

# More Power to You? A Case Against Binding Decisions as the Ultimate Access to Information Enforcement Tool

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## Abstract

The enforcement of Access to Information laws is crucial to their effectiveness. Information commissioners, who enforce about one quarter of federal policies, are granted powers to help them execute their tasks. Many scholars argue that a commissioner should have the right to issue legally binding orders. However, we found that a commissioner with recommendation power is not necessarily less effective. This article argues that one must consider what binding decision power really means, whether the body uses it, and how the body uses its other powers and fulfills its tasks before declaring that binding decision power is the ultimate enforcement tool.

## Keywords

transparency, access to information, regulation, information commissioner, freedom of information

## Introduction

Over the past decade, several dozen countries have passed Access to Information (ATI) laws; the total number of ATI acts worldwide now stands at 95 (Access Info Europe & Centre for Law and Democracy, 2013). In

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addition to the basic aim of granting people the power to access information, the overarching objectives of these laws are to increase transparency and accountability in government and thereby contribute to greater public participation in the political process and higher trust in government (Hazell, Worthy, & Glover, 2010, p. 19; Worthy, 2010). Many government officials and members of civil society argue that ATI policies ultimately contribute to better governance and stronger democracy (Article 19 & Fundar, 2010; Mendel, 2008; Singh, 2007).

ATI laws are based broadly on the same principles and contain similar legal parameters; thus, one might reasonably expect them to be similarly effective. This is difficult to demonstrate, however, as few comprehensive research projects have explored whether the objectives of these laws are actually met (Hazell et al., 2010, p. 3). On the other hand, numerous academic studies, government reports, and news articles discuss the fact that ATI policies suffer from implementation problems. These problems include a lack of publicly available information about how to make requests, delays in responding to requests, and unjust withholding of information.

As with any law, enforcement of ATI is key to mitigating implementation problems or preventing them in the first place. The courts and oversight bodies are the two main enforcement mechanisms built into ATI laws. Many experts in the field consider the primary role of oversight bodies, which enforce roughly one half of all ATI laws by resolving disputes that arise between information requesters and the administration that holds the information as well as carry out other implementation-related tasks, crucial to combating the problems that crop up due to poor compliance (Ackerman & Sandoval-Ballesteros, 2006; Pearlman, 2010); they also play a second role as “champions” of ATI.

Oversight bodies are granted certain powers by law to help them fulfill their functions. These include, among others, the authority to access any information and material relevant to an appeal case, the right to issue to a public authority whose actions it finds do not conform with the law’s provisions a recommendation that specifies steps to conform, and binding decision power, which allows the oversight body to enforce the decisions it issues on appeals submitted by information requesters.

Most scholars argue that an oversight body should have the legal right to issue legally binding orders—not just recommend what the administration should do in an appeal case (Carter & Lv, 2007, p. 38; Neuman, 2009; Rowat, 1993). However, in a comparative case study of ATI oversight bodies in Germany, India, Scotland, and Switzerland, we found that an oversight body with binding decision power is not necessarily more effective than his counterpart with recommendation power. In Switzerland, for example, where the

commissioner does not have binding decision power, and Scotland, where he does, roughly the same percentage of appeal cases result in disclosure of information. This article explores the reasons behind this and argues that one must take into account what binding decision power means exactly in a given jurisdiction, whether the body uses it and why or why not, and how the body uses its other powers and fulfills its tasks before declaring that binding decision power is the end all be all of effective oversight.

Following a brief background on ATI laws and problems with their implementation, the article turns to an overview of their enforcement with a focus on oversight bodies. It then describes the four case study jurisdictions—two of which have oversight bodies with binding decision power (India, Scotland) and two that do not (Germany, Switzerland)—and provides a comparative analysis of the four cases before offering some concluding thoughts.

## **ATI Laws and Their Implementation**

The Swedish government was the first to grant its population the right to information by including it in the country's constitution (Sweden, 1766). The U.S. Freedom of Information Act, passed 200 years later, influenced the laws whose countries legislated subsequently, for example, Australia (1982), Canada (1982), Japan (1999), and the United Kingdom (2000; Banisar, 2006; Hood, 2006).

Nearly all ATI laws address who can make a request, whether a fee is charged for making requests, how long the administrative office has to answer the request, which categories of information are exempt from disclosure, and how the law is enforced. All laws contain a list of types of information that cannot be disclosed, commonly called exemptions, such as national security, personal information and international relations. They also offer at least one avenue of recourse to requesters who do not receive the information they request or who believe an administrative office has otherwise complied incorrectly with the act. These fall under the headings of internal review, external review, and/or the option to take a case to court. In the internal review stage, a person who is dissatisfied with the treatment or result of his request asks the office to which he applied (or another administrative body) to address his complaint. If the response to the review is unsatisfactory, the requester can then move to either the external review stage, which involves an appeal to an oversight body, and/or to review by a court. In some jurisdictions, internal review is optional, in others external review is not required, and in a few the only avenue of appeal is to go to court.

