

# Transparency & Silence

A Survey of Access to  
Information Laws and Practices  
in 14 Countries

OPEN SOCIETY

JUSTICE INITIATIVE



# Transparency & Silence

A Survey of Access to Information Laws  
and Practices in Fourteen Countries

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400 West 59<sup>th</sup> Street, New York, NY 10019 USA  
Tel: 212.547.6932  
Fax: 212.548.5607  
Email: [mgreenwald@sorosny.org](mailto:mgreenwald@sorosny.org)

For more information contact  
Open Society Justice Initiative  
400 West 59th Street  
New York, NY 10019 USA  
[www.justiceinitiative.org](http://www.justiceinitiative.org)  
Email: [info@justiceinitiative.org](mailto:info@justiceinitiative.org)

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# Preface

The ability of citizens to request and receive information on the workings of their government is critical to the transparency and accountability that are hallmarks of an open society. Today, the people of 65 countries have laws that provide mechanisms for them to request and obtain information from their respective governments. The number of these laws on “freedom of information” (FOI), or “access to information,”<sup>1</sup> has increased in recent years, and 53 such laws have been enacted in just the past decade and a half. One of the goals of the Open Society Justice Initiative is to promote freedom of information, and it supports both the passage of sound access to information laws and efforts to ensure that these laws are implemented effectively.

This report details the results of a study undertaken by the Justice Initiative and its partners to discover how government offices and agencies in fourteen countries—Argentina, Armenia, Bulgaria, Chile, France, Ghana, Kenya, Macedonia, Mexico, Nigeria, Peru, Romania, South Africa, and Spain—respond to specific requests for information. For this study, the Justice Initiative and its partners designed a research device, the Access to Information Monitoring Tool, to manage the collection and analysis of data in a manner that would yield statistically valid results. Participants in the study filed requests for information at offices of government bodies and agencies. The Justice Initiative and its partners then evaluated and analyzed how the persons who requested the information were treated, how the government offices and agencies responded, and the nature and quality of the responses to the requests. Follow up interviews were made to discover reasons why officials and personnel at government offices and agencies performed in the way they did.

This report provides a snapshot of the state of access to information in the particular countries studied. The country comparisons below are indicative of broad trends and are not absolute measures of compliance with access to information princi-

ples—indeed, few countries performed consistently across all indicators. Nor does the study purport to give an overall measure of government transparency in any one country or a comprehensive picture of global trends. The study does, however, provide valuable insight into the procedural application of access to information norms in the monitored countries. It opens a window onto one specific aspect of transparency—the right of an individual to request and receive information from a government. And it reveals much about the nature and efficacy of mechanisms adapted and adopted by selected governments to guarantee the right of access to information.

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**Note**

1. In this report the terms “access to information” and “freedom of information” are used interchangeably.

# Summary of Findings

This report records and analyzes the results of a study in which partners of the Justice Initiative in 14 countries filed a total of 1,926 requests for information. In each country, seven different requesters twice submitted up to 70 questions to 18 public institutions. Requesters included NGOs, journalists, business persons, non-affiliated persons, and members of excluded groups, such as illiterate or disabled persons or those from vulnerable minorities. The requests were for the types of information that public bodies hold—or should hold. As far as possible, no requests were made for classified information and other information that would ordinarily be exempted under standard access to information legislation. Following are the main findings.

**1. Access to Information Laws Increase Responsiveness:** Requests for information made as part of the study yielded information more often in countries with freedom of information laws than in countries without, indicating that freedom of information laws have had a significant, positive impact in the countries studied. Specifically, the study shows that in the countries with dedicated freedom of information laws requests for information made to government entities yielded responses nearly three times as often. Survey participants who requested information in countries with dedicated freedom of information laws received information 33 percent of the time, and persons who requested information in countries without such laws received information 12 percent of the time.

**2. Mute Refusals a Significant Problem:** The study shows that, even in the countries studied that have freedom of information laws, there is a serious problem with failure on the part of government to respond in any way whatsoever to requests for information. The study found that 56 percent of the requests made in countries without freedom of information laws went unanswered and that 38 percent of the requests made in countries with freedom of information laws went unanswered.

### **3. Countries in Transition Provided More Information than Mature Democracies:**

Requests for information made in countries that were in transition to democratic governance yielded a higher percentage of information than requests for information made in two mature democracies. The study found that its requests for information from government bodies yielded more frequent and better quality responses in Armenia, Bulgaria, Peru, Mexico, and Romania than its requests for information in France or Spain. The study does not conclude, however, that the governments of France and Spain are less transparent overall or that they make less information available to the public. The study notes, for example, that France makes significant amounts of information available in published reports and on government websites and that some of the information requested was publicly available.

**4. Regional Variations Exist:** Requests for information made in European countries, where a legal and actionable right of access to information has generally existed for longer and is more widely prevalent, received a greater percentage of responses than requests made in Latin American and African countries. Specifically, the study found that governments released more information in European countries than in Latin American and African countries. Access to information has developed in different regions during different periods as civil movements responding, for example, to human rights violations and corruption gained momentum. Factors that have influenced the development of access to information laws include political will and external political incentives such as potential European Union membership and World Bank loans.

**5. Civil Society Involvement Helps:** Requests made in countries where civil society movements were active in the processes of drafting, adopting, and implementing access to information laws received responses in more instances than in countries where civil society movements were not as active in the processes. The study found that requests for information made in Armenia, Bulgaria, Mexico, Peru, and Romania, where NGOs were involved in promoting and ensuring implementation of access to information laws—by, for example, filing numerous requests for information and undertaking strategic litigation in response to failures or refusals by government entities to provide requested information—received more responses than requests for information made in other countries where NGOs were not as involved.

**6. Discrimination Affected Response Rates:** Requesters participating in the study who were journalists or representatives of NGOs and who identified themselves as such when making their requests tended to receive responses more often than individuals who identified themselves as members of an excluded or vulnerable group—that is, members of a racial, ethnic, religious, or socio-economic group routinely subjected to discrimination. The study found that individuals who identified themselves as journalists or NGO representatives when they submitted information requests to government bodies received responses 26 percent and 32 percent of the time, respectively, while requesters from excluded groups received responses just 11 percent of the time.

**7. Results Inconsistent, Even in the Most Responsive Countries:** The study found that, where pairs of identical requests were submitted by different requesters, the responses received were inconsistent (i.e. each requester received a different response) 57 percent of the time. Even in countries where government bodies responded most frequently to requests for information, the responses were inconsistent almost half of the time. The high level of inconsistency suggests a lack of training in and procedures for handling requests, resulting in requests following different paths inside an institution. Discriminatory behavior by government personnel toward some requesters, as noted above, was also a factor.

**8. Noncompliance Varied, but Compliance Was Uniform:** Where government bodies surveyed were, generally speaking, noncompliant with access to information laws and principles, the manner of their noncompliance varied. The study found that, where the same request was submitted twice to a government body, and where both requests yielded non-compliant responses, the noncompliance manifested itself in different ways. Sometimes there was no response whatsoever. Sometimes the response was late. Sometimes the request was not even accepted. In contrast, where government bodies surveyed were, generally speaking, compliant with access to information laws and principles, the way these bodies complied with requests for information tended to be uniform.

**9. Refusals Rarely in Writing:** In instances where government bodies refused to provide requested information, they almost never put their refusals in writing. The study showed that, in countries with freedom of information laws, government bodies made written refusals to provide requested information five percent of the time and that, in countries without freedom of information laws, government bodies made such written refusals

two percent of the time. Of the written refusals that were received, approximately 40 percent cited reasons recognized as legitimate under international and regional law for refusing the requests for information. For example, some government bodies, in refusing requests for information, specified that the release of the requested information would harm interests that are entitled to protection. Approximately 60 percent of the written refusals, however, cited reasons not recognized as legitimate under international and regional law. For example, in some instances, written refusals stated that the person who requested the information had not demonstrated sufficient reason why he or she needed the information. In other instances, delivery of information was conditioned upon payment of a fee above the actual costs of processing the request. In still other instances, a government official, civil servant, or other personnel refused to provide the information on the grounds that it was publicly available elsewhere but failed to provide instructions on where the information could be accessed.

# Recommendations

*To ensure that all persons equally enjoy the right of access to information:*

- National and local legislatures should adopt laws<sup>1</sup> and implementation regulations that provide all persons access to information held by government bodies and bodies performing public functions (hereafter “public bodies”).
- National governments should make clear to officials, civil servants, and all other relevant personnel (hereafter “public officials”) in public bodies that discrimination in treatment of information requests and in provision of information is unacceptable and will result in disciplinary and possibly legal consequences.
- Civil society organizations should monitor freedom of information practices, investigate suspected instances of discrimination, file lawsuits in instances where discrimination is found, and seek the imposition of penalties as set forth in antidiscrimination laws.
- Public bodies should respond to requests for information in a consistent manner. They can achieve this by training officials, civil servants, and other relevant personnel and by establishing transparent, internal systems and procedures for processing requests for information. Such systems and procedures might include assigning responsible officials to manage responses to information requests and introducing a tracking system for such requests.

***To ensure that all public officials, civil servants, and other personnel respect the right of access to information:***

- Public bodies should ensure that all of their personnel, including security and reception staff, have a basic understanding of the right of members of the public to approach these bodies to request and access public information.
- In countries with access to information laws, those public officials likely to receive requests for information should be informed that such requests must be accepted and honored in compliance with the law, and that requesters do not have to justify their requests.

***To ensure that all persons seeking information are able to formulate and submit requests:***

- Public bodies should ensure that members of the public can submit requests for information in person, for instance, at an accessible reception desk or area. Information offices should be clearly designated and easy to locate.
- Access to information laws and implementation regulations should establish the possibility of submitting oral requests for information. Where the law provides for oral requests for information but the information requested cannot be provided immediately, the law should require public officials either to set down the request in writing themselves or to assist persons requesting information to formulate a written request.
- In countries where laws do not permit submission of oral requests for information, public officials should be trained to help requesters make their requests in writing and to write requests for information on behalf of persons who cannot write or have difficulty communicating in writing.

***To ensure that public bodies respond to all requests for information in a timely, efficient manner and at a reasonable cost to persons making requests:***

- Access to information laws and implementation regulations should establish clear time frames for public bodies to reply to information requests. If extensions of time are permitted, such extensions should be for a fixed period of a reasonable duration and granted for specific

reasons, as when, for example, the information requested is voluminous or requires collecting. Fourteen days is the average time frame set for responses to requests for information in more than 40 freedom of information laws surveyed. Time frames longer than 15 days should be scrutinized to ensure that they are justified by unusual circumstances.

- Public bodies should establish internal mechanisms for tracking requests for information, for example, by assigning each request a reference number and providing the person making the request with this number so she or he can make inquiries if the information is not provided in due time.
- Access to information laws and implementation regulations should elaborate procedures, including expedited appeals procedures, for handling failures by public bodies to respond to requests for information within prescribed time frames.
- In responding to requests for information, public bodies should charge only reasonable fees directly related to the cost of reproducing and delivering information. Freedom of information laws should allow for discretionary waiver of such fees in instances where, for example, the number of copies is small or the persons making such requests are indigent. Viewing original copies of documents should always be free of charge.
- Access to information laws and implementation regulations should state clearly that the failure of public officials to respond to requests for information is a violation of the public's right to access public information. Public officials should receive training informing them of their obligation to respond effectively to requests for information in a timely manner.

*To ensure that persons requesting information can identify and locate the information held by public bodies and to ensure that information requests reach the correct public body:*

- Access to information laws and implementation regulations should provide for the appointment of an information commissioner or a similar official or institution to oversee procedures for requesting information and to resolve problems.

- Access to information laws and implementation regulations should require public bodies to compile, maintain, and make public indexes and catalogues of the information that they hold. Such indexes and catalogues should list the titles of classified documents, that is, documents exempted from disclosure to the public, in order to facilitate public review of criteria used to classify documents.
- Access to information laws and implementation regulations should make specific provisions for transferring or referring requests for information when such requests have been filed with an incorrect public body. At a minimum, public bodies must make a good faith effort to direct persons requesting information to the correct agency or body.
- When a person requests certain information from a public body and public officials are unable to locate the information requested, then the relevant official should be obliged to inform both the person who made the request and the information commissioner or other oversight body responsible for access to information procedures. Such an obligation would dissuade public officials from frivolously rejecting requests for information and facilitate monitoring of information management within the government.
- When requested information does not exist, then public officials should be obliged to inform the person who requested the information. Such a response is a key element of open government and can form the basis of a constructive dialogue between the government and the public about the type of information needed in order to improve government efficiency and increase the quality of decision making and policy making.<sup>2</sup>

*To ensure that requests for information are answered even where there has been proactive publication of information:*

- Proactive transparency, such as the publication of information and the posting of materials on government websites, facilitates access to information but does not relieve public bodies of their duty to provide information to persons who request it. At a minimum, public bodies should, when the person requesting information has Internet access,

provide exact URLs; homepages are not sufficient. When the person requesting information does not have Internet access, public bodies should print out and provide the relevant pages, charging standard printing fees provided for by law. Relevant laws and regulations should clearly state such obligations.

*To ensure that government refusals to provide information are based on legitimate exemptions and that refusals to provide information can be appealed:*

- Access to information laws and implementation regulations should state that public bodies can exempt certain information from disclosure only in instances where releasing the information would harm an interest deemed legitimate under international and regional law, and where the harm that could be caused to that interest is not outweighed by the public's interest in the information. Access to information training for public bodies should make clear to all relevant officers that, in questions of the right to information, there is a presumption of openness.
- Access to information laws and implementation regulations should require that all refusals to provide information be made in writing to the persons who requested the information; that such refusals state the grounds for nondisclosure, including the reasons these grounds apply to the information in question; and that such refusals explain the procedures for appeal of the decision. Access to information laws should also require public bodies to notify the information commissioner or similar oversight body of every instance in which they refuse requests for information.
- Access to information training for public bodies should include instruction in the partial release, or “severing” of documents, to ensure that nonharmful information contained in the same documents as classified information can enter into the public domain.

*To ensure independent decision making and review of information denials:*

- Access to information laws and implementation regulations should require the designation of information officers with the authority to release information both proactively and in response to requests.

Information requests should only be denied, however, after a transparent internal review process that includes senior officials to ensure that exemptions have been properly applied.

- The national legislature, an information commission or commissioner, or other monitoring bodies or officials charged with overseeing implementation of access to information laws should, in a timely manner, review the issuance by public bodies of written refusals to disclose information to ensure that exemptions are being applied appropriately and that denials of requests are not being based upon inappropriate fees, or inappropriate demands to clarify requests, or inquiries as to why the information is being requested.

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#### Notes

1. These recommendations refer to laws. Governments can also meet these recommendations by complementing laws with other norms and regulations in order to ensure full compliance with the right to information.
2. The duty to collect information lies outside the scope of this study. Although the current study only addresses the right of access to information, the Justice Initiative encourages governments to adopt laws and regulations requiring bodies to collect information that is central to their functions consistent with international privacy and data protection norms.

# Introduction

The right of access to information held by public bodies has become a benchmark of democratic development. In total, 65 countries around the world now have laws establishing mechanisms for the public to request and receive government held information (access to information or freedom of information laws). Much of this legislation results from recent transparency initiatives in transitional democracies: 53 access to information laws have been adopted in the past 15 years, of which 28 were passed since 2000. Central and Eastern Europe leads the way in enshrining the right to access information in law, followed by a number of Latin American countries. Governments in Asia and Africa are increasingly being swept up in the global freedom of information movement.

The impetus for governments and legislatures to adopt access to information or freedom of information (FOI) laws ranges from civil society campaigns to pressure from intergovernmental organizations and multilateral donors, which place a premium on transparency in anticorruption initiatives. Governments attempting to win the trust of their citizens have—however reluctantly—taken steps to respond to demands for information. These factors provide significant opportunities for those working to promote open and accountable government.

The proliferation of access to information laws is not, however, without its dangers: states eager to tender their democratic credentials to the international community may adopt substandard laws. Even where laws are excellent on paper, they may not be well implemented in practice. In response to these concerns, the Open Society Justice Initiative developed the Access to Information Monitoring Tool, with the objective of assessing not only whether national laws meet international standards on paper, but also whether they are implemented in conformity with these standards, or even with their own provisions.

The Justice Initiative Access to Information Monitoring Tool offers a methodological foundation for monitoring and analyzing compliance with access to information norms. It was developed on the basis of a review of access to information monitoring, research, and standard setting by the Justice Initiative and other civil society organizations.

The Access to Information Monitoring Tool was created as a versatile and effective instrument to enable analysis of a range of access to information indicators, to facilitate comparisons between different public bodies within any given country, and to permit comparative analysis of transparency and of the adequacy of access to information provisions across countries. The tool aims to be flexible enough for use in a variety of monitoring contexts, ranging from large multicountry studies to assessment of one or two institutions within any one country. In countries still lacking access to information laws, indicators of levels of transparency are valuable in demonstrating the need for legislation.

The Access to Information Monitoring Tool was piloted in 2003 in Armenia, Bulgaria, Macedonia, Peru, and South Africa by the Justice Initiative together with civil society organizations in those countries. The five countries were selected to represent a spectrum of legislative development and implementation, ranging from countries without an access to information law at the time (Armenia and Macedonia) to others just setting out on implementing a new law (Peru), to those with some years' experience with an FOI regime (Bulgaria, South Africa).

Following the 2003 pilot project, a second, more extensive, follow up project was carried out in 16 countries in 2004. Selected comparative data from 14 of those countries is presented in this report.<sup>1</sup> The methodology was improved and expanded in 2004, incorporating lessons learned in the course of the pilot project. A larger number of requests were filed, an increased range of outcomes was recorded, and the timeliness of each step in the requesting process was tracked more closely.

Non-governmental organizations (NGOs) have been strong advocates of access to information in emerging democracies and forerunners in developing programs to ensure enjoyment of this right in practice. Typical activities include awareness raising through advocacy, training civil servants, the media, and the public, and challenging refusals to provide information through litigation. The Justice Initiative and Open Society Institute's (OSI) national foundations have been actively engaged in this work. The present monitoring exercise had the additional goal of attempting to track the impact of OSI's implementation support projects in countries that have full freedom of information laws, including in Bulgaria, Romania, and South Africa, and more recently

in Mexico and Peru. Monitoring was also carried out in countries where the Justice Initiative has participated in civil society advocacy for the adoption of freedom of information laws: Argentina, Armenia, Chile, Macedonia, and Nigeria.

For the 2004 study, the Justice Initiative selected countries on three continents encompassing a range of cultural and political environments, and with a broader spectrum of experience in implementing transparency provisions. Two Western European countries were monitored for the first time: France, which adopted a freedom of information law in 1978; and Spain, which has a number of access to information provisions dating from 1992 but not a full access to information law. The inclusion of France and Spain in the present study provides comparative perspective with two longstanding EU member states, whose legal and administrative arrangements are often looked to as models by democratizing countries, particularly in Central and Eastern Europe, Latin America, and Francophone Africa.

In each country, civil society organizations committed to freedom of information worked together with the Justice Initiative to carry out the project:

## **Europe**

- Armenia: Freedom of Information Center (FOI Center of Armenia)
- Bulgaria: Access to Information Programme (AIP)
- Macedonia: Pro Media
- France: Réseau Intermedia
- Romania: Romanian Helsinki Committee (APADOR-CH)
- Spain: Sustentia

## **Africa**

- Ghana: Commonwealth Human Rights Institute-Ghana (CHRI-Ghana)
- Kenya: The Kenya Human Rights Commission
- Mozambique: Mozambican Debt Group
- Nigeria: Media Rights Agenda (MRA)
- Senegal: Forum Civil
- South Africa: Open Democracy Advice Centre (ODAC)

## Latin America

Argentina: Asociación por los Derechos Civiles (ADC)

Chile: Participa

Mexico: Libertad de Información Mexico, Asociación Civil (LIMAC)

Peru: Instituto Prensa y Sociedad (IPYS)

Of the 14 countries in the study, seven—Armenia, Bulgaria, France, Mexico, Peru, Romania, and South Africa—had dedicated freedom of information laws on their books at the time of monitoring. Three others—Argentina, Chile, and Spain—had provisions on access to information in various legal texts but had not adopted full access to information legislation meeting the requirements set out in the sidebar on page 27. Four of the monitored countries—Ghana, Kenya, Macedonia, and Nigeria—had no access to information laws of any kind in place at the time of the study (although Macedonia adopted full freedom of information legislation in 2006).

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### Note

1. In two countries, Mozambique and Senegal, monitoring studies were completed but the results could not be used in this comparative study due to data capture problems.

**Table 1: Constitutions and Legal Frameworks in Monitored Countries**

Country	Constitution	Access to Information Laws in place
<b>Argentina</b>	<b>1994:</b> Access to government held environmental information (Article 41).	<ul style="list-style-type: none"> <li>• General Regulation (Decree) on Access to Public Information for the National Executive Power of 3 December 2003;</li> <li>• City of Buenos Aires access to information statute of 1998 (Law 104).</li> </ul>
<b>Armenia</b>	<b>1995:</b> “Freedom to seek, receive and disseminate information” (Article 24).	<ul style="list-style-type: none"> <li>• Republic of Armenia Law on Freedom of Information of 23 September 2003; entered into force 15 November 2003.</li> </ul>
<b>Bulgaria</b>	<b>1991:</b> Right to government held information in which citizen has legitimate interest (Article 41).	<ul style="list-style-type: none"> <li>• Access to Public Information Act (APIA) adopted 22 June 2000; entered into force 7 July 2000.</li> </ul>
<b>Chile</b>	<b>1980:</b> Article 8 introduced in amendments of 26 August 2005 (Law No. 20050) establishes that the acts and decisions of state bodies shall be public, subject to listed exemptions.	<ul style="list-style-type: none"> <li>• Law 19653 of 14 December 1993 on Administrative Probity Applicable to the Organs of State Administration (“Probity Law”).</li> <li>• Law 19880 of 29 May 2003 on Establishing the Basis for Administrative Procedure affecting the Acts of the Organs of State Administration (Administrative Procedures Act).</li> </ul>
<b>France</b>	<b>1958:</b> Right to know to what uses taxes are put (Article 14).	<ul style="list-style-type: none"> <li>• Act of 17 July 1978 on Free Access to Administrative Documents (Law 78-753) as modified by subsequent laws including Law 2000-231 of 12 April 2000 and most recently Law 2002-1487 of 20 December 2002.</li> </ul>
<b>Ghana</b>	<b>1992:</b> Right to information, “subject to such qualifications and laws as are necessary in a democratic society” (Article 21(1)(f)).	<ul style="list-style-type: none"> <li>• No law. Freedom of Information Bill (draft law) of 2002 still pending. [The Evidence Decree (1975, NRCD 323), State Secrecy Act (1962 Act 101), and Civil Services Law (1993 PNDCL 327) all refer to the right to information in the negative sense of qualifying provision of information to the public.]</li> </ul>
<b>Kenya</b>	<b>1963:</b> Not specified.	<ul style="list-style-type: none"> <li>• No access to information law.</li> </ul>
<b>Macedonia</b>	<b>1991:</b> “Free access to information and the freedom of reception and transmission of information are guaranteed” (Article 16).	<ul style="list-style-type: none"> <li>• Law on Free Access to Information passed March 1, 2006 and entered into force September 1, 2006.</li> </ul>

**Table 1: Constitutions and Legal Frameworks in Monitored Countries** (*continued*)

Country	Constitution	Access to information laws in place
Mexico	1917 (as modified 1977): Article 6 on right to opinion also establishes that “the state shall guarantee the right to information.”	<ul style="list-style-type: none"> <li>Federal Transparency and Access to Information Law of 10 June 2002, entered into force 11 June 2003. Federal District (Mexico City) Transparency and Access to Information Law of 8 May 2003.</li> </ul>
Nigeria	1999: Freedom of information but not access to government held information (Article 39(1)).	<ul style="list-style-type: none"> <li>No access to information law.</li> <li>Draft Freedom of Information Act in Senate as of September 2006.</li> </ul>
Peru	1993: Right to request without being required to show cause and to receive from any public entity any information that is required, within the time legally specified and at cost (Article 2(5)).	<ul style="list-style-type: none"> <li>Law 27806 on Transparency and Access to Public Information of 3 August 2002, entered into force 1 January 2003, incorporating amendments of 7 February 2003.</li> </ul>
Romania	1991: Right of access to information of public interest and duty of public authorities to provide correct information (Article 31).	<ul style="list-style-type: none"> <li>Law no. 544/2001 of 12 of October 2001 (published in the Official Gazette, Part I No. 663 of 23 October 2001) on the Regarding the Free Access to Information of Public Interest, fully in force since March 2002.</li> </ul>
South Africa	1996: Specific provision on access to state held information and information held by private persons if needed in defense of rights (Section 32).	<ul style="list-style-type: none"> <li>The Promotion of Access to Information Act (PAIA), Act No. 2 of 2 February 2000, entered into force March 2001.</li> </ul>
Spain	1978: Citizens have right of access to administrative files and public records, except in matters that affect national security, investigation of crimes and offences, and privacy (Article 105 b).	<ul style="list-style-type: none"> <li>Law 30/1992 of 26 November 1992 on the legal framework for public administration and general administrative process; Royal Decree 208/96, 9 February 1996, that regulates the services of Administrative Information and citizen service; Law 38/1995, of 12 December 1995, on the Right of Access to Environmental Information.</li> </ul>

# 1. International Standards on Access to Information

There is as yet no fixed international standard governing the right of access to information held by public bodies. International treaty law, as it currently stands, establishes only a general right to freedom of information. Yet a number of countries enshrine the right of access to government held information in their constitutions, over 65 countries have passed access to information laws, and countless additional laws and regulations promote information access at the regional and local levels. The most authoritative international text is the Council of Europe's Recommendation 2002(2) on the Right of Access to Official Documents, which sets out clear minimum standards for government transparency.<sup>1</sup> The Justice Initiative has drawn on all these sources to identify a set of 10 principles (see sidebar: Justice Initiative Principles on the Right to Know), to guide civil society groups and legislators in their efforts to increase access to information.

## Justice Initiative Principles on the Right to Know

The right of access to information is a fundamental human right crucial to the development of a democratic society. The following principles represent international standards on how governments should respect this right in law and practice.

### 1. Access to information is a right of everyone.

Anyone may request information, regardless of nationality or profession. There should be no citizenship requirements and no need to justify why the information is being sought.

### 2. Access is the rule —secrecy is the exception.

All information held by government bodies is public in principle. Information can be withheld only for a narrow set of legitimate reasons set forth in international law and also codified in national law.

### 3. The right applies to all public bodies.

The public has a right to receive information in the possession of any institution funded by the public and private bodies performing public functions, such as water and electricity providers.

#### **4. Making requests should be simple, speedy, and free.**

Making a request should be simple. The only requirements should be to supply a name, address and description of the information sought. Requesters should be able to file requests in writing or orally.

Information should be provided immediately or within a short time frame. The cost should not be greater than the reproduction of documents.

#### **5. Officials have a duty to assist requesters.**

Public officials should assist requesters in making their requests. If a request is submitted to the wrong public body, officials should transfer the request to the appropriate body.

#### **6. Refusals must be justified.**

Governments may only withhold information from public access if disclosure would cause demonstrable harm to legitimate interests, such as national security or privacy. These exceptions must be clearly and specifically defined by law. Any refusal must clearly state the reasons for withholding the information.

#### **7. The public interest can take precedence over secrecy.**

Information must be released when the public interest outweighs any

## 1.1 The Access to Information Monitoring Tool

The Access to Information Monitoring Tool comprises a set of instruments designed to capture information about a country's laws and practices regarding freedom of information. First, a legal template provides a basis for assessing country law and practice against international standards. Second, a monitoring methodology, developed by the Justice Initiative based on human rights monitoring experience and expertise from polling and sociological surveys, facilitates standardization in the making of requests and the kinds of information requested. Third, specially designed software, used to allow multiple partners in a range of countries to input information in a common format, enables comparison of the results.

### The Monitoring Process

Applying the Access to Information Monitoring Tool involves four phases. First, a review of national legislation (including freedom of information and related laws), using a legal template, identifies the basic regulations that govern access to information in a particular country. This provides a standard by which to evaluate that country's progress toward implementing its own laws. Next, participants in the study request information from various institutions, track the responses, and key the results into a shared database. A third phase consists of interviews with representatives of bodies to which information requests were made, in order to identify the context in which public institutions (and officials) work. The aim is to get a picture of both the practice and spirit of openness in each body monitored. Finally, the data are analyzed and prepared for presentation.

### Legal Analysis

Legal analysis in each country assesses national law against international standards by means of the legal template. The template is a checklist based on the Justice Initiative's 10 principles on the right to know, which in turn reflect international and national law and practice. The legal template provides a framework for comparative analysis of elements such as the scope of a given country's law, the time frames for delivering informa-

tion, exemptions, costs, and appeals procedures. In countries with access to information legislation, the template allows for the identification of country specific variations for consideration when assessing the compliance of outcomes in those countries. For countries without any relevant legal provisions, the template provides a basic structure for assessment of their compliance with minimum international standards on the right of access to information.

In two areas of the application of access to information laws and standards tested in this study, our methodology permitted variations. First, we held agencies to the time frames set forth in their domestic legislation and, in the absence of such legislation, held them to time frames that reflect international common standards. Second, when a requester submitted a request to an agency that did not hold the information, we considered the response compliant if the agency referred the requester to the right agency, except where national law required the agency to itself transfer the request to the proper agency.

Several of the access to information laws examined in this study fall short of at least some of the principles set forth above. For example, in Bulgaria and France, private or semi-private utilities companies are outside the scope of the access to information laws. In Mexico and South Africa, written applications are the only means of access for all except the illiterate or disabled. Responses to requests that did not meet the 10 principles were deemed noncompliant, even where permitted in national law.

## Requests

The monitoring process began with the submission of requests for information. The type and number of requests filed were determined so as to test a number of variables across countries, allowing for measurement and comparison of the treatment of requests and information received. Requesters in each country were chosen to reflect different groups that may wish to access information, and a broadly similar range of national institutions were targeted for information. Likewise, requests were submitted both orally and in writing in each country.

In 2004, a total of 140 requests per country were filed. The 140 requests comprised 70 questions, each of which was filed twice by different requesters at time intervals longer than the response time provided for by law: thus, requests were submitted in two “waves” in each country. The requests were submitted to 18 different institutions in each country, by a total of seven individuals. Institutions included those of the executive (ministries), the judiciary, local administrative bodies, and parastatal

harm in releasing it. There is a strong presumption that information about threats to the environment, health, or human rights, and information revealing corruption, should be released, given the high public interest in such information.

### **8. Everyone has the right to appeal an adverse decision.**

All requesters have the right to a prompt and effective judicial review of a public body’s refusal or failure to disclose information.

### **9. Public bodies should proactively publish core information.**

Every public body should make readily available information about its functions and responsibilities and an index of the information it holds, without need for a request. This information should be current, clear, and in plain language.

### **10. The right to information should be guaranteed by an independent body.**

An independent agency, such as an ombudsperson or commissioner, should be established to review refusals, promote awareness, and advance the right to access information.

companies. Requesters included NGOs, journalists (in each country, two journalists were selected—one broadly “pro-government;” the other “oppositional”), business persons, non-affiliated persons, and members of excluded groups, such as illiterate or disabled persons or those from vulnerable minorities. Requests were made in both oral and written form,<sup>2</sup> with written requests delivered by hand or sent by post, and on occasion submitted by fax or email, depending on the system most widely used in the country in question.

The study was designed to limit requests to the kinds of information that public bodies do, or should, hold. As far as possible, no information was requested that might ordinarily be expected to be exempted under standard access to information legislation. The study did not, therefore, test the application of exemptions in individual countries, but aimed instead to produce a comparative view of the actual information that ought normally to be available in response to requests from the public in each country. The total number of requests recorded and tracked in the course of the study was 1,926 (140 request in 14 countries, less 34 requests filed in Ghana and Mexico that could not be included in the overall figures, due to problems with implementation of the monitoring methodology).<sup>3</sup>

In order to facilitate comparisons between countries, a number of requests were standardized. In each region (Africa, Europe, Latin America), 16 requests for similar information were submitted to analogous bodies. These questions were decided upon in consultation with the partners from all the countries involved in the pilot project. In addition, specific requests of particular importance to each country were selected. Wherever possible, the selection process involved consultation with the actual requesters themselves so that the requests would have relevance to the requesters and meet their real information needs—for example local NGOs and journalists were consulted so that requests filed would be for information of use to their work.

The methodology also set standards for the behaviour of requesters: in training sessions requesters were instructed to make up to three attempts at submission, an optional telephone call or visit to verify receipt of request, and a later follow up call or visit once the time frame for delivery neared expiry.

Following submission of the 140 requests in each country, one further request was filed with each institution asking about its internal mechanisms for promoting transparency and how it complies with any relevant legal provisions proactively to publish information. The institution was asked whether it had appointed an information officer or a similar person designated with responsibility for providing information to the public.

These “promotion requests” also asked whether the institution’s annual report and budget are available to the public, in addition to information about data held and guidelines on filing a request. The responses to these requests contributed to the assessment of the responses received from individual institutions.

### **Interviews with Public Bodies**

In a third phase, interviews were held with each body monitored, to gain a deeper understanding of their systems for implementation of access to information or other applicable laws. The interviews give officials an opportunity to explain how they handle requests for information in general, and to respond to the project findings, particularly in problematic cases, such as low response rates from certain institutions, or a preponderance of refusals to provide information.

Interviews were carried out by the lead NGO in each country and aimed to identify needs, such as for additional training or internal guides for personnel on implementing freedom of information laws. Interviewers sought a frank discussion with the responsible staff, to listen to their concerns and understand the logistical challenges they face. The recommendations made throughout this report are intended to be as constructive as possible, to assist the authorities in the promotion of greater transparency.

Not all institutions, however, granted interviews, which in some cases made it difficult to evaluate the reasons that information requests were handled poorly. In many (though not all) cases, institutions with low access to information compliance scores were also those that, explicitly or tacitly, refused requests for interviews.

### **Data Collection, Verification, and Analysis**

The Justice Initiative Access to Information Monitoring Software includes a user friendly interface and a relational database that allow for tracking the key stages of a public information request, from filing to receipt of information, through refusals and appeals.<sup>4</sup> Project partners were able to input information into the database online throughout the project period, allowing for results to be analyzed centrally. The software generates statistics on the monitoring outcomes and facilitates comparison of data within and between countries.

This online tool was originally developed for the 2003 pilot project. Following a review of the pilot, the software was redesigned and reprogrammed in 2004.

Once data entry was complete, the data were reviewed and final outcomes assigned to all requests. Data verification sheets in Excel were generated using the software and sent to partners for review and correction. Partners went through at least two rounds of review to ensure that the basic details were accurate, followed by review of the substantive comments to verify the final outcomes assigned to each request. This was followed by a period of conference calls and discussions of the results on a request by request basis. Every single request was reviewed, the comments and results read, and the outcomes evaluated and agreed upon by at least three persons for each request.

The final step in the verification process was an analysis of the outcomes for identical requests. As noted above, each project request was submitted twice to the same institution by different requesters. The results of each pair of requests provide an additional test of whether or not institutions comply with requests for information.

Throughout the study, a “benefit of the doubt” rule was applied. Where institutions responded that they did not hold requested information or provided written refusals stating permissible reasons, the good faith of these responses was assumed, and they were evaluated as compliant with access to information standards. An analysis of the outcomes from pairs of identical requests provided a partial test of institutions’ good faith in practice. In cases where the same requests produced different results—such as delivery of information in response to one request and a written refusal or an “information not held” outcome for the second, paired request—the good faith of the second outcome could not be accepted and the request was reclassified as noncompliant. It is important to note that this study did not deem an agency noncompliant for its failure to *collect* information. Arguably, governments have the duty to collect certain information, for example, information necessary to protect the health of their populations, but any such duty to collect information falls outside the scope of this study.

### **Caveats and Disclaimers**

A study of this kind involves unavoidable human factors—public employees may respond differently to different requesters regardless of the agency’s own policies and regardless of training efforts. The behavior and persistence of requesters in turn will be affected by this treatment. Many freedom of information laws include a “duty to assist” requesters—in this monitoring study, Armenia, Mexico, and South Africa have such provisions and Peru has a provision sanctioning obstruction of requests by information officers.<sup>5</sup> And yet, although training of public officials can help to ensure basic stand-

ards of service, the application of this provision tends to vary among institutions and individual government employees. In the course of this study, some officials were kind and encouraging to requesters, others were rude and obstructive. Given the substantial number of actors involved in the project and the legal and cultural differences among countries, a certain amount of inconsistency was unavoidable. The results should not be regarded as perfectly comparable, even though every effort was made to ensure consistent application of the methodology.

## 1.2 The Classification of Outcomes Used in the Monitoring Study

Ten main categories of outcome were used, listed below. The outcomes are grouped into two broad categories: compliance and noncompliance with access to information principles.

### Broadly Compliant Outcomes

**Information Received:** The requested information is provided, in written or oral form. The information answers the question and is relatively complete.

**Partial Access:** Documents are delivered with sections blacked out or “severed,” or the information is otherwise incomplete on grounds provided for by law. As long as the authority clearly states the grounds for withholding some information, partial access was considered a compliant response.

**Written Refusal:** Refusals to provide requested information ought to be written down, and should state the grounds for withholding information. Written refusals provide a basis for appealing decisions, and so are useful even where noncompliant (for example, when the grounds for refusal are inadequate or unstated). For this study, we generally assumed written refusals to be compliant, except in cases where they clearly were not—such as, for example, when the paired request was treated differently.<sup>6</sup>

**Transferred/Referred:** The institution either: (a) provides a written or oral response referring the requester to another institution: or (b) transfers the request to another institution. This is a compliant response, unless the institution that received the original request is clearly the correct location for the information.

**Information Not Held:** Where the approached authority is the correct location for the requested information, but does not have it, the compliant response is to tell the requester that the “information is not held.” The admission by government bodies of failures or inadequacies in information compilation is beneficial for the overall transparency of government in that it enables a dialogue with the public about data collection priorities. In the present study, this response was recorded as compliant unless there was good reason to believe that the information was in fact held by the institution in question.

## Noncompliant Outcomes

**Inadequate Answer:** Information is provided that is largely incomplete, irrelevant, or in some other way unsatisfactory, demonstrating a disregard for the right of access to information. For example, “inadequate answer” was recorded if a large pile of documents was provided that did not contain the answer to a very specific request, or if a requester was directed to a website which did not contain the requested information.

**Mute Refusal:** This category indicates no response at all from the authorities, or at best, vague answers to follow up calls. There is no formal refusal, but no information is provided. This outcome was recorded after the time frames for answering requests expired.

**Oral Refusal:** An official refuses to provide the requested information, whether or not grounds are given, without putting the refusal in writing. This category includes snap responses to oral or hand delivered requests, such as “that information is not public.” Oral refusals can also be received by telephone, either when a requester calls to verify if a written request has been received, or when a call is made at the initiative of the authority.

**Unable to Submit:** A request is marked “unable to submit” when a requester could not file a request. For example, some requesters could not enter relevant institutions because guards denied them admittance. Or, once inside, requesters could not speak to the relevant person, because they were, for instance, absent, always “at lunch,” or “coming in tomorrow.”

**Refusal to Accept:** Refusal to accept was recorded whenever a government body refused to process in any way an information request, whether oral or written. Typical responses include “We cannot accept oral requests” without any assistance offered to write up the request, or “We do not accept information requests.” Refusal to accept outcomes differ from unable to submit outcomes in that the public body actively declines to process the request. They differ from oral refusals in that the specific content of the information request is never at issue.

**Late Answers:** Responses made after the time frames established in domestic law or, in the absence of domestic law, by this study were counted as mute refusals. A record was kept, however, of responses that came after the legal time frame but within a predetermined “late” period. An analysis of these late answers is to be found in Chapter Four of this report. It is recognized that late responses may be due to several factors other than lack of political will, such as high demand, inadequate resources, or inadequate systems of recordkeeping. Nonetheless, we decided to classify late responses as noncompliant because: (a) timely response is an important element of the right to receive information; and (b) we wanted to ensure consistency in recording results. In any event, very few late responses were received in this monitoring study.

