002, § 11 (Finland)
[26] The Freedom of the Press Act, 1976, Chapter 9, art. 2 (Sweden)
[27] Law on Access to Information], Law No. 282/2000, art. 21(2) (Moldova)

There are a few exceptions where Ombudspersons have binding powers, such as Belize[28] and New Zealand[29]. In New Zealand, for instance, the Ombudsman can make both binding and non-binding recommendations. In instances where the non-disclosure was due to security or defence reasons, the Ombudsman can only recommend a reconsideration from the information holding body. In the case of refusal on other grounds, the law stipulates a public duty to observe the Ombudsman's recommendation.

[28] Freedom Of Information Act Chapter 13 Revised Edition 2020 Section 35(2) (Belize)
[29] Official Information Act 1982. Section 31 and 32 (New Zealand)

Framework conditions for RTI enforcement

There is no single solution to ensuring compliance with access to information or right to information laws and regulations. Each enforcement model operates within its own unique legal, institutional, and political context, guiding different countries toward various designs. However, research has pointed to common factors associated with stronger enforcement, oversight, and ultimately, compliance and accountability.

Clear mandates and powers

The mandate and powers of the Courts, Information Commissioners, and Ombudspersons will determine their capacity for enforcement. Courts and Information Commission(er)s with binding powers can enforce compliance directly, whereas Ombudspersons and Commission(er)s without binding powers must rely on persuasion to achieve compliance with the RTI law. In 36% of the countries with RTI laws, Information Commission(er)s are empowered to issue binding decisions, which, in turn, represent about half of the countries with Information Commission(er)s or Ombudspersons (RTI Ratings by Indicator, Indicator 42). Other powers that can determine the compliance with RTI lawful disclosures are the investigation powers, the sanctioning powers, and the power to impose structural measures on public institutions withholding information.

Courts can have the power to order the public body that holds the requested information either to reassess its original decision of non-disclosure and or to disclose the requested information or document. For example, in Australia[30], Courts that receive right to information appeals have both the power to review and disclose information. The court therefore has the remit to review and rule on any decision made by the public institution in relation to the initial RTI request. The decision of the Court will have the same effect as a decision of the information holding body, including the disclosure of information or document.

In only one-third of the countries assessed by RTI ratings are the Information Commission(er)s granted the necessary mandate and power to effectively perform its functions (RTI Ratings by Indicator, Indicator 41). This includes the authority to review classified documents and inspect the premises of public bodies, ensuring comprehensive oversight and accountability. In most countries with these provisions, the Information Commissioner has the power to enter and remain at locations, inspecting any documents relevant to investigations. For example, in India[31], the Central

[30] Article 27 of Law 1712. (Australia)
[31] Article 18(India)

Information Commission and State Information Commission have the same powers as are vested in a civil court under their Code of Civil Procedure. These powers include:

- summoning and enforcing the attendance of persons and compel them to give oral or written evidence on oath and to produce the documents
- requiring the discovery and inspection of documents
- receiving evidence on affidavit
- requisitioning any public record or copies thereof from any court or office
- issuing summons for examination of witnesses or documents
- any other matter which may be prescribed

During the Investigation, the Commission can examine any record covered by the RTI legislation and no such record may be withheld from it on any grounds. Furthermore, the Indian Information Commissions can publish information or categories of information requisitioned during the investigation.

The Commissioners in countries like Bangladesh[32] and Canada[33] also have the authority to issue summons to enforce the attendance of persons, compel them to give oral or written evidence under oath, and produce documents. In countries like Ireland[34] and Ukraine[35], Commissioners can also make copies of documents and data for the purpose of their investigations.

In the case of the Ombudspersons, even when they do not have the power to issue binding decisions, some of them share similar investigation powers to those vested to Information Commissioners, or even the Courts. In Greece[36], the Ombudsman may request public institutions to provide him with any information, document or other evidence relating to the case, and may examine individuals, conduct on-site investigations, and order an expert's report. During the examination of documents and other evidence, which are at the disposal of public authorities, the fact that they have been classified as secret may not be invoked, unless they concern issues of national defence, state security and the country's international relations. All public services have an obligation to facilitate the investigation in every possible way.