By implementing an ATI policy, a government makes more information available than before the law went into force (Roberts, 2006). This does not

mean, however, that all requested information is disclosed, that the information is released in a timely fashion, or that people even know the law exists. ATI, like most policies, suffers from implementation problems that may hinder the achievement of the objectives set out for it. These include low awareness of the ATI law, lack of understanding of how the request process works, and high fees for making requests, which are often the result of insufficient resources allocated to ATI and inadequate leadership within administrative organizations on matters of compliance.

ATI works differently in different contexts. Use of ATI laws can be influenced by institutional structures, the levels at which decisions are made, and a country's political and social conditions.

It is extremely important that we do not . . . fail to recognize the highly idiographic nature of "freedom of information" in actual practice, taking into account the social and political contexts and the specific histories of different countries, as well as the different character of particular state structures. (Darch & Underwood, 2010, p. 7)

As Meijer (2013) points out, transparency takes distinct forms depending on government dynamics. In his case of the Council of Europe, for example, transparency regulations were passed early on due to lobbying by pro-transparency Scandinavian countries and little understanding of the ramifications of transparency by other member states; over time, however, the council became resistant to transparency, especially as it reduced the body's autonomy and transformed the model of decision making from one of diplomatic negotiations to one that included citizen input. However, public access to Council documents, once nearly impossible, is now possible via a web site due to shifts in attitude toward transparency and openness.

## **ATI Enforcement**

Proper enforcement of the policy by an external body is crucial to overcoming these implementation challenges or preventing them from happening in the first place. Pearlman (2010) argues that "the most liberal [ATI] laws are essentially useless if there's no practical means of enforcing them" (p. 130). An enforcement body is essential to the life of an ATI law because "if there is widespread belief that the legislation will not be enforced, this so-called right to information becomes meaningless"; without strong enforcement, it would be easy for the administration to deny information requests or ignore the law altogether (Ackerman & Sandoval-Ballesteros, 2006, p. 105; Neuman, 2006, p. 10).

There are four main types of bodies independent of government that resolve information requesters' complaints under ATI—an ombudsman's office, a commissioner's office, a tribunal (a specialized court), and the courts. A small number of countries with ATI leave enforcement up to the administration itself, for example, Hungary, as of 2012. Of the nearly 90 countries that had passed an ATI law by 2011, roughly 25% of countries had given enforcement responsibility to an information commission or commissioner, 25% to an ombudsman, and the remainder to a tribunal, the courts or an administrative office (Access Info Europe & Centre for Law and Democracy, 2013; Banisar, 2006).

The main advantage of giving enforcement responsibility to an oversight body (an ombudsman or information commissioner) rather than the courts is that appealing to an oversight body is not as time-consuming, costly, or intimidating for requesters (Ackerman & Sandoval-Ballesteros, 2006; Allan & Currie, 2007; Hammitt, 2007; Nisbet, 2010). In their examination of alternative means of ATI enforcement in South Africa, where until now information requesters could only appeal to the courts about poor or noncompliance, Allan and Currie (2007) concluded that "litigation is self-evidently too inaccessible and cumbersome to be an effective means to enforce the freedom of information rights" (p. 570). Before the passage of the ATI Act in Canada, people who were unable to get the information they needed from government could take their case to the Federal Court of Canada but, once there, they faced "an onerous and frustrating and expensive process" (Canada, 1994). Prior to the establishment of the United States Office of Government Information Services in 2009, which carries out an ombudsman function mediating complaints concerning compliance with the Freedom of Information Act, appeals went "to the ordinary courts, a process which is costly, cumbersome and slow" (Rowat, 1993, p. 215).

### *Information Commissioner*

The establishment of information commissioners as enforcers of ATI policies is a relatively recent development, one which stemmed from the ombudsman tradition: Like the ombudsman, the information commissioner's primary role is to resolve complaints from citizens about poor or noncompliance on the part of the administration. However, the "general purposes of each institution are different": Whereas ombudsmen handle a variety of complaints of illegal or unjust administration, information commissioners deal with complaints related specifically to compliance with ATI (and in some cases, other information-related) policy (Reif, 2008). Two of the advantages of having a specialist body enforce an ATI policy are that the organization's staff are experts

in the area of ATI and can therefore provide “more consistent interpretations and rulings” as well as the fact that they are not distracted by other duties, as ombudsmen, who often deal with a host of other issues in addition to ATI, can be (Carter & Lv, 2007, p. 35; Darbishire, 2007, p. 3; Mendel, 2008, p. 151). Information commissioners also act, in many cases, as champions of freedom of information (FOI) by advocating for transparency and publicly urging governments to be more transparent. This second of two “dual roles” can affect compliance and information release rates, although this is empirically difficult to measure.