## Assessing Compliance

One way to assess compliance was by comparing results for paired requests. For example in Armenia, one requester asked the Yerevan Kanaker-Zeitun District Administration how much money had been allocated for renovation of the roads in that district in 2004. In an oral response provided by the Head of Statistics Department, the requester was told that the department did not have that information and the result was recorded as “information not held.” However, the second requester, a journalist, received a written answer that 28.5 million AMD (c. \$62,000) had been allocated for road renovation. The “information not held” outcome was therefore reclassified as noncompliant, because it was clearly incorrect that the body did not hold the information.

It is not always easy to tell whether a response is compliant or not. For example, a pair of requests filed with the Ministry of Defense in Romania for the number of army recruits in 2001, 2002, and 2003 resulted in different outcomes. The NGO requester received a written refusal stating that the information was “classified,” but without offering the specific grounds.<sup>7</sup> The journalist requester, on the other hand, received part

of the requested information (the number of army recruits in 2003 was 31,500). This information was provided to the journalist by the ministry's press office, who sourced it to the annual report of the National Institute of Statistics. During a follow up interview, the ministry's appointed information officer, an army major, claimed that the refusal resulted from a terminological confusion concerning the difference between recruits and draftees. According to the major, the number of draftees is classified information. Given that this distinction appeared to pose no obstacle in the case of the journalist, the written refusal was clearly not compliant with the law. Nevertheless, had both requesters received a written refusal, that reply would have been recorded as compliant according to the benefit of the doubt principle applied in this monitoring study.

## Country Studies

In the course of the present study, a great volume of information was collected on each of the monitored countries and on the overall trends for all countries. This report is limited to comparative information relevant to all countries in order to provide some insight into freedom of information trends across the world. It includes a representative sample of the statistical data compiled throughout the study, as well as country specific examples to illustrate the trends identified. The examples were selected as illustrative of typical problems and good practices.

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## Notes

1. Recommendation Rec(2002)2 of the Committee of Ministers to member states on access to official documents (Adopted by the Committee of Ministers on 21 February 2002 at the 784th meeting of the ministers' deputies) [http://cm.coe.int/stat/E/Public/2002/adopted\\_texts/recommendations/2002r2.htm](http://cm.coe.int/stat/E/Public/2002/adopted_texts/recommendations/2002r2.htm).
2. The number of oral requests filed varied by country (from 12 in Mexico to 34 in Argentina, Nigeria, and South Africa) according to a number of factors, including whether requesters were literate or not, and the likelihood in a given country that requests would be filed orally.
3. In Mexico, one requester approached the wrong branches of the monitored institutions; in Ghana, not all requesters reported full data back to the monitoring partners. Data from these countries is generally included here, except where charts are labeled "12 countries."
4. Although the methodology allows for appeals to be monitored, the appeal process requires considerable time and effort and was not undertaken in the present study.
5. Armenia's Law on Freedom of Information (23 September 2003) at Article 13.2.b, Mexico's Federal Transparency and Access to Information Law (2002) at Article 40, South Africa's Promotion of Access to Information Act (2000) at Section 19, and Peru's Law on Transparency and Access to Public Information (2002) at Article 14.
6. In principle, a written refusal is only compliant where it states that the requested information is subject to an exemption laid out in law. However, the precise legal grounds vary from country to country and are subject to judicial review. In this study, we have chosen to give the benefit of the doubt to institutions that set down refusals in writing, even where there was no clear mention of exemptions, and generally assumed that they are compliant.
7. In this report, "classified" refers to information subject to classification under laws relating to state secrets irrespective of whether it has been withheld from disclosure, whereas "exempted" refers to information subject to the exemptions of an access to information law and therefore withheld from disclosure. "Reserved" means withheld from disclosure. However, when citing answers from public officials, the closest translation of the term in the original language has been used, even if the officials concerned may not have applied the terms in the strictly legal sense.

## 2. Main Findings of the Monitoring Study

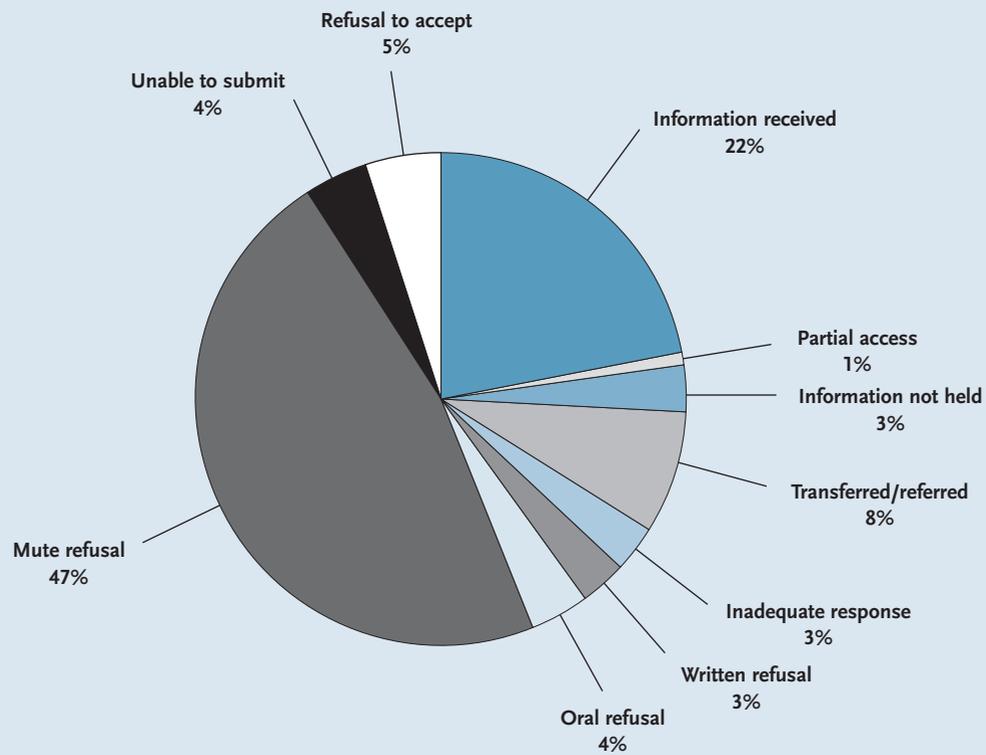
### 2.1 Half of the Information Requests Met with Silence

In this study, a “mute refusal” is a failure by a government body to respond in any way to a request for information. Persons who requested information as a part of this study—hereafter referred to as “requesters”—received mute refusals for 47 percent of their requests.

A mute refusal to a request for information from a government body constitutes a clear violation of the right to access government held information, as well as a violation of the right to petition government as established by the constitutions and laws of many jurisdictions. Mute refusals effectively alienate the public from government, relegating citizens to the role of periodic electors and limiting the ability of people to participate meaningfully in decision making or to hold government bodies and officials to account. Mute refusals undermine trust in government and foster an atmosphere in which members of the public assume the worst about official practices. Mute refusals, in fact, imply the existence of a wall of silence allowing corruption and wrongdoing to flourish.

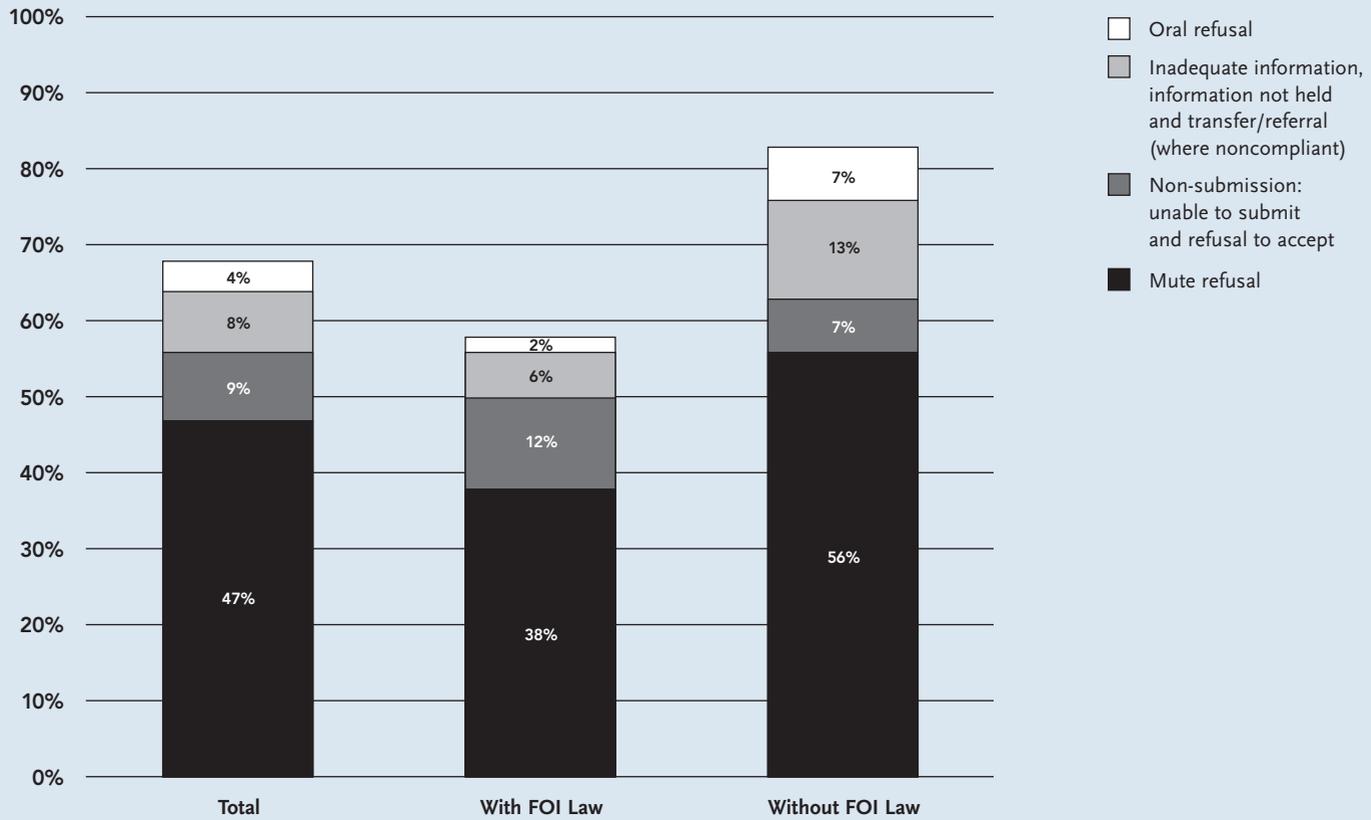
In the countries surveyed that did not have dedicated freedom of information laws, 56 percent of requests for information from the government yielded no response.

Figure 1: Responses to 1,926 Requests in 14 Countries, by Type of Outcome



Analysis based on data from 14 countries, all requests

Figure 2: Mute Refusals and Other Noncompliant Outcomes as a Percentage of All Requests



Analysis based on data from 14 countries, all requests

In the countries surveyed that did have dedicated freedom of information laws, 38 percent of requests for information from the government yielded no response. Figure 2 indicates an unacceptably high percentage of mute refusals. However, many of the freedom of information laws in the countries included in the present study are relatively new, so the number of mute refusals might decline over time.

### Disincentives to Mute Refusals in Mexico

Administrative law, depending on the country and particular legal provisions, will usually indicate whether administrative silence is considered a positive or a negative response by a government body. If an individual has applied for a license to build an extension to her or his house, for example, and if silence is designated by law as a positive response, the failure of a government body to respond to the application after a set period of time is considered a grant of permission to build the extension to the house. In the case of access to information requests, such “positive” silence requires further action to obtain the information. Many access to information activists consider a “mute refusal” to be *de facto* a negative response.

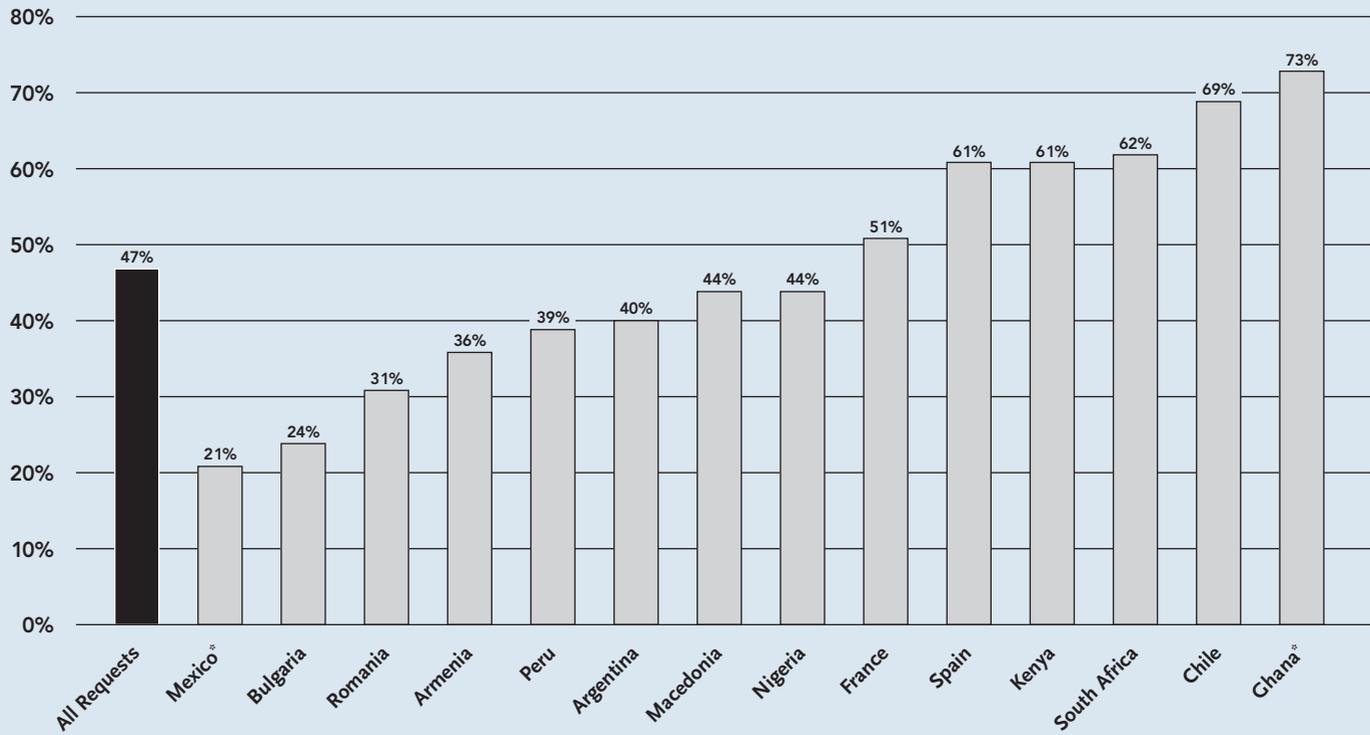
In Mexico, the Federal Transparency and Access to Information Law (2002, LFTAI) construes administrative silence on information requests as being by default a positive response—meaning that the government body has agreed in principle to release the information. Applicants who do not hear from the government body within 20 working days may appeal directly to the IFAI, Mexico’s Information Commission, which is responsible for following up with the relevant body to require it to release the information.

**Table 2: Details of Mute Refusals and Other Noncompliant Outcomes as a Percentage of All Requests**

Response	Total %	With FOI Law %	Without FOI Law %	Nature of response
Mute refusal	47	38	56	Administrative silence (in spite of at least one follow up call for all requests).
Unable to submit	4	4	5	Request could not be submitted due to obstacles created by institution.
Refusal to accept	5	8	2	Institution refused to receive the request.
Information not held <sup>*</sup>	1	1	2	Institution answered that information not held (unjustified and noncompliant).
Transfer/referral <sup>*</sup>	5	2	8	Requester transferred or referred to another government agency in unjustified manner (for example because agency known to hold the information).
Inadequate information provided	3	3	3	Minimal or irrelevant information provided.
Oral refusal	4	2	6	Oral refusal to provide information.
<b>Total</b>	<b>69</b>	<b>58</b>	<b>82</b>	

<sup>\*</sup> Where these responses were clearly not in compliance with access to information principles and national law—see Chapter Three for detailed analysis of noncompliance.

**Figure 3: Mute Refusals as a Percentage of All Requests, by Country  
(Including Late Responses as Mute Refusals)**



\* Adjusted data for Ghana and Mexico

Analysis based on data from 14 countries

In practice this means that the agency has to give priority to answering previously unanswered requests and disclose information wherever possible. If the information falls under one or more of the exemptions of the LFTAI, then the government body must immediately inform the requester and provide grounds for applying the exemption. Anytime the IFAI intervenes for this reason, the government body in question has to bear the reproduction and delivery costs, which are ordinarily the requesters' burden, and the public officials concerned may be subject to penalties under administrative law.

### **Civil Society Challenges to Mute Refusals in Bulgaria**

Bulgaria's Access to Public Information Act (APIA, 2000) does not anticipate administrative silence to information requests, and it provides no explicit remedy. Nevertheless, Bulgaria's highest administrative court has ruled that mute refusals are a breach of the right of access to information. In a case brought during 2001 by the Center for Independent Living, with legal support from the Access to Information Programme, Bulgaria's Supreme Administrative Court upheld the right of citizens to file complaints based upon administrative silence,

The countries with the lowest percentages of mute refusals in the study were Mexico (21 percent) and Bulgaria (24 percent). Thus, the findings indicate that mute refusals are less frequent in countries where there has been a concerted effort by civil society, NGOs, and government officials to implement a new access to information regime. The findings also indicate that the introduction of a freedom of information law, when accompanied by training of public officials and clear political support for public access to information, can dramatically improve levels of responsiveness to information requests. Even if responses do not always result in release of information—for example, when a government body responds to a request with a written refusal—they nevertheless provide bases for a dialogue between the public and government over the right of access to information.

The study found requests for information yielded the highest percentages of mute refusals in South Africa (62 percent), Chile (69 percent), and Ghana (73 percent). Ghana has no freedom of information law; South Africa's Promotion of Access to Information Act (2000) has been touted as a model for the African continent; and Chile's provisions on access to administrative documents date from 1999.

## Case Study: Inadequate and Unclear Provisions in Chile

Chile's legal provisions relating to access to information are complex and not always clear, primarily because they were adopted at different times and are now found in an array of laws but also because these provisions combine access to information and secrecy regulation and provide no clear tests for determining whether or not to release information. In an application to the Inter-American Court, the Inter-American Commission on Human Rights highlighted the problems with the Chilean access provisions, explicitly arguing that Chile's existing legal provisions did not guarantee the right of access to information for two main reasons:<sup>5</sup>

*First, the law only applies to “administrative acts” and supporting documents, which “excludes a vast quantity of records and other information in the possession of the State that do not constitute ‘administrative acts’ or may not be related to final or contentious administrative decision making.”<sup>6</sup>*

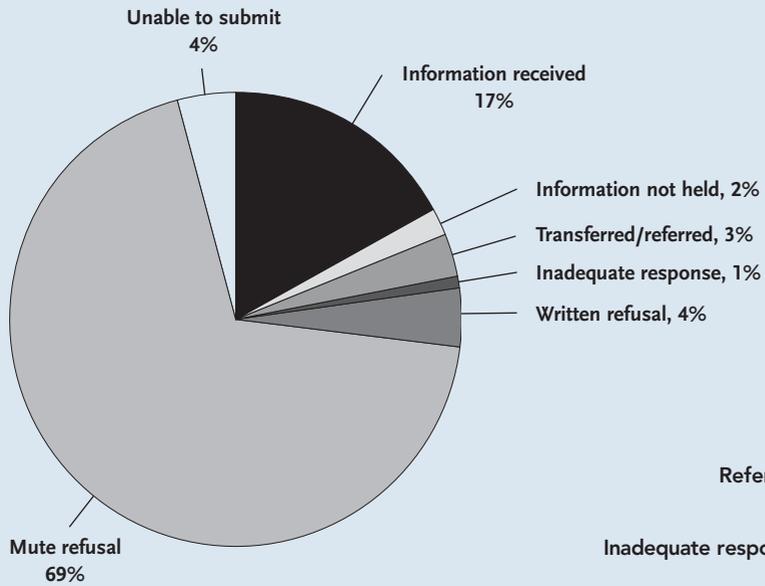
*Second, the exemptions provided for in the law are overly broad, vague, and confer an excessive degree of discretion on the official determining whether or not to disclose the information....In the Chilean law, the third exemption, for example, allows a third party who is referred to or “affected” by the information to prevent disclosure of the information, without a showing that his or her interest in keeping the information private outweighs the public interest in having access to the information. Likewise, the fifth exemption does not balance the national security or other national interest against the public interest in access to information, and furthermore, does not define the terms “national security” or “national interest.” The other exemptions are similarly flawed.*

Time frames for responding to requests for information are another area where the law in Chile is unclear. The 1999 Administrative Probity Law<sup>7</sup> established for the first time the procedure for “citizen access to administrative information, in conformity with the law” (Article 53). This law establishes that administrative bodies must respond to or deny requests for information within 48 hours. A further law 19,880 on Administrative Procedures Governing Acts of State Administrative Bodies (29 May 2003)<sup>8</sup> sets out the principles of good administrative practices, including transparency of the administra-

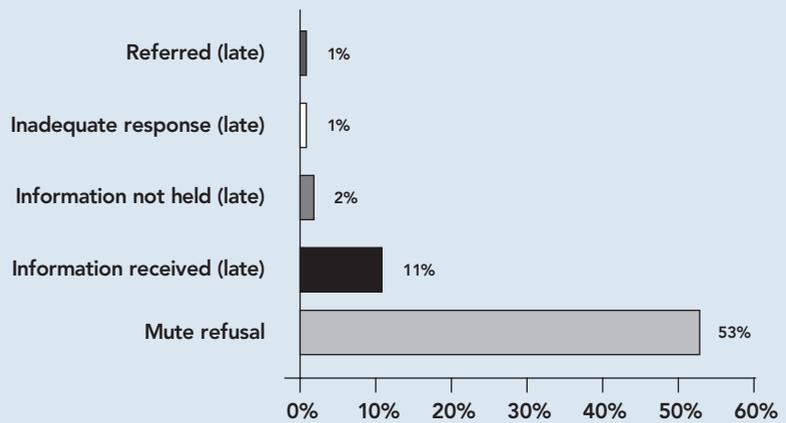
despite the absence of any specific provision of the APIA.<sup>1</sup> In 2003, the court found that administrative silence constituted a breach of procedural law: “[Silent refusal] represents a line of conduct that is impermissible by law. This is so because a fundamental principle of administrative law is [that] the authorities may not act in contravention of what has been prescribed by law, whereas Article 28 of the APIA contains the imperative obligation of the authorities to make a reasoned decision, especially when they refuse access to information.”<sup>2</sup>

In their advocacy work, civil society organizations in Bulgaria have highlighted mute refusals as a recurrent problem in the Bulgarian administration. AIP has focused training exercises on eliminating mute refusals, citing language in the law, which expressly states that mute refusals and oral denials violate the right to information, and highlighting the finding of the Supreme Administrative Court that all denials must be in writing. Bulgarian journalists have also taken up the cause, writing stories on the filing of information requests to help trigger a government response.

Figure 4: Responses to All Requests in Chile, (Including Late Responses)



Breakdown of Mute Response (Total %)



Analysis based on data from 14 countries, all requests

tion, and provides that all administrative procedures should be free of charge, be available in writing, and correspond with principles of clarity, impartiality, and avoidance of formalities. This 2003 Law establishes time frames for government bodies to respond to petitions by citizens (Article 24). These time frames range from 48 hours for decisions that are mere formalities, to 20 days for more complex decisions. The 2003 law also provides (Article 26) that the time frames may be extended for an additional 10 days either at the initiative of the administrative body or at the request of interested parties. Although the 2003 Administrative Procedures law does not apply specifically to information requests, its existence has produced confusion among public officials about the time frames for responding to requests for information. For the purposes of this monitoring exercise, a time frame of 10 working days was allocated, which is clearly superior to the 48 hour window provided by the 1999 Administrative Probity Law; answers made within a subsequent 10 days were recorded as late, and answers made after the subsequent 10 day period were recorded as mute refusals.

### The Impact of the Lack of Clarity

Chile's short and confusing time frames appear to have contributed to the incidence of failure to respond to requests for information, even in situations where government bodies were willing to reply to information requests. Of the total requests made during the present study, 16 percent resulted in late answers, i.e., answers received between 10 and 20 working days after requests were filed; and 11 percent of the late responses yielded information. If the time frames are discounted, the level of mute refusals would be 53 percent—still high, but no longer among the worst offenders. Interviews with government officials confirmed that lack of responses in Chile resulted in part from the inadequacy of the law. The Justice Initiative's partner, Participa, suggested that there is a need to clarify, harmonize, and rationalize the time frames for responding to information requests. A draft access to information law currently in preparation by civil society organizations—led by a coalition, Pro-Acceso, which is working with the Justice Initiative—recommends 15 working days for all requests.

Interviews and the monitoring results also indicated that Chile lacks administrative procedures for answering requests for information. Public demand for information remains low, which does little to promote the development of better systems. Requesters who made follow up calls to learn the status of their requests identified two problems. First, requests were not internally monitored and were hard for either officials or requesters to track, resulting in requesters being passed from office to office. (Other

### South Africa: Silence a Fundamental Obstacle to Information Access

In the Justice Initiative's pilot study in South Africa during 2003, 52 percent of all attempted requests and 62 percent of those requests that were successfully submitted resulted in mute refusals. These results were replicated in 2004. In South Africa, requests were either left unanswered or, rarely, received a response only after the prescribed 30 day time frame had passed. This poor score occurred even though South Africa's Promotion of Access to Information Act (PAIA) provides one of the longest time frames of any access to information law in the world—the initial 30 day limit is more than twice the global average of 14 days and can be extended another 30 days by the government body in question for complex requests that involve a large number of records or require a search or consultations within the department or with other bodies.<sup>3</sup> In such cases the requester must be notified “as soon as reasonably possible, but in any event within 30 days, after the request is received.”<sup>4</sup> Five late answers were received during the present study; each answer arrived well after the full 60 days had passed, and in no case were requesters notified that the information would be provided late. For example, a request to the Department of Environmental Affairs and Tourism submitted

on 18 June 2004 for any and all documents stating the criteria for granting registration of lion holding and lion breeding facilities received an answer with criteria on 2 September 2004.

The high incidence of mute refusals in South Africa indicated poor compliance with the PAIA and problems in managing requests rather than weaknesses in the law itself. The public bodies in question acknowledged only a few requests related to the present study; in most cases, the requester never knew whether a request had reached the right hands or was being processed at all. Requesters who made follow up inquiries were frequently told to resubmit their requests.

Interviews with officials provide some insight into the high incidence of mute refusals. Many officials attributed it to a lack of capacity to deal with the requests. Some believed that the 30 day period was too short to deal with difficult requests. Others found the PAIA complex and onerous to implement and, as a result, procrastinated in processing requests. Lack of training was cited as an obstacle. One official admitted that she ignored requests because she was unfamiliar with the law and was afraid to respond.

monitored countries, including Mexico, Peru, and Bulgaria, have solved this problem by issuing reference numbers once a request is accepted.) For example, when one requester made a follow up call to Chile's Supreme Court, an employee from the *oficina de partes* (reception desk) forwarded the call to the office he thought was responsible; from there, the call was forwarded onward. Eventually, the requester spoke to six different offices, and was ultimately transferred once more to the *oficina de partes*, "because he should know who's in charge of the answer..." The requester never discovered what happened to his original request.

Second, officials in Chile do not have standard criteria for how to deal with requests for information. Requesters routinely received formulaic replies to follow up queries—such as "the answer is being prepared, you will receive it soon." In most cases, no answer ever arrived. According to one minister interviewed as part of the study, "We do not have any clear mechanisms to follow up the requests that are transferred from one department to another within the ministry. Once the employee transfers the requests, he or she forgets about the matter. There is no person in charge of following the route of each request and making sure it is answered." Another minister was more forthright: "Thank goodness this will not be a frequent situation! We did not know what to do with the requests....we called for a general meeting to analyze the situation." This reply indicates a very low level of public demand for government information in Chile. In this instance, the study's very existence appears to have spurred an investigation into the procedures needed to reply to requests. Similarly, at the Municipality of Vitacura, an official commented to one requester on the usefulness of receiving information requests: "It's been of great help to receive all these requests...it helps us to improve our standards of transparency. We have decided to put some of the information you requested on the Internet." The requester had asked for information about the decisions of municipal council meetings with details on how each member had voted; in response, he was invited into an office where he could read the documents and was able to make copies of them.

## Recommendations:

- Access to information laws should establish clear time frames for public bodies to reply to information requests. If extensions of time are permitted, such extensions should be for a fixed period of

a reasonable duration and granted for specific reasons, as when, for example, the information requested is voluminous or requires collecting. Fourteen days is the average time frame set for responses to requests for information in more than 40 laws surveyed. Time frames longer than fifteen days should be scrutinized to ensure that they are justified by unusual circumstances.

- Public bodies should establish internal mechanisms for tracking requests for information, for example, by assigning each request a reference number and providing the person making the request with this number so she or he can make inquiries if the information is not provided in due time.
- Access to information laws should state clearly that the failure of public officials and all other relevant personnel to respond to requests for information is a violation of the public's right to access public information. Public officials should receive training informing them of their obligation to respond effectively to requests for information in a timely manner.
- Access to information laws should elaborate procedures, including expedited appeals procedures, for handling failures by government bodies and bodies performing public functions to respond to requests for information within prescribed time frames.

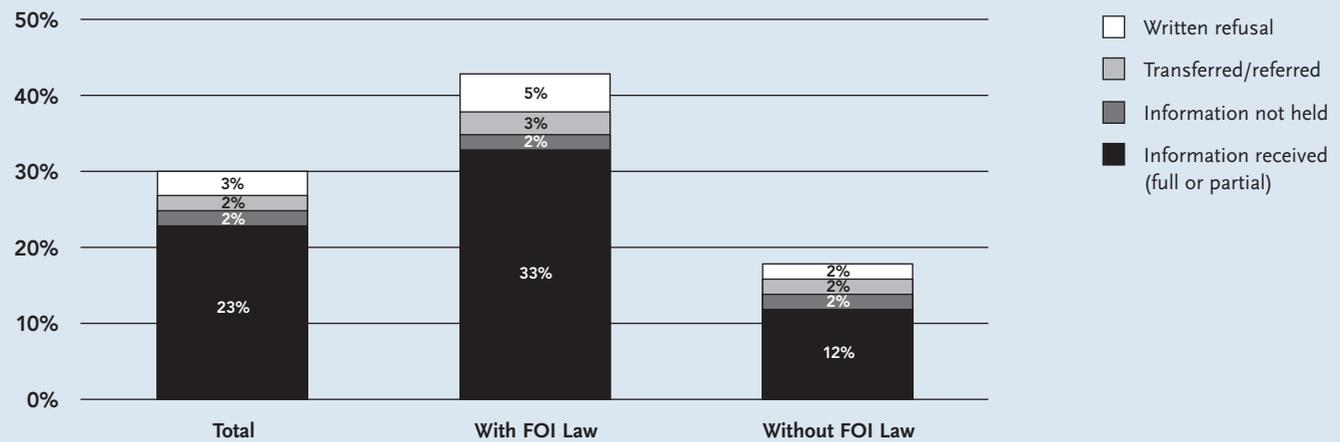
## 2.2 Access to Information Laws Increase Responsiveness

A principal finding of the Justice Initiative's Access to Information Monitoring Study was that governments were more likely to respect an individual's right to request information and to deliver the information requested in countries that had freedom of information laws than in countries that did not have freedom of information laws.

The results show a clear distinction between those countries with full freedom of information laws and those without.

- Countries with dedicated freedom of information laws were more compliant with access to information principles—43 percent of requests resulted in compliant responses in these countries, more than twice as many as in the countries lacking access to information laws (18 percent).
- The six best performing countries all had dedicated freedom of information laws—Bulgaria, Romania, Armenia, Mexico, France, and Peru. The three countries that follow—Argentina, Chile, and Spain—each had constitutional or legislative freedom of information provisions, but no full law. Ghana, Kenya, Macedonia, and Nigeria had neither laws nor provisions promoting freedom of information at the time of the study. South Africa responded poorly for a country that has a law.
- Requesters in countries with dedicated freedom of information laws were more likely to receive full or partial information in response to their requests—33 percent as compared with 12 percent in countries without freedom of information laws.
- In countries with dedicated freedom of information laws, refusals to disclose information were more likely to be delivered formally—five percent as against two percent of requests in those countries without freedom of information laws.
- Overall compliance in the 14 countries was, nevertheless, very low, at 30 percent.

**Figure 5: Compliance with FOI Principles in Countries with and without FOI Laws, as a Percentage of All Requests**



Analysis based on data from 14 countries

**Table 3: Compliance with FOI Principles in Countries with and without FOI Laws, by Type of Response**

Response	All requests %	With FOI Law %	Without FOI Law %	Nature of response
Information received	22	32	12	Adequate information provided in response to question within time frame specified by law.
Partial information	0.5	1	0	Information provided but some parts of answer withheld in manner established by law.
Information not held <sup>*</sup>	2	2	2	Authority provided credible response that it does not hold requested information.
Transfer/referral <sup>*</sup>	2.5	3	2	Requester transferred or referred to another government agency in manner provided by law.
Written refusal <sup>*</sup>	3	5	2	Formal written refusal to release information.
<b>Total</b>	<b>30</b>	<b>43</b>	<b>18</b>	

<sup>\*</sup> Where these responses were in compliance with access to information principles and national law—see Section 3.5 for detailed analysis of compliance.

## Recommendations:

- Public bodies should ensure that all of their personnel, including security and reception staff, have a basic understanding of the right of members of the public to approach public bodies to request and access public information.
- In countries with access to information laws, those public officials likely to receive requests for information should be informed that such requests must be accepted and honored in compliance with the law.
- Public bodies should ensure that members of the public can submit requests for information in person, for instance, at an accessible reception desk or area. Information offices should be clearly designated and easy to locate. If the law does not specify otherwise, when creating systems for receiving requests for information from citizens, public institutions should consider making use of pre-existing systems for receiving communications from citizens, for example, the public boxes in Armenia, the archives office in Macedonia, and the *mesa de partes* reception desks that issue registration numbers in Latin American institutions.
- Access to information laws should establish the possibility of submitting oral requests for information. Where the law provides for oral requests for information but the information requested cannot be provided immediately, the law should require public officials to set down the request in writing themselves or to assist the persons requesting information to formulate a written request.
- In countries where laws do not permit submission of oral requests for information, public officials should be trained to help requesters make their requests in writing and to write requests for information on behalf of persons who cannot write or have difficulty communicating in writing.
- Access to information laws should provide for the appointment of an information commissioner or similar official or institution to oversee procedures for requesting information and to resolve problems.

### Varying Compliance—How the Same Question Was Treated in Different Countries:

Defense ministries in all the monitored countries in Europe were asked the following question twice, once by persons who identified themselves as business persons (“business requesters”) and once persons who identified themselves as representatives of an NGO (“NGO requesters”):

*Please provide, for the year 2003, the number of formal/official investigations into the deaths of armed forces personnel as well as a list of causes of deaths of all armed forces personnel.*

**Armenia:** Both requesters received the answer that 43 soldiers died in 2003. The causes were not provided. The business requester received the answer on time; the NGO requester’s response arrived late.

**Bulgaria:** The business requester received this answer: “Ten soldiers died in 2003 in performance of their duties. We provide you with their names. Investigations have been held in each individual case, but the results constitute classified information.” The names were provided. The NGO requester received no reply.

**France:** Both requests resulted in mute refusals. The NGO requester telephoned to verify receipt of the request; it could not be found.

The requester sent the request again and called to follow up; after a long discussion, the public servant said that the question had been transferred to a specialist official but refused to give the official's name. An official from the Ministry of Defense telephoned the business requester to ask why he needed the information; the business requester replied that it was for a statistical inquiry and that the data in any case belongs to the public. Nothing more was heard from the ministry.

**Macedonia:** The Ministry of Defense referred the NGO requester in writing to the public prosecutor's office. This response was recorded as a noncompliant referral, because the ministry should hold the requested information. The business requester's request resulted in a mute refusal.

**Romania:** Both requesters received the same detailed answer: 40 deaths, including: 13 suicides; 10 from medical causes; 9 in traffic accidents; 2 shootings; 2 deaths in action (in Afghanistan); and 2 deaths in airplane crashes.

**Spain:** The requesters were directed to different departments. In both cases, they were told that the 2003 data did not exist; these responses were recorded as "information not held." Instead, both received the "most recent" information, dating from 2002 in the case of the business requester, 2001 for the NGO requester.

- Access to information laws and implementation regulations should require public bodies to compile, maintain, and provide public access to indexes and catalogues of the information these bodies and their agencies hold. Such indexes and catalogues should list the titles of classified documents, that is, documents exempted from disclosure to the public, in order to facilitate public review of criteria used to classify documents.
- Access to information laws and implementation regulations should make specific provisions for transferring or referring requests for information when such requests have been filed with an incorrect body. At a minimum, public bodies must make a good faith effort to direct persons requesting information to the correct agency or public body.
- When a person requests certain information from a public body and public officials are unable to locate the information requested, then the relevant official should be obliged to inform both the requester and the information commissioner or other oversight body responsible for access to information procedures. Such an obligation would dissuade public officials from frivolously rejecting requests for information and facilitate monitoring of information management within the government.
- When requested information does not exist, then public officials should be obliged to inform the person who requested the information. Such a response is a key element of open government and can form the basis of a constructive dialogue between the government and the public about the type of information needed in order to improve government efficiency and increase the quality of decision making and policy making.<sup>9</sup>
- Proactive transparency, such as the publication of information and the posting of materials on government websites, facilitates access to information but does not relieve public bodies of their duty to provide information to persons who request it. At a minimum, public bodies should, when the person requesting information has Internet access, provide exact URLs; homepages are not sufficient. When the person requesting information does not have Internet access, public should print out and provide the relevant pages, charging standard printing fees provided for by law. Relevant law and regulations should clearly state such obligations.

## 2.3 Results Were Inconsistent Even Where Good

During the study, every request for information was filed twice: Two different requesters submitted identical requests to the same institutions at different times. Requests were filed twice so the study would yield a picture of how consistent the government bodies would be in their responses. Both statistical and anecdotal evidence revealed poor levels of consistency in all countries monitored, including those countries that showed the best overall compliance with access to information principles. The inconsistent responses reflected a range of problems, including poor training and a lack of internal procedures for processing requests for information. The inconsistent responses also reflected the simple fact that some public servants respected the right to freedom of information while others were less inclined to do so.

Predictable application of the law is a fundamental principle of the rule of law. When exercising their rights, members of the public should not fear or expect arbitrary treatment by officials. Where rights are not absolute, as is the case with the right to information, it is imperative that any restriction be clearly defined by law. For this reason, the great majority of existing access to information laws have relatively detailed provisions on the legal grounds for nondisclosure of information. These provisions, when drafted soundly, enable individuals to predict with reasonable certainty the contours of their right to information under the law.

### Outcome Consistency

This study measured consistency in two ways. First, it assessed whether the paired requests submitted by different requesters resulted in the same outcome. For example, in Macedonia, a request was filed with the office of the mayor of the Municipality of Skopje asking:

*What is the length of the road network which the city of Skopje is responsible for, how much resources are allocated annually for their maintenance, i.e., how much from the city annual budget is spent for this purpose? Please give us these data for the period 2000–2003 for each year separately.*

This request was submitted twice. First, an NGO requester submitted it in written form; later, a business requester submitted it in written form. In the first case, the NGO requester received a detailed answer stating that the Skopje municipality is responsible for 540 km of roads and that the municipality allocates 60 million *denars* annually for road maintenance, which is 10 percent of the municipal annual budget. This data was for the period 2000–2003. The NGO requester was given a contact name if more detailed information was needed. The business requester had her request transferred to the public company responsible for road networks, which provided detailed information on the length of the road network, including data on boulevards, squares, and roads. The business requester was referred back to municipality of Skopje for data related to financial questions. The outcome allocated in the first case is *information received*, and in the second *transferred* (with a note that the information was eventually received in incomplete form).