Establishing sanctions for public officials who fail to comply with binding RTI decisions further solidifies the binding aspect of a decision. The lack of sanctions may foster adverse incentives, resulting in breaches of RTI laws, such as the excessive use of exemptions or the outright neglect of information requests (OECD 2022). For example, in South Africa, an information officer of a public body who refuses to comply with an

[32] Act to Make Provisions for Ensuring Free Flow of Information and People's Right to Information (Right to Information Act, 2009), Act No. 20 of 2009, (Bangladesh)
[33] Access to Information Act, R.S.C., 1985, c. A-1, Last amended on June 21, 2020, provision 55 (Canada)
[34] Freedom of Information Act 2014 (Ireland)
[35] On Access to Public Information, No. 224-VII of 14.05.2013 (Ukraine)
[36] Article 45 (Greece)

enforcement notice emitted by the Information Regulator is deemed guilty of an offence and liable upon conviction to fine and/or to imprisonment for a period not exceeding three years.

In the United Kingdom[37], if a public authority has failed to comply with an enforcement notice, the Commissioner may certify in writing to the court that the public authority has failed to comply with that notice. Where a failure to comply is certified, court may inquire into the matter and, after hearing any witness who may be produced against or on behalf of the public authority, and after hearing any statement that may be offered in defence, deal with the authority as if it had committed a contempt of court. In the Maldives[38], where 45 days passed without the public institution withholding information either appealing against or complying with a decision made by the Information Commissioner, the Commissioner may submit the case to the Office of the Prosecutor General, requesting to send the matter to a judicial court, to act against the party for disobeying an order lawfully issued.

In 33% of countries, the Courts, or Information Commission(er)s have the power to order remedies for the requester, which may include the declassification of information (RTI Ratings by Indicator, Indicator 43). For instance, in Brazil[39] the Revaluation Commission has the power to declassify information within ten days to be counted from the date he/she was notified of the said decision. In Sri Lanka[40], the Commission can direct public authorities or information officers to reimburse fees charged to citizens due to delayed provision of information.

Another power Information Commission(er)s or Courts may possess relates to the imposition of so-called 'structural measures' on information holding public bodies, as is the case in 38% of countries with RTI frameworks. For example, in Croatia[41], this power includes prescribing measures to address irregularities and deficiencies within public bodies, with designated deadlines for implementation. Similarly, in countries like India[42] and Mexico[43], specific measures can be required, such as adjustments to practices related to record maintenance, management, and disposal, as well as enhanced training for officials on the right to information.

Sufficient independence

Given that RTI laws can be used to monitor the executive authority of government agencies, independent enforcement and oversight structures are essential for ensuring accountability within these agencies (Hanretty & Coop 2012).

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[37] Freedom of Information Act 2000, c. 36, §§ 50, 54 (UK)
[38] Art. 61 (b) (Maldives)
[39] Law n.12.527 of November 18, 2011. (Brazil)
[40] Right to Information Act, No. 12 Of 2016 (Sri Lanka)
[41] Act on the Right of Access to Information, No: 71-05-03/1-13-2 (Croatia)
[42] Right to Information Act, 2005, (India)
[43] General Act of Transparency and Access to Public Information], Diario Oficial de la Federación [DOF] 04-05-2015, últimas reformas DOF 20-05-2021, (Mexico)

The inherent tension between enforcing RTI laws and the standard operational opacity of government agencies is well-documented (Roberts 2010; Pugliese 2019; Laroche 2016). While accountability is crucial for maintaining democratic institutions, it is often challenging for those subjected to it. Being required to explain or justify one's actions can be seen as distracting and time-consuming at best or provoke defensiveness and hostility at having one's decisions or performance scrutinised (McGill 2016). Additionally, RTI regimes might be perceived as a threat by public officials who seek to actively curate their public image (Farrell 2015). Given these political pressures to protect the image and agendas of the executive branch, an independent body to conduct RTI enforcement is necessary for this accountability mechanism to operate effectively.

The first enforcement model, direct judicial proceedings, is, in theory fully independent from the executive branch. In practice, the independence of the judiciary does not only require independence in the constitutional sense, that is, the separation of powers between the three branches of government (executive, legislature and judiciary), but also the personal independence of judges so that they are free to decide cases based on the application of the rule of law (Jennet 2014).

As for Information Commissions or Ombudspersons, several factors determine their overall independence. These include the manner of selecting commissioners, their term limits and procedures for dismissal, the branch of government from which they receive their powers and to whom they report, and their autonomy in budgeting (Neuman 2009).

One of the most frequently debated aspects of independence is the mechanism for appointing the heads of information commissions. According to RTI Ratings, only 36% of the countries with a RTI framework, appoint their Ombudsperson or Commission(er) in a manner that shields them from political interference (RTI Ratings by Indicator, Indicator 38). Various methods are employed to ensure these appointments are non-partisan. The most common method involves executive nominations, which require confirmation by the legislative branch. This approach is used in countries such as Canada[44] and Mexico[45]. In Ireland[46] and India[47], nominees are presented by the legislature for the president to select the information commissioner.