The first ATI oversight body given the title of information commissioner was the Canadian Federal Office of the Information Commissioner set up under the Canadian Access to Information Act in 1983. While nearly all of the ATI policies passed before the Canadian law gave responsibility for resolving requesters’ complaints to an already established ombudsman, a growing trend in the last 10 to 20 years has been to create an information commissioner office to function as the ATI oversight body. There are now 23 information commissioner offices worldwide at the federal/central government level and many more at the state level. In 2010, the Australian government switched from the ombudsman model to that of an information commissioner with the passage of reforms to the country’s ATI law and the Australian Information Commissioner Act 2010.

There are two information commissioner models: an office headed by one commissioner, for example, Canada, Slovenia, Scotland, Ireland, Australia, Switzerland, United Kingdom, and Germany, and a commission consisting of several commissioners, for example, Mexico and India (see Table 1). The information commissioner’s primary function is to resolve requesters’ complaints about procedural issues and/or appeals against the withholding of information. In addition to reviewing and resolving appeals, commissioners’ legal duties often include one or more of the following In addition to reviewing and resolving appeals, commissioners’ legal duties often include one or more of the following (Darbishire, 2007; Mendel, 2008; Neuman, 2009):

1. advising and assisting people who have questions about ATI and/or specific questions about making an appeal;
2. advising and assisting the administration with questions on compliance and/or specific ATI request or appeal cases;
3. providing the administration with training and guidance on ATI compliance;
4. assessing the administration’s compliance with the policy;
5. compiling and reporting statistics on use of the ATI law;

**Table 1.** Table of Single and Multiple Commissioner Offices.

|                     | Single/multicommissioner model |
|---------------------|--------------------------------|
| Antigua and Barbuda | S                              |
| Australia           | S                              |
| Canada              | S                              |
| Cayman Islands      | S                              |
| Estonia             | S                              |
| France              | M                              |
| Germany             | S                              |
| Iceland             | S                              |
| India               | M                              |
| Ireland             | S                              |
| Japan               | S                              |
| Latvia              | S                              |
| Macedonia           | S                              |
| Mexico              | M                              |
| Portugal            | S                              |
| Scotland            | S                              |
| Serbia              | S                              |
| Slovenia            | S                              |
| Switzerland         | S                              |
| Thailand            | S                              |
| Turkey              | S                              |
| United Kingdom      | S                              |
| Zimbabwe            | S                              |

6. giving advice on reform of the ATI law and/or on how the ATI law can affect or be affected by other (including proposed) legislation; and/or
7. promoting and raising awareness of the law.

Oversight bodies are granted powers by the ATI law that make it possible for them to carry out these tasks successfully. The powers include the authority to

1. access any information and/or documents relevant to procedure of mediation;
2. give a recommendation to a public authority whose actions it finds do not conform with the law's provisions or spirit, specifying steps to conform;
3. issue binding decisions; and/or

4. impose a fine on civil servants for noncompliance or other violation of the ATI law.

Whereas most ombudsmen and some information commissioners possess only the power to offer a recommendation to the administration about a case they have handled, many information commissioners can issue binding decisions. Binding decision power has different meanings in different jurisdictions. Neuman identifies binding decisions as those that do not allow an administrative organization the “right of judicial review” after the decision has been issued (Neuman, 2009, p. 17). In the United Kingdom, failure by an administrative office to comply with a decision notice issued by the Information Commissioner’s Office (ICO) can prompt the ICO to hold the office in contempt of court, which means that the Court may look into and rule on the matter (Information Commissioner’s Office (UK), 2015). If an administrative office in Slovenia refuses to comply with the Slovenian commissioner’s decision, she can fine the office between roughly CHF500 and 1200 plan for the legal violation (although she had not done so as of 2007; Darbishire, 2007, p. 7).

The general consensus in the ATI community is that an oversight body should be granted binding decision power. The two main arguments for giving an oversight body binding decision power are (a) that it gives the body “teeth” to force disclosure of information when the administration is reluctant to do so and (b) the decisions become legal precedents to which the administration and oversight body staff can refer when dealing with similar issues on requests and appeals (Neuman, 2009, p. 7; Rowat, 1993, p. 219). The push for granting oversight bodies with binding decision power in ATI laws has been fueled by a rise in established international standards in ATI provisions and lobbying by civil society organizations (Neuman, 2009).