These two outcomes were inconsistent. The Skopje Municipality clearly handled the same request in two different ways. This example illustrates the benefit of submitting requests more than once. In the first instance, the request resulted in a compliant outcome. The outcome to the second case is not in compliance: the request was transferred elsewhere when we know from the first case that the municipality holds the requested information and could have provided it, so the later transfer is a noncompliant outcome.

If we had only submitted the request once and had received only the second answer, we would have accepted the outcome that another institution had this information and allocated a compliant outcome. Multiple submission of requests is a further test of the institution. Thus, the consistency analysis provides a diagnostic tool for understanding the internal processes of institutions; that is, it isolates the behavior of the institution and shows where it goes off track. The access to information activist can use this information to enter into discussions with the institution as to why the same request was handled differently with the goal of identifying and rectifying weaknesses in internal procedures. Explanations for the inconsistency might include: bias in the treatment of different requesters, different treatment for different types of submission (not relevant in this case), and different handling of requests by different public officers. All of these results might indicate a need for further training. Inconsistency of responses might also result because there is no set of internal guidelines, so the receiving officer decides how to handle requests on an *ad hoc* basis.

Figure 6a: Frequency of Identical Outcomes for Paired Questions

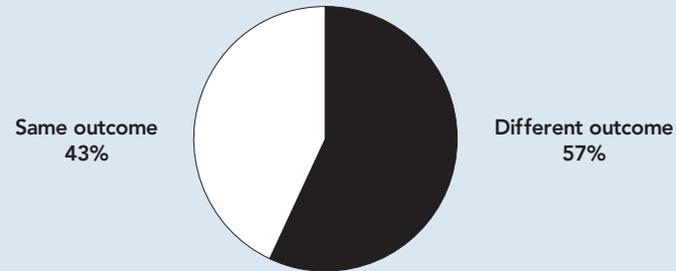
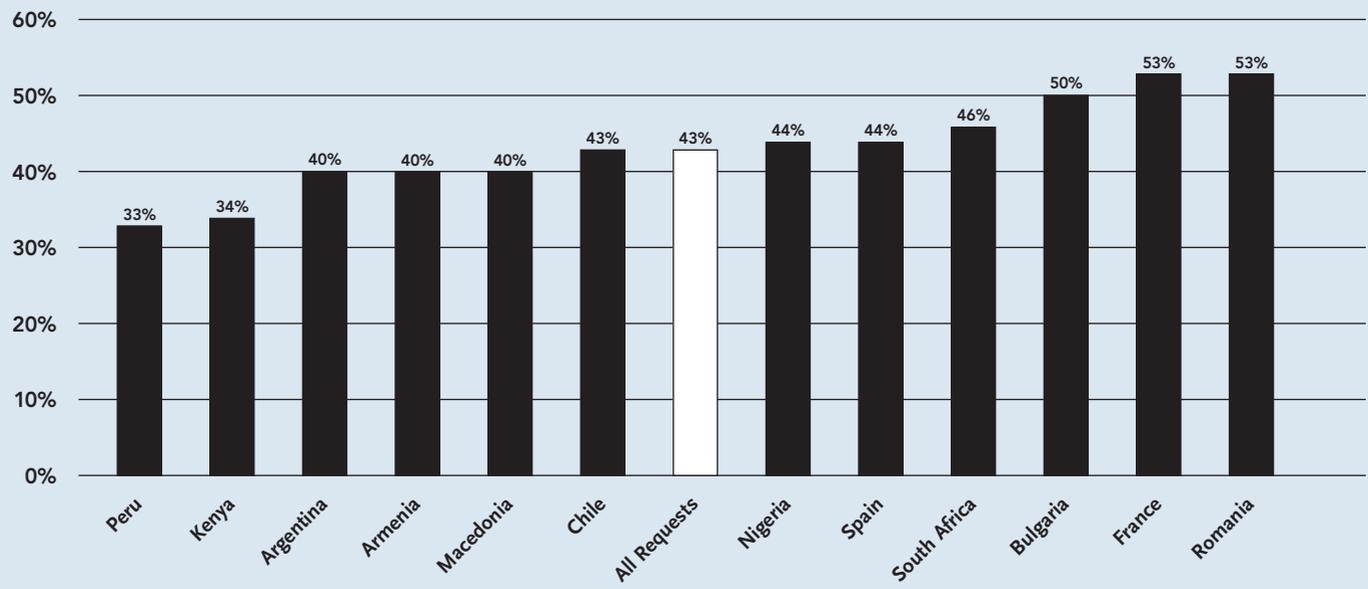


Figure 6b: Frequency of Identical Outcomes for Paired Questions, by Country



Analysis based on data from 12 countries

## Bulgaria: Different Treatment by Requester

In Bulgaria, for example, a business requester made a request to the Municipality of Montana for a list of municipal properties rented, including the amount of the rent but without any names. A detailed answer arrived by post within the 14 day time frame specified by law, putting the number of residential rentals at 205, and other rented lots of land at 117, including 90 buildings. The municipal order used for determining rental prices was also provided. The requester from an excluded group, however, a Roma woman, received a mute refusal to the same request. Although Bulgaria had one of the highest levels of compliance in this study and one of the highest levels of consistency, only 50 percent of the pairs of requests received the same answer.

## Romania: Inconsistent Application of Time frames Established by Law

In this study, late responses were regarded as noncompliant, as government bodies should be expected at least to respond within the timelines set by law. In Romania, for example, both requesters who sought information from the Bucharest Heating Company on

Reasons for the inconsistent handling of requests vary widely by institution and country. Inconsistency, however, is the rule rather than the exception.

- Overall, 57 percent of all paired requests by different requesters resulted in different outcomes for each of the pair, while 43 percent had identical outcomes.
- This high rate of inconsistency was replicated in each country of the study with only minor variations. European administrations were marginally more consistent, at 47 percent; Latin American countries were marginally less so, at 39 percent; and the African countries surveyed scored 41 percent.
- Discrimination played a role in some inconsistent responses to requests. Requesters who were or appeared to be members of an excluded or vulnerable group—that is, members of a racial, ethnic, religious or socio-economic group routinely subjected to discrimination—were generally less likely to receive compliant responses. In Macedonia, for example, 13 pairs of inconsistent responses were received for requests presented by a person from an “excluded group.” Of these 13, the person from the excluded group received a less useful response for 10 requests. For example, an NGO requester received information from the Ministry of Labor and Social Policy on the number of families who received benefits in 2003, including details of the amounts received; the requester from the excluded group received a mute refusal. In three cases both the excluded group requester and the paired requester received similar, noncompliant responses.
- In other cases, differences in treatment of requests depended upon whether the request was submitted orally or in written form. Written requests were more likely to achieve compliant responses. For example, in Bulgaria, there were 14 pairs of written and oral requests that resulted in inconsistent responses. In every one of the 14 pairs, the oral request received a less compliant answer than the written request.
- Sometimes follow up interviews revealed that requests had simply been handled by different officials, sometimes resulting in

significantly different outcomes. For example, one requester received information that the other requester was told the institution did not hold. (See sidebar: Bulgaria: Different Treatment by Requester for examples.)

## Consistency of Compliance

A second method of assessing consistency provides a general measure of the result expected from institutions when the same request is resubmitted by the same requester. This measure looks more broadly at the relative consistency of compliant and noncompliant responses, with a view to assessing the predictability that a request submitted twice to the same institution would yield the same general result. Under this method, three general results are possible for resubmitted requests: (1) the outcomes for both requests are in compliance with the relevant access to information law; (2) the outcomes for both requests are noncompliant; or (3) the outcomes are mixed, where one request achieves a compliant result and the other does not.

This three way classification of the results provides additional insight into the behavior of institutions. Figure 7 shows the number of paired requests that resulted in (1) two compliant outcomes (consistently compliant); (2) two noncompliant outcomes (consistently noncompliant); and (3) a mixed category, with one in compliance and the other not. The data in Figure 7 represent 1,668 requests forming 834 pairs in a 12 country data set. Of these, 169 pairs received compliant outcomes for both requests (20 percent), 395 received noncompliant outcomes for both requests (47 percent), and the remaining 275 pairs received mixed outcomes (33 percent).

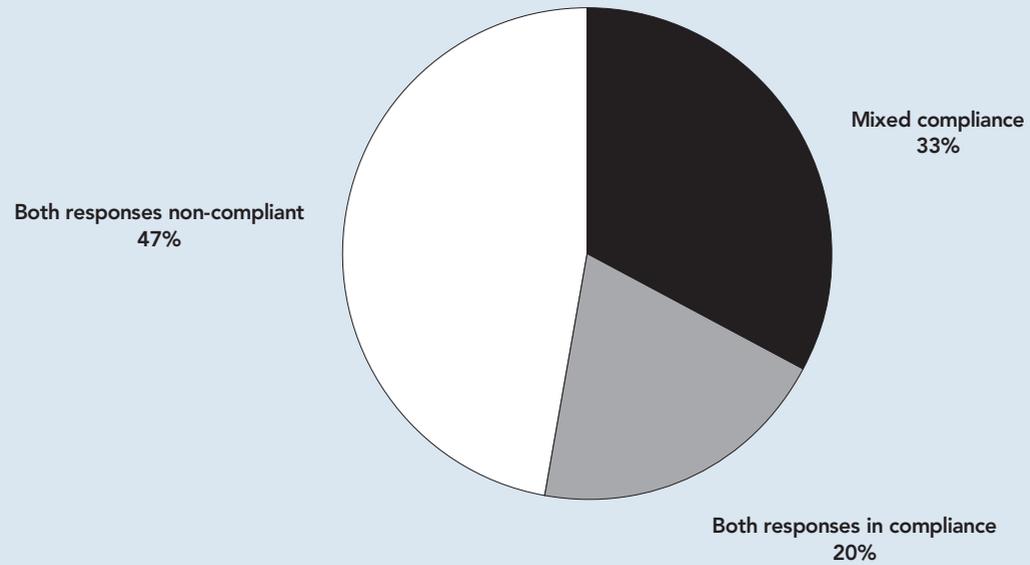
One important finding that emerged from this analysis is that high levels of compliance with access to information laws depends upon consistent procedures in processing requests for information.

the current level of its debtors received the same response: on 31 March 2004, the company had to recover 2,991,309,234 Romanian lei from 7,000 owners' associations and firms. The difference was that the business person requester received this response on time, and the answer to the excluded group requester, a Roma man, received the response eight days after the time frame established by law. Romania's short (10 day)<sup>10</sup> time frame led to a relatively high level of late responses, being 12 percent of all request. Romania's 53 percent consistency level, the highest for any country in the monitoring, still does not inspire confidence in the predictability of gaining a response in accordance with the law: for 47 percent of paired requests, outcomes were inconsistent. Nine percent of these were otherwise consistent and would both have been in compliance but were registered as inconsistent due to responses arriving after the time frame; the remainder were inconsistent for an array of other reasons, some which cannot be identified with certainty by this study. As noted above, consistency is not solely a process issue but also a rule of law and human rights issue.

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**Figure 7: Consistency of Compliant and Noncompliant Responses**

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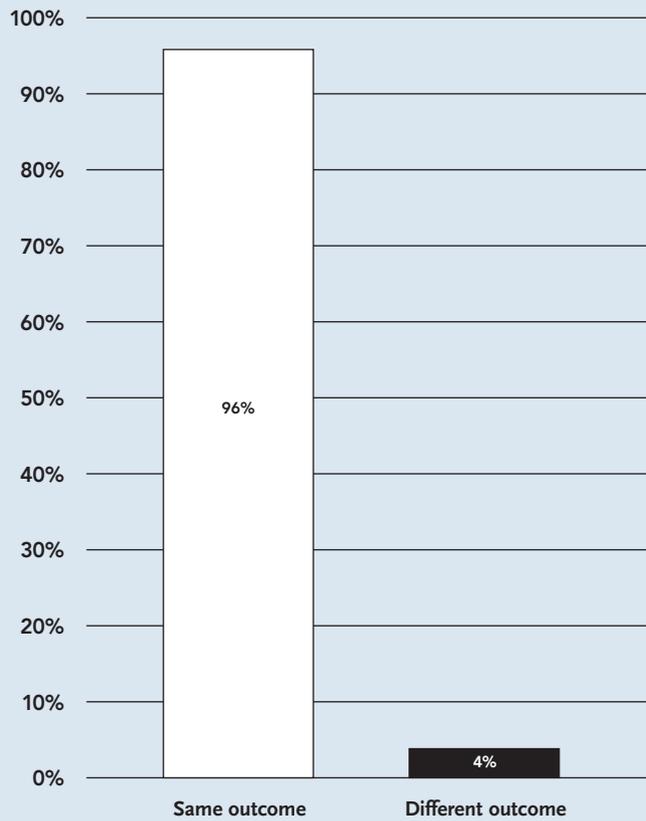


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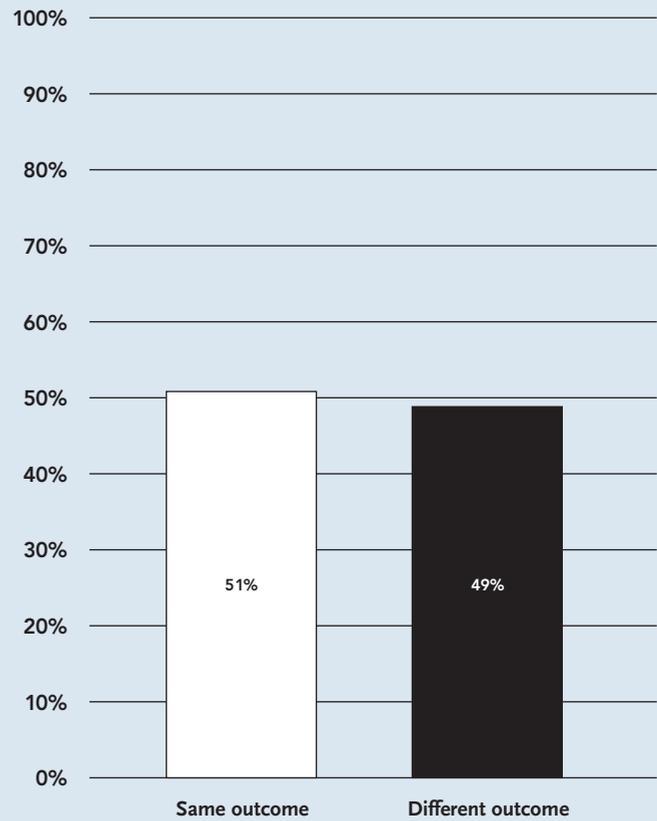
Analysis based on data from 12 countries

Figure 8: Same and Different Outcomes for Compliant and Noncompliant Responses

Compliant pairs (N = 169 pairs)



Compliant pairs (N = 395 pairs)



Analysis based on data from 12 countries

Of 338 pairs that resulted in compliance, a very small portion (four percent) did not have the same final outcome. Thus, where institutions were generally compliant, their compliance was also uniform. In a compliant institution, almost all requests were treated the same way.

Where institutions were consistently noncompliant, the nature of their noncompliance varied. Almost half of paired noncompliant responses received different treatment from the government body. In a noncompliant institution, requests were treated in highly variable ways.

This finding for the whole monitoring is repeated in country by country analyses. Figure 9 shows country levels of (1) both responses compliant, (2) both responses noncompliant, (3) mixed compliant and noncompliant.

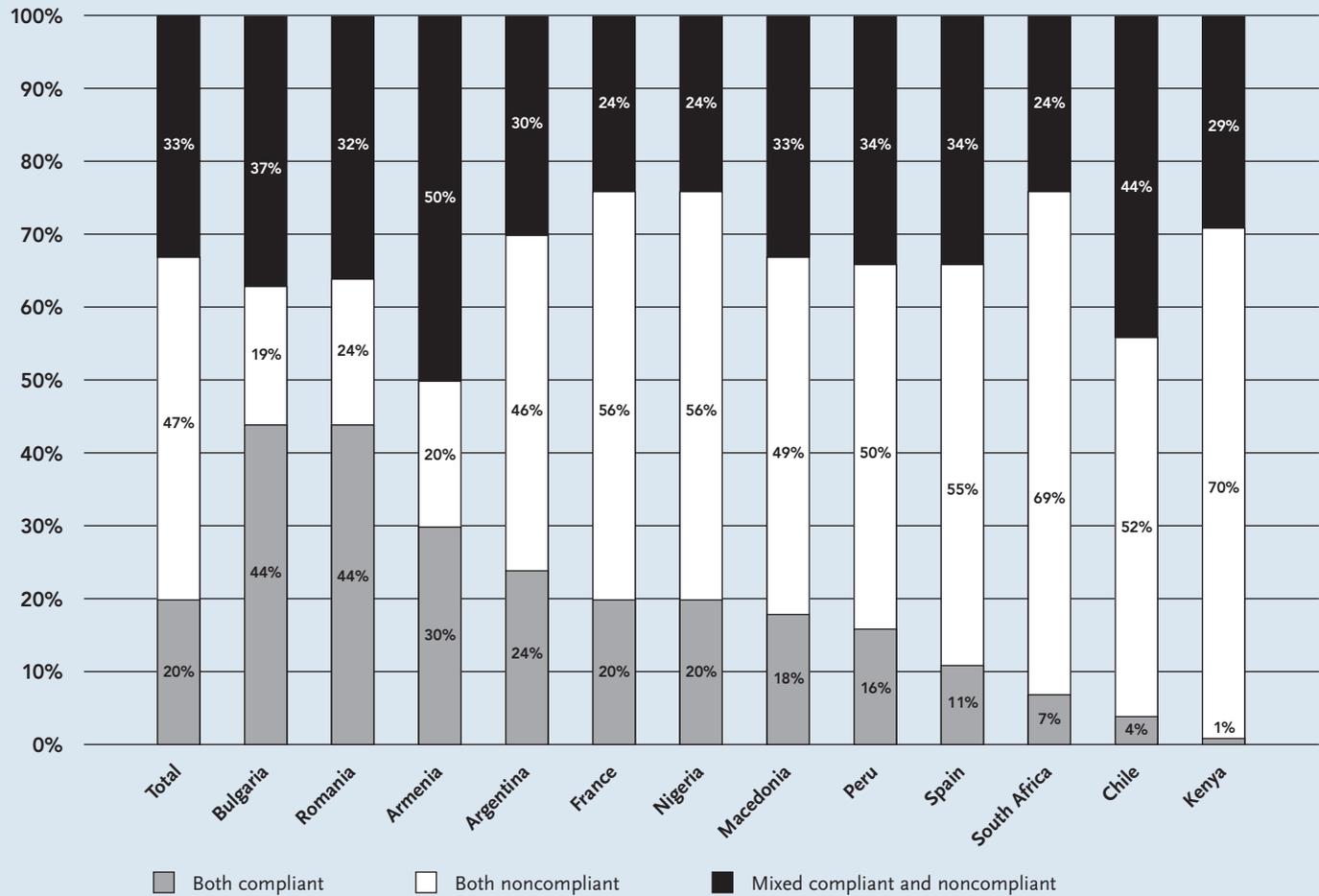
Bulgaria and Romania (44 percent of pairs both compliant) followed by Armenia (30 percent) led in this regard. Bulgaria and Romania, as might be expected of the study's best performers, both scored highest on consistent compliance. These scores indicate that in these countries at least some institutions are applying the law uniformly, although other institutions are treating requests in an unpredictable manner.

In all countries except Bulgaria and Romania, compliant outcomes were more often paired with noncompliant outcomes than with a second compliant outcome. This appears to indicate that procedural rigor is reasonably widespread in just two of the 12 monitored countries for which results are available: Bulgaria and Romania. In all but three countries, fewer than 25 percent of paired questions submitted by the same requester both resulted in compliance. In three countries (Chile, Kenya, and South Africa), the figure is less than 10 percent.

Many countries were consistently noncompliant. More than half of paired requests from the same requester resulted in two noncompliant responses in France (56 percent), Kenya (70 percent), Nigeria (56 percent), Peru (50 percent), South Africa (69 percent), and Spain (55 percent). In any of these countries, if a first request is ignored, a second filing by the same requester was likely to receive similar treatment.

In two countries, high levels of paired questions resulted in a confused mix of compliant and noncompliant responses: Armenia (50 percent) and Chile (44 percent). This likely indicates a lack of procedural clarity or uniformity on the right to know: one receives information or a written refusal, a second receives a mute refusal, oral refusal, or other noncompliant response. In Chile, this result is unsurprising: existing provisions are unclear and contradictory about appropriate deadlines, for example.

Figure 9: Compliance and Consistency by Country



Analysis based on all requests, adjusted data for Ghana and Mexico

## Recommendation:

- Public bodies should respond to requests for information in a consistent manner. They can achieve this by training public officials other relevant personnel and by establishing transparent, internal systems and procedures for processing requests for information. Such systems and procedures might include assigning responsible officials to manage responses to information requests and introducing a tracking system for such requests.

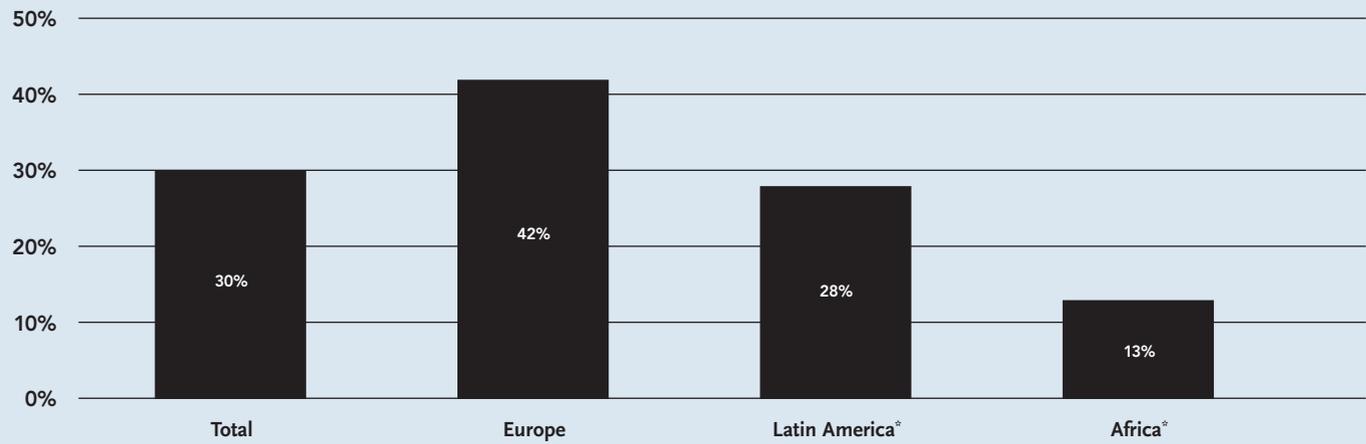
## 2.4 The Spread of FOI Laws

The results of the 2004 study indicated that there are regional variations in the degree to which government bodies comply with access to information laws and principles. Government bodies in the European countries examined during the study responded to a higher percentage of requests for information than government bodies in the Latin American countries; and government bodies in the Latin American countries responded to a higher percentage of requests for information than government bodies in the African countries. These results reflect the fact that development of an actionable right of access to information began at different times in Europe, Latin America, and Africa and progressed in successive waves.

Taken together, the six European countries tested showed an above average compliance rate, with 42 percent of requests resulting in government responses consistent with access to information laws and principles. Four of the countries have access to information provisions on the books.

The four Latin American countries studied—all of which have access to information laws in some form: Mexico and Peru have dedicated laws, and Argentina and Chile have more limited access to information provisions—scored near the average, with 28 percent of the responses to requests compliant with FOI laws and principles.

Figure 10: Ranking of Compliance by Geographic Region



\* includes adjusted data for Ghana/Mexico

Analysis based on data from 14 countries, all requests

The African countries studied scored well below the average, with only 13 percent of requests yielding responses in compliance with access to information standards. Three of the four African countries monitored did not have an FOI regime in place at the time of monitoring.

## The Development of Access to Information Standards

The very first access to government information provisions were adopted as early as 1766 by Sweden as part of the freedom of the press act which granted a right to access official documents. Finland adopted an access to information law in 1951. The United States set many of today's freedom of information standards with the enactment in 1966 of the U.S. Freedom of Information Act (FOIA).<sup>11</sup> The FOIA was amended in 1974, after the Watergate scandal, to force greater agency compliance and again in 1996 to introduce greater access to electronic information.<sup>12</sup> The FOIA is narrow in that it allows only access to "records," which should be identified by the requester, and does not cover some branches of government, including the legislative branch (Congress), the federal courts, or those parts of the executive branch, or administration, that serve the president.

During the 1970s and 1980s, European states adopted a number of laws on access to official documents. Norway passed its law in 1970<sup>13</sup>; and France and The Netherlands passed similar laws in 1978.<sup>14</sup> These laws codified administrative procedures for providing information to the public and focused on administrative bodies, rather than executive, legislative, or judicial bodies. In 1999, SIGMA, a joint EU-OECD body, adopted a set of principles for public administration, which include reliability, predictability, accountability, transparency, managerial competence, organizational capacity, and citizen participation in government.<sup>15</sup>

Democracies in other parts of the world also adopted access to information laws, including Australia and New Zealand in 1982 and Canada in 1983.<sup>16</sup> These laws offer valuable models for future access to information laws. For example, the laws in Australia and Canada provide for the establishment of oversight officers or bodies, such as an information commissioner or ombudsman office, both at the national and state levels. Other European countries adopted laws during the late 1980s and early 1990s, including Austria, Belgium, Denmark, and Portugal<sup>17</sup>; and Italy and Spain adopted administrative provisions<sup>18</sup>. These early laws provide a right of access to official *documents*—i.e., those formally created by the administration as part of its functions—although some of these laws make broader references to information as well. Significantly, these laws enshrine

one of the core principles of the emerging right of access to information: that requesters do not need to justify their interest in the information sought (an exception to the rule is the Italian law which does require that legal interest be demonstrated). Rather, any member of the public may request any information held by public bodies as an inherent part of holding governments accountable on an ongoing basis.

### **Eastern Europe: Opening Previously Closed Societies**

Following the seismic political shift that took place with the fall of the Berlin Wall in 1989, Hungary became the first post Communist country to adopt an access to public information law in 1992.<sup>19</sup> The law provided a model for the other countries of Eastern Europe. For example, it included a reasonable, 15 day time frame for receiving information, explicitly defined exemptions, and established an oversight mechanism, the Parliamentary Data Protection and Freedom of Information Commissioner, who must be notified of refusals to provide information. Further impetus was given to the access to information movement at the European level by the success of environmental activists in securing adoption of the Aarhus Convention, which links access to environmental information to citizen participation in government.<sup>20</sup> Throughout the 1990s, the post Communist leaderships of Eastern Europe—who were responding to demands from civil society that they honor their commitments to open government by enshrining them in law and who were motivated by the desire to join the Council of Europe and the European Union—adopted access to information laws across the region: in the Baltics (Lithuania 1996, Latvia 1998, Estonia 2000), Central Europe (Czech Republic 1999, Slovakia 2000), and South Eastern Europe (Bulgaria 2000, Romania 2001).<sup>21</sup> In 2000, the international community required Bosnia and Herzegovina to adopt an access to information law incorporating the emerging standards. By 2004, 18 post Communist countries, six more countries in Western Europe, as well as Japan (1999) and South Africa (2000) had adopted access to information laws.<sup>22</sup>

The newer access to information laws captured the lessons learned during implementation of earlier transparency laws and reflected developing standards. The scope of the newer laws became broader—for example, Bosnia’s law covers all branches of government and all bodies performing public functions<sup>23</sup> and Slovakia’s law covers bodies receiving public funds.<sup>24</sup> Stipulated time frames for information delivery gradually became shorter, dropping from one month in France and two weeks in the Netherlands to as little as five days in Estonia.<sup>25</sup> More recent laws often provide for greater specificity on mechanisms for accessing information,<sup>26</sup> application of exemp-

tions, and use of harm and public interest tests for assessing the necessity of withholding information from the public.

In February 2002, the Council of Europe adopted the first text from an international human rights body setting out minimum standards on access to information: the Recommendation on Access to Official Documents, Recommendation 2002(2) of the Committee of Ministers. The Recommendation defines “official documents” as “all information recorded in any form, drawn up or received and held by public authorities and linked to any public or administrative function, with the exception of documents under preparation,” which is a broad definition in line with the scope of the newer generation of “access to information” laws. In May 2005, the Council of Europe mandated a working group to review the possibility of enshrining the right of access to information in a binding treaty.<sup>27</sup>

### **Latin America:**

#### **Transparency as a Benchmark of Transitions to Democracy**

In Latin America and the Caribbean, the development of access to information laws is a more recent phenomenon. Colombia was the first country to adopt a dedicated access to government held information law in 1985.<sup>28</sup> Three Caribbean Commonwealth countries followed: Belize in 1994, Trinidad and Tobago in 1999, and Jamaica in 2002. The adoption of access to information laws in Mexico and Peru in 2002 marked a new wave of democratic reforms prompted by civil society activity focused on promoting greater government transparency across the region. The movement for transparency in Latin America developed as much in response to corruption in the 1990s as to human rights violations in earlier years.<sup>29</sup>

### **Africa: Aspiring to New Standards of Openness**

South Africa was the only African country to have an access to information law in mid 2004, the time the monitoring was conducted. South Africa’s law was rooted in the movement away from apartheid and toward the new Constitution of 11 October 1996. Article 32(1) established the right of access to: (a) any information held by the state; and (b) any information that is held by another person and that is required for the exercise and protection of any rights. Article 32(2) requires that “[n]ational legislation be enacted to give effect to this right.” South Africa adopted the Promotion of Access to Information Act on 2 February 2000.

With access to information now a clearly developed benchmark of democracy, and with African human rights activists and the international donor community emphasizing the need to combat corruption and create more transparent governments, there has been a flurry of interest in freedom of information laws across Africa in recent years. Uganda adopted its Freedom of Information Act in April 2005. As of September 2006, Ghana and Nigeria are both close to adopting similar laws.<sup>30</sup>

By late 2005, at least 65 countries around the world had access to information provisions on their books. More than 45 of those laws establish the right to all government held information rather than the narrower right to official documents.

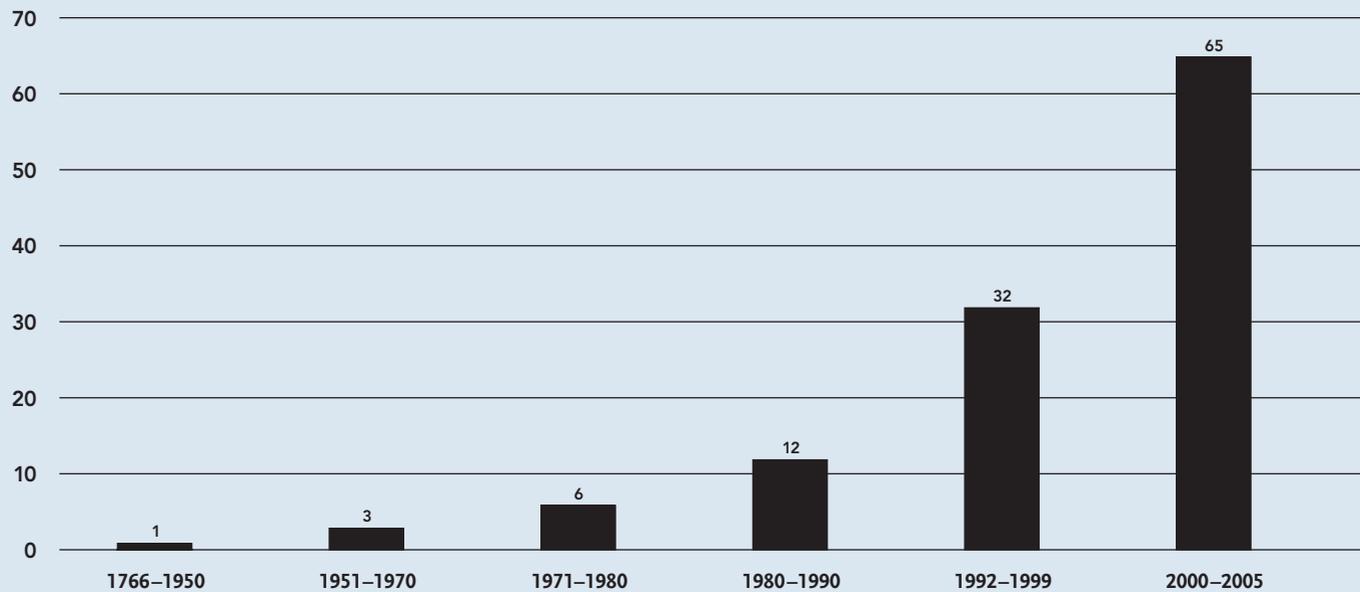
Countries in the “new democracies” with recently passed access to information laws—Armenia, Bulgaria, and Romania—performed better in the study than France, which has had a dedicated access to official documents law since 1978; Spain, which has limited access provisions; and Macedonia, which had no such legislation at the time of the study.<sup>31</sup>

As in other regions, the study found that the Latin American countries with full freedom of information laws, Mexico and Peru, performed better than the countries with incomplete legal provisions, Argentina and Chile. Nonetheless, Mexico and Peru performed less well than the newer democracies of Eastern Europe, which may be explained in part by the fact that their laws were adopted more recently.

In Argentina and Mexico, different laws and regulations apply to federal and local governments respectively, and so two different FOI regimes were monitored.<sup>32</sup> Requesters in Buenos Aires received more information than those elsewhere in Argentina; 22 percent of requests filed with the Buenos Aires institutions resulted in information but only seven percent of requests filed with the central government. Similarly, in Mexico, the central government provided information in response to 25 percent of all requests, but the Mexico City government provided information in response to just 17 percent of all requests. Moreover, 11 percent of the requests submitted to federal institutions yielded mute refusals, while 56 percent of the requests submitted to Mexico City institutions yielded mute refusals.

South Africa, the only monitored country in Africa with a freedom of information law in place, demonstrated greater compliance with the right to information than the other four African countries. However, only 19 percent of the requests submitted in South Africa yielded a compliant outcome and only 13 percent yielded information. This is by far the lowest score of the seven monitored countries with freedom of information laws.

Figure 11: Cumulative Number of Access to Information Laws over Time



Justice Initiative monitoring exercises in both 2003 and 2004 highlighted serious problems with the implementation of South Africa's Promotion of Access to Information Act (Act No. 2 of 2 February 2000), and these problems resulted in high levels of mute refusals in response to requests. Although the law is strong on paper, it has proved complex to implement in practice, and there have not been sufficient efforts to make its implementation a priority. Better implementation may yet make it a model for the region.

Nigeria has had a long running campaign to adopt an access to information law, and this campaign was underway well before the monitoring period began. Only seven percent of requests submitted in Nigeria yielded compliant responses, however, and just two out of the 140 requests yielded the information sought. These results establish a clear baseline for strengthening the right to information in Nigeria.

Adoption of draft freedom of information laws now in the pipeline may improve the low compliance rate of other countries in the monitoring, but only if governments undertake serious efforts to ensure full implementation of these laws once they are adopted.

## Recommendations:

- Access to information laws and regulations should state that public bodies may exempt certain information from disclosure only in instances where releasing the information would harm a protected interest not overridden by a public interest. Access to information training at public bodies should make clear to all relevant officers that, in questions of the right to information, there is a presumption of openness.
- Access to information laws and regulations should require that all refusals to provide information be made in writing to the persons who requested the information in question; that such refusals state the grounds for nondisclosure, including the reasons these grounds apply to the information in question; and that such refusals explain the procedures for appeal of the decision. Access to information laws should also require government bodies and bodies performing public

functions to notify the information commissioner or similar oversight body of each and every instance when public bodies refuse requests for information.

- Access to information training at public bodies should include instruction in the partial release, or “severing” of documents, to ensure that nonharmful information in classified documents can enter into the public domain.
- Access to information laws should require the designation of information officers with the authority to release information both proactively and in response to requests. Information requests should only be denied, however, after a transparent internal review process that includes senior officials to ensure that exemptions have been properly applied.
- The national legislature, an information commission or commissioner, or other monitoring bodies or officials charged with overseeing implementation of access to information laws should, in a timely manner, review the issuance, by public bodies and bodies performing public functions, of written refusals for requests for information to ensure that exemptions are being applied appropriately and that denials of requests are not being based upon inappropriate fees, demands to clarify requests, inquiries as to why the information is being requested, etc.

## 2.5 Responsiveness Improves through NGO Involvement

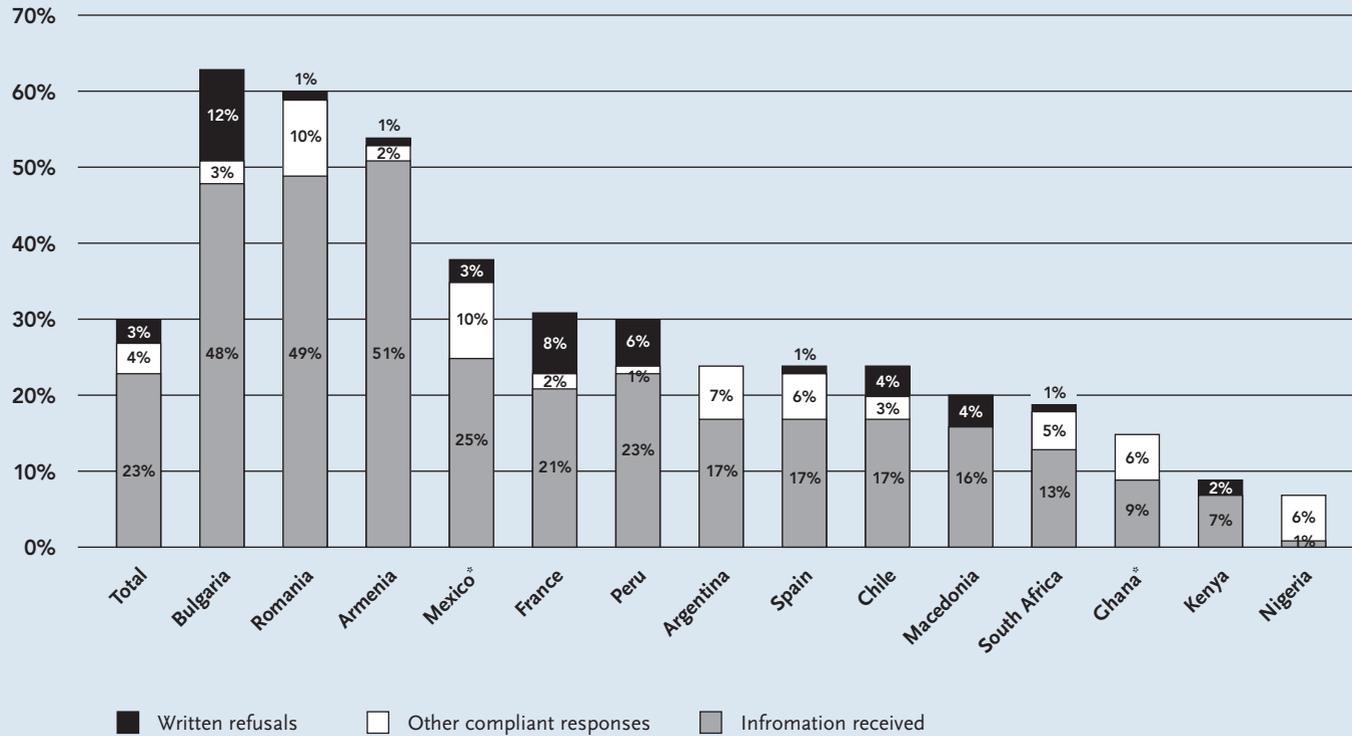
The study gave strong indication that, when NGOs and government leaders actively promote and support implementation of access to information laws and principles, the response rate by government bodies to requests for information was higher.

Although Justice Initiative partners in Bulgaria, Romania, and Armenia frequently raise concerns about the fragility of freedom of information in their respective countries and note that civil servants often display little genuine commitment to transparency, a surprising finding of the present study was how well those newer democracies scored in comparison with the two more mature democracies studied, France and Spain. Several factors appear to underlie the higher scores of Bulgaria, Romania, and Armenia attained in responding to information requests. For Bulgaria and Romania, the EU integration process galvanized political leaders, government officials, and NGO activists to make access to information a priority. In these two Eastern European countries and in Armenia, active civil society groups have also pushed aggressively for government transparency, and this is at least partially in reaction these countries' totalitarian past. In Mexico, the government of President Vicente Fox made a concerted effort to promote freedom of information, which appears to have had a positive effect on implementation of the country's access to information laws. (Bulgaria and Mexico are discussed below.)