On the other hand, some countries, such Sweden[48] , rely entirely on the legislative branch for the appointment of the commissioner or ombudsman. When parliament is the primary body involved in the appointment, the required threshold of support can significantly impact the legitimacy of the appointee. Many countries require

[44] Access to Information Act, R.S.C., 1985, c. A-1, Last amended on June 21, 2020, provision 54 (Canada)
[45] General Act of Transparency and Access to Public Information], Diario Oficial de la Federación [DOF] 04-05-2015, últimas reformas DOF 20-05-2021, (Mexico)
[46] Freedom of Information Act 2014 (Ireland)
[47] Right to Information Act, 2005, § 19(7) (India).
[48] The Freedom of the Press. Act, 1949 (Sweden)

supermajorities in the legislature for their appointment, which in democracies with free elections can help safeguard the independence of the Ombudsperson or Commission(er). For instance, in Honduras[49] and Azerbaijan[50], two-thirds of the parliament's approval is necessary, while in Kyrgyzstan[51,] a three-fourths majority is required. In functioning democracies, this broad political consensus can reduce the likelihood of partisan appointments. Additionally, countries like Albania[52] and New Zealand[53] require a multi-party coalition to select commissioners, further reinforcing the need for broad political consensus. In Mexico[54], the law mandates that the legislature consult civil society organisations when presenting nominees for commissioners, integrating public input, and aiming to reduce political influence.

Another consideration in appointments is whether there are specific prerequisites for candidates. These prerequisites may involve possessing expertise and qualifications, maintaining a strong moral record, or avoiding significant political affiliations (Mendel, 2008). Only 17% of countries with RTI frameworks have prerequisites provisions for choosing their Information Ombudsperson or Commission(er), with the most common being specific educational qualifications and extensive work experience (RTI Ratings by Indicator, Indicator 40). For instance, in Croatia[55], the Information Commissioner must have completed both undergraduate and graduate programs in legal or social sciences in addition to having a minimum of ten years of professional experience. The second most common provision is the prohibition to select political party members as Information Ombudsperson or Commission(er). In India[56], this prohibition also extends to individuals in the private sector who directly benefit from political party connections. In the Bahamas[57] this restriction is extended to anyone who has ever held an official position in a political party.

Once the question of appointment is settled, ensuring continued independence can also be influenced by the term length and the conditions for dismissal. If terms are too short, commissioners may prioritise their political careers and seek to please those responsible for future appointments. The term length can also impact the effectiveness of the Ombudsperson or Commissioners, as acquiring the necessary specialisation and experience requires sufficient time.

In approximately one-third of countries with a RTI framework, their Ombudsperson, or Information Commission(er) enjoy security of tenure, protecting them from arbitrary

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[49] Ley De Transparencia y Acceso a La Información Publica Decreto No. 170-2006, (Honduras)
[50] Law Of the Republic of Azerbaijan “On the Right to Access to Information” № 1024-Iiq, Adopted On 30 September 2005 (Azerbaijan)
[51] Law on the right of access to information, 2023 No. 217 (Kyrgyzstan)
[52] Law No. 119/2014 On the Right to Information (Albania)
[53] Official Information Act 1982, (New Zealand)
[54] General Act of Transparency and Access to Public Information], Diario Oficial de la Federación [DOF] 04-05-2015, últimas reformas DOF 20-05-2021, (Mexico)
[55] Act on the Right of Access to Information, No: 71-05-03/1-13-2 (Croatia)
[56] Right to Information Act, 2005, (India)
[57] The Freedom of Information Act, 2017 (The Bahamas)

dismissal (RTI Ratings by Indicator, Indicator 38). Regarding dismissals, a process of removal free from political influence or intimidation, with a right to appeal, is important. According to Neuman (2009), the power to dismiss heads of appeals bodies like Ombudsmen or Information Commissioners should not be solely vested in one individual, such as the president, but rather require the approval from the legislative branch. In Panama[58], for example, the Ombudsperson responsible for RTI can only be dismissed through a process overseen by a constitutional court, which helps prevent arbitrary removal.

Furthermore, budget autonomy is a crucial aspect of overall independence. When the Ombudsperson or Commission(er) has its own designated budget line, it reduces reliance on a particular ministry or agency to advocate for and secure its financial requirements. Conversely, if an executive branch ministry must submit the commission's budget for legislative approval, it creates a dependency on that ministry. In 29% of the countries with RTI frameworks, the budget of the Information Ombudsperson or Commission(er) is either approved by parliament or safeguarded through other effective mechanisms to ensure financial independence (RTI Ratings by Indicator, Indicator 39).