External experts in Canada have made a case for giving the Office of the Information Commissioner, which currently has recommendation power, the power to make binding decisions. In a study of the Federal Information Commissioner of Canada for a review of the Canadian ATI Act in 2002, McIsaac (2002) argued that granting the commissioner binding decision power would make the body more effective in addressing complaints because, although the percentage of cases that ultimately go to court after the commissioner has made a recommendation is very small (1%), there are probably many more requesters who are dissatisfied with the final outcome of their request and appeal; therefore, obligating administrative offices to comply with a binding decision would result in more information being released and more satisfied requesters. In addition, she argues that the fact that the commissioner does not publish decisions means there is no body of jurisprudence,



which would be useful to both the administration and potential requesters. Roberts points out that because it does not have the power to make binding decisions, the Canadian Information Commissioner has had to resort to issuing administrative officials with subpoenas to advance cases in court (36 in the 3-year period 1999-2002) and publicly shaming administrative offices with low marks in the office's "report card assessments" that are included in each year's annual report. He finds that these tactics have led to increasing animosity and a loss of trust between commissioner's office and the administration (Roberts, 2002).

However, recommendation power also has its advantages. In Denmark, for example, government agencies nearly always accept what the ombudsman recommends and comply accordingly (Carter & Lv, 2007, p. 38). Neuman (2009) highlights the fact that a "soft" approach to appeal resolution can be less intimidating to information requesters: faster, as it limits investigations to "unsworn representations"; and less adversarial, "potentially leading to greater compliance," than the formal approach of issuing binding decisions (p. 8). Despite advocating for binding decision power in Canada, McIsaac also acknowledges the advantages of the Canadian commissioner's current recommendation-only model: that it encourages negotiation with the administration and costs relatively little.

In summary, persuasive arguments have been made by advocates of binding decision power as well as those who support recommendation power. The general consensus is, however, that having the "teeth" to enforce a decision makes an oversight body more effective in pushing for disclosure and proper compliance with an ATI law. But what do those in information commissioners' offices and the administration say? Following a short description of the method, this article briefly describes four case studies of ATI oversight bodies in Switzerland, Germany, India, and Scotland and finds that the subject is not as cut-and-dried as one might think.

## **Method**

To understand whether binding decision power is necessary to an information commissioner's effectiveness in enforcing ATI, we carried out a comparative case study of four commissioners' offices at the federal or central government level. Case selection was based on two main criteria. First, we chose two commissioner offices that have binding decision power (Scotland and India) and two that do not (Germany and Switzerland). Second, we chose to look only at recent ATI implementations that have a certain level of maturity, that is, more than one or two years old, to ensure sufficient data would be available. We chose jurisdictions in which the ATI law was brought into effect

within the last six years to be able to study the oversight body's work not only during the initial implementation stage but also as it developed up until the present day. The four jurisdictions implemented their laws within 18 months of one another. Another reason for this is that we wanted to be able to interview the first information commissioners in post to be able to ask about perceptions of change over their tenure since the beginning of implementation; due to the laws' relative youth, we were able to interview the first oversight body director in post in three of the four jurisdictions. While the jurisdictions vary widely in terms of history and size, among other things, both India and Scotland are based on common law legal systems (with Scotland a mix of common and civil law), while Germany and Switzerland follow the civil code tradition.

Data for the article were collected through interviews. Thirty-seven semi-structured interviews were conducted with members of the commissioners' staff, administrative officials who had dealt with a particular commissioner's office on appeal cases or other issues of compliance, people who had filed appeals with the commissioner's office, and other external experts who are knowledgeable about the subject of ATI implementation and oversight. Our three main questions were as follows: What binding decision power means exactly in a given jurisdiction, whether the body uses it (why or why not?), and how the body uses its other powers and fulfills its tasks. The interviews took place between September 2010 and March 2011. All interviews were recorded and transcribed.

## Cases

### *Germany*

The Federal Commissioner for Data Protection and Freedom of Information (Bundesbeauftragte für den Datenschutz und die Informationsfreiheit—BfDI) has been responsible for enforcing the German Informationsfreiheitsgesetz (IFG) since the law came into force on January 1, 2006. By law, the commissioner's primary task is referred to from the information requester's point of view: "anyone considering their right to ATI pursuant to this Act to have been violated may appeal to the Federal Commissioner for Freedom of Information" (12[1]). In other words, the BfDI is obligated to consider all appeals to it brought by information requesters. However, the commissioner considers his functions to be enforcing the IFG by "acting as point of contact for complaints lodged by citizens," monitoring compliance by the administration, advising both the Parliament and administration on IFG-related topics, and informing the public about IFG developments (Government of Germany,

2008, p. 21). When they find problems with the organization's compliance—whether in the course of investigating a complaint or during an assessment—the commissioner may file a formal complaint with the head of the administrative organization. The commissioner must also inform both the public and Bundestag of developments in IFG; one specific avenue for this is the biannual activity report about the implementation of IFG the commissioner is required to submit to the Bundestag. Likewise, he must provide expert advice and reports to the Bundestag and government when requested as well as make more general suggestions to the administration about increasing transparency and providing information pro-actively (Government of Germany, 2008, p. 21). The commissioner's sole power to aid him in the fulfillment of his functions is to “expect assistance by public bodies in performing duties, in particular: information in reply to questions, opportunity to inspect all documents relevant to compliance, and access to all official premises at all times” (S. 24 [4]).