The comparatively lower results of France may not be representative of problems in implementation of access to information laws mature democracies in general. But examination of France's access to documents regime and interviews conducted before and after the present study indicate that there is a relatively low level of awareness of the country's legal provisions among journalists and NGO activists, two critical groups that could bring attention to government transparency issues. The study also found an apparent lack of funding and an inadequate legal mandate for France's information commission, which could potentially undertake awareness raising activities both inside the government and before the general public. (France's access to information monitoring body is discussed below.)

Requests for information made in countries that were in transition to democratic governance yielded information more frequently of the time than requests for information made in the two mature democracies. The study found that requests for information from government bodies yielded more frequent and better quality responses in Armenia, Bulgaria, Peru, Mexico, and Romania than its requests for information in France or Spain. As shown in Figure 12, France with 31 percent compliance and Spain with 24 percent compliance place below these other countries whose results range from 38 to 63 percent.

Figure 12: Compliance as a Percentage of Total Requests Filed, by Country



\* adjusted data for Ghana and Mexico

Analysis based on data from 14 countries, all requests

The study does not conclude, however, that the governments of France and Spain are less transparent overall or that they make less information available to the public. Information is made available in other ways: in France, for example, much information is available in published reports and on government websites and some of the information requested was already publicly available from other sources. However, French officials did not respond to information requests filed in this study according to the procedures laid down by law. In total, 69 percent of requests in France met with noncompliant outcomes, of which 51 percent were mute refusals.

The countries that produced the highest response rates to requests for information during the study were those where civil society movements have been active in promoting the adoption and subsequent implementation of national freedom of information laws. These include Armenia, Bulgaria, Mexico, Peru, and Romania. In these countries, NGOs have submitted numerous requests for information from the government, undertaken strategic litigation in response to refusals by the government to release requested information, and engaged in media advocacy on access to information cases involving corruption and governance issues.

Likewise, countries where the national government has taken steps to promote access to information fared better. This is particularly the case in Mexico, where government sponsored campaigns promoting freedom of information, clearly defined procedures for handling requests, and a state supported Federal Access to Information Institute have contributed to installing a functioning access to information regime relatively soon after its access to information law was adopted.

## **Bulgaria: Civil Society Promotion of Access to Information**

In Bulgaria, an exceptionally active civil society organization, the Access to Information Programme (AIP), has been promoting access to information since 1996. AIP carries out a range of activities that are ordinarily conducted by information commissioners or ombudsman offices. AIP conducts training workshops (for 200–300 civil servants each year); publishes handbooks and annual reports; assists the administration in elaborating internal rules and systems for transparency; and makes policy recommendations. Additionally, AIP undertakes public interest litigation challenging refusals and targeting overly broad application of exemptions.<sup>33</sup> Public awareness has been raised through

AIP's training of NGOs, and good media coverage: Bulgaria even has a weekly FM radio show dedicated to access to information. Bulgaria's political leadership has promoted anticorruption and transparency policies as part of the drive for EU integration, although no specific policy measures to promote access to information have been taken since the Access to Public Information Act was adopted in 2000, leaving the initiative to civil society to promote the law. Individual government bodies have, however, introduced systems for handling requests and have been welcoming of AIP's training and technical assistance. Nevertheless, AIP's annual report for 2004 notes, "[h]owever beneficial our work can be, it cannot fully replace oversight institutions [established by law], whose decisions are mandatory for the administration."<sup>34</sup>

## **Mexico: Government Promotion of Access to Information**

In Mexico, the government of President Vicente Fox made a serious commitment to access to information by pressing for the adoption of the Federal Law on Transparency and Access to Information (LFTAI) in 2002. This law opened up Mexico's historical archives to public scrutiny and established an information commission, the Instituto Federal de Acceso a la Información (IFAI). The IFAI's annual budget of about U.S. \$22 million (240 billion Mexican pesos) compares with that of the Information Commissioner's Office in the United Kingdom (£10,578,447, or about \$19 million, in 2003/04) and significantly exceeds that of any other similar body globally. The IFAI has five commissioners, and a support staff of 178, far more than comparable bodies elsewhere. The IFAI has worked with government officials and civil society to activate Mexico's access to information legislation. It has also developed a one stop web portal for filing requests for information with federal bodies and for learning how the law is working in practice. It produces a weekly radio program on transparency issues, which is available on the Internet and on AM stations.

It should be noted that in addition to the IFAI, which only covers federal executive agencies, the LFTAI establishes other oversight bodies within the bodies not supervised by the IFAI, including the legislature and autonomous bodies such as the National Human Rights Commission and the Federal Electoral Institute. They have smaller budgets but a similar scope of responsibilities; many of these other institutions have also developed their own systems for accepting requests filed via the Internet.

## France: Lack of Awareness, Relatively Low Results

In France, the Law on Free Access to Administrative Documents (Law No. 78-753 of 17 July 1978) enables citizens to exercise a constitutional right to be informed of how tax money is spent and to hold the administration accountable.<sup>35</sup> This law provides for access to government documents and has a broad definition of the kinds of documents held by the administrative departments of the French government for which access is allowed. The law, however, exempts other branches and organs of the French state, including the parliamentary assemblies, State Audit Office and Conseil d'État, from providing access to documents. This law makes standard exemptions to disclosure of documents and information that would jeopardize national security, impinge upon the conduct of foreign policy, infringe upon privacy, and reveal “secrets protected by law,” but does not establish a public interest test that could result in the release of otherwise classified information where its disclosure would serve a public good. A requester need not show any reason why he or she is requesting the document. The requested document can be inspected free of charge *in situ*; and a copy can be provided at the requester's expense. The law does not specify procedures for handling requests, nor does it define time frames for the government entity to comply with requests.

A nine member oversight body, the Commission on Access to Administrative Documents (CADA), supported by 10 rapporteurs and a nine person secretariat, meets fortnightly to review complaints.<sup>36</sup> The CADA has no enforcement powers, but notes that its opinions are accepted in most cases and that 20 percent of all complaints result in release of information even before the CADA has ruled on them. In 2004, the CADA ruled in favor of release of information for 48 percent of the 5,467 complaints it received; it ruled against release of information in 10 percent of the complaints; and it found that the remainder of the complaints were either inadmissible or referred to requests for documents that did not exist.<sup>37</sup> There is a right to appeal the CADA decisions to an administrative court; but of the 40,000 or so complaints to the CADA since its inception in 1979, fewer than 1,000 have gone on to further appeal.<sup>38</sup> The CADA notes that many complaints do not stem from outright refusals to provide information but rather from “inertia” by public bodies which seem reluctant to release information unless the CADA gives a green light.<sup>39</sup> The CADA notes that staff shortages also play a role in lack of responsiveness, and that for many public bodies “the time frame of one month for responding to a request proves insufficient, all the more so if the body needs to deal with what it considers to be more pressing tasks.”<sup>40</sup> In this study however, we did not

find time frames to be a specific problem in France: most responses to the information requests filed either came within a few days or not at all.

Lack of awareness of the law and lack of civil society demand do, however, seem to be problems. In contrast with recently established bodies, such as Mexico's IFAI or the United Kingdom's Information Commissioner's Office, the CADA has historically had a limited mandate and has not been charged with promoting the right of access to information. While conducting interviews before and during the study, the Justice Initiative and its partner in France, Réseau Intermedia, found that civil society representatives, journalists, and public officials had a low awareness of the existence of France's access to documents law and its relatively poor implementation in practice. In interviews for this study, the CADA staff noted the monitoring body has neither sufficient resources nor a mandate to engage in educational work on the law or in efforts to raise public awareness.<sup>41</sup>

## Notes

1. Ruling No. 8645/16 of November 2001 on Administrative Case No. 6393/01.
2. Judgment No. 266/31 March 2003 on Administrative case No. 10261/2002. See *Access to Information Litigation in Bulgaria, Volume 2*, Sofia: Access to Information Programme (2004).
3. South Africa's PAIA Section 26, sub-section (1).
4. South Africa's PAIA Section 26, sub-section (2).
5. Petition submitted by the Inter-American Commission on Human Rights to the Inter-American Court of Human Rights in the Case of *Claude Reyes et al v. Chile* (No. 12.108), 8 July 2005, paras 89–90.
6. The Commission, in making this point, quoted from the *amicus curiae* brief submitted to the Commission by the Open Society Justice Initiative; ARTICLE 19, *Global Campaign for Freedom of Expression; Libertad de Información Mexico (LIMAC); and the Instituto Prensa y Sociedad (IPYS)*, 24 February 2005.
7. Chile's Ley 19.653 with Spanish title: "Ley sobre Probidad Administrativa de los Órganos de la Administración del Estado" of 14 December 1999, which in turn is linked to Law 18.575, the Administrative Code.
8. Chile's Law 19.880 with Spanish title: "Establece Bases de los Procedimientos Administrativos que Rigen los Actos de los Organos de la Administración del Estado" of 29 May 2003.
9. The duty to collect information lies outside the scope of this study. Although the current study only address the right of *access* to information, the Justice Initiative encourages governments to adopt laws and regulations requiring bodies to collect information that is central to their functions.
10. For a fuller discussion of time frames in Romania, please see Section 4.3. The Romanian law does not specify if the days are working or calendar days, so under the Code of Civil Procedure, a total of 10 calendar days is available for responses, discounting the first and last days, which yields 12 calendar days or about eight to 10 working days. For the purposes of this monitoring, 10 working days were allocated and only responses received after that period were recorded as late.
11. Section 552 of title 5 of the United States Code, as amended in 1970, in 1996 (Electronic Freedom of Information Act) and most recently in 2002.
12. See National Security Archive, "The Freedom of Information Act on its 38th Birthday", 4 July 2004, at <http://www.gwu.edu/~nsarchiv/news/20040704/>.
13. Norway's Act of 19 June 1970 No. 69 Relating to Public Access to Documents in the Public Administration, as subsequently amended, most recently by Act of 10 January 1997 No. 7.
14. Netherlands: Containing Regulations Governing Public Access to Government Information Act of 31 October 1991.
15. *European Principles for Public Administration*, Sigma Paper 27, p5, published by Support for Improvement in Government and Management (SIGMA), a joint initiative of the European Union (EU) and the Organization for Economic Co-operation and Development (OECD), CCNM/SIGMA/PUMA(99)44/REV1.
16. Australia: Freedom of Information Act (1982), New Zealand: The Official Information Act (1982) and Canada: Access to Information Act (1985).
17. Austria: Bundesgesetz über die Auskunftspflicht der Verwaltung des Bundes und eine Änderung des undesministeriengesetzes (1986), Belgium: Loi relative à la publicité de l'administration (1994); Denmark: Act No. 572 on Access to Public Administration Files (1985 as modified 2000); Portugal: Law on Access to Administrative Docuemnts (1993 as modified 1999).

18. Italy: Administrative law Law No. 241 of 7 August 1990, Chapter V Access to administrative documents; Spain: Law 30/1992 of 26 November 1992 on the legal framework for public administration and general administrative process.
19. Act LXIII on the Protection of Personal Data and the Publicity of Data of Public Interest (1992).
20. United Nations Environmental Commission for Europe Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters of 25 June 1998.
21. Lithuania: Law on Provision of Information to the Public (1996 amended 2000); Latvia: Freedom of Information Law (1998); Estonia: Public Information Act (2000); Czech Republic: Law on Free Access to Information (1999); Slovakia: Act on Free Access to Information (2000); Bulgaria: Access to Public Information Act (2000); Romania: Law 544 Regarding the Free Access to Information of Public Interest (2001).
22. Japan: Law Concerning Access to Documents Held by Administrative Organs (1999).
23. Freedom of Access to Information Act for Bosnia and Herzegovina, Official Gazette, No. 28/2000, 17 November 2000, Article 3, "Definitions."
24. Slovakia: Act on Free Access to Information (2000).
25. Public Information Act of 15 November 2000 (RTI I 2000, 92, 597), entered into force 1 January 2001, Article 18(1): "A request for information shall be complied with promptly, but not later than within five working days."
26. See, for example, Bulgaria's law Public Access to Information Act (2000), Article 24(1): "The request for granting access to public information shall be made in the form of a written application or verbal request."
27. Terms of reference of the Council of Europe's Steering Committee of Human Rights (CDDH) with a view to drafting a legally binding instrument on access to official documents, adopted by the CDDH at its 60th meeting (14–17 June 2005) on the basis of the *ad hoc* terms of reference adopted by the ministers' deputies at their 925th meeting (3–4 May 2005).
28. Law on Publicity of Official Acts and Documents (Law 57 of 5 July 1985). Colombia has a long history of legislation recognizing access to information, since the 1888 Political and Municipal Organization Code provided for the right of individuals to request documents held by government bodies or archives. See Toby Mendel, *Libertad de Información: Derecho Protegido Internacionalmente*, in UNAM University, "Derecho Comparado de la Información," No. 1. January-June 2003, Mexico City, Mexico.
29. See, for example, the Justice Initiative report, *Freedom of Information and Expression: Advocacy and Litigation Strategies for Latin America, Report of a Meeting Held in Buenos Aires Argentina, 18–19 March 2004*, available at: <http://www.justiceinitiative.org>.
30. As of September 2006, Nigeria's Freedom of Information Bill was pending before the Senate and Ghana's Freedom of Information Bill was undergoing cabinet review. Angola's Access to Information Law (2004) is not included here as it has never been implemented. Zimbabwe's Access to Information and Privacy Act (2002) combines state secrets and press regulation rather than promoting transparency.
31. The Macedonian Law on Free Access to Information of Public Character was adopted on 1 March 2006 and entered into force on 1 September 2006.
32. In Mexico, the Federal Transparency and Access to Public Information Law (2002), and the Federal District (Mexico City) Transparency and Access to Public Information Law (2003). In Argentina, the Argentine Decree on Access to Public Information (2003) and the City of Buenos Aires Access to Information Statute (1998).
33. See AIP's website: [www.aip-bg.org](http://www.aip-bg.org).
34. Access to Information Programme, *Access to Information in Bulgaria*, Sofia: AIP (2005), 5.

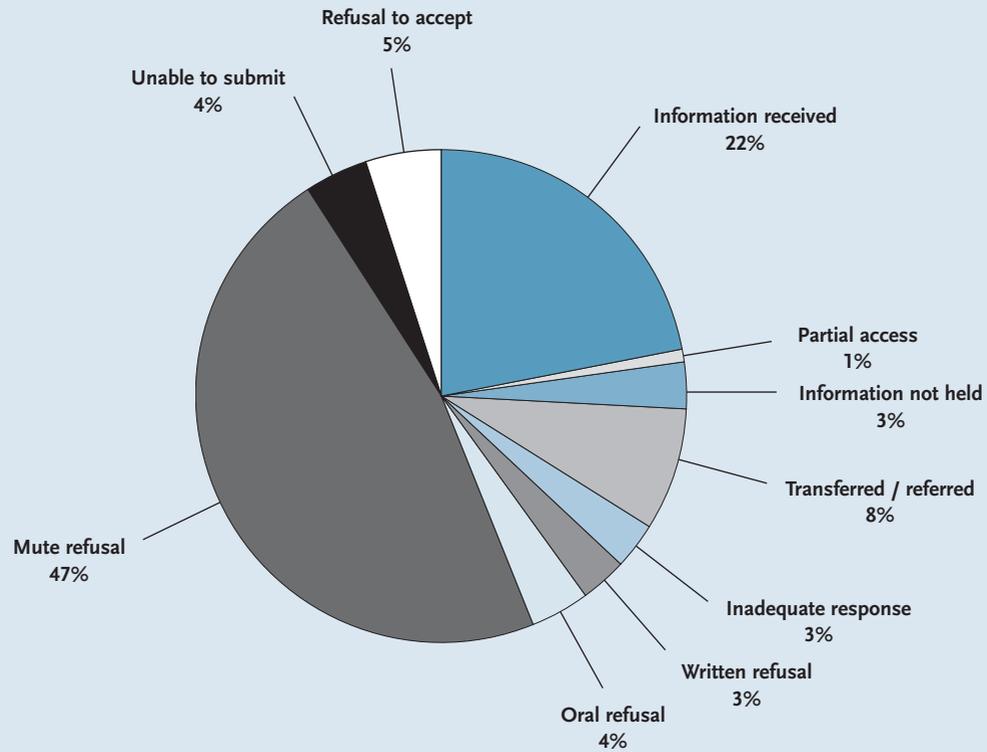
35. The Constitution of the French Republic of 4 October 1958, which incorporates the 1789 Declaration of Rights of Man and of the Citizen, Article 14 of which provides that “All citizens have the right to ascertain, by themselves, or through their representatives, the need for a public tax, to consent to it freely, to watch over its use, and to determine its proportion, basis, collection and duration,” and Article 15 of which provides that “Society has the right to ask a public official for an accounting of his administration.”
36. The CADA reports annually on the time frame in which it processes appeals, which normally exceeds the one-month limit established by law, and in 2004 reached an average of 46 days; a lack of resources was the reason given in the 2004 Annual Report, echoing concerns expressed since its earliest reports in the 1980s.
37. CADA Annual Report for 2004, <http://www.cada.fr/fr/rapport/rapport2004.pdf>, p.3.
38. Public presentation by Michèle Puybasset, President, Commission on Access to Administrative Documents, at 3rd International Information Commissioners’ Conference, Cancun, Mexico, 21 February 2005.
39. CADA Annual Report for 2004, p.15.
40. CADA Annual Report for 2004, p.15.
41. Meeting of the Justice Initiative and Réseau Intermedia with the CADA staff, Paris, 25 September 2004.

# 3. Findings by Type of Outcome and Legal Analysis

In the course of the monitoring study, a total of 1,926 requests were submitted in 14 countries. Each request was tracked, and ultimately allocated one of the 10 possible outcomes outlined in the introduction. The overall results were as follows:

- Mute refusals (administrative silence) were the most common outcome, representing nearly half of total requests (47 percent).
- Refusals were relatively rare, with oral and written refusals together totaling only seven percent of responses to requests.
- The provision of full information in response to a request occurred in just under one in four (22 percent) of cases.
- Requesters were unable to submit their requests at all in nine percent of cases.
- Requests were redirected to other government bodies (either transferred internally or the requester was referred elsewhere) in eight percent of cases.

Figure 13: Responses to 1,926 Requests in 14 Countries, by Type of Outcome



Analysis based on data from 14 countries, all requests  
This Figure also appears as Figure 1 in Chapter Two

In the following section, outcomes are reviewed in the sequential order in which a requester is likely to confront them: Unable to Submit and Refusal to Accept; Oral Refusal; Transfers or Referrals, Information Not Held, Written Refusals, and Information Received.

### 3.1 Unable to Submit/Refusal to Accept: Requesters Can Face Significant Obstacles to Submitting Requests

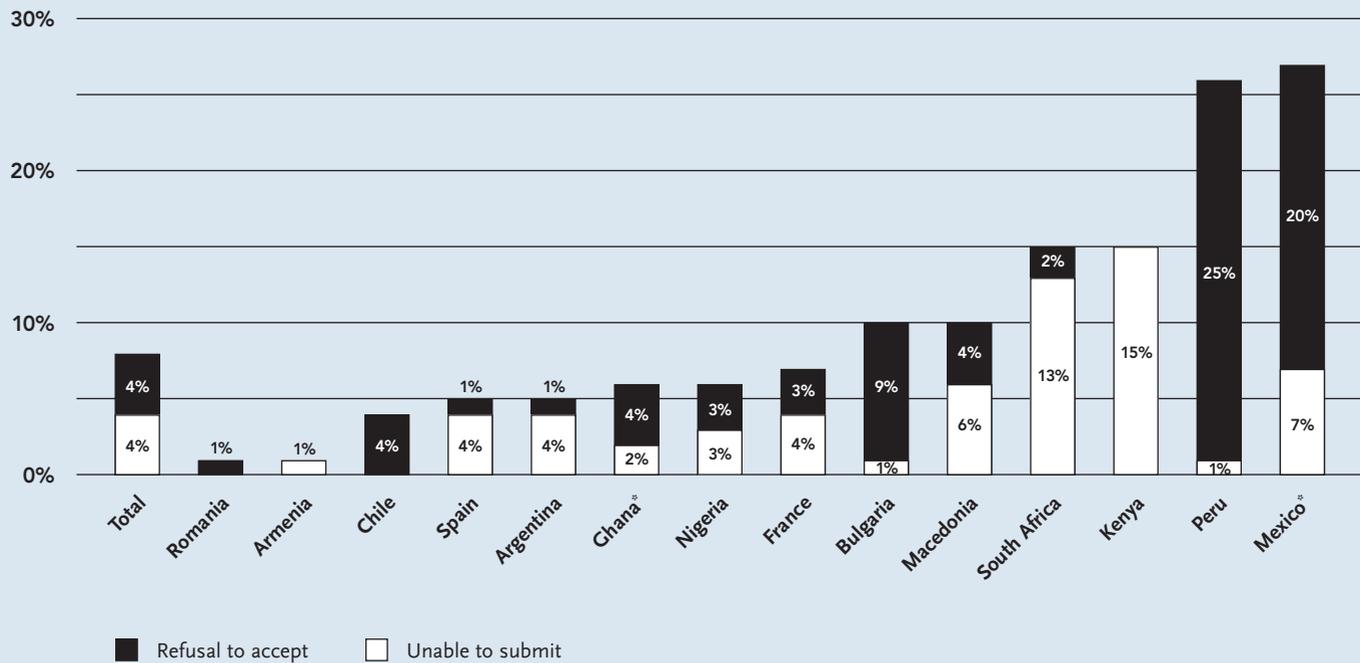
The ability to submit requests for information to a public authority is the first step in any access to information process. Where requesters are blocked from submitting requests—due to either procedural omission or active refusal to receive the request—this amounts to a serious violation of the right to information. The experience fosters a negative view of government and discourages future attempts at requesting. This study found that in many countries requesters encountered serious problems submitting requests. In follow up interviews it became clear that authorities often did not know that requesters were being turned away at the doors of their institutions.

Almost one in 10 of the requests attempted in this study could not be submitted and therefore never reached the official who might have been able to process the request.

In the case of four percent of all attempted requests, the requesters could find no way to submit their request. They encountered two main problems in filing requests: they were either unable to enter the relevant building or could not find a person to whom to present the request. This was a particular problem for requesters attempting to submit oral requests (22 percent of which could not be submitted) but attempts at hand delivery also failed in this way (one percent of written requests could not be submitted). Often, security and reception staff prevented entry or submission. Even where helpful, their ignorance of the public's right to public information, and/or of the relevant internal processes, resulted in requesters being unable formally to submit their requests.

Five percent of requests were actively refused by public officials. The main reasons for the refusal to accept outcome were legal restrictions as to who may submit

**Figure 14: Unable to Submit and Refusal to Accept Outcomes as a Percentage of All Requests, by Country**



\* adjusted data for Ghana and Mexico

Analysis based on data from 14 countries, all requests

oral requests (in South Africa and Mexico only the illiterate or disabled may do so) and bureaucratic reluctance to receive oral requests, even where they are permitted by law (for example, in Bulgaria). In total, 20 percent of oral requests were refused, as were one percent of written requests. In countries where laws specifically and clearly provide for oral requests (Armenia and Romania), fewer problems were experienced with submission. In addition, these two countries both have good systems in place for receiving oral requests.

## Unable to Submit Outcomes

### Unable to Submit in Argentina

A typical example of an unable to submit outcome comes from Argentina where the excluded group requester, a low income woman from the countryside, approached the Ministry of Social Development to file a request on the total number of families receiving benefits. She first went to the 19th floor, where they then sent her to the 16th floor office of “Alimentación” (Food), where she was directed to the 13th floor (Communications). There they sent her back to the 16th floor. “I was treated well at all times,” she said—better, indeed than in any of the other agencies she visited—but nevertheless, at each office she was told they would give her the information somewhere else. Ultimately she was unable to deliver her request.

### Unable to Submit in Armenia

In Armenia, one of the unable to submit outcomes resulted when a journalist attempted to file a request orally to the Yerevan Center District Administration. He made 10 telephone calls and could not find anyone to speak to. But the same request—about the number of unemployed registered in the district—when filed by mail by a media law NGO resulted in a speedy written answer giving the data. Generally, however, oral requests were received well in Armenia, in compliance with the Law on Freedom of Information (2003), which specifies that oral requests are to be answered. Armenia also has good systems for receiving written requests, and some institutions have public boxes for receiving petitions from citizens—a system that dates back to Soviet days.

## Unable to Submit in Kenya

The excluded group requester in Kenya, a member of the small Nubian community that has long been subject to discrimination, exclusion and human rights violations, was unable to submit 17 out of 20 requests. He approached many institutions in person only to be told he needed an appointment, but without being helped or allowed to make one. This happened in the Office of the President, Ministry of Gender and Social Services, the Ministry of Justice and Constitutional Affairs, the Kiambu County Council, and the National Water Conservation and Pipeline Corporation. The security officers at the gate of the State House (Office of the Presidency) informed him that only members of a particular organization could make an appointment. His three submitted requests resulted in one mute refusal, one information not held response, and one inappropriate referral. In the first two cases, the paired question received the requested information.

## Refusal to Accept Outcomes

### Refusal to Accept in Peru

The NGO representative in Peru, a female lawyer who works on women's rights issues at the NGO Flora Tristan, approached the Ministry of Defense to file an oral request asking for the number of women who had worked in the ministry for more than two years. The requester waited 30 minutes in the ministry to gain access to the information officer to make the oral request. While she waited, the clerk and guard repeatedly asked her why she wanted to talk to the information officer, what kind of information she sought, and whom she represented. She was then told that the information officer was in a meeting with the minister and that the officer would telephone her with the information. No telephone call came the following day, so the requester telephoned the ministry three times. When she finally reached someone (a colleague of the information officer) she was told to write down her request as they "don't accept oral requests."

### Refusal to Accept in Ghana

A young journalist working with *The Insight* in Ghana, a leading opposition newspaper, reported that he faced persistent hostility when submitting his requests. For example, the officer responsible for receiving mail in the Ministry of Agriculture refused to receive a hand delivered request (for the total number of workers under the ministry in the

area of Tamale), stating that other requesters had approached the ministry with similar requests and he was not sure the minister was ready to respond to yet another request. In fact, an earlier attempt to file the same request, by a university student, had also been turned down. The official also refused to give his name to the journalist.<sup>1</sup>

## Good Practices on Submission

### Mexico's SiSi Information System

In Mexico, where different laws cover information access at federal and local level, two out of three of the 30 requests not submitted were attempted at local government level in Mexico City, which has its own access to information regime. By contrast, requests at federal level were submitted comparatively easily. The difference is largely due to the efforts that have been made to encourage ready acceptance of requests at the federal level, as part of the effort by the Mexican Federal Access to Information Institute (IFAI) to promote a spirit of openness. Submission and subsequent tracking of requests has been aided by a sophisticated digital system for receiving requests developed by the IFAI.

Mexico's federal level access to public information system, under its Federal Law on Transparency and Access to Information (LFTAI, 2002), combines widely publicized public information offices and a one stop Internet portal, the "SiSi" (Sistema Integrado de Solicitudes de Información: Integrated System for Information Requests). The SiSi enables requesters to file queries online from anywhere in Mexico with Internet access. The SiSi issues reference numbers, and these can be used to track the status of a request. Requesters in Mexico City without Internet access may go to one of the IFAI's offices in the city and file requests on computers available for that purpose. For those Mexico City who lack Internet access, the IFAI's telephone helpline functions from 9 a.m. to 7 p.m. on working days, for anyone seeking guidance in submitting a request.

### Problems with Submission

Submission problems tend to occur in countries with relatively new freedom of information laws, where there has not previously been a tradition of openness. These problems point to the challenges of implementation of new laws, including the following:

**Security personnel are not informed about law and do not admit requesters.** Denial of requester access to public buildings was identified in the Justice Initiative pilot 2003 study as a common obstacle to submission. In Bulgaria and Peru, problems of access were less common in 2004 than they had been in 2003 but persisted, with guards and other staff impeding entry to appropriate buildings. In Sofia city government, the security guards at many buildings are supplied by the private company *Egida Ltd.*, whose employees are not provided with specific training or guidelines on access to information. They would advise people where to go, sometimes politely, sometimes rudely. The treatment of the requesters thus depends on the intelligence and communication skills of individual guards. In Peru, the security guard at the Office of the National Executive (*Presidencia*) likewise turned away the excluded group requester. Security guards again arose as an obstacle in South Africa and Kenya—where one requester was told that an appointment was needed to enter the building of the Office of the President.

**Failure to establish mechanisms required by law to process requests.** In Mexico City, four of the bodies monitored had not set up offices to handle requests, as they are required to do under the Federal District Transparency and Access to Public Information Law (2003).<sup>2</sup> Unable to submit and refusal to accept outcomes were common. In some cases where the required office existed, there was no one on duty to receive requests. In the Mexico City Ministry for Transport and Highways, the information officer was reportedly on sick leave the day a request was attempted, with no replacement available. The Justice Initiative team in a separate visit witnessed similar problems at the Mexico City Transport Ministry: the desk for filing information requests was not staffed.

**Illegitimate practices that deter requesters: illegal charges.** The monitoring project identified some illegitimate practices likely to deter requesters. In Peru, a number of municipalities conditioned processing of requests upon payment of a fee. One municipality, Lince, sent two requesters a written notice that: “In order to process your request you need to pay 25 soles (approx. U.S. \$8). This fee is to be paid within the next 48 hours or the request will not be processed.” Another Peruvian municipality, Santiago de Surco, informed a journalist requester that his information would cost 28.5 soles (approx. U.S. \$9) for 13 pages. To impose any fee beyond “the costs incurred to reproduce the required information” is specifically prohibited under Peru’s 2002 freedom of information law.<sup>3</sup>

**Unnecessary clarification requests.** In Mexico City, whose law is distinct from the Federal level law, officials frequently requested clarifications, sometimes more than once for the same request. According to Mexico City’s Transparency and Access to Public Information

Law (2003) requests for clarification are part of the process of finalizing the request for submission, and so in practice the clock is reset on the delivery process whenever clarification is received.<sup>4</sup> For example, all eight requests (four requests each submitted twice at separate times) to the Mexico City Controller's Office, received responses asking for clarification, together with a query as to why the information was sought. In only one case was information provided following a clarification by the requester. Concerned by a pattern of behavior encountered repeatedly in some Mexico City offices, the Justice Initiative partner LIMAC conducted further testing through filing of requests and found that use of the clarification clause was almost reflexive in some institutions. These requests for clarification were recorded as noncompliant outcomes.

Clarification requests were also received in two Bulgarian municipalities, Lom and Montana. The requests for clarifications seemed intended merely to dissuade requesters, particularly as other municipalities answered almost identical request without problems. To test this, requesters provided clarifications but did not even then receive information.

**Public officials illegitimately asking why the information is being sought.** In France, a requester who asked the Ministry of Defense for the number of deaths in the armed forces in 2003 received a telephone call from a ministry official wanting to know why the requester needed the information. The requester replied that it was for a statistical inquiry, and that the data was public property. No further response was received: the final outcome was a mute refusal. Similarly, a French NGO requester received a call from the chief clerk at the Marseilles Court asking for further information about a request on the number of cases of domestic violence registered in 2003, "in order to be able to answer it." It was suggested that the requester send additional information by email. The information was sent, but the request was subsequently ignored. The response was recorded as an oral refusal, since the provision of information was made conditional upon information not required under French law.

**Non-acceptance of oral requests, even when provided for by law.** The Justice Initiative's 2003 and 2004 monitoring studies both demonstrated a bureaucratic tendency to privilege written materials, sometimes exacerbated by the introduction of a new FOI regime. Formalist demands that requests are written and/or special forms be completed may prevail even where not required by law. This bureaucratic formalism underlies submission problems in Bulgaria (nine percent of requests not submitted) and Peru (25 percent not submitted). In Bulgaria, the access to information law allows for "written or verbal" requests but does not specify how oral requests should be treated. Yet, the law

also requires that requests contain the requester's name and address, a description of the information sought, and the preferred form of access—a format that clearly favors written requests. In addition, the internal systems established by many public bodies in Bulgaria fail to provide for oral requests. In interviews, this was generally explained as an oversight rather than a policy. In Peru, the law is silent on oral requests, establishing only that “all requests shall be directed to the official named by the Public Administrative entity to perform this task.”<sup>5</sup> While this wording does not appear to disallow oral requests, the national implementing regulation introduces a model form to be completed, and specifically requires that requests be in writing. Local access to information groups have argued that this requirement violates both the constitutional right to information and the country's freedom of information law, particularly given that one in 10 of the population is illiterate and many more have low literacy.<sup>6</sup>

**No system to track written requests.** The methods of submission and follow up for requests were selected country by country according to local practices. All requesters filing written requests (or where oral requests had been accepted and noted down) made at least one follow up telephone call or visit to check what had happened to their request. This was usually at about the same time as the deadline for answering expired. In addition, those who had not received confirmation of receipt of the request made an optional verification call or visit—this was not necessary in countries where requests automatically receive a reference number or some other confirmation of receipt upon submission. Tracing requests frequently proved very difficult in Chile where requests were not given a reference number and internal systems for handling requests were often absent. In France, where 75 percent of requests were submitted by post, requesters followed up by telephone, but often could not locate the request, and after speaking to various officials, some in effect presented the request orally. The Justice Initiative's partner in France, Intermedia, suggests that, absent centralized systems for filing requests, a successful approach for requesters in France would involve telephoning first to find the responsible person and addressing the written demand to that individual. This relies on persistence and on the good will of receptionists and secretaries to put the requester through, either to speak to the appropriate individual in advance or to get their name.

## Recommendations:

- Public bodies should ensure that all personnel, including security and reception staff, have a basic understanding of the right of members of the public to approach the institution and to file requests for information.
- In countries with access to information laws, those public officials likely to receive requests should be informed that requests must be accepted.
- Public bodies should ensure that the public can submit requests in person, for instance, at a publicly accessible reception desk or area. Information offices should be clearly designated and easy to locate. If the law does not specify otherwise, public institutions should consider making use of pre-existing systems for receiving communications from citizens as an additional way of receiving requests (for example, public boxes in Armenia, submission via the archives office in Macedonia, the *mesa de partes* reception desks that issue registration numbers in Latin American institutions).
- Access to information laws should establish the possibility of submitting oral requests. Where the law provides for oral requests for information but the information requested cannot be provided immediately, the law should require public officials either to set down the request in writing themselves or to assist persons requesting information to formulate a written request.
- In countries where laws do not permit submission of oral requests for information, public officials should be trained to help requesters make their requests in writing and to write requests for information on behalf of persons who cannot write or have difficulty communicating in writing.
- In countries where the law stipulates that public officials should assist illiterate or disabled requesters to convert oral requests to writing, appropriate procedures should be established to ensure that such assistance is provided.

- In responding to requests for information, public bodies should charge only reasonable fees directly related to the cost of reproducing and posting information. Access to information laws should allow for discretionary waiver of such fees in instances where, for example, the number of copies is small or the persons making such requests are indigent. Viewing original copies of documents should always be free of charge.
- Oversight bodies monitoring the implementation of laws (e.g. information commissioners, ombudspersons, and legislative bodies) should ensure there are no illegitimate barriers to information, such as requirements to clarify requests, fees charged for access, or inquiries into why information is sought.
- Comparative international standards establish that the only charge public bodies may make are those directly related to the cost of reproducing and posting information.<sup>7</sup> There are very few exceptions (for example, in the UK a charge may be levied where compliance with a request entails more than three days of government time). In practice, many access to information regimes allow for discretionary waiving of these charges, particularly where the number of copies would be small and the cost of collecting the fee higher than the monies recovered, or where the persons making requests are indigent.

## Case Study: South Africa

South Africa provides the most striking example of the problems of submitting oral requests, with 15 percent of total requests (all of them oral) not submitted. South Africa's PAIA establishes "information offices" in all public institutions required to process requests. While requests must be submitted in writing, information officers have a duty to assist those who cannot submit written requests.<sup>8</sup> The excluded group requester, an illiterate elderly woman named Ausi, who speaks only Sesotho, attempted to submit 20 oral requests, 10 in person and 10 by telephone. She was not provided with assistance required under Section 18(3) and 19 of the PAIA in any of these attempts. All her attempts to submit in person were unsuccessful: on three occasions she was given telephone numbers of other people who might assist. In total, she was unable to submit 15 of her 20 requests. The other five, all telephone requests, resulted in refusals to accept

(in two cases) and oral refusals (in three). Officials were often evasive, referring her to others within the same office or to other offices.

The distressing treatment Ausi received repeated her experience in the 2003 pilot study, when she was unable to submit nine of 10 requests, all presented orally in person. Then, too, she was not assisted, but was instead passed from office to office and treated dismissively. In 2004, problems encountered included:

- Ausi was not permitted to enter public buildings or was immediately directed elsewhere. At the Presidency, she was told she needed an appointment. Eskom, the telecommunications company, sent her to another, incorrect, building, a few kilometers away.
- When presenting herself in person to the Presidency, the Department of Social Services, and the Department of Justice, she was given the telephone numbers of people who could help her submit her requests, but on attempting to follow up by telephone was only able to leave messages, was not called back, and was forced to record unable to submit outcomes.
- As a result of the cultural and linguistic diversity of South Africa, which boasts 11 official languages, most of which are predominant according to region, Ausi was not able to communicate requests with government bodies in the regions where her language, Sesotho, was barely spoken. On occasion she was advised to submit her request in the languages that were predominant in those regions of the Eastern Cape, namely isiXhosa, Afrikaans, or English.
- When she found officials who spoke Sesotho, in the Sakhisizwe municipality located in the Eastern Cape province, they refused to assist her further in submitting requests to the appropriate department.
- Ausi was often asked why she was requesting information. Project requesters were trained to resist such questions, and Ausi had prepared an answer: that she was helping her daughter on a project. Generally this explanation did not help, as public officials were still suspicious of her motives. When attempting to request by telephone information about the local water supply from the Umgeni Water Company, she met with repeated requests as to why she needed

the information. The officer ignored her explanation and refused to grant Ausi the records on the grounds that she might be a journalist conducting an investigation into the company (the water company stated in a follow up interview that they were concerned about bad publicity).

- Assistance was often misguided, even if well intentioned. When Ausi approached the Johannesburg High Court for information on domestic violence, officials assumed that she herself had a case to report, even after she explained the information was for her child's project. The clerk exhibited genuine concern for Ausi's well being and safety, but in the end Ausi gave up on her attempts to submit the request. The clerk's otherwise commendable concern for Ausi underscored a generic problem: many public officials do not accept that members of the public are entitled to approach government bodies without having to state their reasons.

Of the remaining 14 oral requests in South Africa (each of the other requesters filed two or three), only four could not be submitted. Of the 10 that were submitted, four resulted in information provided without requiring that the request be put in writing. A further six were accepted—three of which were written down at the request of the receiving institution—without resulting in information (one transfer and five mute refusals).

The oral requests that resulted in information demonstrate how easily they can be addressed—information can be provided directly, or the relevant document put in the post in response to a telephone call. Oral requests can result in speedy and effective release of information:

- The Supreme Court answered both requests on procedures for recusal of judges immediately over the telephone, stating that there was no policy document or statistics on this issue.
- The Ekurhuleni Metropolitan municipality (a local government body) answered a question on its 2003–2004 budget and expenditure reports by sending a copy by post to a requesting journalist.
- The Ministry of Environment sent by post information on sea fisheries quotas since March 1994 to the business requester.

## Impact of Unsubmitted Requests on Overall Results

High levels of unable to submit outcomes impact negatively on the overall outcomes for an institution or country. On average, countries' compliance ratings increase by four percent when only submitted outcomes are assessed: the total level of compliance for submitted requests is 34 percent as opposed to 30 percent compliance for the all requests.