[58] Ley que dicta normas para la transparencia en la gestión pública, establece la acción de habeas data y dicta otras disposiciones. Publicada el 23-01-2002 (Panama)

Tactics for enforcing RTI laws

Courts, Information Commission(er)s and Ombudspersons can rely on a range of tactics to enforce their decisions, ranging from cooperative to confrontational. In the case of Courts, and Information Commissions(er)s with binding powers, the legal weight of their rulings and the decisions might be enough to make information holding bodies comply. However, if this is not the case, they can turn to confrontational tactics, namely relying on enforcement agents. Ombudspersons and Information Commission(er)s without binding power can also rely on confrontational tactics although these will likely relate to tactics such as naming and shaming, rather than direct enforcement. Cooperative tactics are also available to Courts, Ombudspersons, and Information Commission(er)s which can include coordination with the judicial, branch with the information holding bodies and with the requestors.

Cooperative tactics

Courts, Information Commission(er)s and Ombudspersons can rely on cooperative tactics to enforce their decisions and ensure higher compliance with RTI laws. One important aspect of cooperation, especially with Ombudspersons and Information Commission(er)s without binding powers, relates to the quality of their leadership. Neuman (2009) emphasises that the personal characteristics and background of individuals assuming the role of Information Commissioner or Ombudspersons play a crucial role in fostering cooperation among public entities. Factors such as their personal integrity, perception of their mandate, reputation prior to assuming office, and seniority all influence their effectiveness. In contrast, Commissioners or Ombudspersons who lack these attributes may struggle to effectively coordinate with other bodies and enforce compliance.

Beyond leadership, scholars (Darbishire, 2007; Mendel, 2008; Neuman, 2009) have pointed to the cooperative potential of additional functions of oversight bodies, beyond dealing with appeals from requesters. Some of these functions are advisory in nature, such as assisting individuals with questions about RTI or specific appeal cases, advising public bodies on compliance issues or specific RTI requests, and offering guidance on RTI law reforms or its interactions with other legislation. Other functions involve direct capacity building, such as providing training and guidance to administrations on RTI compliance.

For instance, the Ombudsman in Guatemala has played a role in reviewing and drafting legislation and policies related to access to information, while the Ombudsman of Peru has developed a handbook for public officials on exceptions to the right to information to prevent overly broad interpretations of the law (Zuegel, Cantera & Bellantoni, 2018).

Another potentially effective cooperative tactic is building the capacity of information officers through training and resources. Information Commissions(er)s can organise workshops, develop manuals, and offer technical assistance to ensure that information officers within information holding bodies are well-equipped to handle RTI requests efficiently. By investing in the professional development of these officers, Commissions(er)s can mitigate misunderstandings and procedural errors that often lead to non-compliance. In Mexico, for example, the Information Commission regularly trains public officials who are required to successfully complete these capacity building activities.

Cooperation tactics Courts, Information Commission(er)s, Ombudsman and information holding bodies might face significant challenges. Firstly, the lack of standardised procedures across government agencies hampers the oversight role of Information Commissions or Ombudsman responsible for ensuring consistent application of RTI laws (Holsen & Pasquier 2012). Secondly, unclear responsibilities within public institutions and the absence of designated information officers in public bodies further complicate effective enforcement (Dokeniya 2013). Additionally, technological limitations, such as interoperability and data security concerns, coupled with varying levels of technological readiness among agencies, hinder collaborative efforts (OGP 2023). Lastly, the need to harmonise RTI laws across different levels of government, especially in federal systems, poses a coordination challenge, leading to inconsistencies in implementation (Chi 2021).

Finally, civil society organisations can play a crucial cooperative role in promoting and enhancing compliance with the right to information laws. CSOs also assist in capacity building among citizens and officials alike. They educate citizens on their rights under RTI laws and empower them to file effective requests and appeals. In Nepal, organisations such as Freedom Forum have conducted extensive training programs for both citizens and public officials, enhancing understanding and compliance with RTI provisions (Freedom Forum 2012). CSOs can also support the expansion of RTI provision to vulnerable communities that tend to have higher barrier of entry. For example, in Pakistan, Transparency International in collaboration with its local partner Social Welfare Society organised a workshop to equip persons with disabilities to access to public information, including disability certificates (McDonald et al 2021).