Under the IFG, the administration has one month to formulate a response to a person's request for information and send it to the requester. If the response provided is unsatisfactory to the requester, he or she can ask the same administrative office to reconsider the request. This is called an internal review. The person *must* file a request for an internal review if he or she is considering the possibility of taking the case to court. Before or while taking this step, the requester may also seek an opinion on the case from the ICO to obtain a neutral and independent point of view about the appropriateness of the administration's response. There is no requirement to do so, however, nor are the administrative office and commissioner's office required to communicate about the case. In fact, the administrative office does not always know that the commissioner's office has been asked to give an opinion on a certain case.

In handling appeals, the BfDI staff provide a free service to people who would otherwise have to pay a lawyer to get legal advice (Interview 27). In addition to this benefit, however, there are several reasons for a person to request an opinion on a case from the commissioner. If the information requester files an appeal with the BfDI at the same time or soon after submitting a request for an internal review and he or she allows the commissioner's staff to include his or her name in correspondence with the administrative office, the BfDI may be able to influence the outcome of the internal review by providing the administration with an external legal judgment. If, for example, the BfDI finds that the legal basis for the administration's decision was not sound, they may be able to persuade the administration to disclose the information (Interview 28). Alternatively, if the commissioner's opinion concurs with the administration's decision of partial or complete nondisclosure,

the requester has a judgment on the case provided by an external body, which could dissuade him or her from pursuing the case in court, thereby saving time and money. Finally, if the BfDI concludes that the decision to withhold has been reached in error but is unable to convince the administration to disclose more or all of the information and the requester decides to pursue the case further, he or she has in hand a document from an external body explaining the legal arguments for disclosure.

The latter outcome does not differ much from that when requesting an opinion from the commissioner later in the appeal process. The requester also has the option to file an appeal with the commissioner after receiving a negative response from the administration as a result of the internal review. In this situation, the requester is still in the position to take the case to court and may wish to get the commissioner's opinion either to make that decision and/or to obtain a "statement . . . [made] on a legal basis . . . by a respected institution . . . which could be helpful if [they] go to court" (Interview 27).

Although the commissioner and his staff can strongly recommend that the administration release the requested documents, they cannot force an office to do so. If at any point during his involvement in a case the commissioner finds that the administration has incorrectly complied with the act and is taking no steps to fix the error, however, he may issue a formal complaint against the office, stating, in effect, that "this [lack of disclosure] is not OK" (Interview 31), and set a date by which he expects a statement in response. This complaint serves to alert the top level of the organization that a violation of the provisions of the act has occurred and requires an explanation of the steps the authority has taken to correct the problem (Schwanitz, 2007). While this can be an effective tool, however, it is at its base only a recommendation with no force behind it (Interview 29); a negative response by the minister to the formal complaint closes the door, in effect, to the commissioner's influence; after that the requester must abandon the case or, if still within the legal time limit of 4 weeks, take it to court if he or she wishes to pursue the request.

## *India*

The Central Information Commission (CIC) was established with the passage of the Right to Information Act (RTIA) in October 2005 and has jurisdiction over appeals and complaints made to administrative bodies in Delhi and at the federal level. The law states that the Commission's duties are to issue decisions resolving appeal and complaint cases, inform both the requester and respective administrative office of the decision made on their case, and produce an annual monitoring report of the administration's compliance with the act. The Commission is also granted several powers by law. One is the

ability to initiate an inquiry into any matter it considers deserving of attention (Chapter V, S. 18[2]). While carrying out an inquiry, the commissioners have the powers of a civil court, including summoning and enforcing people's attendance at hearings and obtaining any relevant documents on the case (Chapter V, S. 18[3]). According to the law, the commission also has the right to examine any document that the administration holds (Chapter V, S. 18[4]), although it does not specify if or how it can enforce noncompliance with this if an administrative office refuses to hand over said document. In relation to appeal and complaint cases, the law states that the commission's decisions are binding and that commissioners can require the public authority to appoint a Public Information Officer (PIO), publish information, change records management practices, compensate a complainant for any loss suffered or impose penalties on administrative offices (Chapter V, S. 19[8a-d]). Commissioners can also impose fines on individual PIOs or recommend a PIO for disciplinary action for violating any of the provisions of Chapter V, S. 18(1). The commission may also write a recommendation about how a public authority's practices on right to information (RTI) compliance could be improved (Chapter V, S. 25[5]).

A person's first step in obtaining information under the act is to submit a request by sending or taking it in person to the administrative office that he or she believes holds the information and paying the required fee. Every administrative office is required to designate at least one staff member as a PIO, the person who is responsible for responding to RTI requests; in many administrative organizations, there are several PIOs. Once the PIO has received the person's request and proof of fee payment, it is his or her duty to provide the information within 30 days (or within 48 hr if the request is submitted as a matter of life and liberty).