Where the obstacle to submission lies with security arrangements rather than civil servants, the problem ought to be easy to remedy and could result in an immediate increase in overall compliance

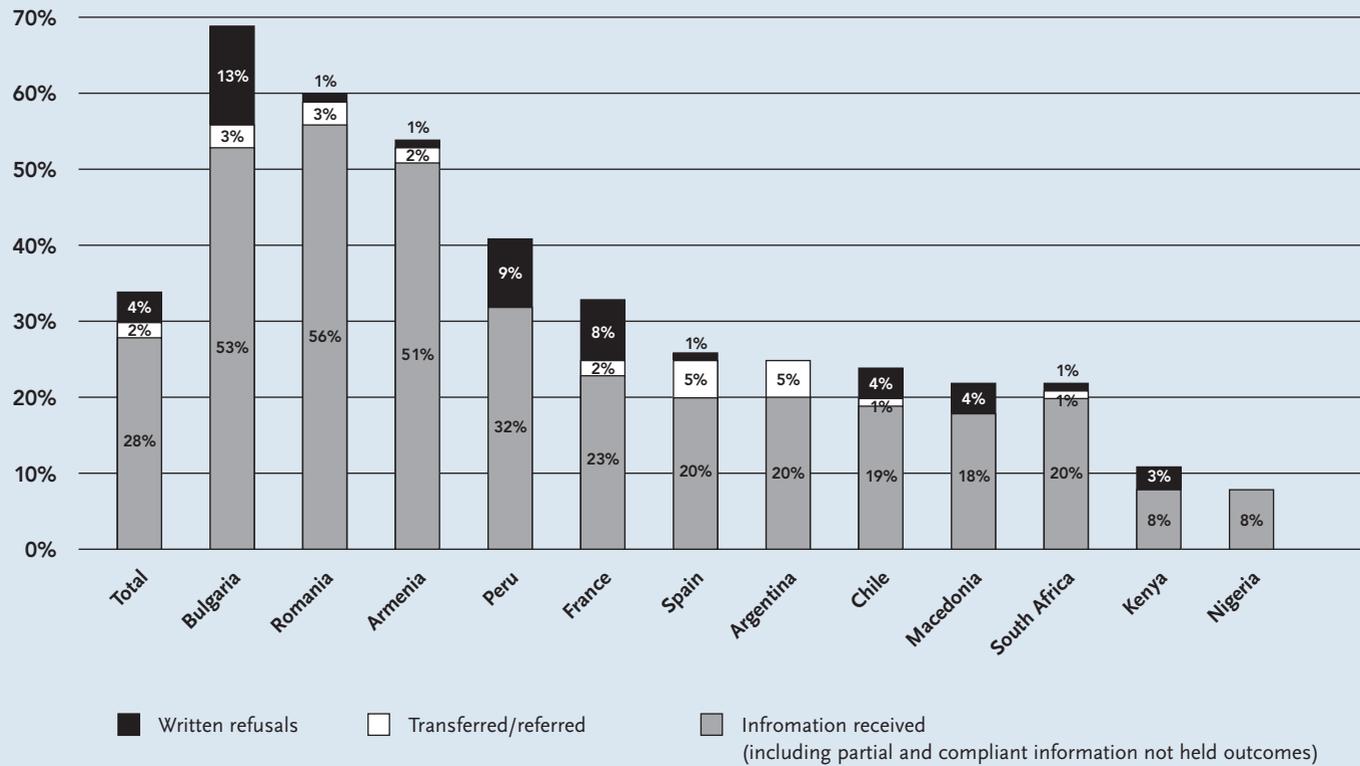
Submission problems impact some countries' results particularly badly. For example, when unable to submit responses are excluded, Peru improves relative to other countries, moving ahead of France. The adjusted result moves closer to that expected in Peru, a country with a dedicated access to information law and active civil society promotion of information access.

Countries lacking freedom of information laws, such as Ghana, Kenya, and Nigeria, would do well to ensure that systems are in place for receiving requests as soon as laws are adopted. Although the Nigerian draft freedom of information law stipulates that only written requests are allowed,<sup>9</sup> a duty to assist requesters is provided. Given the South African experience, and that 33 percent of Nigerians above the age of 15 are illiterate,<sup>10</sup> the absence of procedures to assist these individuals in setting down their requests in writing constitutes a violation of the right to information.

## 3.2 Oral Refusals: Little More than a Brush Off

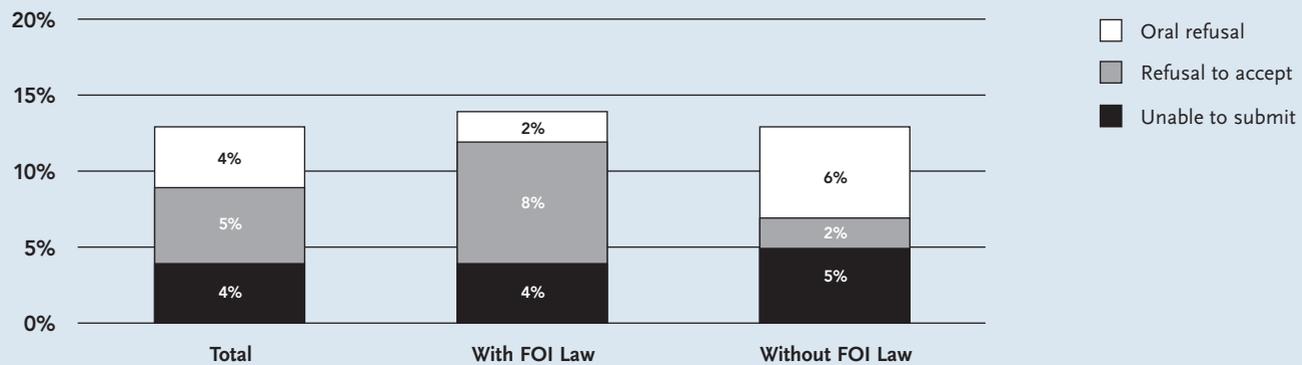
An oral refusal is the verbal statement by an official on receipt of a written or oral request that it will not be answered. This response usually occurred either directly upon submission of a request—when officials read or listened to the petition and refused the information immediately—or during follow up telephone calls. In total, four percent of requests resulted in oral refusal outcomes. Oral refusals are an effective way for officials to rid themselves of persistent requesters. Oral refusals complicate legal appeals as nothing is set in writing: if appealed, the requester's word would be pitted against that of the official.

**Figure 15: Compliance Outcomes for Submitted Requests  
(Percentage of Requests after Unable to Submit and Refusal to Accept Excluded), by Country**



Analysis based on submitted requests, 12 countries

Figure 16: Oral Refusals as a Percentage of All Requests, Shown with Unable to Submit and Refusal to Accept



Analysis based on data from 14 countries, all requests

The Justice Initiative regards all oral refusals as unacceptable under international norms and categorized them as noncompliant.

Oral refusals are more prevalent (six percent of total requests) in countries without access to information laws. This may be accounted for by the lack of clear legal provisions obliging public officials to set down rejections on paper.

In countries with freedom of information laws, oral refusals to furnish information are relatively rare (two percent of requests). This is likely to be because in countries with freedom of information acts, oral refusals are not generally permitted by law.

In the present exercise, not one of the 81 oral refusals received included an explanation of the appeals procedure (where such exists). Public servants often gave only vague reasons for denial. An official at the Prime Minister's Office of Armenia, for example, refused to deliver data on the black market in petrol and medicine on the grounds that it fell outside the purview of the office.

Some requesters were told that the information was “secret” or “classified” but often without citing any particular legal ground.

## The Illegitimacy of Oral Refusals

Of the seven monitored countries with dedicated freedom of information laws, six provide that all refusals be in writing. In the seventh, Armenia, oral refusals may only be made in response to oral inquiries (see Table 4) and then only in limited circumstances.

Peru's Law on Transparency and Access to Public Information at Article 13 provides specifically for written refusals:

*The denial of information must be based on the exemptions mentioned in Article 15 of this law, and the reasons for denial along with the period of time in which this information will remain reserved must be expressed in writing.*

The Bulgarian Access to Public Information Act (2000) is not as explicit, but does require that “[a] decision refusing access to public information shall be handed over to the applicant against his/her signature or sent by registered mail.”<sup>11</sup> The law also requires that a decision refusing access to public information shall state the legal and factual grounds for the refusal under this act, the date of the decision and the procedure for its appeal.<sup>12</sup>

*Oral refusals do not respect the right of access to information for a number of reasons:*

- A decision to refuse requested information limits a fundamental right and is thus a serious matter. It should only result from a process of internal deliberation. Oral refusals in the present study, however, appeared *ad hoc* and arbitrary. For example, the following written request was submitted to the French Ministry of Finance: “What was the final cost of bailing out the Credit Lyonnais Bank, directed by the state, after the Executive Life affair?”<sup>13</sup> When telephoned, an official at the ministry said he “did not know the answer and furthermore this information is not public.” The reply gave no indication as to whether or not all or part of the information had been properly reserved from public dissemination, and indeed much information about this case is in the public domain.
- Under most freedom of information laws, the application of an exemption requires an assessment as to whether the information might harm a legitimate interest, as defined in law, such as national security, the prevention and investigation of crimes, the internal deliberations of administrative bodies, commercial secrets and fair competition, and personal privacy (see Chapter Three for more on written refusals). Many laws also require that exemptions may be overridden if they are outweighed by a public interest in receiving the information. Again, such a determination can only result from a deliberative process, which ought to be as transparent as possible.

*The decision to refuse information should be a high level decision taken following due consideration by the public body concerned:*

- Both Mexico’s LFTAI (2002) and Argentina’s Decree on Access to Public Information (2003) specify that a decision to refuse must be taken at the highest institutional level: in Mexico, a special committee; in Argentina an official of or above the rank of Director General of the institution (those above the rank of Director General include appointed political officials).

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**Table 4: National Laws on Oral Refusals**

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<b>Country</b>	<b>Oral requests?</b>	<b>Refusal form</b>	<b>Refusal content</b>
<b>Armenia</b>	Yes.	Oral for oral inquiries only; otherwise written.	Reasons, appeals procedures, and must state time it took to reach refusal decision.
<b>Bulgaria</b>	Yes.	Written.	Legal and factual grounds for refusal.
<b>France</b>	Yes. (Law is silent but the French Commission on Access to Documents says both options are available.)	Written.	Reasons for refusal.
<b>Mexico</b>	No (unless blind or illiterate).	Written.	Reasons and appeals procedures.
<b>Peru</b>	Yes by law (regulation limits to written).	Written.	Reasons and time period for restriction of information.
<b>Romania</b>	Yes.	Written—if oral request cannot be satisfied immediately requester must be informed about converting it to a written request.	Reasons.
<b>South Africa</b>	No (unless illiterate or disabled).	Written.	Reasons and appeals procedures.

- According to Article 45 of Mexico’s LFTAI, if the head of an administrative unit within a government body determines that information is classified or confidential, he or she must forward the request to the “Information Committee,” a three member entity comprising a high level official, the external audit officer, and the information liaison officer. The Information Committee has the right of access to any documents in the administrative unit, and is empowered to review the classification and confirm, reject or modify it. This Information Committee also oversees internal implementation of the LFTAI, and is responsible for reporting annually to IFAI.<sup>14</sup>

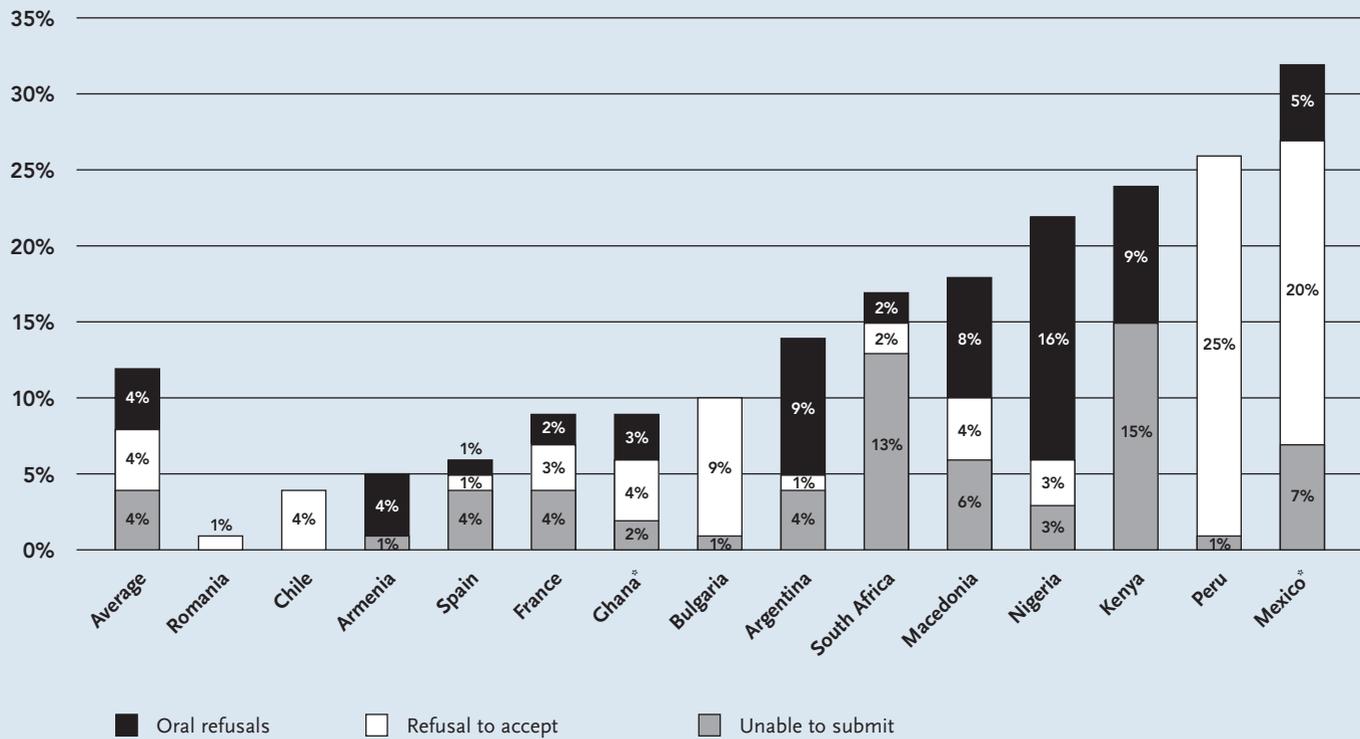
*Oral responses to oral requests must be limited in scope, but cannot be refusals to provide information:*

- In Romania, oral requests are permitted and, if they cannot be answered on the spot, rather than denying the information, the public officials must inform the requester that they can file a written request.<sup>15</sup>
- In Armenia, oral requests are only permissible in three instances: to access information relating to matters of urgent public interest, to verify that the approached institution holds a particular piece of information, or to clarify the procedures for processing written inquiries. Oral requests may only be declined where the request falls outside the scope of this provision, or where the requester does not meet the formal requirement of stating their first and last name before making the request. The law further stipulates that written requests can only be refused in a written note that clearly states the grounds for refusal and the appeals procedure.

## Oral Refusals in Countries Lacking FOI Laws

Figure 17 shows that oral refusals were a particular problem in countries that do not have access to information laws. The highest levels were in Nigeria (16 percent of requests met with oral refusals), Argentina and Kenya (nine percent each) and Macedonia (eight percent). Often, in the absence of an access to information law, these refusals simply underlined an institutional culture of secrecy (“it’s secret”) and/or a lack of understanding of the right of the public to information (“that is not public data”).

Figure 17: Country Results for Unable to Submit, Refusal to Accept and Oral Refusal



\* adjusted data for Ghana and Mexico

Analysis based on data from 14 countries, all requests

## Macedonia

In total, eight percent of requests in Macedonia resulted in oral refusals. The following is a sample of oral refusals received during the present project. Given that the requests concern public interest issues, their informal treatment is particularly problematic:

- “It is a secret and the Ministry will not disclose it.” Response of the Ministry of Justice to a question about the grounds for disciplinary actions against employees and the numbers reprimanded in 2003.
- “We only respond to legal persons.” Response of the Skopje Public Enterprise for Water Supply when asked for a copy of the plan for reducing use of drinking water for industrial purposes.
- “That information is not for the public.” Response of Macedonian Public Electric Company to a question asking how many days must pass before customers are cut off from services if they fail to pay their bills.
- “We don’t have the staff to answer that question.” Response of the Public Enterprise for Garbage collection in Veles Municipality to a request for budget information, including a detailed break down for salaries, wages for official trips, and equipment for hygienic and technical protection of employees.
- “That information is a company secret.” Oral response of the Macedonian Radio and Television state broadcasting company to a question about their total debts. When the excluded group requester, an ethnic Albanian, asked for a written refusal, he was invited to “come to a meeting.”

## Kenya

Nine percent of requests in Kenya resulted in oral refusals. Requesters were often asked their reasons for seeking information. One petitioner who requested the total number of public works contracts issued in 2003–2004 from the Ministry of Finance, was asked why he wanted the data and told that contracts are confidential (he had not asked for the contracts themselves).

Some answers reveal the difficulties facing public officials in the absence of a freedom of information law. In Kenya, the NGO representative managed to speak to the defense secretary to follow up on a request filed with the National Security and

Provincial Administration on the criteria used to select armed forces for peace missions abroad. The defense secretary responded that information concerning defense is sensitive and cannot be released, and urged the requester's understanding. In the absence of a freedom of information law, no guidance is available to public officials in these cases; there is no formal basis either for yielding or denying the information. Similar questions about the armed forces, which do not pose a threat to national security, were answered in countries which have functioning FOI regimes (see sidebar on page 53).

## Nigeria

Oral refusals were a particular problem in Nigeria, where 16 percent of requests resulted in an oral refusal. In a handful of these, requesters were told that information was "secret" or "classified." More often no reason was given for refusing information. In some cases, the manner of oral refusals was insulting or threatening—for example a requester was told, threateningly, that he was looking for trouble.

- A request by the non-affiliated requester, an unemployed male university graduate, to the Ministry of Finance for the total amount of illegally sequestered public funds recovered between 1999 and 2003, including the amount spent since recovery, elicited an oral response from the chief press secretary to the minister that the amount spent is "highly secret," whereas the amount recovered was available in newspaper reports or on the Ministry's website.
- The same requester was turned down by the public relations officer at the Abuja Water Board when he attempted to hand deliver a written request asking the amount of water consumed per capita in the Federal Capital Territory in 2003, because, he was informed that "you might be a journalist looking for verification of information or someone employed by foreign agents or even an impersonator. Beyond this, I can't give you any information."
- The same requester, on hand delivering a request to the Ministry of Transport for the minutes of the meeting where the decision was taken to use London taxis for public transport in the Federal Capital Territory, was told by an officer that he was "looking for *wahala* [trouble] by asking for minutes of a meeting held by government officials." The official even suggested that the requester might be insane.

- The excluded group requester, an illiterate woman, was generally allowed to ask her questions directly, but was subsequently given short shrift and turned away. In total, 90 percent of her requests resulted in oral refusals. For example, when asking for data on judges at the Supreme Court accused of corruption, she was told she did not need the information. When she asked an officer at the Ministry of Youth how much of the 2003 budget had been spent, the officer said he was not the minister and should not be disturbed.
- The business person also received oral refusals. A question about deaths in the armed forces resulted in a rebuke; she was told that only very high ranking army officers are entitled to such information.
- Neither of the journalists received any oral refusals, nor did the other NGO representative although their oral requests and hand delivered written requests did result in unable to submit and refusal to accept outcomes.

## Recommendations:

- Access to information laws should expressly state that oral refusals are not permitted. Refusals to provide information should be required to be in writing, and should state the legal grounds for nondisclosure, the reasons they apply to the particular information in question, and the procedures for appeals. Where existing access to information laws are ambiguous or silent on oral refusals, they should either be amended or regulations and national and institutional policies should make clear what is and is not permitted.
- The public should be provided with information on the applicable standards on refusing requests, and public officials should be trained to uphold them.
- Where the law provides for oral requests but information cannot be provided on the spot, the law should establish that public official should assist requesters in formulating a written request.

### 3.3 Sent Elsewhere: Transfers and Referrals

Submitting a request to the wrong institution is the kind of honest mistake that ordinary requesters are likely to make occasionally. Absent clear indexes of information held (which the Armenian, Bulgarian, French, Romanian, and South African laws require—see Table 7), it is sometimes hard to know which body in the administration holds which information. Hence, for an access to information regime to function effectively, procedures are needed to ensure the request finds its way to the correct institution. Most freedom of information laws provide that authorities should either transfer requests internally or refer requesters to the appropriate body when they do not hold the relevant information. This is in keeping with the duty of public officials to assist requesters, an increasingly common obligation in newer access to information laws. Requests in the present exercise were delivered to the body deemed appropriate—but on some occasions, the wrong institution was targeted. These genuine errors provided a useful test of the institutional response to a request that would be better answered by another body.

If a public official determines that a request would be better answered by a different institution, the result should either be a transfer (where the request is redirected internally) or a referral (when the requester is directed elsewhere). Eight percent of all 1,926 requests filed in this monitoring exercise resulted in either transfers (19) or referrals (128). These outcomes are different from an “information not held” result in that information not held is the appropriate response for an institution in receipt of a correctly delivered request, which should have the requested information but does not, either because it has failed to retain it, or the information simply does not exist.

Transfers, the higher standard, were always regarded as compliant unless they clearly were not (paired question resulted in information received). Referrals, as the minimal standard, were regarded as compliant except in countries where transfers were required by law (Bulgaria, Romania, South Africa; see Table 5) and if there was no good reason to believe them to be inappropriate—in fact many of the referrals, particularly in countries without freedom of information laws, were noncompliant.

## Compliance of Transfers and Referrals

There is no fixed international standard on transfers and referrals. Some laws require transfers, and this is regarded by freedom of information advocates as the better standard. The Council of Europe's Recommendation 2002(2) On Access to Official Documents establishes at Principle VI.4 that: "If the public authority does not hold the requested official document it should, wherever possible, refer the applicant to the competent public authority."

This provision sets referrals as the minimum standard in cases where requests are submitted to the wrong institution, and this standard was adopted by the Justice Initiative and its partners in the present study, unless national law requires transfers (as in the case of Bulgaria, Romania, and South Africa).<sup>16</sup>

Where domestic law requires that requests be transferred, referrals were graded as noncompliant. Referrals were viewed as compliant where provided for by law, and in cases where countries have no legal specification. However, where an institution clearly had, or ought to have had, access to the information requested, both transfers and referrals were regarded as noncompliant.

### Examples of Compliant Transferred and Referred Requests

- In Mexico the business person and an NGO requester both asked the Ministry of Environment for information about programs and budgets for treatment of waste water in Mexico. The two were separately referred to the National Water Commission, where both reported receiving ample information and good treatment.
- In Romania, the Bucharest Tribunal was asked for the number of judges disciplined since the beginning of 2000, including grounds for the reprimand and the sanction applied in each case. The tribunal transferred the request to the Superior Council of Magistrates, the body that sanctions judges. The requester received a full response from the Council—a four page list of all sanctioned judges, with details of the reasons and sanctions. The pair of the same question was filed orally, and was referred orally to the Superior Council of Magistrates; as Romanian law is silent on how to redirect oral requests, this oral referral was deemed to be compliant.

**Table 5: National Laws on Transfers/Referrals in Countries with FOI Laws**

Country	Requirement to redirect requests	Time frame
<b>Armenia</b>	Inform requester in writing and if possible make referral to source of information.	Within five calendar days.
<b>Bulgaria</b>	Transfer with notification to requester.	Within 14 calendar days.
<b>France</b>	Law silent.	—
<b>Mexico</b>	Law does not require either: if information not held, committee to review request and draw up a notice that information is not held.	Within 20 working days.
<b>Peru</b>	Referral: law requires that department inform requester if department knows location.	Within seven working days.
<b>Romania</b>	Written requests must be transferred (this is stipulated in the Decree on Implementing Norms (2002) which is silent on oral requests).	Within five days (see Chapter Four for more information on time frames in Romania).
<b>South Africa</b>	Transfer: the public body should transfer the request to the body holding the information.	Within 14 calendar days.

*Note: For countries without freedom of information laws or where the law and relevant provisions were silent on redirecting requests, the minimum standard of referral was assumed. Unless otherwise specified by law, the time frame applied was that of the time for responding to requests.*

- In Bulgaria, a request to the Environmental Agency for data on radioactive emissions from Bulgaria’s only nuclear power plant, in Kozloduy, was transferred to the Kozloduy Power Plant, which provided a report on a radiological survey.
- In Ghana, where there is no dedicated freedom of information law, requests to the Ministry of Justice on a range of issues, including for the number of female judges serving and for the number of judges asked to stand down due to disciplinary matters between 1995 and 2003, were referred to the Judicial Secretary of the Judicial Service of Ghana.

Partners closely examined each transfer and referral to determine whether it was reasonable. Transfers were also tracked and partners noted if information did eventually result.

- Of the transferred requests, 14 were compliant and five noncompliant.
- Of the referred requests, 33 were compliant, 94 noncompliant.
- Eight percent of all requests filed were transferred or referred. Only one in four of these—little over two percent of total requests—were transferred or referred correctly, in compliance with access to information standards and national laws. This appears to indicate that in general requests were in fact filed to the correct institutions.
- Transferal or referral is half as likely where there is an FOI regime (five percent of requests as against 10 percent in countries with no FOI law). This seems to be because freedom of information laws oblige government bodies to handle requests themselves rather than just sending requesters elsewhere.
- In countries without freedom of information laws, transfer or referral is more likely to be unjustified (noncompliant), than in countries with dedicated laws. Public officials apparently find it easier to direct requesters away than to take responsibility for either delivering or refusing information.

Figure 18: Transferred and Referred Requests Totals, by Compliance and Noncompliance

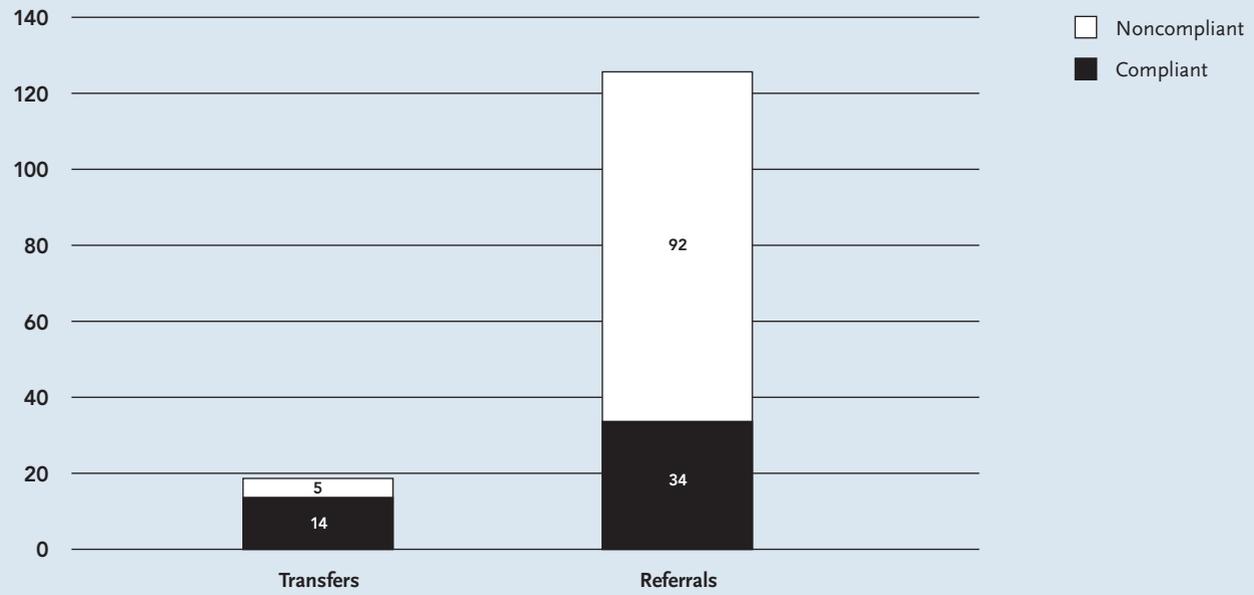
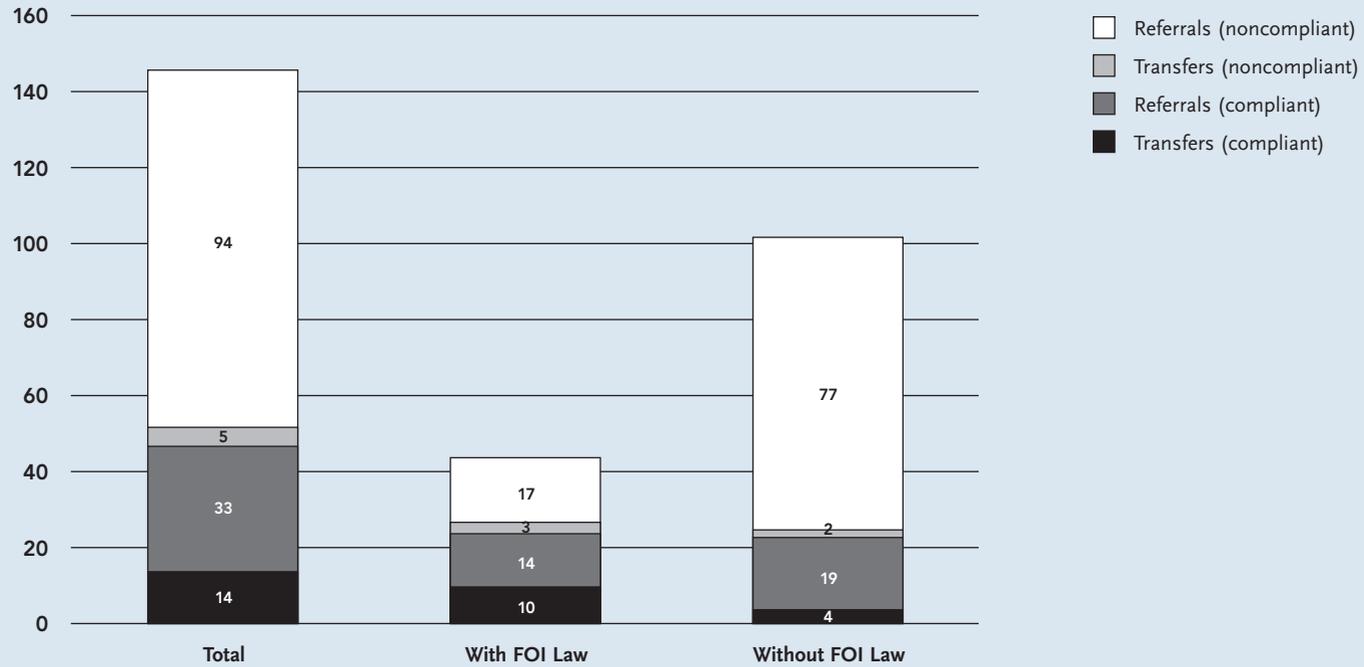


Figure 19: Transferred and Referred Requests, by FOI Law and by Compliance and Noncompliance



- In some rare cases, public bodies made an appropriate transfer or referral of one request whereas its pair resulted in a mute refusal. For example, in South Africa, a request to the Parliament by a representative of the NGO SAHA (the South African History Archive, known for its access to information work) was correctly transferred to the Independent Election Commission, whereas the paired request from the private business received no response. The request asked for all accounting reports submitted to Parliament by political parties pursuant to their obligations to account for parliamentary funding since relevant legislation came into effect.

### **Beyond the Call of Duty: Transfers in Armenia**

Transfer is the optimum outcome for an institution that does not hold requested information, as it facilitates efficient access to information. The countries in the study represent a typical mix of requirements on transfers/referrals: there is no fixed global standard. In the course of the present monitoring exercise, however, institutions occasionally transferred requests even absent a legal requirement to do so.

For example, in Armenia, two requests asking how much money had been spent since 2003 to inform the public on government anticorruption measures were directed to the Prime Minister's office. Although the Law of the Republic of Armenia on Freedom of Information (2003) does not require transfers (whereas referrals are mandatory), both requests were transferred to the Ministry of Finance, which provided a detailed written response with the data. The requesters were not, however notified about the transfer, and given that in both cases the answer came after the five day notification period (10 and 15 working days respectively), a mute refusal might have been assumed.

### **The Challenge of Tracking Transfers in Spain**

Even when requesters are informed of a transfer, there may be difficulty in knowing what has happened to a request if tracking procedures are inadequate. In Spain the current administrative law provisions on access to documents specifically require public institutions to transfer requests to the relevant government body.<sup>17</sup> In this monitoring study, three requests were transferred and one of these resulted in receipt of information: a request by a representative of the NGO Economists Without Borders to the Ministry of Economics for the list of firms that had received Development Aid Fund (DAF) credits during 2002 and 2003, along with details of how these companies were chosen.

The ministry acknowledged receipt of the letter by post, and when the requester telephoned to follow up he was told that the request had been transferred to the Commerce and Tourism State Secretary, which regulates the DAF credits through the Commerce and Investments General Office (part of the Ministry of Industry, Tourism and Commerce). The requester followed up with Ministry of Industry, and although they initially could not find the request, after a few days they nevertheless provided the information, which arrived three weeks after the initial request was filed. The paired request, filed by the business person, however, received a mute refusal, and during follow up telephone calls he was not able to identify what had happened to his request; it is therefore not known if it was transferred or not.

## Noncompliance in transfers/referrals

- As noted above, five percent of all requests filed were transferred or referred in a noncompliant manner, with only 2.5 percent transferred or referred compliantly.
- The study found no correlation between the level of transferred/referred requests and overall compliance. Nor does the existence of an access to information law appear to impact the level of transfers/referrals in a given country, rather specificities of national bureaucratic practices, poor information management, and inconsistent treatment of requesters by some institutions appears to have resulted in higher levels of transferred and referred requests in some countries.
- Referrals were particularly high in Macedonia and Nigeria, two countries without freedom of information laws at the time of monitoring. In these two countries, public bodies reluctant to handle requests for information readily referred requesters elsewhere, even where the referral was patently inappropriate.

**Table 6: Transferred and Referred Requests, by Country (12 Countries)**

Country	Transferred	Transferred (noncompliant)	Referral	Referral (noncompliant)	Total
Nigeria				29	29
Macedonia		2		19	21
Argentina	1		6	13	20
Mexico			11	5	16
Spain	3		4	8	15
Romania	3		1	4	8
Bulgaria	4	3			7
Ghana			7		7
Armenia	2		1	3	6
Kenya				6	6
Chile			2	2	4
France			2	2	4
South Africa	1			1	2
Peru					0
Total	14	5	34	92	145

## Referrals by Public Bodies in Possession of the Requested Information

- In Peru, a request to the Ministry of Finances for the investment of international funds and the proportion allocated to job creation received an email referring the requester to the Ministry of Agriculture. Although referrals are permitted under Peruvian law, this referral was inappropriate because: (a) the request was for data covering sectors other than agriculture; and (b) the Ministry of Finance should hold this information, at least in part or in broad terms
- A full 21 percent of requests made in Nigeria resulted in noncompliant referrals, a far higher number than any other country. For example, two requests to the Nigerian Ministry of Youth, Sports and Culture for the total number of Nigerian athletes indicted for drug use at international events from 1999 to 2004 were both referred to the Nigerian Olympic Committee. This is inappropriate because: (a) the ministry should have at least some information on this question; and (b) the information does not refer only to Olympic events. In another example from Nigeria, a request to the Ministry of Agriculture concerning funds spent on research into cassava exports, including trips abroad and countries visited, was referred to the Nigerian Central Bank.

### South Africa:

#### Referral Made although Transfer Required by National Law

In South Africa, where transfer is required by law, a requester who asked the Johannesburg High Court for the number of cases of domestic violence in 2003 was referred by letter to the Magistrate's Court instead of the request being transferred. By contrast, a request to the South African National Treasury by the same NGO requester for the most detailed itemized record available of the expenditure of the Truth and Reconciliation Commission for 1996 was transferred to the Ministry of Justice and Constitutional Affairs which provided the record.

According to South Africa's PAIA Section 20, entitled "Transfer of Requests," a request should be transferred if the body approached does not have it or if the request is more closely connected with the functions of another public body or if it relates to com-

mercial information in which another body would have a greater commercial interest. Section 20 also provides that if the record was created by another public body, or if it is “not closely connected to the functions of the public body of that information officer and the information officer does not know whether the record is more closely connected with the functions of another public body” then it should be transferred. According to this provision, the High Court itself should have transferred the request to the Magistrate’s court. Nevertheless, Section 20 is a complex provision and partially contradicted by Section 19 on the information officer’s Duty to Assist, which at Sub-Section 4 states that “the information officer of the public body concerned must—(a) render such assistance as is necessary to enable the person to make the request, to the information officer of the appropriate public body; or (b) transfer the request [...] whichever will result in the request being dealt with earlier.” Section 19 thus appears to allow referrals, at least where assistance is provided. For transfers to work when appropriate, some clarification of the law is needed.

**Table 7: Requirements to Publish Lists or Indexes of Information Held**

Country	List or index of information held	Information on procedures for requests
Armenia	<b>List of information held must be published.</b> Institutions must publish, at least once per year, a list of information held (Article 7(j)).	Institutions must publish the procedures for providing information (Article 7(j)).
Bulgaria	<b>Description of data held must be published.</b> The institution must publish, on a regular basis, information that includes the scope of duties of the body, the list of the acts issued within the scope of its powers and a “description of the data volumes and resources, used by the respective administration” (Article 15 paragraphs 1-3).	The authority must publish the name, the address, the telephone number and the working hours of the office authorized to receive applications for access to public information (Article 15.4).
France	<b>A reference list of documents held by the body</b> should be published “regularly,” along with all ministerial orders, instructions, circulars, memoranda and replies containing an interpretation of positive law or a description of administrative procedures (Article 9). Decree No. 79-834 of 22 September 1979 elaborates on the implementation of the 1978 Law on Free Access to Administrative Documents with respect to proactive publication.	The law does not establish an information officer or equivalent.
Mexico	<b>Index of classified documents must be published.</b> This index, to be updated every semester (six months), must be organized by subject headings, and must indicate the administrative unit that generated the information, the date of its classification, the reason, the length of time it will be classified and, when relevant, which parts of the documents are classified. In no instance shall the index itself be considered classified information (Article 17). In addition, each body must publish ex officio considerable detail on its constitution, powers, functioning, decisions taken, contracts awarded, and reports generated (Article 7).	The institution must publish the address of the information office, as well as the electronic address where requests for information can be received (Article 7.V).

**Table 7: Requirements to Publish Lists or Indexes of Information Held** (*continued*)

Country	List or index of information held	Information on procedures for requests
Peru	<p><b>Index of documents not specifically required</b>, although institutions must publish on their websites a range of information including general information about the functioning, financing, organization and procedures of the body, including the Unified Text of Administrative Processes (<i>Texto Único Ordenado de Procedimientos Administrativos</i>—an internal regulation governing each body in Peru) (Article 5.1).</p>	<p>The officer responsible for freedom of information must be named in the Unified Text of Administrative Processes (see left) which must be published electronically (Article 3).</p>
Romania	<p><b>List of all documents of public interest must be published</b> (Article 5.1.g) as well as a list of the categories of all documents prepared and/or administered according to the law (Article 5.1.h). These lists must be made public ex officio and must be updated and published in a bulletin at least once per year (Article 5.2).</p>	<p>The full names of those responsible for public information in the authority and the contact information for the institution including the name, telephone and fax numbers, email address and website must be made public ex officio (Article 5.1 paragraphs c and d).</p>
South Africa	<p><b>Index of records held must be published.</b> Each body must publish a manual on functions of and index of records held (Section 14).</p>	<p>The contact details of all information officers must be published by the department of government communication and information services in all telephone directories issued for general use (Section 16).</p>

## Knowing Where the Information Is

If a public body does not hold the information requested, it may be difficult for its employees to know where the information might be found and to advise a requester accordingly. This is particularly true in countries where information management is weak and government departments have not created public (or even internal) indexes of information held. Similarly, even where there is an obligation to transfer information, this may prove onerous absent efficient mechanisms for transferring requests. Poor information management and lack of interagency mechanisms prevail in many transitional democracies, including those covered in this study. Ensuring that public officials can locate and request information between one government department and another is a prerequisite for ensuring full compliance with access to information laws and standards and an essential component of efficient administration. It is fundamental to good governance and should therefore be a priority for all administrations and for international donors.