Furthermore, CSOs can collaborate with the monitoring of RTI compliance, for example, Acción Ciudadana, the Guatemalan Chapter of Transparency International, developed a methodology to assess the level of compliance with the law at the executive level. The organisation evaluated public agencies' compliance based on six indicators, and by making access to information requests to a sample of ministries and public agencies (FUNDAR 2012). Similarly, civil society groups in Australia, Brazil, Czech Republic, European Union, Germany, Hungary, New Zealand, and Spain have established online platforms to assist citizens in filing RTI requests, appealing denials, and accessing previous requests and responses from government bodies (Martini, 2014).

For example, Fundación Pro Acceso promotes the right to access public information in Chile that makes information requests to monitor the implementation of Chile's FOIA and identifies barriers that might affect citizens' access to information (FUNDAR 2012). The organisation is well known for its strategic litigation, bringing cases before national courts and the Inter-American Court of Human Rights, such as the Claude Reyes vs. Chile. In Claude Reyes vs. Chile, the Inter-American Court of Human Rights ruled that Chile violated the rights to freedom of expression, due process, and judicial protection by refusing the applicants' request for state-held information without legal bases and without providing a justified decision in writing explaining the reasons for the refusal. It also concluded that Chile had failed its obligation to adopt domestic legal provisions to make effective the right to access state-held information (Global Freedom of Expression n.d). This exemplifies how CSOs can also be pivotal in the appeal of RTI decision by bringing cases to either higher national courts or recourse to regional ones.

Confrontational tactics

If cooperative tactics are exhausted the enforcement of RTI laws relies on confrontational tactics. Courts and Information Commission(er)s have the authority to issue binding orders and injunctions compelling information-holding bodies to comply with their RTI (Right to Information) rulings. These orders carry the weight of the judicial system, making non-compliance a serious legal offense. However, if non-compliance persists, enforcement proceedings are necessary. An enforcement title serves as the legal basis for granting the right to enforce a claim and for carrying out enforcement proceedings. Generally, enforcement titles can include court judgments, arbitral awards, notarial deeds, and administrative decisions, such as those made by Information Commissions (CEPEJ 2015).

Enforcement is dealt with by the "enforcement agent", which covers a wide variety of persons (e.g., bailiff, huissier de justice, enforcement judge etc) who have in common an authorisation by the state to carry out the enforcement process. There are three dominant models of enforcement agents. Court enforcements are directed by a judge and enforcement activity is accomplished generally by courts with or without involvement of the executive branch. In the second model enforcement professionals are civil servants and the organisation of enforcement activity is dealt with outside the courts, for example through the Ministry of Justice. Finally, there are self-employed enforcement agents, bailiffs, whose activity is dealt with outside the courts on a self-employed, entrepreneurial, and competitive market level (Centre for European Constitutional Law 2021). These enforcement agents can enforce the Information Commission(er)'s or Court's decision by physically retrieving the documents or imposing fines on the non-compliant public official.

Information Commissions without binding powers and Ombudspersons cannot rely on enforcement agents for enforcement. They can, however, rely on other confrontational practices. First and foremost, they can refer the case to the judicial system who can the initiate court proceedings.

Other confrontational tactics at the disposal of Information Commissions without binding powers and Ombudspersons rely more on exposing and publicly denouncing the lack of compiance. Publishing detailed public reports that highlight non-compliant bodies can be an effective way to exert pressure on those who fail to adhere to RTI laws.

The negative publicity generated by such reports can compel information-holding bodies to comply with RTI requests to avoid reputational damage. For example, in India the CIC publishes annual reports that document the performance of various public authorities regarding compliance with RTI requests (CIC 2023). These reports include rankings of different public bodies that provide a clear and comparative assessment of how different entities perform in terms of transparency. Similarly, in Uruguay the Unit for Access to Public Information created a National Transparency Index that measures agency-level compliance with the RTI law, including the proactive sharing of information (OGP 2018). Ombudspersons or Information Commissioners can also draw media attention to specific cases of lack of compliance with RTI disclosure. For example, in Chile, in a high-profile case, the Consejo para la Transparencia, CPLT exposed the Ministry of Health's failure to release critical information related to public health spending. The CPLT collaborated with major news outlets to publish stories detailing the Ministry's lack of transparency (CiperChile 2022).

Through their advocacy and monitoring activities, civil society organisations can exert pressure on public institutions to adhere to RTI mandates. For example, in India, Mazdoor Kisan Shakti Sangathan, an organisation that works to ensure the proper implementation of people's rights, has mobilised communities and advocated for transparency in relation to the implementation of the Right to Information Act in Rajasthan. Through sustained strikes in cooperation with sympathetic government officials, the public institutions withholding information ultimately provided photocopies of the documents requested. Its success has inspired people in other Indian states to demand the passage of a similar Right to Information Act in their states (Bhatnagar et al. 2003).

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