If the person is unhappy with the PIO's decision or otherwise dissatisfied with any part of the request process, including no response to the request, a delayed response, or excessive fee charged, he or she may file an appeal or complaint. A commissioner's main task is to carry out an investigation of an appeal or complaint and make an initial judgment about whether withholding the information was the correct response to a request. This is accomplished by communicating with the PIO who received the request. The commissioner then schedules a hearing to obtain the requester's side of the story and decide whether the refusal to disclose is based on sound reasoning or not.

Appeal hearings consist of a session in front of the commissioner to which the PIO and appellant are invited. Both sides are given the opportunity to tell their side of the story, but the PIO must begin as the RTIA specifies that the person who has denied access to the requested information must justify his or her reasons for doing so. The commissioner's responsibility during a hearing

is to ask questions and draw out the relevant arguments. At the hearing's end, the commissioner issues a decision on the spot and provides a copy to both parties. If the commissioner rules that information is to be disclosed, the PIO must do so by the date stated in the decision. If a PIO is found during any point in the appeal resolution process to have knowingly failed to comply with the RTIA, a "show cause" hearing may be planned, which involves a written or in-person explanation by the PIO for why the commissioner should NOT levy a penalty against him or her for noncompliance.

A large percentage of the decisions the commissioners hand down are believed to be ignored. In a study done by the Public Cause Research Foundation (PCRF; 2009) to analyze the effectiveness and "pro-disclosure factor" of the individual commissioners and the CIC as a whole, which they conducted by analyzing more than 7,500 decisions handed out by the commission, only 20% to 30% of those that required full disclosure of the information were finally complied with. This is due, at least in part, to the fact that the culture of complying with orders by an independent body such as the CIC is lacking in India. "The belief that an order needs to be obeyed is not too high" (Interview 24); "the culture that orders must be obeyed has been very low, overall" (Interview 23).

Noncompliance is also the result of the fact that the commissioners rarely use the strongest tool granted them by the RTIA—the power to fine civil servants for noncompliance with the law. Those who won the fight to include the penalties provision in the law hoped that it would make a difference in how well the law was enforced and, thereby, complied with (Interview 24). "In India if we did not have a penalty clause we would have forgotten an RTI. It would be just like many laws" (Interview 23). In fact, binding decision power (Sec 19 [7]) is based on the commission's ability to penalize PIOs—if a decision is not followed, the commissioner who issued the decision can fine the PIO who does not carry through with it. However, this type of power is typical of those held by "quasi-judicial" bodies like the Central Information Commission, which means that although they can demand that civil servants pay for noncompliance, they cannot hold them in contempt of court and/or send them to jail (Interview 24). Moreover, if the civil servant on whom a fine has been imposed does not pay, the Central Information Commission has no means to recover the money.

Despite the power they are granted by law, by most accounts few commissioners issue penalties (Interview 24; Peisakhin & Pinto, 2010, p. 275; PriceWaterhouseCoopers, 2009, p. 51). The evidence is scarce, however. The CIC itself only provides the total amount charged to PIOs during the year in its annual report and has only done this in the past two reports. In 2010-2011, commissioners fined administrative officials the equivalent of INR 4,538,825,

of which INR 2,572,814 had been recovered by the time the report was written (Central Information Commission, 2011b, p. 29). Nevertheless, this is nearly 60% greater than the amount of fines imposed the year before—INR 2,642,500 (Central Information Commission, 2011a, p. 18). The RTI Assessment and Analysis Group and National Campaign for the People's Right to Information calculated that the CIC had only imposed penalties in 0.3% of their cases between 2005 and August 2008 (RTI Assessment & Analysis Group & National Campaign for People's Right to Information, 2009, p. 18), while more recent research found that the body recovered only about half of the penalties they imposed between January 2012 and November 2013 (RTI Assessment & Analysis Group & Samya—Centre for Equity Studies, 2014, p. 113).

### *Scotland*

The office of the Scottish Information Commissioner (OSIC) was created with the passage of the Freedom of Information (Scotland) Act (FOISA) in April 2002. In addition to processing appeals (49), annually reporting on his activities as commissioner (46 [1, 1 A & B]), acting as a consultant on other laws with a connection to FOI (60, 9, 12, & 13), and maintaining confidentiality when given access to documents by the administration (45), the commissioner's office must approve publication schemes (23 [1a]), promote good practice among the administration vis-à-vis the FOISA (43 [1]) and promote the law to the public (43 [2a]). Discretionary functions include assessing the compliance of administrative offices with FOISA (43 [3]), providing information about FOI to administration and members of the public (43 [2b]), and producing reports (other than the annual report), which must then be published (46 [3] & [3A]).