Problems with organization of files and lack of indexes make it hard for information officers to locate information within their own organizations. In some cases, requesters were told to approach another department within the same institution where the request was made. This was a common problem in Spain and France as well as in Chile and Argentina. In such cases, the methodology required that upon being referred to the fourth person within a particular body, the requesters not pursue the request and register an unable to submit outcome. In Spain, 29 percent of oral requests were referred to another department in the same body, even though in preparing the monitoring, the correct department to approach had been researched and identified to the best ability of the Justice Initiative's partner in Spain, Sustentia. Follow up phone calls to written requests also often resulted in internal referrals.

In countries where the law does not elaborate a comprehensive set of mechanisms for handling access to information requests, such as Argentina, Chile, and Spain, the survey found that requesters were often referred elsewhere in good faith by public officials but in an *ad hoc* manner that was ultimately fruitless and would prove highly frustrating for the average requester. Subsequent interviews with government bodies in these countries indicated that a fundamental problem is knowing where the information is. Even when an officer knows whom to ask, his or her colleagues may not feel compelled to act. Such referrals and transfers are not consistent with comparative legal standards: to ensure effective enjoyment of the right of access to information, a government body should take every step to remove obstacles. To this end, simple systems for

submitting requests are needed at a single public access point. A single official or office should have responsibility for collecting information internally. Only if the information is held by an entirely different body is an interagency transfer acceptable.

Inefficient internal procedures can also impede access to information, particularly in countries where access provisions are unclear. For example, in Spain, one NGO requester sent a faxed request to the Ministry of Environment for information about air pollution in each region and all cities over 100,000 inhabitants during 2002 and 2003. He received a letter suggesting that he try a different department in the same ministry and that the information could be found on their website. The requester sent an email to the second department but it was not answered (and the information was not found on the ministry's website). The same request, submitted by the business person via the ministry's web portal, remained unanswered in spite of attempts at follow up. An interview with the ministry revealed a complicated set of internal procedures that attempted to deal separately with the disparate information provisions of Spanish law (access to administrative information, access to environmental information). One department handles environmental requests, while administrative requests are referred to the departments that should hold the administrative information. In this monitoring exercise in Spain only three of the eight requests filed with the Ministry of Environment received answers, and these provided administrative information only.

## **Internal Referrals: Journalists Sent to Public Relations Departments**

The monitoring study identified a particular problem of internal referrals of journalists to public relations departments, even when information requests were filed according to the law. These incidents were not recorded as referrals, but either as refusals to accept, or mute refusals, or sometimes information received, depending what happened to the requester.

- In Argentina, a journalist filed a written request to the Buenos Aires Finance Department about the number of employees financed by UNDP. He was later telephoned by the spokesperson, angered that the journalist had not called the press office directly. The journalist was reprimanded in very strong language and told that there was now nothing the press officer could do to help. Both he and the NGO

requester who filed the paired request received mute refusals to this question.

- In France, a correspondent for *Le Figaro* telephoned the Préfecture de Paris with an oral request on the number of homeless in Paris. He was referred to the Press Department, which did not, however, give him any specific information. Eventually the request was classified as a mute refusal. (The paired request from an NGO requester resulted in a mute refusal.)
- In Chile at the local (municipal) level, the *mesa de partes* reception desks frequently asked journalists “but why didn’t you go directly to our Press Department/Public Relations Department?”

## Recommendations:

- Access to information laws and/or implementing regulations and guidelines should make specific provision for either transferring or referring requests where the request has been filed with the incorrect body. The minimum standard is to make a good faith effort to direct the requester to another body. The Justice Initiative recommends an obligation to transfer requests.
- Indexes of information held by public bodies greatly assist both requesters (in correctly wording and directing their requests) and civil servants (in locating the information). Indeed, the absence of such indexes prevents effective referrals and transfers. Accordingly, the Justice Initiative recommends that access to information laws and/or implementing regulations require the compilation of such indexes.
- Where civil servants are unable to identify the correct location of the information, they should inform the requester. The Justice Initiative recommends that where information commissioners or similar monitors are established, officials should be obliged to notify the monitor when information cannot be located. Such an obligation would dissuade frivolous rejections of requests and facilitate monitoring of information management within government.

## 3.4 Information Not Held: The Failure to Collect Information

If a public body is asked for information it cannot access, it may answer that it does not hold the information in question. Unless the paired question resulted in information received, these responses were regarded as compliant for several reasons. They allow requesters to perceive the workings of government, and are preferable to mute refusals because they facilitate appeals and also establish responsibility for denials. This study did not deem an agency noncompliant for its failure to *collect* information. Arguably, governments have a duty to collect certain information, but any such duty falls outside the scope of this study.

In South Africa, a journalist filed a request in July 2004 with the Nelson Mandela Metropole (local authority) for the budgets and expenditure reports for the 2003-2004 financial year. In response he was told that the documents would only be available in September 2004. This is a positive example of a reply that enables citizens to track the operation of government. Public officials do not always wish to concede that they do not have reports and documents they are obliged to have by law, and this may result in mute refusals. However, putting the facts down in writing, as in this case, encourages openness. South African law provides for “information not held” responses. Six such were recorded in the present study, all in compliance (i.e. there was no reason to believe that the body had the information in fact).

In the present study, the information not held response was rare. However, about a third of usage was noncompliant. The monitoring study found that some authorities may use this response to avoid disclosing information altogether.

- There were marginally more information not held outcomes in countries without freedom of information laws—3.3 percent of total requests, as against 2.5 percent in countries with freedom of information laws.
- Information not held outcomes in countries without freedom of information laws were not generally in compliance with international access to information principles.

- Nigeria (10 percent), Romania (eight percent), and South Africa (four percent) scored higher than average levels of information not held outcomes as a percentage of all requests.

## Nigeria: Public Interest Information Not Held

In some cases, an information not held response may raise serious questions about the functioning of a public body. In Nigeria, for example, the study found:

- There are no records of the amount of money spent on public hearings by the Senate since 1999.
- There is no record of the number of kilometers of water pipes laid in the Federal Capital, Abuja, since 1992 (although this information should be calculable on the basis of the construction contracts, and therefore is probably held by the Water Authority).
- There is no record of the number of days in 2002 in which Abuja residents did not have a functioning water supply, nor of the reasons for any such water cuts.
- There is no record of the quantity of effluents discharged by private companies in the Abuja district.
- There are no records of the tons of waste generated monthly in Nigeria's Federal Capital Territory.
- There is no record of the number of children vaccinated for polio in the Federal Capital Territory between 1999 and 2003—when requested orally, the official said “most children” but did not have precise numbers.

There is a clear public interest in information of this kind, as it relates to health and safety, the provision of basic supplies (water) and government openness (public hearings by the Senate). The information management lacunae revealed by these requests can be of value in sparking public debate about administrative performance of concern to members of the public: to the electorate, to taxpayers, to citizens.

Of Nigeria's 14 information not held responses in the present study, eight appeared credible (including the above) and six did not—where, for example, the Justice

Initiative's partner organization Media Rights Agenda had credible knowledge that the body did in fact hold the information requested.

## **Romania: Information Not Prepared Despite Legal Obligation**

In Romania, a number of bodies frankly admitted that they did not hold information they are obliged by law to create:

- The Court of Cassation replied to two requests that it did not hold information on the costs of implementing Government Emergency Ordinance No. 38/2003 (that directs all appeals on points of law to the Supreme Court). There is a general obligation to conduct a financial assessment of draft laws, but despite this, requesters were informed that these figures had not been produced.
- The City Hall of Buftea told requesters that the report was not yet ready. In an interview the responsible officer explained that he was new and had not yet had time for the task.
- One request, to the Ministry of Labor, Social Solidarity, and Family received an answer that the annual report on implementation of the access to information law had not been written; the journalist filing the second request received a late response containing the report (it stated that there had been 58,800 access to information requests in 2003). It seems that the report had been created in the meantime. Both were recorded as compliant outcomes.

Of Romania's 11 information not held outcomes, 10 were in compliance with the access to information law even if the failure to create information is in violation of other laws. Romania's Law 544 on Free Access to Information of Public Interest (2001) does not have a specific provision on steps to take if information is not held, except in cases of oral requests where requesters are to be asked to set requests down in writing if the information is not immediately available.

The single noncompliant instance seems to have resulted from internal processing problems. Both an NGO requester, who telephoned, and the pro-government

journalist, who submitted a written request, asked the Ministry of Defense for its annual report on implementation of the access to information law. The former was told that no such report existed. The journalist, however, received a two page report drawn up according to the law. The report gave the total number of freedom of information requests (58,209 requests received in 2003, of which 1,362 were written, 3,883 were electronic, and 52,964 were oral), categorized by types of requests, with details of answers and administrative complaints. During a follow up interview, Major Dragoman (responsible for access to information at the ministry) said the noncompliance was due to a misunderstanding and that he had not been informed about the request. According to Romanian law, the NGO requester should have been asked to resubmit in writing, which might have yielded the report, demonstrating that attention to the procedural implications of laws can clearly make a great difference to the success of public information requests.

## Recommendations:

- Access to information laws (and/or regulations and guidelines relating to their implementation) should provide clear guidance to public servants as to how to respond to requests when the information is not held by the public body, even if it relates to its functions and responsibilities. If information does not exist, public officials should be prepared to inform the requester. Such responses are a key part of open government and can form the basis of constructive dialogue between the administration and the public about the type of information needed in order to improve government efficiency and increase the quality of decision making and policy making.
- Public authorities should have the duty to inform the information commissioner or similar oversight body of instances when requests were refused for lack of information. Such requirements are particularly important in transitional and developing countries where information management can be deficient.
- Establishing indexes of the information held by particular bodies, and making these indexes public can greatly assist information officers in rapid retrieval of information upon receipt of a request, or in

quick identification of the nonexistence of information. Such indexes should also list the titles of documents subject to classification under other laws, in order to facilitate requests for these documents and review of the necessity of the classification according to the standards established by the access to information law.

- Although the current study only addresses the right of *access* to information, the Justice Initiative encourages governments to adopt laws requiring the collection of information necessary for the agencies to perform their public functions.

## 3.5 Information Received: On Time and of High Quality

Information was received in response to 23 percent of requests, making “information received” the most frequent outcome after mute refusals. This figure includes a small number of requests (nine out of the total of 1,926) that led to the partial release of requested information, where some relevant information was withheld on the grounds that it was exempt from release under the national access to information law.

In general, institutions that complied with the right of access to information did so quickly and thoroughly. Received information was of good quality and arrived within the time frames specified by law (see Chapter Four for information on late responses).

### Information Received: Expanding the Public Domain

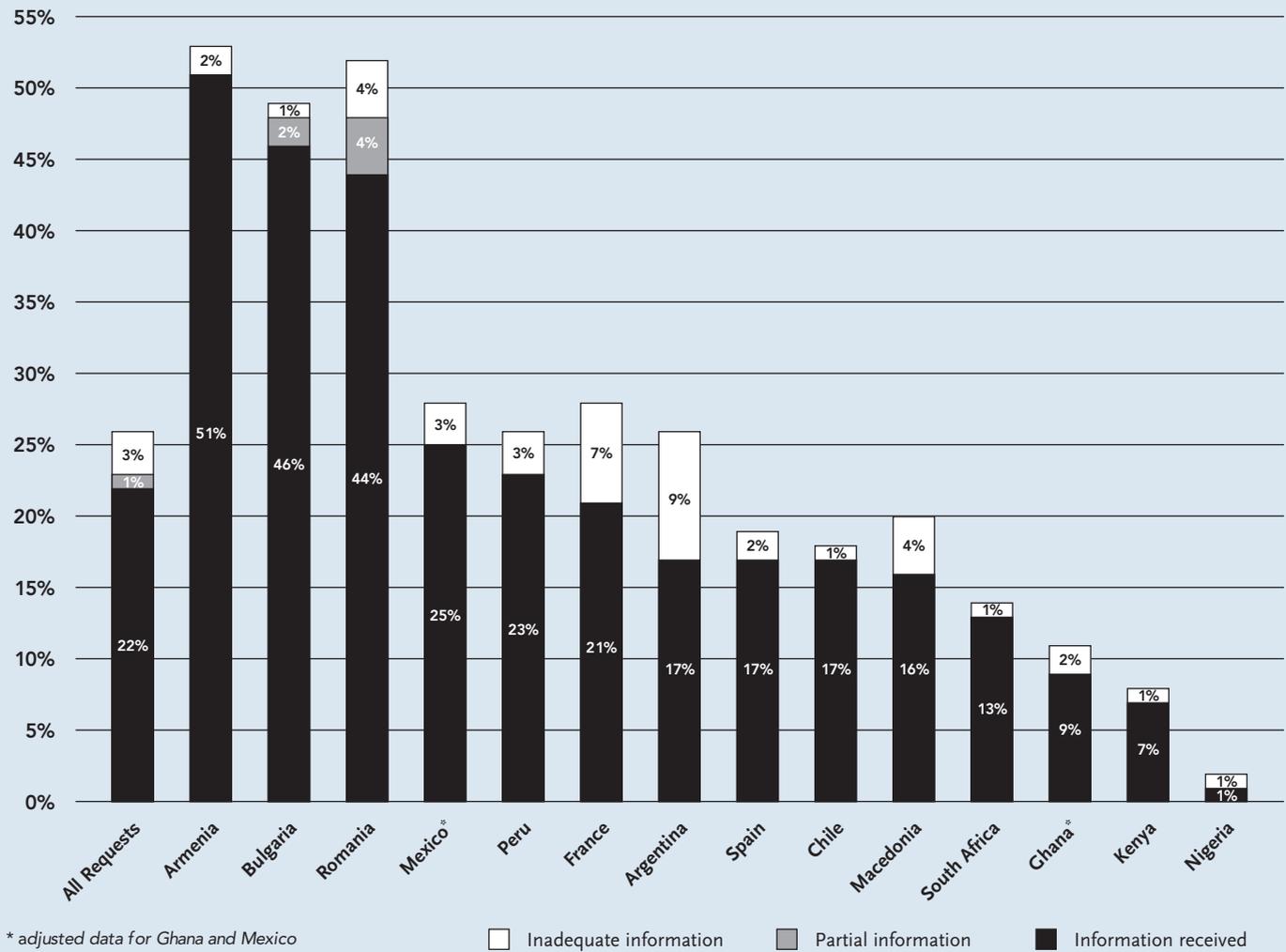
In some monitored countries, the study resulted in the delivery of much information that had not previously been public. Some institutions provided lengthy documents, including details of government policy and programs—the kind of information that is immensely useful in a range of civil society activities, such as human rights monitoring and anti-corruption work.

In Argentina, for example, information was received on: the number of children who died of asthma in Buenos Aires (one child in 2002 and none in 2003); the number

Figure 20: Information Received on Time and Late, Including Compliant and Noncompliant Results



Figure 21: Information Received, Including Partial and Inadequate Information, by Country



Analysis based on data from 14 countries

of food baskets supplied in 2003 (total 93,189, broken down according to whether they were provided to social organizations or directly to individuals); the international institutions supporting justice reform and the dollar amounts (the Ministry of Justice has a loan for an access to justice project from the World Bank for US\$690,633 in 2004 and US\$995,075 for 2005); and the national government's programs for training garbage collectors on the sorting of household trash.

### **Armenia: Expanding the Public Domain**

Some of the information released during the Access to Information Monitoring survey proved of value to partner organizations, particularly when the information related to the inner workings of government in countries where such information has not traditionally been public. In Armenia, for example, requesters received information not previously in the public domain:

- The First Instance Court of the Yerevan Center and Nork Marash district disclosed the number of court cases filed against media outlets in that district in 2002-2004 and full copies of all nine cases that had been heard within that period were released. The Freedom of Information Centre that led the monitoring in Armenia notes that Armenian courts had previously refused to provide copies of documents to those not party to a particular case. The decision by this court to release full copies of all nine decisions involving media outlets illustrates the power of the 2003 Law on Freedom of Information to secure information previously not in the public domain.
- Requests to Yerevan Avan district administration for copies of all decisions of the Council of Elders of the District in the first quarter of 2004 resulted in 25 pages of information detailing decisions by the council.
- The business requester asked the prime minister's office for information on the level of black market activity in petrol and medicine. A three page reply from Deputy Minister of Finance Tigran Khachatryan provided information on the amount of petrol and medicine imported both legally and illegally into the country in 2003 and also offered background information on the causes of the black market in these goods.

- The head of the financial department of the Ministry of Defense responded to a request by the Yerevan based Media Law Institute with a complete three page list containing the salaries of the ministerial staff. Financial information relating to the ministry had not previously been disclosed to the public as a matter of course.

## Best Performing Institutions

The Justice Initiative filed requests with a total of 252 government institutions across the 14 countries of this monitoring study. Based on a combination of the number of requests answered by each institution (information received score) and the compliance scores for each institution, the Justice Initiative was able to rank each of these institutions, based on a score range of 0 to 200. (Both original measures range between 0 and 100 percent. The combined score ranges between 0 and 200.)

A score of zero indicates that the institution failed to handle any request in compliance with the law, and provided no information. The highest score indicates that the institution handled all requests in compliance, and provided the requested information in all cases. On a scale ranging from 0 – 200, the average for all institutions is 51. Ranking all 252 institutions on this scale shows that:

- 28 percent of all institutions scored 0 (absolutely no compliance and no information provided);
- 33 percent scored low (a combined score between 0+ and 50—one standard deviation below the midpoint);
- 26 percent scored in midrange (a combined score between 50+ and 100—within one standard deviation of the midpoint);
- Nine percent scored high (a combined score between 100+ and 150—one standard deviation above the midpoint); and
- Four percent scored among the top of all institutions (two standard deviations above the midpoint, 150+ on the combined scale).

Using this measure, the top performing institutions are easily identified by their score. A total of 16 institutions fall within the top category, meeting high levels of compliance and providing information to nearly all requests.

The sixteen top performing institutions (all having a standard deviation of 1.5 or greater in the analysis) were as follows:

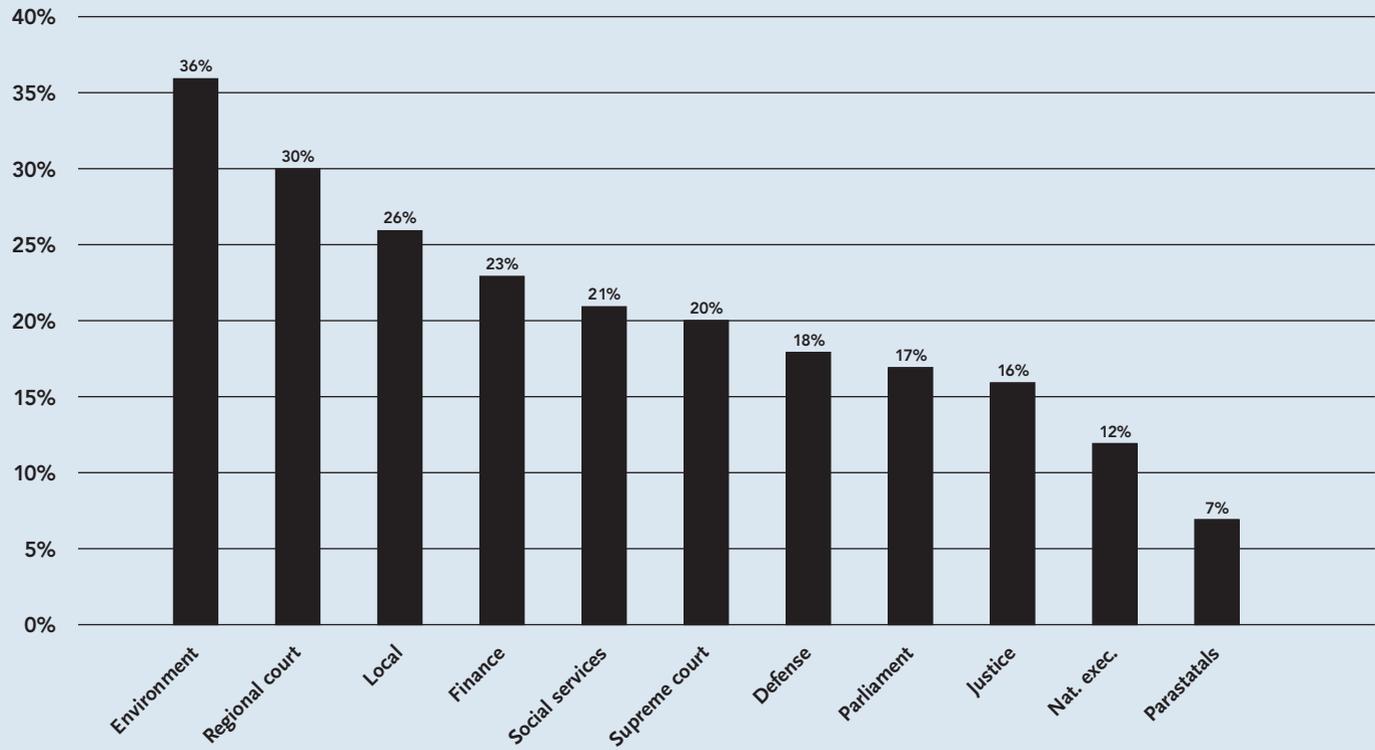
1. Ministry of Finance, Armenia
2. Ministry of Work and Social Issues, Armenia
3. Municipality of Sredets, Bulgaria
4. National Supreme Court of Justice, Mexico
5. Ministry of Environment, Armenia
6. Yerevan Avan District Administration, Armenia
7. Municipality of San Isidro, Peru
8. Bucharest Tribunal (regional court), Romania
9. City Hall, Bucharest Fourth District, Romania
10. Ministry of Justice, Romania
11. Municipality of Miraflores, Peru
12. Secretary of Culture, City of Buenos Aires, Argentina
13. Ministry of Environment and Water, Bulgaria
14. Municipality of Slatina, Bulgaria
15. Regional Court, Montana, Bulgaria
16. Supreme Court of Cassation, Bulgaria

**Note on institutional variation within countries:** We note that while Romania and Armenia were top performers in this study, Argentina and Peru, which each had some strongly performing institutions, ranked lower overall because other agencies did not perform as well. Bulgaria on the other hand, a country that also performed well, had a more even spread of performance among institutions, with no top 10 placements, but a number of well performing institutions.

Follow up interviews with officials in those institutions that supplied most information showed that transparent institutions share a number of common features:

- A commitment to transparency exists at all levels of the institution.
- Internal information management systems enable staff members to locate information.

Figure 22: Performance of Institutions by Type by Percentage of Requests Receiving Information



- Sufficient human resources are allocated to processing information requests.
- Staff members are trained on the relevant laws and on dealing courteously with the public.
- Clear lines of decision making exist so responses can be approved within the time frames stipulated by law.
- Committed and trained officials oversee information requests and ensure that they are answered.
- A proactive approach to transparency, with information made available in reports and on websites.

## Civil Society Demand and Technical Assistance

A combination of technical assistance by civil society and demand for information can help ensure that a government body is committed to the release of information and actually does so in practice.

### Romania: Empowering the Information Officer

The commitment and experience of the official responsible for answering information requests was a common feature of institutions that performed well in Romania. Also important was that each had an influential position within the institution, be it formal or informal. Thus they were able to obtain information from other departments and even to ask them to gather information from archives.

The Bucharest Tribunal, for example, responded to all requests in line with its legal obligations and on time, including by transferring one request to another body, referring orally the paired question that had been submitted orally. The responsible information officer is Deputy Chair of the Court Laura Andrei, who voluntarily assumed the responsibilities of information officer and had an excellent knowledge of the law, having been involved in a civil society initiative to write a guide on applying the access to information law in the judiciary.<sup>18</sup>

In other strongly performing bodies in Romania, empowered information officers also played a key role. It is noteworthy that in these institutions, the information officers themselves rather than the head of the institution signed the responses to the information requests (the law does not require that the head of the institution sign, but

bureaucratic habit often establishes this practice). The autonomy of these officers, often relatively senior civil servants, combined with their commitment to transparency, helped ensure that the tight deadlines under Romanian law were met.

Internal systems were a strong complement to the empowerment of the information officers. The City Hall of Fourth District of Bucharest performed extremely well, responding to all requests with the information requested and doing so within the time frames in all but one of eight cases. During a follow up interview, the monitoring team learned that this institution has a computer system for registering and tracking requests. This enables the head of the Public Relations and Information Department, which every Romanian public institution is required by law to establish, to check at any moment the status of a request. The computer system guides public servants on the internal steps for processing a request. Additionally, the department head is a highly experienced individual, well regarded within the institution and thus well placed to obtain information from other departments.

## 3.6 Partial and Inadequate Information: Poor Excuses

### Partial Access to Documents

Many access to information laws allow authorities to provide *partial access* to information, where some information falls under the law's exemptions. If a request is for information, rather than specific documents, any non-exempted information can be provided. If a request is for a particular document, any exempt information in the document needs to be "severed" so that the rest can be released. The most common way of doing this is by blacking out sensitive information. In countries such as the United States, where this practice is well established, requesters regularly receive documents with heavy black lines exempting information deemed to be harmful to national security or containing private data. Information can also be redacted and the sensitive information excised using electronic means, resulting in delivery of only part of the information. This is often done when requested information is registered alongside sensitive information—such as the names of private individuals, for example—that is not relevant to the request.

A very small number of requests in this study—nine in total, less than one percent—resulted in the delivery of partial information, and these occurred in only two countries: Bulgaria and Romania. In all cases, a part of the requested information was delivered, together with a statement that other information could not be provided as it was exempted by the freedom of information law. Partners note that although these partial releases of information were recorded as compliance for the purposes of this monitoring, in practice, these statements were often broadly worded and did not always appear to be in conformity with national law and practice on access to information. For instance, exempting the names of companies that had won tenders in Bulgaria on grounds of protection of personal data appears to be an incorrect application of the law on access to information.

Laws are not always precise in guiding public officials on delivering partial information. In Peru, for example, the Law on Transparency and Access to Public Information requires that “Where a document contains partial information mentioned in articles 15, 15A and 15B [on exemptions] of the present law that is not subject to public access, the Public Administrative entity must release the available information in the documents.”<sup>19</sup>

Access to information laws in Armenia, Mexico, Peru and South Africa also allow for the delivery of partially severed documents, yet the technique of blacking out or otherwise severing information was not used in any of the monitored countries in the present study. In Bulgaria and Romania, some responses to questions stated that part of the requested information could not be released.

The limited release of partial information might be due in part to the deliberate attempt in this study to avoid formulating requests that might trigger exemptions, and is consistent with the low levels of written refusals overall: by design, requests in this monitoring did not invoke exemptions. It may also be, however, that public officials may not be familiar with the process of severing documents, or even aware that such a possibility exists. In interviews in some of the countries monitored, including Armenia and South Africa, officials indicated a lack of familiarity with freedom of information laws and lack of confidence in using them. Practices such as partial document disclosure and blacking out might not yet have taken root.<sup>20</sup> In countries with new freedom of information laws, time is needed to develop a culture of releasing, rather than withholding, information, and to establish internal mechanisms for applying exemptions and deciding which parts of documents to sever. In Bulgaria the monitoring did not find problems of lack of familiarity with the relevant legal provisions, a result of the widespread efforts to promote it, and an undoubted factor in the successful implementation of the law.

## Instances of Partially Exempted Information

### Romania

In response to requests for the annual expenditure on modernizing armaments between 2000–2003, as a percentage of total annual expenses, the Ministry of Defense delivered information on the total annual amount spent on modernizing all equipment (not specifically armaments). Although the ministry claimed the requested information on armaments was exempted, no specific grounds were given for this classification. Both requesters received the same answer.

Two requests were made to the Bucharest Prefect's Office for a list of local and municipal council decisions contested before the courts by the prefect in 2003, the grounds for contestation, status of proceedings, and final court rulings, where decided. Both requesters received a list of decisions together with a statement that the other requested information was exempted (grounds not stated).

The Romanian Ministry of Justice was asked for the complete list of national general-inspectors and judge-inspectors, the year of their employment at the ministry, and their previous employment. The ministry released the list of judge-inspectors' names to both requesters, but claimed that the remaining requested information represented personal data (an exemption under the law).

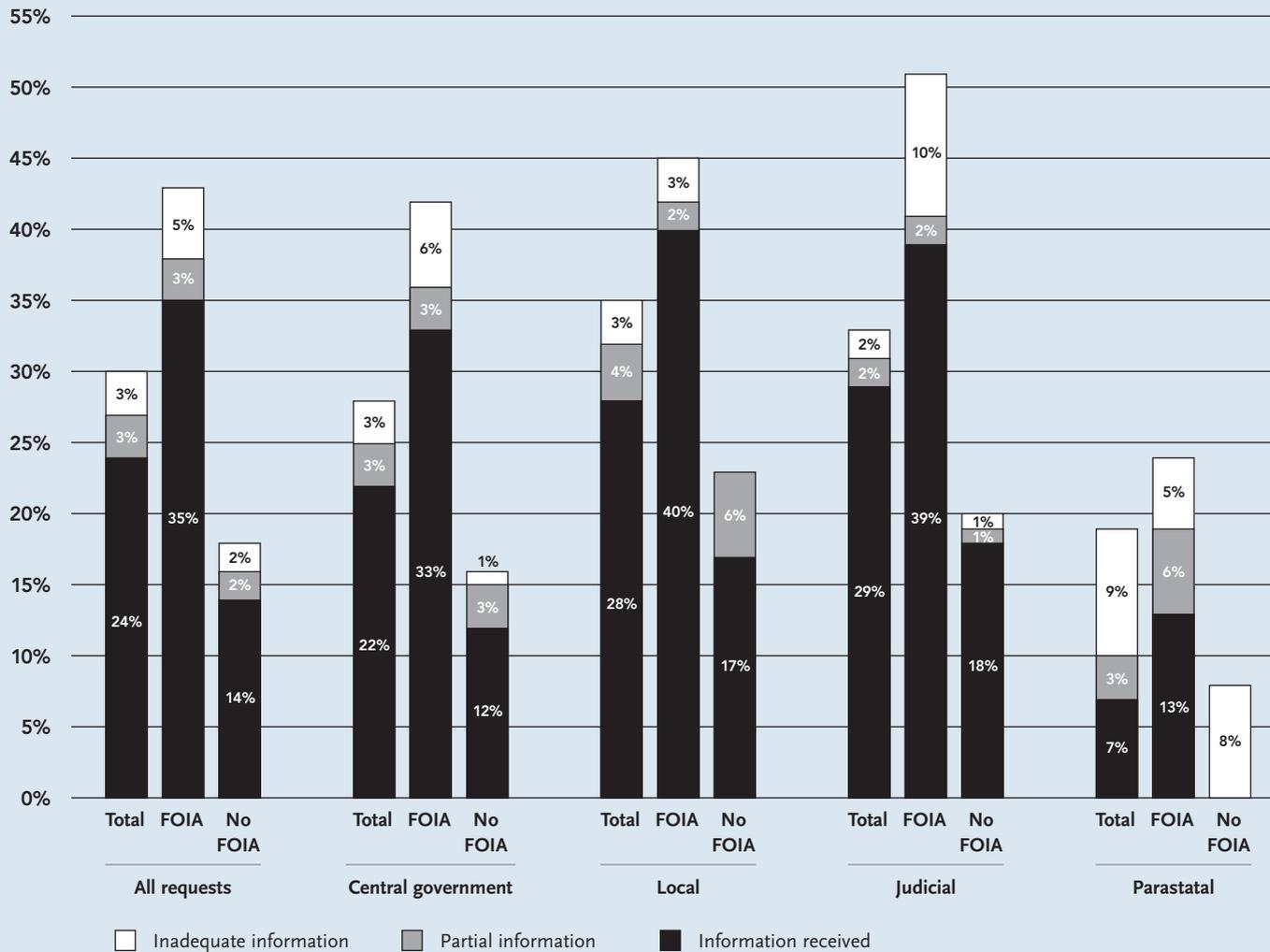
### Bulgaria

A request was submitted to the Council of Ministers for a list of public works contracts allocated without a public procurement procedure in 2003 and the reasons for this.<sup>21</sup> Both requesters received a list of the contracts but not the reasons for bypassing public procurement procedures.

The Municipality of Lom was asked for information about public procurement procedures, including a list of all companies/persons who won tenders in 2003. Both requesters were provided with information about the public procurement procedure, but the names of the tender winners were withheld citing protection of personal data as the grounds.

The Ministry of Defense was asked to provide information on the number of soldiers who had died in 2003 and the causes of death. The business requester was provided with the names of 10 soldiers who died in 2003, but was told that the results of investigations into causes of death constituted classified information. A requester from an environmental NGO received a mute refusal to the same question.

Figure 23. Compliance by Institutional Type and FOI Law Status



## The Impact of Access to Information Laws on Institutions

The compliance of each type of institution shows that local government and the judiciary performed best across the entire monitoring (with 28 percent and 29 percent information received), followed by central government (22 percent information received), and parastatals lagging behind significantly at just seven percent information received.

The analysis by countries with and without freedom of information laws shows that freedom of information laws have a positive impact across the board. The impact was comparatively limited at the local government level where compliance nevertheless increased almost twofold, from 23 percent to 45 percent. At the level of central government, the impact of having an access to information law is even more significant, with compliance increasing from 16 percent to 41 percent.

The formal obligations of access to information laws also encourage significantly greater responsiveness from the judicial branch, with compliance as defined by this study rising from 20 percent to 51 percent, but it should be noted that 10 percent of the responses from the judiciary in countries with a freedom of information law were written refusals, the highest rate for any of the institutions.

Parastatals also had very high levels of written refusals: nine percent of the parastatals' 19 percent compliance rate consisted of written refusals. In countries without access to information laws, no information at all was received from parastatals, although eight percent of requests to these institutions met with written refusals.

## Inadequate Information

Some information delivered in response to requests was substantially and inexplicably incomplete, entirely irrelevant, or otherwise inadequate. In this study, a "10 percent rule" was applied: if a response provided 10 percent or less of the information sought, it was considered inadequate. Otherwise institutions were given the benefit of the doubt. In practice, the rule was rarely invoked: requested information was either delivered or it was not.

## Examples of Inadequate Information

- In Macedonia, in reply to a request for a copy of the plan for the reconstruction of the water supply system of the Municipality of Veles, a requester was told that the plan was financed by the European Union, but no copy was delivered.
- A Macedonian requester asked for a copy of the procedure to have original receipts verified with an *apostille* seal. The requester received a copy of the Hague Convention of 1961.<sup>22</sup>
- In Ghana, a request to the Ministry of Defense for details on the number of the Ghana Armed Forces serving on peacekeeping missions throughout the world resulted in a range of documents provided without any specific information relating to the request.
- A Kenyan requester asked whether an environmental impact analysis had been conducted with regard to the titanium mining project in Kwale, and requested a copy of the final report if so. The answer stated that an impact analysis had been carried out, but no report was provided.
- In Spain, a request to the *Presidencia del Gobierno* (Cabinet Office) for disclosure of the personal wealth of ministers resulted in the provision of a web address for Spain's 1995 Law on Conflict of Interest for Members of Government, but nothing else.
- In France, a requester asked the Ministry of Defense for information concerning the privatization of the French electricity company (EDF) and when following up by telephone was told to check the ministry's press releases. The press releases were not provided.

In some cases in response to follow up telephone calls, officials promised, apparently in good faith, to provide information later without ever actually doing so. In others, they explicitly explained their failure to provide information, sometimes due to lack of time and resources. In Macedonia, for example, an NGO requester who asked the Veles Municipal Garbage Collection Company for information about the budget, including amounts spent on staff salaries and on hygiene measures for staff was told they had no time to prepare the answer. Similarly, the Veles Water Company told another requester that it had no staff available to answer questions about corporate debtors (private or public companies owing money for water supply). In one instance in France, the Municipal

Council of the Bouches du Rhône responded to one request in writing to apologize for not providing an answer. The requested information—on the funds invested in local colleges during the previous six years—was scattered in a number of departments, and would be too time consuming for him to collect. He suggested that the requester instead conduct research within Council’s records department, where the information should be available. France’s Law on Free Access to Administrative Documents (1978) is silent on the obligation on officials in cases that necessitate compiling information,<sup>23</sup> but many recent access to information laws implicitly require officials to compile disparate information sources, permitting time extensions if necessary (see Chapter Four for more information on time frames).<sup>24</sup>

## Publicly Accessible Information and the Internet

In some instances, officials failed to provide information, claiming that it was already available in the public domain. Some laws provide for information requests to be denied if the information is already publicly available. In the countries surveyed, Armenia<sup>25</sup> and France<sup>26</sup> have such provisions in their laws. In the monitoring itself, such grounds for refusal were infrequent. In Armenia, for example, a reply from the prime minister’s office to a request for the personal wealth disclosure statements of each minister said merely that the information had been publicized in the “mass media.” According to Armenian law, such a response would be sufficient were details of the specific media and the date provided.<sup>27</sup>

Such provisions are problematic, as the mere fact that information has been released does not mean it is readily available. In the information age, any document on the Internet could be considered as having been circulated or published, even if it is next to impossible to locate. In Argentina, seven out of 12 incomplete answers were referrals to websites where the information either could be found in general form or not at all, despite an exhaustive search of the referred site. For example, a business person was told by the Ministry of the Economy that information on the total number of UNDP-contracted persons working in each ministry could be found on their homepage ([www.mecon.gov.ar](http://www.mecon.gov.ar)). The information was not to be found.<sup>28</sup> Argentina’s Decree on Access to Public Information (2003) requires that information be provided “in the form in which it exists at the moment that the request is made, the [public body] is not required to process or classify it.”<sup>29</sup> The provision lacks clarity as it fails to specify whether the “form” refers to the content of the document or the manner in which it is held, thereby leaving open the possibility

that references to websites are acceptable under current Argentine access to information provisions. Unlike other laws,<sup>30</sup> Argentine access to information provisions do not permit the requester to specify the form in which the information should be provided.

In France, where significant amounts of information can be found on government websites, requesters were frequently referred to a public authority's Internet portal.<sup>31</sup> In some cases, information could be readily located. For example, a requester asked the Marseilles regional Environmental Department for information on flood prevention measures, in particular for the mechanism for enforcing the PPRN (prevention plan for natural risks). A clarification request was received saying that a more precise question was needed, but the request gave two websites: prim.net and that of the department, bouches-du-rhone.equipement.gouv.fr. Sufficient information was indeed found on these websites. The French Ministry of Finance satisfactorily answered a request about the level of French aid to Eastern Europe both by sending an electronic document entitled "The Financial Flow between France and Europe in 2003" and further web references, which contained the information.

In follow up interviews in France, government officials sometimes expressed the opinion that posting routine information on the website was sufficient to fulfill their information provision obligations. This attitude may be due to the absence of internal structures for handling requests in France—the documentation departments of many institutions are responsible for managing information internally but not for delivering it to the public. Hence there is a reliance on websites. While posting materials on government websites clearly facilitates transparency, it is insufficient in itself to guarantee the right of access to information. Even where information is available on government websites, the requester may not have Internet access. For example most persons from excluded groups in this study do not have Internet access and some were illiterate. In Argentina, for example, the excluded group requester was provided with website addresses in response to some of her requests, without ever being asked if she could make use of them.

In the experience of the Justice Initiative and its partners, government bodies themselves sometimes have limited Internet access: some monitored agencies in Armenia and in Africa did not have computer facilities for their own staff, let alone for the public. In Peru, central and local government bodies are obliged by the Law on Transparency and Access to Public Information to post certain data on their websites. Municipalities are also required to do so "unless the technological and financial resources make it impossible for them to comply."<sup>32</sup> In the present study, the Peruvian Municipality of Chorrillos reported, in response to a request about their website, that they did not have funds to create one.

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**Table 8: Internet Penetration for Countries in Justice Initiative 2004 Monitoring**

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<b>Country</b>	<b>Internet penetration %</b>
France	41.2
Spain	33.6
Chile	25.8
Bulgaria	20.5
Romania	18.7
Argentina	14.9
Mexico	11.8
Peru	10.2
South Africa	7.3
Armenia	6.7
Macedonia	4.9
Kenya	1.2
Ghana	0.8
Nigeria	0.5

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*Source: InternetWorldStats.com, which compiles data published by by Nielsen/NetRatings, the International Telecommunications Union, local network information centers, local Internet Service Providers and "other reliable sources."*

## Recommendation:

- Proactive transparency and the posting of materials on government websites facilitates access to information, but cannot in themselves guarantee the right of access to information. At a minimum, where requesters do have Internet access, officials should provide exact URLs, a service which entails little effort and no expense. Homepages are not sufficient. Where requesters do not have Internet access, the government body must print out the relevant pages and provide them to the requesters (charging any standard copying costs provided for by law). Such obligations should be clearly stated in relevant legislation and guidelines.