The Scottish Commissioner is granted several powers by law, which he or she can use in cases of noncompliance or cooperation by public authorities. Most of these come into play within the framework of the office's appeal resolution and other enforcement work. First, the commissioner is granted the power to decide what "good practice" means in the context of his work with public authorities (43 [8]). If the commissioner determines that a public authority is not complying with the FOISA, he can issue a "practice recommendation" to the authority (44 [1]). If an authority fails to provide OSIC with information relating to an appeal application or relating to its compliance with the FOISA, the commissioner can issue an "information notice" (50). He can also issue an "enforcement notice" to a public authority if satisfied that it has failed to comply with Part I of FOISA, requiring specific steps to be taken to address the problem areas (51). The commissioner may be

granted warrant to enter premises of authority (within 7 days of receiving said warrant) suspected of failing to comply with Act and search, inspect, and seize documents or other material, or test equipment holding information at the authority (Schedule 3 [1]). A last tool in his armory is the power to take an authority the Court of Session over its failure to comply with a decision, information, or enforcement notice (53).

Once an administrative office in Scotland has received a request for information, it has 20 working days to respond. If after the 20-day deadline the requester has received no response or has received a response with which he or she is not satisfied (no information released, only some of the information disclosed, or payment required for the information), he or she has the right to file a request for an internal review by the same authority. If the response to the internal review is also unsatisfactory, the requester has 6 months to appeal to the commissioner. If the commissioner determines that an investigation of the appeal is unnecessary because (a) the requester did not file for an internal review, (b) the request is assessed as vexatious or frivolous (section 49 (1) (a)), or (c) the request seems to have been withdrawn or abandoned (section 49 (1)(b)), the commissioner must inform the public authority and the appellant of this within 1 month (or as is reasonable, according to the Act) of receiving the appeal. A valid appeal, on the other hand, should be answered within 4 months (or as is reasonable, according to the Act) after the commissioner receives it. If the commissioner's investigation of appellant's appeal results in an unsatisfactory outcome for the appellant, he or she can take the case to the Court of Session, Scotland's supreme civil court, but only on a point of law. Alternatively, if the public authority does not heed the commissioner's decision, the commissioner can take the authority to the Court of Session for contempt of court. The final stage of appeal for both requester and administration is the Supreme Court but only on a point of law.

Binding decision power is only one of several tools the Scottish commissioner possesses to enforce the law. In a sense, it is secondary to the more immediate powers the office has and from which the staff pick and choose. For example, a large chunk of appeals conclude without a formal decision notice. In 2010, 37% of all FOISA appeals closed during investigation were resolved by settlement, which entails an informal agreement between the requester and public authority. These settlements are often the outcome of a failure by the public authority to deal properly with the request; in most cases, once OSIC points this out the public authority usually discloses some or all of the information to the requester (Keyse, 2009, and Interview 11). The commissioner has been encouraging more case settlements since the Act came into force because "that's where the efficiencies lie—there's no decision notice, there's not an enforceable decision, but both parties are satisfied" (Interview 6).



However, it's not always faster than producing a decision—"sometimes the settlement cases are actually ones which take a while, going back and forth to the public authority and then to the applicant, trying to broker some sort of agreement" (Interview 9).

ATI is the office's ultimate goal. Although the commissioner and staff strive to deal with cases in a "completely impartial way . . . never making judgments until [they] have all the evidence together" (Interview 7), helping the requester is the priority and the commissioner encourages case settlement only if it leans in the requester's favor. "We're very keen not to settle a case where an applicant would get less [information] than they would by way of decision unless we tell the applicant that we think that's going to be the likely outcome," explained a member of the commissioner's office (Interview 7).

In contrast, there are circumstances that lead the investigative officer or the enforcement team to resolve an appeal with a decision notice rather than settlement. This is the case, for example, when the administration demonstrates significant failure to comply with the act and would rather conclude the appeal quietly by giving the requester the information he wants but OSIC "think it's worthwhile having it noted that there has been a failure" (Interview 8). The commissioner's staff also prefer to issue a decision notice when the case is precedent-setting, and the decision can become an educational tool for requesters and administration alike.

OSIC has never held an administrative office in contempt of court for noncompliance. Despite this, the Scottish commissioner and his head of enforcement consider binding decision power essential to their ability to enforce the law. They reason that without it, administrative offices would ignore the law, as they did the 1994 Code of Practice on Access to Government Information, which encouraged public authorities to disclose information but had no legal force behind it and therefore resulted in little disclosure. In their opinion, a law with a commissioner wielding enforcement power removes room for maneuver: "It's not—'this is what I think you'd do if you were a nice person,'" said the head of enforcement; "if you say, 'this is what's going to happen,' authorities will do it," explained the commissioner (Interview 7; Interview 9).