## 3.7 Written Refusals: Defining Exemptions

The access to information laws of most countries included in this survey establish that refusals to provide information should be in written form and should include the grounds for refusal based on the exemptions laid out in law. The present study did not set out to test the usage of exemptions. Submitted requests aimed to seek only information that ought to be released under a standard access to information regime. Nevertheless, in keeping with the benefit of the doubt principle applied throughout the project, written refusals were assumed to represent genuine attempts to apply the law—for public officials applying a new access to information law in countries emerging from cultures of extreme secrecy, even a formalistic compliance with the law by applying the exemptions it establishes demonstrates recognition of the right of citizens to seek information. Furthermore, there may have been instances when, in spite of best efforts to formulate requests that did not invoke exemptions, information requested under this monitoring study could, in part at least, legitimately be subject to the exemptions of the law. Hence all written refusals were registered as compliant, except where a paired request had resulted in information received—a clear indication that the refusal was noncompliant.

Written refusals were provided in response to a total of just three percent of requests overall—five percent on average in countries with freedom of information laws and two percent in those without. There appears to be a great reluctance on the

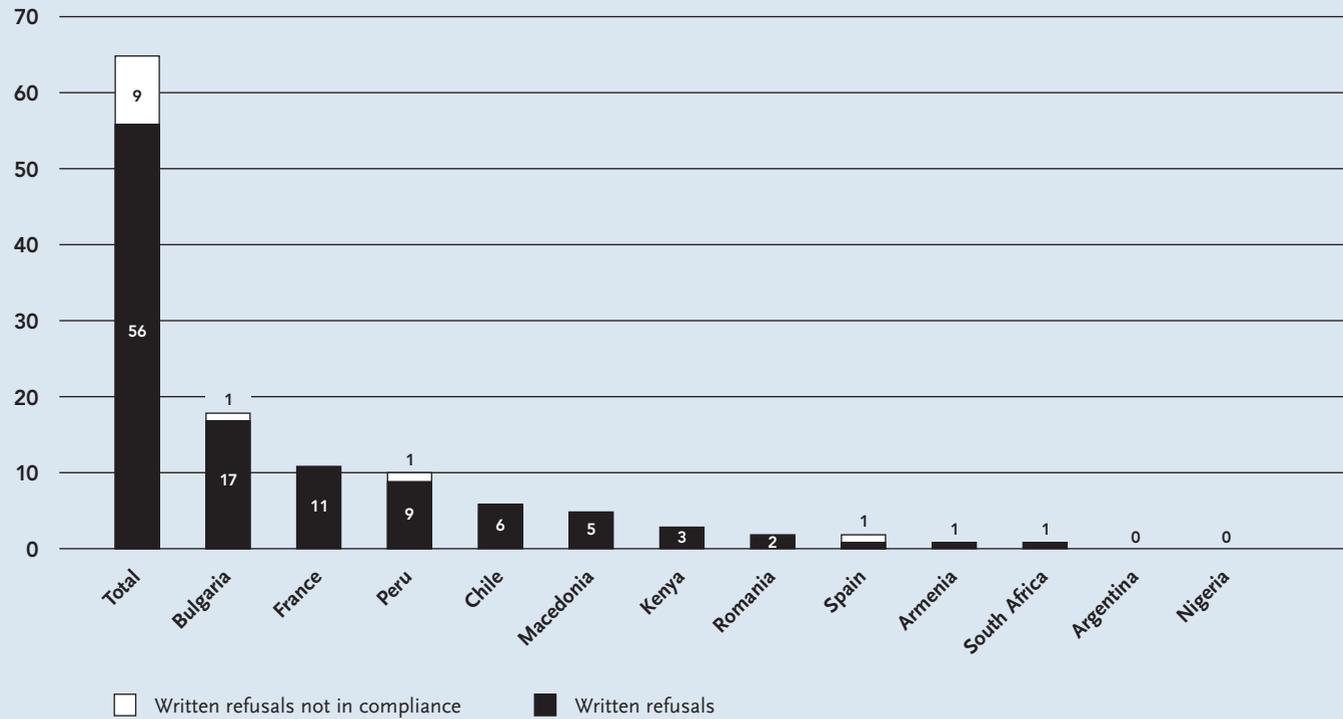
part of authorities to commit on paper a decision to render information to requesters, even in countries where the law requires that either information be released or refusals be set down in writing. In a handful of cases in this study, as an optional part of the methodology,<sup>33</sup> requesters asked that oral refusals be written down, but without success. For example, in Macedonia, an NGO requester who hand delivered a written request to the Veles Garbage Collection service for budget data on salaries, travel and equipment for the period 2002–2004, was told orally that there was no time to prepare the information. When the requester asked for a written refusal, the official stated that he was not sure and would have to consult with the general manager; no written document was received. Sometimes such requests for written refusals resulted in statements likely to deter the average requester, such as when the excluded group requester in Macedonia, an ethnic Albanian, asked Macedonian Television for a written copy of a refusal to provide details of its debts, which he had been informed verbally by an official was “a company secret” and he was invited to “come to a meeting.”

The pattern for the country by country results for written refusals does not fit obviously or directly with the patterns of compliance and noncompliance with access to information principles found in other parts of the study. In Bulgaria, there is a correlation between low levels of mute refusals and high levels of written refusals: public officials in Bulgaria know that a mute refusal is not an option and if they are not ready to disclose information, a written refusal must be issued.

Partners from the four countries with the highest levels of written refusals—Bulgaria, Chile, France and Peru—note that the administrations in these countries have a formalistic approach to the application of the law. Consistent with this, in Chile and France the majority of refusals were on the grounds that the body was not covered by the law, and this was generally correct with regard to the existing domestic legal provisions.

In Peru, six of the 10 written refusals that gave grounds for rejecting the request were contrary to Peruvian law and the remainder applied the privacy exemptions in ways that seem to be inconsistent with both domestic and international standards (see Table 9 for further details).

Figure 24: Number of Written Refusals Received, by Country



Analysis based on data from 12 countries, total of 140 requests per country

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**Table 9: Time Frames and Content of Refusals for Countries with FOI Laws**

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<b>Country</b>	<b>Refusal time frame</b>	<b>Refusal form</b>	<b>Refusal content</b>
<b>Armenia</b>	Five calendar days.	Oral for oral inquiries only, otherwise written.	Reasons, appeals procedures, and must state time it took to reach refusal decision.
<b>Bulgaria</b>	14 calendar days.	Written.	Legal and factual grounds for refusal.
<b>France</b>	One month.	Written.	Reasons for refusal.
<b>Mexico</b>	20 working days.	Written.	Reasons and appeal procedures.
<b>Peru</b>	Seven working days.	Written.	Reasons and time period for restriction of information.
<b>Romania</b>	Five days (see Chapter Four for more information on time frames in Romania).	Written—if oral request cannot be satisfied immediately requester must be informed about converting it to a written request.	Reasons for refusal.
<b>South Africa</b>	30 calendar days.	Written.	Reasons for refusal and appeals procedures.
<b>Argentina</b>	10 working days.	Written.	
<b>Chile</b>	48 hours.	Written.	Reasons for refusal.
<b>Spain</b>	Three calendar months, for environmental information, and two calendar months, for administrative information and records.	Written.	Reasons for refusal.

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All seven monitored countries with dedicated freedom of information laws provide for written refusals to information requests, and all but Armenia require that refusals must be set in writing. Argentina and Chile also require written refusals in the context of their existing access provisions. Time frames for issuing refusals are generally the same as those for releasing information, with the exception of Romania where refusals must be delivered more speedily (five days for refusal as opposed to 10 for providing information).

## Exemptions to Access: International Standards

An increasingly standard set of grounds for exempting information from release is incorporated into access to information laws. Following are the exemptions commonly found in access to information laws:

- National security.
- Public order.
- The prevention and investigation of crimes and other violations of law.
- Commercial secrets or fair trade.
- Due process rights of parties to judicial proceedings.
- The confidentiality of deliberations within or between public authorities during the internal preparation of a matter. This exemption is limited to the time prior to taking the decision.
- Private life.

This set of standard exemptions has been incorporated into many freedom of information laws and also the 2002 Council of Europe Recommendation on Access to Official Documents, Principle IV of which establishes that limitations to the right of access should be: (a) set down precisely in law; (b) necessary in a democratic society; and (c) proportionate to the aim of protecting specified interests. Principle IV also establishes that documents may only be refused “if the disclosure of the information contained in the official document would or would be likely to harm any of the [mentioned] interests ... unless there is an overriding public interest in disclosure.” It further urges member states to consider setting time limits beyond which the limitations would no longer apply.

These exemptions protect legitimate interests (as defined by international, regional and comparative law) from possible harm that might result from disclosure of information. For example, a request for the encryption codes used in communication between law enforcement agents engaged in antiterrorist operations could legitimately be denied on the ground of jeopardizing law enforcement operations. A request for the annual budget for antiterrorist operations, however, could not cause harm to ongoing law enforcement operations and should be disclosed.

Most freedom of information laws also provide for what is known as “public interest override” of legitimate exemptions. The harm that information release might cause a protected interest might be outweighed by a public interest in disclosing the information—for example, where it may throw light on major environmental damage, human rights abuses, or corruption. The public interest in such cases may be considered more pressing than possible damage to the commercial interests of a private company due to the release of government held information in cases of that kind.

Some countries’ laws enumerate protected public interests as a guard against overuse of exemptions. Mexico’s Federal access to information law, for example, specifies that “[i]nformation may not be classified when the investigation of grave violations of fundamental rights or crimes against humanity are at stake.”<sup>34</sup> Armenia’s Law on Freedom of Information (2003) similarly establishes, in Article 8(3), that information may not be declined if it relates to urgent threats to public security and health or natural disasters. Also, information may not be denied if it presents the “real situation” of the economy, the environment, health, education, agriculture, trade, or culture. This is a strong counterweight to the broad exemptions for “state, official, bank or trade secrets” and “copyright and associated rights” contained in the same law (Article 8(1)). There is relatively little jurisprudence yet in Armenia to give guidance on resolving these conflicts. There has been just one Court of Cassation ruling fully based on the access to information law, where the conflicting aims were access to information and protection of official secrecy; the outcome was in favor of the requester.<sup>35</sup>

## The Use of Exemptions

Applying exemptions requires assessment of whether disclosure of the requested information might harm one of the exemptions specified in the access to information law, and whether, if it does, there is nevertheless an overriding public interest in disclosure of the information. It often requires taking information marked “classified” or

“confidential” and assessing whether this classification is correct and whether or not the information may be released under the freedom of information law. Such a review process requires the information officer to consult with departmental lawyers and senior staff, who may not themselves have been trained in the freedom of information law, or whose job descriptions may give them other priorities than ensuring that the public’s right to know is satisfied. Sometimes the letter to inform the requester that information will be denied needs to be signed by the head of department, which means troubling a busy and important person for a request coming from an unknown individual. In Mexico, a special process is established for denying information and in Bulgaria the head of department (which may be as high as the level of minister) signs the letter. In South Africa, where the law is very detailed and complex, information officers are required to apply both the exemptions provisions and a public interest test, and we know from interviews that many officers find the exemptions section of the law complex and this contributes to delays in responding.

Refusals received during this study fall into two rough groups: those that were broadly in line with international standards, and those that were not. Although, for the purposes of the present study, the compliance of written refusals was not recorded according to the group any given refusal belonged to, it is likely that in the real world many if not all of the latter group ought to give rise to appeal.

Of 78 written refusals analyzed, 48 contained grounds broadly in line with freedom of information laws. Requesters in a total of 21 cases were informed that information was “classified,” “secret,” being withheld on grounds of privacy or third party confidentiality. As examined further below, it was rare that refusals provided detailed reasoning for the application of the exemptions and often did no more than state the general fact that information had been withheld.

Half of the written refusals (24 out of 48) informed requesters that the information was not being provided because the body itself or the specific information requested was not covered by the access to information law. These responses were often detailed, did cite relevant legal provisions, and were usually a correct interpretation of national law. These responses are examined in the section below on the “Limited Scope of Existing Provisions”.

**Table 10: Grounds Given for 78 Recorded Written Refusals (on Time and Late Refusals)**

Written refusals (for on time and late refusals)	Armenia	Bulgaria	Chile	Spain	France	Macedonia	Mexico	Peru	Romania	South Africa	Kenya	Totals
<b>Refusals potentially in line with FOI principles</b>												
Information refused and provision of law cited							4			1		5
Information is “secret” or “classified” (with no more detail)	2	2							1			5
Information is for internal use only or in preparation*					4	1					1	6
Third party confidentiality		3									1	4
Privacy (of individuals)								4				4
This body is not obliged by the law**		6	6	3	6				1			22
A different law should be used to request this information+		2										2
<i>Subtotal</i>	2	13	6	3	10	1	4	4	2	1	2	48
<b>Refusals clearly not in line with FOI principles</b>												
Requester has no legal interest in the information	1	6		1								8
Requester must justify why asking for the information				1		4		1			3	9
Illegal fee imposed as condition for releasing information								4				4
Requester must attend in person to review the information								1				1
Information already requested by another requester		1										1
No grounds given		1							1			2
Other reasons <sup>36</sup>		2							3			5
<i>Subtotal</i>	1	10	0	2	0	4	0	6	4	0	3	30
<b>Totals (written refusals and late written refusals)</b>	<b>3</b>	<b>23</b>	<b>6</b>	<b>5</b>	<b>10</b>	<b>5</b>	<b>4</b>	<b>10</b>	<b>6</b>	<b>1</b>	<b>5</b>	<b>78</b>

\* Many FOI laws allow exemptions for information that is part of internal deliberation processes prior to taking of decisions.

\*\* As noted in the introduction, some of the requests were submitted to bodies not covered by national FOI laws.

+ Under some legal systems, some information held by particular bodies may be covered by other legislation than the FOI law, although the Justice Initiative recommends that all information held by all public bodies be subject to one set of comprehensive access to information provisions.

Of the 78 refusals, 30 were not in line with international standards on access to information: even *prima facie*, they could not be considered to be acceptable. Reasons for rejecting requests, the most frequent were that the requester had not demonstrated a legal interest in the information (eight responses) or the authority made the release of information conditional upon justifying the reasons for requesting it (nine responses, which were categorized by this monitoring as refusals). Such conditionality is a flagrant disregard for the right of access to information, the core of which is equality of access: no interest or reason need be demonstrated for access.

### Misapplied Exemptions

Even where exemptions grounded in law were explicitly referenced in refusals, they might not have been applied appropriately by officials in question. Such administrative decisions can be appealed in a well structured FOI regime, although appeals were not pursued in the present study. Even where an appeal results in a finding that the exemptions were correctly applied, it may be that application of a public interest test gives rise to an order to disclose the information.

All written refusals tendered in Mexico cited the relevant provisions of the law with precision. For example, two requests to the Mexican Ministry of Defense for the number of formal/official investigations into complaints of sexual violence committed by Armed Force personnel against their colleagues, both received the written answer that the information was reserved under Article 14 Section III of the Mexico's Federal Transparency and Access to Public Information Law (2002)—which protects the confidentiality of preliminary judicial investigations.<sup>37</sup>

In Peru, requests to the Ministry of Justice for the curriculum vitae of senior ministry officials were denied as exempted “private information.” An administrative or court appeal might overturn this decision.

A request to the Bulgarian Ministry of Justice for a list of international institutions supporting justice sector reform between 1993 and 2003, and the amount invested by each, was refused because third party consent for the information's release had not been obtained. Bulgarian law requires third party consent for information that may “affect [a] third party's interests,”<sup>38</sup> such as sensitive commercial data. Such exemptions ought not cover *all* information relating to or mentioning third parties, which would effectively exclude significant volumes of information from public scrutiny. Rather, as noted above, exempted information should be that which would cause particular harm to the protected interest, and should be subject to a proportionality and public interest test.

## Illegitimate Exemptions

In some instances, the exemptions applied were not those provided for by national law or international standards. For example:

- In Armenia, a request to Yerevan Erebuni District Administration for the 2003 budget implementation report was refused by the chief of staff because the requester was not a “community member.”
- In Bulgaria, a request to the Municipality of Vazrajdana for a list of municipal properties rented, including the prices but excluding individual names, was refused on the grounds that the requester had “no legal interest” in receiving the information.
- In Romania, the business requester asking Buftea City Hall for detailed information on the number of individuals who requested and received social benefits was turned down because the letter requesting the information did not have the official stamp of the company on whose letterhead it was written. The excluded group requester (a Roma man) received a full answer to the same request.

## The Limited Scope of Current Laws

### Institutions

A functional FOI regime should ensure access not only to information held by government bodies but also by those private or semiprivate bodies that perform public functions—water supply, electricity, or telephone companies, for example. The Council of Europe Recommendation on Access to Official Documents, for example, establishes, in Principle I, that access to information regimes should cover “all natural or legal persons insofar as they perform public functions or exercise administrative authority.”<sup>39</sup> In the present study, in each country, information requests were submitted to parastatals even where this was not explicitly provided for by law.

Of the 22 requests rejected on the grounds that the institution in question was not required by law to deliver information, the answer was correct in terms of national law but fell short of these international standards. In the current study, the laws Armenia, Mexico, Peru, and South Africa cover most parastatals; the laws of Bulgaria and Romania

are more limited in scope but cover some quasi-governmental bodies receiving public funds; and the law of France and the legal provisions of Argentina, Chile and Spain are limited to the central administration.

- In Bulgaria the National Electricity Company refused to respond to any of six requests. The refusals took the form of letters signed by the Executive Director, explaining (correctly) that the NEC was not bound by the Bulgarian access to information law.
- In Chile, three requests by the business person to Chilean water company Aguas Andinas SA were all dismissed with the same response: “you asked, based on the State Probity Law no. 19653, that we provide you with some information. As you may know, that law affects Ministries, *Intendencias*, Regional Governments, companies, and public services. Aguas Andinas is a company where the National State only shares a minor part and, therefore, is not included within the sphere of application of the law.” The excluded group requester asking the same question was referred to a website but could not find the requested information there.
- In France, the judiciary is not covered by access to information legislation.<sup>40</sup> In France, seven of the eight written requests submitted to the Court of Cassation—three on matters of jurisprudence and one on the administration of the court—received written refusals. All the refusals stated uniformly that the Court was permitted to disclose information only to others within the judicial system and that legal information is disseminated on the websites [.legifrance.gouv.fr](http://legifrance.gouv.fr) and [www.courdecassation.fr](http://www.courdecassation.fr).<sup>41</sup>

### Classes of Information

In countries lacking full freedom of information legislation, some refusals registered omissions in the scope of information that could be requested:

- In Chile, a requester who asked the Las Condes municipality for the number of computers owned was informed that the requested information was not covered by Chilean law. This is strictly correct as the Chile’s existing provisions provide for access to administrative

“acts,” which cover decisions or resolutions and possibly reports, but not general information. The narrow construction of Chilean law clearly places unacceptable limits on the right to information held by public bodies.<sup>42</sup>

- In Spain, a difficult request to the Madrid Environmental Council for the list of companies penalized for breaches of environmental law during 2000–2003 was rejected as current laws prohibit disclosure of files concerning ongoing or completed judicial proceedings (trials and hearings).<sup>43</sup> This blanket exemption on disclosure of information relating to a broad swathe of information connected with the administration of justice is a clear contravention of international standards on the right to information.

In these and similar cases, the officials involved clearly knew the law and applied it to the letter. Were the law to change in line with international standards, the volume of information available to the public in these countries might increase significantly and rapidly.

## Recommendations:

- A standard part of training in any access to information regime is to ensure that public officials understand the presumption of openness, and that exemptions can only be applied when information harms a protected interest and is not overridden by a public interest.
- Public officials must be aware that refusals can only be written—never oral—and must state the relevant exemptions that justify refusal.
- Information officers, or their equivalent, should have the authority to decide on information disclosure. Information should only be denied following a transparent internal review process that includes senior officials to ensure that exemptions have been properly applied.
- The national legislature, an information commission or commissioner, or other monitoring bodies or officials charged with overseeing implementation of access to information laws should, in a timely

manner, review the issuance, by public bodies **and bodies performing public functions**, of written refusals for requests for information to ensure that exemptions are being applied appropriately and that denials of requests are not being based upon inappropriate fees, demands to clarify requests, inquiries as to why the information is being requested, etc.

- Access to information training at public bodies should include instruction in the partial release, or “severing” of documents, to ensure that non-harmful information in classified documents can enter into the public domain.

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#### Notes

1. There were very few cases in which we found evidence of a “second wave effect” in this monitoring study and there is no significant difference in the statistics. However, the Commonwealth Human Rights Initiative, the Accra-based NGO that conducted the monitoring project in Ghana, reports that hostility towards requesters increased during the second wave of requests, because officials noticed an increase in requests, which are generally negligible. In follow up interviews, some officials reportedly stated that they had indeed noted an increase in requests and had tried to discourage requesters. They added that they had not succeeded and commended the requesters on their patience and maturity in the face of hostility.
2. Federal District Transparency and Access to Public Information Law (2003) at Article 4.XI that the Office of Public Information of each public entity is the administrative unit that receives citizens petitions for information, and whose responsibility is to processes them in accordance with the same law.
3. Law 27806 on Transparency and Access to Public Information, Art. 17: “The individual(s) requesting the information shall solely bear the costs incurred to reproduce the required information. The total amount must be expressed in the Rules of Administrative Procedures (*Texto Único de Procedimientos Administrativos*—TUPA) of each public entity. Any additional costs shall be considered a restriction on the right guaranteed by this law and will be subject to the corresponding sanctions.”
4. Federal District Transparency and Access to Public Information Law (2003) at Article 40 provides the public body with five working days to respond to the requester with a request to clarify or complete a request. Furthermore, if the requester does not respond within another five working days, it will be held as not presented. In either case, in effect, the time for responding does not commence until a complete and clear request has been accepted by the public body. This provision was changed in amendments adopted by the Federal District Congress in July 2005. The reforms eliminate the clarification provisions and encourage the agency to assist the requester at the moment of filing the request. The reforms also eliminate the obligation to identify oneself to request information and establish the possibility of and procedures for filing requests by Internet.

5. Peru's Law of Transparency and Access to Public Information (2002), Article 11(a).
6. CIA World Factbook, Peru, 2005.
7. See also Council of Europe Recommendation 2002(2) at Principle VIII on "Charges for access to official documents" which recommends that (1) consultation of original official documents on the premises should, in principle, be free of charge, and (2) a fee may be charged to the applicant for a copy of the official document, which should be reasonable and not exceed the actual costs incurred by the public authority.
8. South Africa's Promotion of Access to Information Act (2000), Section 19.
9. Nigeria's Freedom of Information Bill as of September 2006.
10. United Nations Development Programme, Human Development Report 2004, Nigeria (2002 data).
11. Bulgaria, Access to Public Information Act (2000), Article 39.
12. Bulgaria, Access to Public Information Act (2000), Article 38.
13. The French Treasury assumed the debts and bad assets of formerly state owned Credit Lyonnais Bank in a series of rescue packages from 1995 to 1999, when the bank was privatized. These included debts incurred following the bank's illegal purchase of California insurance company Executive Life in 1991. A 2004 settlement of a criminal case brought in California in connection with the Executive Life purchase brought the total of fines and other payments to \$771.75 million—the largest criminal settlement in U.S. history at the time (US Department of Justice press release 21 January 2004) of which as much as \$600 million was paid by the French public purse; the total cost of the bailout of Credit Lyonnais to the taxpayer has been estimated at \$15 billion. See "A Tangled Web," *The Economist*, 27 November 2003 ([www.economist.com](http://www.economist.com)) and "Credit Lyonnais Faces Huge Fine," *BBC News*, 18 December 2003 ([www.bbc.news.co.uk](http://www.bbc.news.co.uk)).
14. Mexico's Judicial and Legislative branches and other autonomous entities not overseen by Mexico's IFAI have to report to other, equivalent, bodies for those branches of government.
15. Romania's Law 544 on Free Access to Information of Public Interest (2001), Article 8.
16. We hold officials to their national law when that law sets a higher standard than the international norms because rule of law requires officials to comply with national law.
17. Article 38.4 (b) of Law 30/1992 of 26 November 1992 on the legal framework for public administration and general administrative process.
18. The Central and East European Law Initiative of the American Bar Association (ABA/CEELI) was involved in the project.
19. Peru's Law on Transparency and Access to Public Information (2002) at Article 16.
20. In Mexico, according to the Justice Initiative's partner LIMAC, there is an emerging practice of exempting information by severing documents, but this was not encountered in the present study.
21. Under Bulgarian law, a public procurement procedure may be avoided in certain limited circumstances, including where the contract relates to national security.
22. An *apostille* seal is a means of providing official verification of a document hence allowing for international recognition of national legal documents among country parties to the 1961 Hague Convention. The precise procedures and costs for receiving a seal vary from country to country.
23. French law requires that information be provided in an "easily intelligible copy on a medium identical to the one used by the public service or on paper, according to the requesting person's preference within the limits of what is technically possible to the public service and at the requesting person's own expense, without such expense exceeding the reproduction cost, under such conditions as provided for by decree." Law on Free Access to Official Information (1978), Article 4.

24. A handful of countries, notably the UK with the recent UK Freedom of Information Act (2000, entered into force 1 January 2005), permit government bodies (in accordance with Section 12 of the Act) to charge requesters if the search for the information is likely to take time and therefore be costly to the authority. In the UK the rate for central governments is £600, calculated at £25 (\$45, €38) per hour; so requests entailing more than 24 hours' work (about three full working days on one request) may be charged, providing the requester agrees to pay. Such charges may be appropriate in countries with efficient information management systems, but not in countries where information management is poor and the onus should remain on the public institution to carry the burden of searching for information.
25. Armenian Law on Freedom of Information (23 September 2003) at Article 9.7.
26. France's Act of 17 July 1978 on Free Access to Administrative Documents (Law 78-753), at Article 2.
27. Armenian Law on Freedom of Information (23 September 2003) at Article 9.7 requires that if information has been previously publicized, then "information on the means, place and time framework of that publication shall be provided."
28. Sometimes the reverse happens: in the 2003 pilot study, a request by a journalist to the Bulgarian Ministry of the Interior for an agreement with Europol received a late refusal because the document was "under negotiation," an exemption under Bulgarian law. However, the document in question was available on the Europol website.
29. General Regulation (Decree) on Access to Public Information for the National Executive Power 3 December 2003 at Article 12, third paragraph.
30. For example, Mexico's LFTAI (2002) at Article 40 permits the requester to elect to receive information verbally, by means of direct consultation, as simple copies, as certified copies, or by other means (such as electronically). Armenian, Bulgarian, French, and Peruvian laws also provide options, including direct viewing of the information or receipt of copies.
31. The study recorded 16 instances of website referrals as part of information received and inadequate answers, but in total the number of references was higher: during follow up calls it was common for public officials to ask "Have you tried the website?" In some instances, where no formal response was found from the authority and the recorded outcome was a mute refusal, the Justice Initiative's monitoring partner was able to identify that relevant information was on the authority's website.
32. Peru's Law on Transparency and Access to Public Information (2002) at Article 6, which also provides that "The authorities in charge of designing the budget will take into account the aforementioned deadlines when assigning the corresponding resources."
33. Requesting written refusals in response to oral refusals was not made obligatory for requesters as it was known from the 2003 pilot study that in a number of countries the request process was sufficiently intimidating for some requesters and it would have been hard to ensure that such requests were made in a uniform manner. That said, in some countries in the 2003 monitoring there was a positive experience where the conversion of oral requests into written requests by literate requesters at the invitation of public officials did result in the subsequent release of information.
34. Federal Transparency and Access to Information Law, Article 14.
35. *Investigative Journalists vs. Yerevan Mayor*—Civil case No. 3/290 (Court of Cassation) decision of 10 February 2005. Another case settled at first instance is that of *Helsinki Citizens Assembly Vanadzor Office vs. Mayor of Vanadzor*—Civil case No2/609 (First Instance Court of Lori Region) decision of 30 April 2004 in favor of the applicant.
36. The other reasons given were mixed grounds for not releasing information that do not show a good faith attempt to comply with the right of access to information: "the agreement has been signed but has not

- entered into force,” “the body (whose name had changed recently) doesn’t exist by this name,” and “the request was not stamped by the firm on whose letterhead it was sent.”
37. The internationally recognized exemption protecting judicial proceedings is intended to ensure that information is not released that would jeopardize either an investigation, before charges are brought, or the principle of equality of arms during civil and criminal proceedings. Although the matter would have to be decided on appeal—in Mexico’s case by the Information Commissioner or the Courts—it is unlikely that providing information on the total number of such investigations would cause harm in any particular case.
  38. Bulgaria’s Public Access to Information Act, Article 37(2).
  39. Council of Europe Recommendation 2002(2) on Access to Official Documents, Principle I.
  40. France’s law specifically excludes from the definition of “administrative documents” the proceedings of the parliamentary assemblies, recommendations issued by the Conseil d’État and administrative jurisdictions, documents of the State Audit Office (Cour des comptes), documents regarding the investigation of complaints referred to the Ombudsman of the Republic, and documents prior to the drafting of the health-organization accreditation reports (Article 1).
  41. The response cited Article R 131-14 of the Judicial Code, a ministerial order of 24 May 1972, and statutory order no. 2002-1064 of 7 August 2002.
  42. Chile’s legal provisions relating to access to information have been found wanting by the Inter-American Commission on Human Rights.
  43. According to administrative law 38/1995, modified by law 55/1999.

# 4. Findings by Monitoring Variables: Requesters, Requests, Time Frames

## 4.1 Discrimination in Provision of Information: Variation by Requester

The right of access to information must be enjoyed without discrimination, regardless of who is exercising the right. The principle of nondiscrimination is enshrined in most modern constitutions and is required by international and regional law.<sup>1</sup> The prohibition against discrimination is expressly stated in a number of freedom of information laws, such as Finland's Act on the Openness of Government Activities, which requires that "the persons requesting access are treated on an equal basis" (Section 17). Bulgaria's APIA (2000) makes clear that "securing equal conditions for access to public information" is a core principle of the law (Article 6.2).

Other laws contain provisions to ensure that there is no discrimination due to the reasons for the request or the potential use of the information. For example, Peru's access to information law at Article 7 states that: "An explanation for the request is not required under any circumstance."

South Africa's law in the preamble restates the constitutional principle of equality and also at Section 11(3) makes clear that no motive, stated or imputed, shall cause discrimination by information officers:

*A requester's right of access contemplated ... is, subject to this Act, not affected by—*  
*(a) any reasons the requester gives for requesting access; or*  
*(b) the information officer's belief as to what the requester's reasons are for requesting access.*

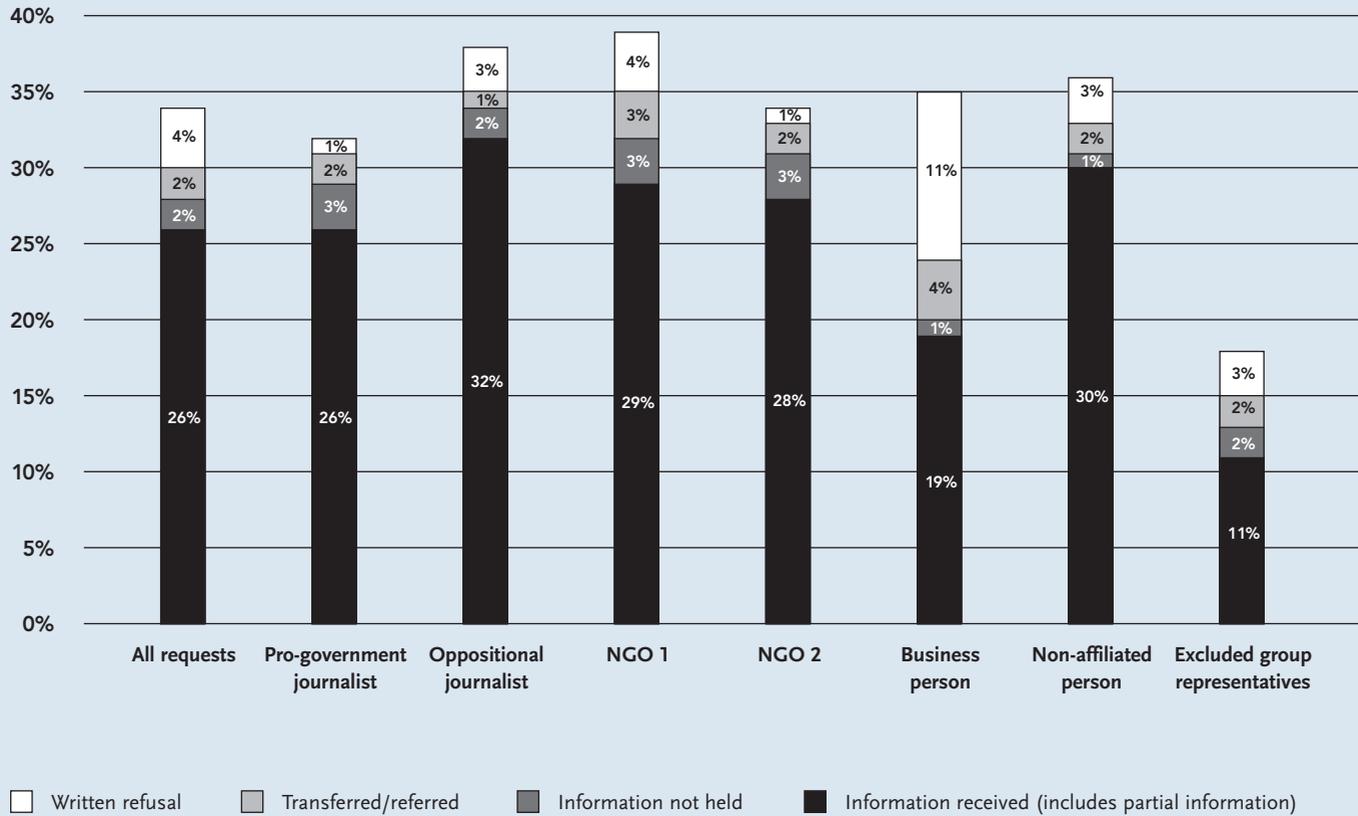
In each country surveyed in the 2004 study, seven requesters were chosen specifically to represent different groups of people. The aim was to examine whether governmental bodies in those countries treated all requesters equally.

In each country, selected requesters included two journalists (one broadly pro-government, the other oppositional), a business person, two NGO representatives, a member of an excluded or vulnerable group, and a "non affiliated" person. The requesters identified themselves either by the headed notepaper they used (for the media, business and NGO representatives) and by presenting themselves in person or by their names in the case of the excluded group representatives. The study found significant and consistent discrepancies in the treatment of individuals according to which group they belonged to. Indeed, institutions often seemed more sensitive to the identity of the requester than to the content of the request.

Journalists and NGO representatives received more information than business persons or excluded group representatives. Journalists and NGO representatives and the non affiliated persons received information in response to between 26 and 32 percent of submitted requests, the business persons received information in response to an average of 19 percent of submitted requests and the excluded group members in response to just 11 percent of submitted requests.

The excluded group representatives fared significantly worse than other requesters. Although excluded group persons were more likely than others to make oral requests—and these often failed at submission—the study found that they also fared worse once requests were successfully submitted: only 11 percent of *submitted* requests resulted in information (compared with an average of 26 percent for all submitted requests).

Figure 25: Compliant Outcomes by Requester as a Percentage of Submitted Requests



Analysis based on data from 12 countries

Business requesters received significantly higher numbers of written refusals than other requesters, at 11 percent of submitted requests, almost three times the next highest figure of 4 percent for NGOs. Business persons also received more mute refusals—a total of 61 percent of submitted requests, significantly higher than the study average for submitted requests of 51 percent.

## **Journalists, NGO Members, and Ordinary People: Regular Clients**

In follow up interviews with officials, it transpired that journalists and civil society groups are regarded by public institutions in many countries as natural requesters of information from government. Civil servants are used to receiving requests about government functioning and policy from these constituencies, which may explain their good result. Civil servants are also habituated to requests from ordinary individuals without institutional connections concerning information of personal interest to them—these persons are not usually perceived as influential or hostile. This may explain why the non affiliated persons in this study received compliant outcomes relatively often.

## **Business Persons: Suspicious and Polite Refusals**

The comparatively low rate of information received by business requesters in all countries was a surprising outcome. One explanation may be that the requests touched on a wide range of issues, generally unrelated to the business in question. These requests seem to have raised suspicions. For example, in response to a request on the number of deaths in the armed forces asked in all six European countries by a total of 12 requesters, the business requesters in both Armenia and France were contacted by the ministry to discuss the request further. No one else was. In France, the other requester asking the same question received no response at all and in Armenia the other requester received the information sought.

This is discouraging, as business requesters benefit from government transparency. Indeed, in countries with established FOI regimes, the business sector is often a significant petitioner of government information, particularly relating to public tenders and contracts. These requests in turn contribute to a climate of transparency that can

reduce corruption in government by creating demand for a level playing field. In this study, however, questions related to government probity rarely yielded information. For example, the business requesters along with excluded group requesters in the six European countries asked for declarations of ministers' assets, but only in Romania were the requested declarations provided (to both requesters).

The criteria for selecting business persons included that they be head or a senior officer of a small to medium sized business, preferably one that might do business with government. For example, in Spain, the business requester was the owner of a provider of supplies and logistical services (ranging from consultancy services to warehousing and transport) to Spanish industries. The written refusal came in response to a request to the Madrid Environmental and Territorial Planning Agency asking how many urban planning permits had been approved by Autonomous Region of Madrid since 1994, how many had been rejected, and the reasons for rejection. The refusal stated that the requester could not have the information without demonstrating an interest. The other requester filing the same request was referred to another body within the same institution, but did not receive the information. In total, the business requester in Spain received information in response to just five percent of requests, compared with an average of 17 percent for all requesters, and of 40 percent for one of the NGO requesters.

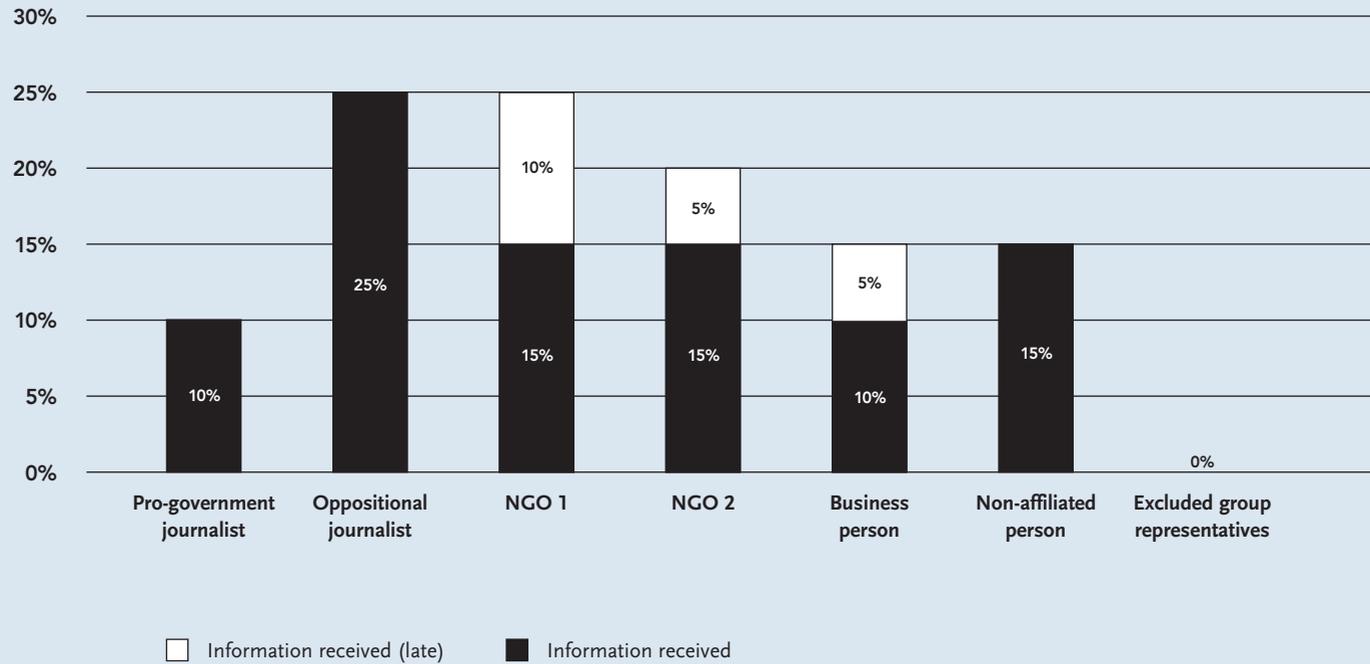
## **Excluded Group Requester: The Right to Know Denied**

Excluded group members received the worst treatment by far in the study, both overall and in the great majority of countries individually (see Table 11).

The total of compliant responses was only 18 percent of submitted requests from excluded group persons, compared with an average for the other requesters (not counting the excluded group representative) of 35 percent. As already noted in this report, it was not just the quantity but the quality of the treatment that varied.

In part, the poorer results for the excluded group may have been because these requesters, who included illiterate and disabled individuals in some countries, filed a higher proportion of oral requests than others. Oral requests were less likely in general to achieve submission and were more likely to result in oral refusals than written requests (and less likely to result in written refusals). However, once submitted, oral requests were actually more likely to result in release of information, with 28 percent of submitted oral requests receiving information as opposed to 24 percent of submitted written requests. Excluded group members, however, received a significantly lower rate of compliance

Figure 26: South Africa: Different Treatment of Different Requesters



**Table 11: Information Received by Excluded Group Requesters as Compared to Other Requesters**

Country	Excluded Group Requester	Country Average Information Received	Country Highest Information Received /Requester	Excluded Group Requester Information Received
Argentina	A young, low income woman from the interior province of Mendoza.	17%	30% opposition journalist	0%
Armenia	Physically handicapped (uses wheelchair).	51%	80% NGO 1	35% (lowest was business 30%)
Bulgaria	Roma woman (works with Romani Baht Foundation; presented herself as an individual).	46% (plus 2% partial information)	70% (plus 5% partial information) opposition journalist	10% (plus 5% partial information)
Chile	A member of Mapuche indigenous community.	17%	35% non-affiliated person	10% (lowest was NGO1 with 0%)
France	Arab woman.	21%	30% (both journalists)	5%
Ghana	A 56-year-old woman, uneducated, from far outside the city of Accra.	7%	15% pro-government journalist	10% (lowest was non-affiliated person 0%)
Kenya	Member of the Nubian community in Kibera, Nairobi. (The Nubians, who number over 100,000, are victims of discrimination, exclusion and human rights violations.)	17%	35% NGO 1	5%

**Table 11: Information Received by Excluded Group Requesters as Compared to Other Requesters** (*continued*)

Country	Excluded Group Requester	Country Average Information Received	Country Highest Information Received /Requester	Excluded Group Requester Information Received
Macedonia	Albanian ethnic group (male).	16%	30% (NGO 1 and pro-government journalist)	0%
Mexico	Indigenous man, 33-years-old, born in Tlalchichilco, Veracruz, Mexico.	25%	47% (non-affiliated person)	11%
Nigeria	Illiterate woman.	1%	5% (opposition journalist and NGO 1)	0%
Peru	Black 43-year-old man.	23%	45% pro-government journalist	4%
Romania	Roma man, 25-years-old.	44% (plus 4% partial)	70% (non-affiliated person)	30% (plus 5% partial)
South Africa	Illiterate, elderly, black woman.	13%	25% (opposition journalist)	0%
Spain	Roma who works as a social worker with Roma families (presented himself as an individual).	17%	40% (NGO 2)	0%

on successfully submitted requests—indicating that even if institutional discrimination played a role at the point of contact, when the requester was physically in the presence of an institutional representative—this was likely not the only opportunity for officials to avoid treating vulnerable populations equally.

In addition to receiving less information in response to submitted requests—11 percent compared with the average of 26 percent for all submitted requests—excluded group requesters received the highest rates of inadequate information, at six percent of submitted requests for excluded group members, which was twice the study average of three percent for all submitted requests.

The monitoring findings indicate that public officials are often more concerned with *who* is requesting information than with *what* is being requested.

Discrimination of any kind is unacceptable. Discrimination in the provision of government services and the enjoyment of human rights is a serious matter that all governments should take urgent steps to correct and prevent. Discrimination in the right of access to information is particularly grave, as information is necessary for the defense of other rights—possession of information can empower those from excluded groups to begin to take their rights into their own hands.

## Recommendations:

- National and local legislatures should adopt laws<sup>2</sup> that provide all persons access to information held by government bodies and bodies performing public functions.
- National governments should make clear to officials, civil servants, and all other relevant personnel in public bodies that discrimination in treatment of information requests and in provision of information is unacceptable and will result in disciplinary and possibly legal consequences.
- Civil society organizations should monitor freedom of information practices, investigate suspected instances of discrimination, file lawsuits in instances where discrimination is found, and seek the imposition of penalties as set forth in antidiscrimination laws.

## 4.2 Routine, Difficult and Sensitive: Outcomes by Different Request Types

Unsurprisingly, complex, multifaceted requests are sometimes answered less readily or rapidly than simple, routine requests. Experience has also taught that government institutions sometimes shy away from politically sensitive requests, such as those regarding ongoing public scandals, even if the information clearly falls within the scope of freedom of information laws.

To assess the effect of the content of information requests on government responses, the questions used in the 2004 monitoring study were chosen according to three different approximate categories:

**Routine Requests** (30 questions per country, each submitted twice). Routine requests are those for which the answers should be easily or automatically available, relating to the everyday work of the institution. Four of the thirty routine requests were regionally defined, and 26 were formulated by each country team, some in consultation with the local requesters.

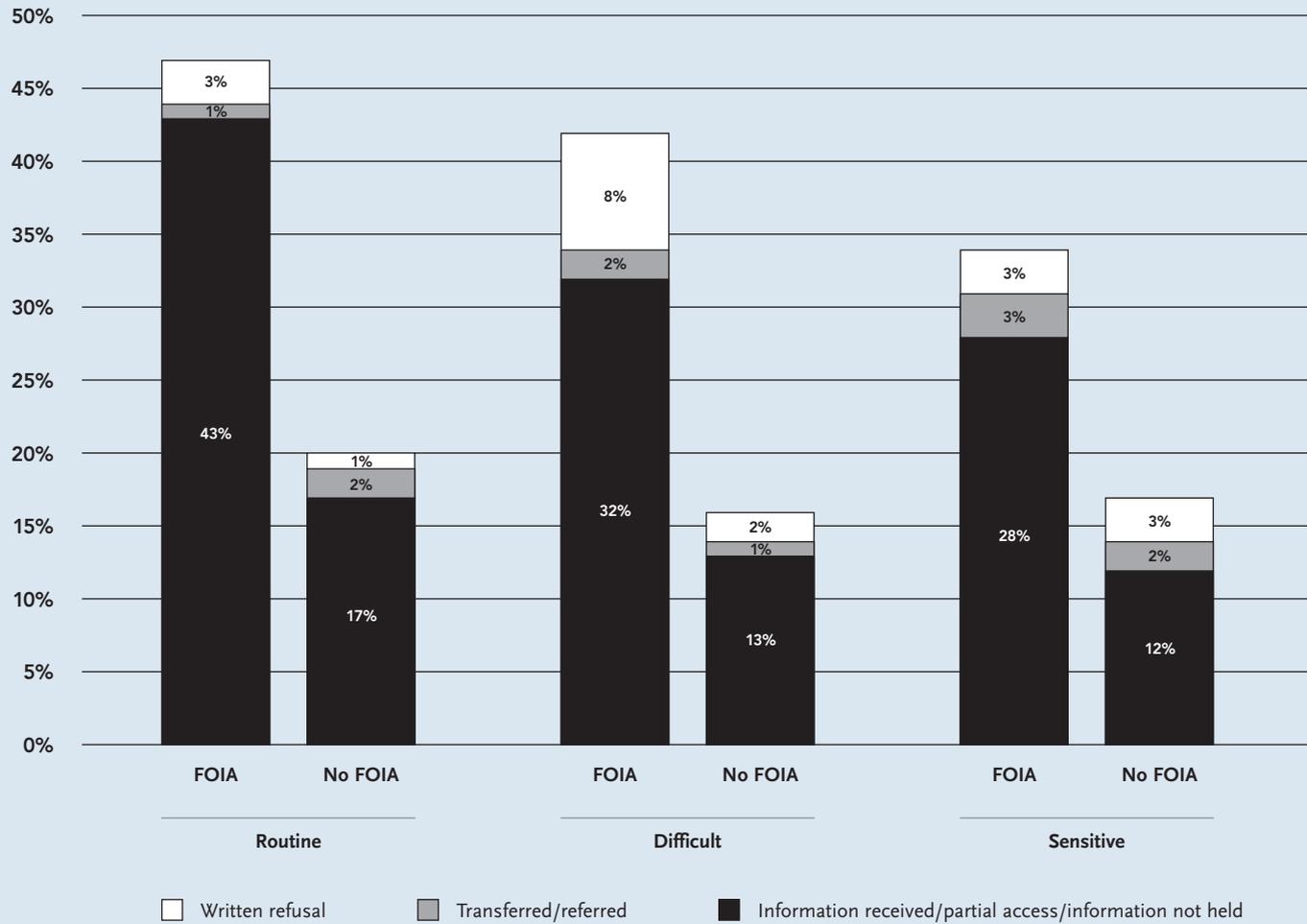
**Difficult Requests** (25 questions per country, each submitted twice). Difficult requests might require research or compiling documents to be answered adequately. Five of the difficult requests were regionally defined, and 20 by each country team.

**Sensitive Requests** (15 questions per country, each submitted twice). Sensitive requests may be politically or culturally provocative. They do not concern legally exempted issues, although answers sometimes invoke exemptions to avoid responding. Five sensitive requests were regionally defined, and 10 by each country team.

Although this classification is inevitably subjective, it gave a structure for formulating requests and enabled a test of the impact of content on the handling of requests.

More information was released in response to routine requests than to difficult requests than to sensitive requests: 29 percent of routine requests resulted in information, against 19 percent of difficult requests and 17 percent of sensitive requests. This confirms a finding from the 2003 pilot study (see Figure 28) which also found that routine requests were more likely to be answered than difficult or sensitive requests.

Figure 27: Outcome for All Requests by Request Type, in Total, and for Countries with and without Full FOI Laws in 2004



As Figure 27 shows, in countries with access to information laws, routine requests are even more likely to be answered, with 43 percent of requests resulting in either information, partial information or a credible information not held response. This compares with 32 percent for difficult and 28 percent for sensitive requests.

Partial information was received only in countries with access to information laws and only in response to difficult or sensitive requests. Partial information was received in response to 1.6 percent of difficult requests in countries with freedom of information laws and 2.3 percent of sensitive requests.

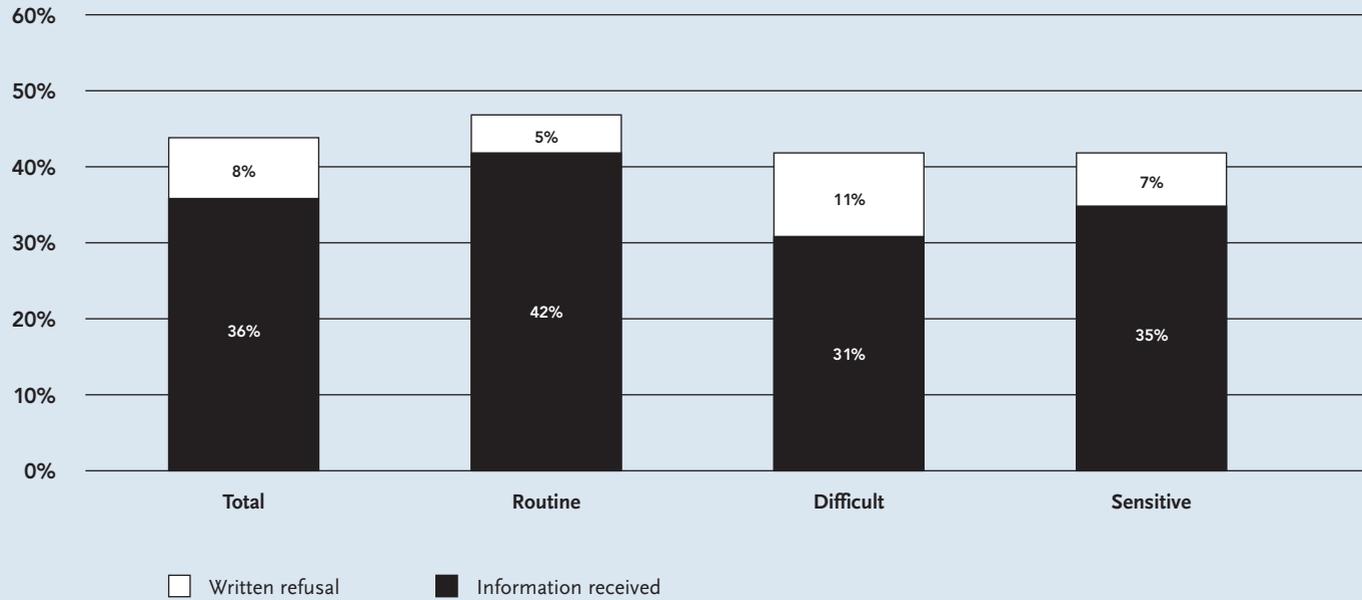
The greatest percentage of written refusals was in response to difficult requests, five percent overall for difficult requests contrasting with two percent for routine and three percent for sensitive.

In countries with access to information laws, eight percent of difficult requests received written refusals, as against three percent for both routine and sensitive questions. It may be that issuing written refusals was a way to avoid answering complex requests, although in the grounds for refusal received, this was not once the given reason (see Chapter three for more information on written refusals).

The results are surprising in that routine requests do not elicit even more information than difficult or sensitive requests. That the difference is not greater may indicate that public officials expend little time monitoring the content of requests: requests are treated equally (or equally badly) regardless of their subject matter. Although requesters were occasionally told (both orally and in writing) that information was “classified” or were quizzed as to why they wanted it, the results do not indicate a systematic filtering of information on the basis of content (indeed, delivery seemed more dependant on the identity of the requester, as detailed above). This finding may indicate that obstacles to access to information are often caused not by secretiveness, but rather by failures in internal procedures and information management.

Difficult requests may need more time to process and the law in most countries allows for an extension, but in this monitoring such an extension was requested in one case (see Section 4.3 for more information on time frames and extensions). In addition, in Bulgaria, one difficult request for information was refused on the grounds that it would require a lot of work to compile the information; Bulgarian law does not however provide for such refusals and an extension should have been requested.

Figure 28: Outcome for All Requests by Request Type in 2003 Monitoring



Analysis based on all request filed in 2003 Pilot Monitoring Study

## Recommendations:

- All requests for information should be treated equally, and there should be no discrimination between requests based on their content, with the exception that if requests are particularly complex and if the law provides for it, a time extension may be applied to gather the necessary information.
- Routine information—such as copies of regular reports, information on the core functions of the public body, indexes of records held, and other information that the laws require be disclosed proactively—should be available easily and immediately from public bodies in response to requests for information. Public bodies should monitor requests to determine the classes of information regularly requested by the public and ensure that they are readily available.
- Government bodies should consider posting responses to requests on the institution’s website so that all subsequent requesters have access to that information. This good practice is obligatory under some laws, such as Mexico’s law which requires that answers to frequently asked questions be posted on the institution’s website.<sup>3</sup>

## 4.3 On Time or Not at All: Time frames and Late Information

In each country in this study a time frame was established within which responses were categorized as “on time.” This was either the time frame established by relevant provisions of national law or a time frame determined by the monitoring teams in the absence of unambiguous local provisions. When determining the latter, general practices of administrative law and the proposed time frames in any draft laws were considered. Only responses arriving on time were considered compliant for the purposes of this survey.

A second time period was defined, during which requests would be classified as late. This was generally a period of 10 working days (see Table 12). The purpose of this late period was to ensure that the monitoring study captured information about

tardy responses. This section examines those outcomes and seeks to identify good practices and problems relating to time frames. For all other sections of this report, all late requests were considered mute refusals—strictly in line with the legal status of such late responses in countries with freedom of information laws.

Where national law allows public authorities to extend the initial time frame for responding, and where they availed themselves of this option, it was also recorded in the monitoring database. The standard applied was that if an extension was requested and the response subsequently received within the time frame established by law, or within a reasonable period in the absence of a law, this would be recorded as a compliant outcome.

## On Time or Not at All

The common experience of this study was that responses were received either on time or not at all. In total, 43 percent of the requests received some kind of response within the time frames established by law or applied in this survey. Another 50 percent received no response, either because requesters were unable to submit the requests (10 percent), or the institution remained mute (40 percent). The remaining seven percent were answers that came during the late period established in each country. Of all requests filed, five percent resulted in late provision of information.

Of the handful of answers that came after the late period defined for each country by this report, some came spectacularly late. In Argentina, for example, the latest reply of all, well after the monitoring database had been closed down, was received on 10 December 2004, approximately six months after the difficult category request was submitted—and the reply was incomplete. The City of Buenos Aires Social Development office provided a list of the hotels contracted by the city authorities to provide housing to homeless and low income persons, but failed to indicate the average number of people per room in each hotel, which had also been requested.<sup>4</sup>

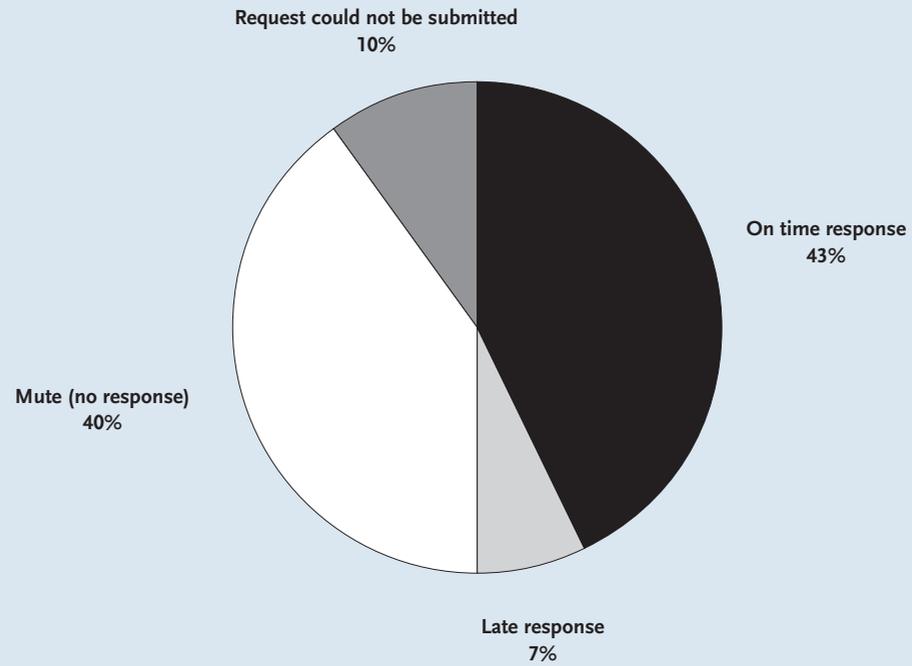
## International Standards on Time frames

When determining the time frames for responding to requests, legislators have to balance the public's right to receive information as rapidly as possible with the everyday demands on public bodies. The Council of Europe's Recommendation on Access to

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**Figure 29: Responses by on Time, Late and Mute**

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*\* data weighted for comparison*

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Analysis based on data from 14 countries, all requests

Official Documents suggests that: “A request for access to an official document should be dealt with promptly. The decision should be reached, communicated and executed within any time limit which may have been specified beforehand.”<sup>5</sup>

Globally, time frames range from immediate or near immediate response deadlines (Sweden’s Freedom of the Press Act requires that the requested document “shall be produced forthwith, or as quickly as possible”)<sup>6</sup> to 30 days (Canada, India, Ireland, and South Africa). The average time frame globally is currently under 15 working days.<sup>7</sup>

Many new laws set a maximum time frame while encouraging immediate access. Mexico’s law, for example, states that a response should be sent to the requester notifying them of the decision to grant access “in the shortest possible time, which cannot in any case be longer than twenty working days.”<sup>8</sup> This exhortation to speedy responses has an impact on practice: the Mexican Federal Access to Information Institute reports that of 37,732 requests filed with executive bodies in 2004, the average time for responding was 10.8 working days, about half the required period and that the average for all requests was 11.4 working days.<sup>9</sup>

In this survey, the range in the countries that have legal provisions was from five calendar days to 30 calendar days, as shown in Table 12. Other time frames were assigned in each country by the Justice Initiative and its monitoring partners, taking into consideration any relevant administrative provisions relating to other responses to citizens, and also considering proposed time frames in draft freedom of information laws.

All the best performing countries in the present study—Bulgaria, Romania, Armenia, and Peru—would have registered significantly improved performances had the provision of information been more rapid. This is also true of some lesser performing countries, particularly Chile and Spain.

With timelines discounted, a full 61 percent of all requests in Romania resulted in the release of information. However, only 49 percent was received on time (including 4 percent partial information) and 12 percent was received late, hence in noncompliance.

In Spain, seven percent of responses arrived too late to be regarded as compliant. With late answers included, a total of 24 percent of requests resulted in delivered information.

In Chile, 15 percent of all requests were received outside the time frame. With late answers counted, a total of 28 percent of requests actually resulted in information received. As noted in Section 2.1, the lack of clarity in Chile’s existing legal provisions had a negative effect on the results, as did the absence of administrative procedures for handling requests. Had administrative processes met the legal requirement to deliver, Chile would have been among the stronger performing countries.

**Table 12: Time Frames for Responses and Extensions, Plus the Late Period Used in the Monitoring Study**

Country	Time frame for response	Extension (only applied if requested by institution)	Late period in Justice Initiative monitoring study
<b>Argentina</b>	Within 10 working days (both Federal Decree and City of Buenos Aires Law).	Additional 10 working days if information is hard to gather—requester must be notified of extension (both Federal Decree and City of Buenos Aires Law).	Additional 10 working days.
<b>Armenia</b>	Within five calendar days.	Additional 30 calendar days if work needed; requester must be notified of extension within five calendar days.	Additional 10 working days.
<b>Bulgaria</b>	In shortest possible time, but not later than 14 calendar days must notify requester of decision to grant access.	Additional 10 calendar days if information is substantial in volume and additional time for its preparation is needed; must notify requester of extension within 14 days.	Additional 10 calendar days.
<b>Chile</b>	Ten working days (existing legal provisions provide for 48 hours, 10 working days or 20 working days depending on action needed to fulfill request).	Extension can be half the original time frame (so 24 hours, 5 working days or 10 working days).	Additional 10 working days.
<b>France</b>	One month (after this period is considered mute refusal).	Not specified.	Additional 15 working days.
<b>Ghana</b>	Within 20 working days allocated by monitoring team (and two days allowing for postage).	—	Additional 10 working days.
<b>Kenya</b>	Twenty working days allocated.	—	Additional 10 working days.
<b>Macedonia</b>	Twenty working days allocated.	—	Additional 10 working days.

**Table 12: Time Frames for Responses and Extensions, Plus the Late Period Used in the Monitoring Study**  
(continued)

Country	Time frame for response	Extension (only applied if requested by institution)	Late period in Justice Initiative monitoring study
<b>Mexico</b>	Federal law: in “shortest possible time, which cannot in any case be longer than 20 working days” body must notify requester of decision to grant access, which must be made within another 10 working days (Article 44).	Additional 20 working days for complex requests.	Additional 10 working days (after initial 20 days).
	Mexico City law: must notify requester within 10 working days and must provide information within 10 days of payment of any costs by the requester (Articles 44 and 45).	Not provided for in law.	Additional 10 working days (after initial 10 days to notify requester).
<b>Nigeria</b>	Fifteen days.	—	Additional 15 working days.
<b>Peru</b>	Within 7 working days (Article 11(b)).	Within additional five working days “for exceptional cases when the requested information is unusually difficult to gather;” requester must be notified within initial seven working days (Article 11(b)).	Additional 10 working days.
<b>Romania</b>	Within 10 working days (the law does not specify working or calendar days; the study used working days as this gives a longer time frame).	Maximum 30 working days (from date of registration of request, so 20 additional working days); requester to be notified within ten days.	Additional 10 working days.
<b>South Africa</b>	Within 30 calendar days must notify requester of decision on access.	Additional 30 calendar days for complex / voluminous requests; must notify requester of extension within first 30 days.	Additional 30 days.
<b>Spain</b>	Fifteen calendar days. (Administrative law provides for up to three months for administrative information; two months for environmental information.)	Not specified.	Additional 15 calendar days.

**Table 13 : Late Responses as a Percentage of All Requests (14 Countries)\***

Country	Information received	Partial information	Information not held	Inadequate information	Referred	Written refusal	Total
Romania	12%			1%	3%	4%	20%
Chile	11%		1%	2%	1%		15%
Armenia	13%					1%	14%
Bulgaria	5%	1%		1%		4%	11%
Argentina	7%			3%	1%		11%
Spain	6%					1%	7%
Peru	5%			1%			6%
South Africa	3%			1%			4%
Ghana**	2%					2%	4%
Mexico**	3%						3%
France	1%			1%			2%
Kenya						1%	1%
Macedonia	1%						1%
Nigeria							0%

Note: \* This table includes all late responses, regardless of whether they are in compliance or not. After evaluation, all late responses were, however, classed as mute (and hence noncompliant) in the results presented elsewhere in this report. If institutions had maintained the required timelines, many of these requests would have been in compliance with the relevant access to information law. Others, such as the inadequate answer outcome, would remain in noncompliance.

\*\* Adjusted data for Ghana and Mexico.

## Country Specific Time Frame Issues

### Armenia: Short Time Frames Can Work

The time frames being very short in Armenia—five calendar days—another two days in either direction was allowed for the postal service (which is reasonably reliable but slow). A further two weeks were allocated for counting late responses.

In Armenia, 14 percent of requests resulted in late responses, of which 13 percent (18 answers) provided information and one percent (two requests) were written refusals. The law establishes up to 30 additional calendar days answering complex requests, but in not one single instance did a public body avail themselves of it.

During the interview phase, almost all officials complained that the time frames were unreasonable and unrealistic. They noted that registering and processing requests takes time and that they need to gather information inside the institutions. Furthermore, they complained, the law does not make allowance for the postal service.

The postal service can indeed be a problem, and such problems were recorded. For example, an answer from the Ministry of Finance to the nonaffiliated person dated May 11 was received on May 17. It was found, however, that public institutions could not always be trusted to date requests and answers correctly: the pro-government journalist submitted a request to the Malatsia-Sebastia district administration on April 23 by registered mail. No answer was received and in due course the request was recorded as a mute refusal. Two months later, the journalist happened to interview the governor of the district and during the interview asked why the governor had not responded to any of her requests. The governor said this was impossible. Just two days after the interview, the journalist received responses to both her requests in written form. But although the answers arrived on August 22, and the enveloped was postmarked August 20, the official response was dated May 19.

Postal services were not the only cause, however, as some late answers arrived by fax or email, in response to requests also submitted by fax and email. For example, the opposition journalist addressed a request to Yerevan Ajapnyak District Administration by fax and the response was received by fax, but nine days late (after the initial five days had passed). In another case, the Ministry of Defense responded to a request submitted by the pro-government journalist but with seven days delay (12 days after the initial request). In neither case did the postal service have an impact.

A second cause of delayed responses is problems with the internal systems of the institution. Sometimes, the person responsible for access to information would gather the information and prepare the answers on time, but then have to wait for the officials responsible for securing the signatures on the official letters that accompany answers in Armenia to complete their side of the work. It was found that certain institutions were slower than others in responding. Central government (with the exception of the Ministry of Defense) was on time, whereas most late answers were given by the courts (seven late responses), then the Ministry of Defense and self governing bodies of Yerevan with five late responses each. Three late answers came from other public bodies (television and electricity).

The Freedom of Information Centre in Yerevan, which carried out this monitoring study with the Justice Initiative, does not believe that the time frames are a fundamental problem. The very positive experience of this survey—a total of 51 percent of submitted requests being answered within the five day time frame established by law—shows that with good will, effort, and effective organization within institutions, requests can be answered on time and in line with the provisions of the current law.

### **Romania: Conflicting Time Frames for Answers and Refusals**

In Romania there are a number of issues with regard to law and practice on the number of days for answering requests. In the first instance, the Romanian Law No.544/2001 on access to information of public interest simply provides for “days,” without specifying if they are calendar or working days. That means that the Civil Procedure Code system for calculating deadlines should be applied: the first and the last day of the deadline are not taken into consideration and if the last day is not a working day, the deadline will end on the next working day. The Romanian term for the system is “zile libere” (meaning “free days”). In this system 10 “days” represent in most cases 12 calendar days, which in fact equates to something between 8–10 working days. The methodological norms for implementing the law<sup>10</sup> provide for working days, in contradiction with the law. In case of any conflict the law takes precedence over secondary legislation and the Romanian Courts have been consistent in settling the conflict between the two provisions in favor of the law and not the norms.

In practice, however, many public servants are using the methodological norms. For the purposes of this monitoring exercise, we chose to use 10 working days, as this equates to the longer time frame and fits with the current practice.

A second issue arises because the law requires that refusals be issued within just five days (the Law 544 stipulates at Article 7(2): “The refusal of providing the information requested is grounded and shall be notified within five days since the receipt of the petitions.”) This provision is one of a few in the world that establishes a different time frame for refusing requests (one other that the Justice Initiative is aware of is Hungary where there are 15 days for releasing information and only eight for refusing it).<sup>11</sup>

For the purposes of this study, institutions were held to the five working days for refusing requests. Of the seven written refusals received, only two—both from the City Hall of Buftea—came within the five day time frame (these were two refusals to the business person, where the rather spurious ground for refusal was that the letter of application was not stamped by the business person’s company). In follow up interviews, it became clear that in many cases public servants are not aware of the different time frames for refusals and answers and so usually aim to issue refusals within the same 10 days applied for providing an answer.

The five day time limit also applies to transfers in Romania, and was respected in both cases that transfers occurred. Referrals are not permitted by law, but where they came after the five days for transfers, they were recorded as late as well as noncompliant; there were four such referrals in this study.

As to the remainder of the late responses, 20 percent of all requests, they represented 12 percent information received and one percent inadequate information.

The interviews revealed that the delays were mostly caused by blockages in information flow within the institutions. The challenge for the information officer is that he or she has to transfer requests to other public servants, those who actually hold the information. In many cases, those other public servants are not familiar with freedom of information law, nor do their jobs ride on responding to requests from the public—they are used to responding to requests from other officials but not from simple citizens. Information officers complain about being caught between their obligation to respect time frames for responses and the lack of power to force other departments to deliver information. By the same token, until the information officer has heard back from colleagues, it is impossible to determine if part of the information should be exempted, and is therefore hard to issue refusals within the shorter five day time frame. In response to these dilemmas, some institutions (for example, the Ministry of Public Finances) have set up internal regulations to determine that departments should release information to the information officer in even shorter periods of time than the law provides, in order that the information officer can process the request and respond to the public on time. In one or two institutions, the need for information officers to gather information also

accounted for the slightly faster release of information in the second wave of the monitoring exercise, as the information officers already had information on hand.

No institution in Romania requested extensions for answering a request. Even complex requests received information on time. Overall, in Romania full or partial information was received in response to 49 percent of requests. The Romanian Helsinki Committee believes that the current 10 day time frame is appropriate, but is recommending harmonizing the five days for denying information with the 10 days established for releasing it.

## Short Time Frames

The significant proportion of late responses in some countries—particularly Armenia (five days, 14 percent late responses), Chile (48 days in law, 10 days in this monitoring exercise, 17 percent late), Romania (10 working days, 20 percent late), Argentina (10 working days, 12 percent late) and possibly Peru (seven working days, eight percent late)—raises the question of whether the time frames are too short. In the follow up interviews, some concerns were raised about time frames by public officials, particularly in Armenia and Chile.

There has also been discussion at the national level about whether time frames should be lengthened to improve access to information. In Peru, a legislative amendment currently under discussion would increase the time frame from seven to 10 working days. In Chile, a draft law proposed by civil society suggests a time frame of 15 working days, which would clarify and lengthen existing time frames. (However, in Nigeria, the current draft law proposes a five day deadline for responding to requests, in order to convey the importance and urgency of government transparency.)

The Justice Initiative does not believe that longer time frames are necessary, for two reasons.

First, the stronger performing countries in the study were those with shorter time frames (notably Armenia, Bulgaria, and Romania). Countries with longer time frames did not perform particularly well. Only Mexico, where public officials have 20 working days to notify requesters of a decision to deliver information, and another 10 working days to do so, demonstrated reasonable compliance within a long time frame, but as noted above, Mexico's civil servants have developed a practice of complying with the requirement of the law to respond as rapidly as possible, bringing down response times. Mexican public servants reported in interviews that, as a result of extensive

government led training, they were highly conscious of the time limits. In this study, only three percent of requests resulted in late delivery of information, and there were no other late responses at all. Despite first appearances, the Mexican case supports the thesis that short time frames encourage better release of information.

Second, public officials reported in interviews that time frames are not the cause of late refusals any more than they are the cause of general failures to comply with FOI laws. Rather, other procedural concerns dominated: the quality of information management systems and the lack of clarity regarding legal exemptions. Interviewed public officials seemed more interested in learning how to comply within existing time frames than in changing them.

## Extensions

Most countries' laws provide for extending time frames in the case of complex information requests that require documentary compilation, research, or analysis (see Table 12). The length of the extension allowed varies from country to country, ranging from five working days to 30 calendar days. If an institution wishes to make use of an extension, the procedure is generally to inform the requester in writing within a specified time period. However, extensions were rarely requested in this survey. In countries with high compliance rates, even complex requests tended to be answered within the time frames, if they were answered at all. In Argentina, Armenia, Romania, Bulgaria—all of which provide for extensions by law—no government body requested an extension, even where the information request was complex. Extensions were also not requested in Chile. In Bulgaria, one difficult request for information was refused on the grounds that it would require a lot of work to compile the information; Bulgarian law does not provide for such refusals.

In Peru, where the deadline is seven working days, there was just one request for an extension. This came from the Ministry of Defense, in response to a request for the list of law firms that provided legal assistance to the ministry in 2003 and the amounts billed. The general secretary at the ministry contacted the requester to say that she had asked other departments for the information and needed more time. The response was received two months later, well past the five working days permitted for an extension; it had been classified as a mute refusal in the meantime.

The option for public servants to avail themselves of extensions makes good sense in cases where the information is genuinely hard for them to gather.

## Recommendations:

- Short time frames promote the right to know and encourage efficient information management. According to the Justice Initiative study, other factors are likely more critical to the effective implementation of the right of access to information than time frames. Where time frames are short, a clear signal is sent to government bodies to prioritize and respect the right to know. Longer time frames can result in procrastination or reprioritization, given the busy schedules of many public officials. Short time frames encourage efficient solutions to information management, including internal information systems, and reliance on websites and publications to disseminate information—responses that increase both internal administrative efficiency and overall government transparency.
- Extensions are necessary, particularly in establishing new access to information regimes. The Justice Initiative recommends that extensions be for a period of no more than 20 working days, and be limited to situations in which the department can demonstrate a real need for more time to collect the information. Extensions are critical in the early years of implementation of a new access to information law, when information management systems are immature. Government departments should be encouraged to make use of extensions where necessary. At the same time, Information Commissioners and civil society monitors need to ensure that the application of extensions does not become reflexive and baseless, as this in itself amounts to a violation of the right to know.

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## Notes

1. See Articles 2 and 26 of the International Covenant on Civil and Political Rights, Article 28 of the African Charter on Human and Peoples' Rights, Article 14 of the European Convention on Human Rights, Article 24 of the American Convention on Human Rights.
2. These recommendations refer to laws. Governments can also meet these recommendations by complementing laws with other norms and regulations in order to ensure full compliance with the right to information.
3. Mexico's LFTAI (2002), Article 7.XVII.
4. The Association for Civil Rights, which carried out the monitoring in Argentina, notes that the City of Buenos Aires Social Development office was usually diligent and speedy in responding to requests and had been helpful to requesters; it had obviously taken a long time to gather the information to respond to this particular request.
5. Council of Europe Recommendation 2002(2) on Access to Official Documents at Principle VI.3.
6. Sweden's Freedom of the Press Act of 1776 as amended, at Article 12.1. The Act has constitutional status, giving particular weight to the right of access, including the time frames.
7. The Justice Initiative reviewed the time limits in 47 laws worldwide. Of these, 24 had time limits in working days average 13.35 working days, and 23 had time limits in calendar days averaging 20.86 calendar days which was recalculated as 14.9 working days; the weighted average of these two totals gives the figure of 14.13 working days. In other words, public authorities around the world have on average 15 working days or three weeks to respond to requests.
8. Mexico's Federal Transparency and Access to Information Law (2002), Article 44.
9. Mexican Federal Access to Information Institute, Report of Work 2003-2004 as presented to Congress, <http://www.ifai.org.mx/informe/Informe2003-2004.htm>.
10. Romanian Government Decision No.123/2002 on methodological norms for applying Law No.544/2001 was published in the Official Gazette on 8 March 2002.
11. Hungary's Act LXIII on the Protection of Personal Data and the Publicity of Data of Public Interest (1992) at Section 20(1) provides for release of information within the shortest possible time but not more than 15 working days, and Section 20(2) provides that refusals must be issued within eight working days.

## Open Society Justice Initiative

The Open Society Justice Initiative, an operational program of the Open Society Institute, pursues law reform activities grounded in the protection of human rights, and contributes to the development of legal capacity for open societies worldwide.

The Justice Initiative combines litigation, legal advocacy, technical assistance, and the dissemination of knowledge to secure advances in the following priority areas: national criminal justice, international justice, freedom of information and expression, anti-corruption, and equality and citizenship. Its offices are in Abuja, Budapest, and New York.

The Justice Initiative is governed by a board composed of the following members: Aryeh Neier (Chair), Chaloka Beyani, Maja Daruwala, Anthony Lester QC, Juan E. Méndez, Diane Orentlicher, Wiktor Osiatyn'ski, András Sajó, Herman Schwartz, Christopher E. Stone, Abdul Tejan-Cole and Hon. Patricia M. Wald.

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## Open Society Institute

The Open Society Institute works to build vibrant and tolerant democracies whose governments are accountable to their citizens. To achieve its mission, OSI seeks to shape public policies that assure greater fairness in political, legal, and economic systems and safeguard fundamental rights. On a local level, OSI implements a range of initiatives to advance justice, education, public health, and independent media. At the same time,

OSI builds alliances across borders and continents on issues such as corruption and freedom of information. OSI places a high priority on protecting and improving the lives of marginalized people and communities.

Investor and philanthropist George Soros in 1993 created OSI as a private operating and grantmaking foundation to support his foundations in Central and Eastern Europe and the former Soviet Union. Those foundations were established, starting in 1984, to help countries make the transition from communism. OSI has expanded the activities of the Soros foundations network to encompass the United States and more than 60 countries in Europe, Asia, Africa, and Latin America. Each Soros foundation relies on the expertise of boards composed of eminent citizens who determine individual agendas based on local priorities.

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The right of access to information held by public bodies is a bedrock principle essential to any open society. Yet in many countries, access to information laws are weak, riddled with loopholes and poorly implemented. *Transparency & Silence* takes a close look at access to information laws in 14 countries and how they work in practice, and lays out a role for NGOs and citizens in promoting government openness and accountability. The text includes charts comparing countries' responsiveness, as well as recommendations on improving access to information laws and practices. By tracking more than 1,900 actual requests for information submitted to government offices and agencies in countries ranging from Nigeria to Macedonia to France, this survey shines a bright light on where and how access to information laws work—and where they don't.

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