### *Switzerland*

The Swiss commissioner's office was originally established as the regulator of the Swiss Federal Act on Data Protection (DPA) over a decade before the Federal Act on Freedom of Information in the Administration (LTrans) was passed and implemented. The office of the Federal Data Protection Commissioner began its work after the DPA went into force on July 1, 1993.

When the office took on responsibility for the LTrans in 2006, the commissioner's title changed to the Federal Data Protection and Information Commissioner (FDPIC).

According to the LTrans law, the duties of the commissioner are to

- conduct mediations to resolve appeals by requesters against an administrative office and write a recommendation if the mediation fails to result in a satisfactory solution for the two parties
- inform administrative offices and requesters about the modalities of the LTrans
- comment on draft legislative acts or other measures that have a fundamental impact on the principle of LTrans
- review the execution and costs of LTrans implementation and report the findings to the Federal Council on a regular basis, starting with a report after the first 3 years.

His sole power granted by law is to be able to access any documents relevant to the mediation procedure, even those that are confidential.

A Swiss public authority has 20 days to respond to a request by either disclosing or by refusing either in part or in full to disclose the information. In exceptional cases, for example, when a large number of documents have been requested or the documents are complex or difficult to find, the authority can extend the deadline by an additional 20 days.

If the request for information is entirely or partially refused, the requester has 20 days to file an appeal for mediation via the commissioner's office. If the outcome of the mediation procedure is unsatisfactory to the parties, the commissioner is obliged to issue a written recommendation concerning the case and provide a copy to both the requester and the public authority. The recommendation must be issued within 30 days after the appeal is received. The recommendation is not binding; in other words, the public authority is not obligated by law to do what the commissioner recommends. If the recommendation is for disclosure of more information than the administrative office was originally willing to give, the requester has 10 days to ask for a decision by the administration following receipt of the recommendation; the law requires that the administration respond to this request within 20 days. There is no clause in the law that requires the public authority to inform the commissioner of its final decision on the matter. A requester who is unhappy with the administration's decision can take the matter to the Federal Administrative Court and, if dissatisfied with the ruling, to the Federal Supreme Court.

The mediation and recommendation process is time-consuming and laborious but it also has several upsides, according to supporters of the system.

First, it is an informal process that (usually) brings the two parties to the table as equals, which makes it especially comfortable for the requester, who can be intimidated by meeting with the administration (Interview 3). Second, it is free of charge. Third, no lawyer or legal background is required as the procedure consists of dialogue about the request with an expert mediator's help in progressing to a solution, rather than written briefs given to a judge who makes a decision based on the law and the best arguments made by those who know the law. Fourth, the fact that the commissioner's office specializes in the LTrans law, in contrast to a court that takes cases involving any number of different laws (Interview 3), gives him an intimate understanding of the LTrans issues over time, although admittedly the subject of each case is unique and takes time to understand.

### *Analysis*

Only the Scottish and Indian commissioners have the legal ability to make binding decisions (see Figure 1, for a comparison of all four commissioner offices' powers). What this means in practice—and to what extent OSIC and the CIC use it—differ, however.

Binding decision power in Scotland means the commissioner can take an administrative office to court over noncompliance with a decision he or she has issued on an appeal. Despite their emphatic declarations that having binding decision power makes a difference to their effectiveness, however, OSIC has never held an administrative office in contempt of court over noncompliance. This being said, they do use their power to issue decision notices to teach lessons; instead of settling some of the appeals they receive, they choose to go through the formal investigation process and produce a public document to show other administrative offices where a mistake has happened and what they should do to avoid making the same one.

The issue of binding decision power is not as cut-and-dried in India. Although the RTIA states that the decisions of the commissioners are binding, it is not clear what this means. Presumably it means that if a PIO does not comply correctly with the law, the CIC can then use its power to penalize them with a fine; however, the commission cannot hold the PIO for contempt of court if he or she does not obey with the order given in the decision or fails to pay the fine. In effect, then, the commission's binding decision power is weakened by its inability to take a case of noncompliance with a decision or nonpayment of pay a fine to court.

By most accounts, the Indian commissioners do not use their power to fine PIOs regularly, even though, according to one expert, it should not be a matter of discretion—"the law . . . says thou shall impose the penalty" (Interview

|                                                                                                                                                                                                                                                                                                  | Scotland | India | Switzerland | Germany |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------|-------|-------------|---------|
| Access to any information and/or documents relevant to procedure of mediation, even those that are confidential (Scottish commissioner can issue 'information notice' to a public authority if it fails to provide information relating to an appeal or to comply with Act or Codes of Practice) | ✓        | ✓     | ✓           | ✓       |
| Can summon and enforce attendance of people (including witnesses) and compel them to give oral or written evidence and produce documents                                                                                                                                                         |          | ✓     |             |         |
| May give a recommendation to a public authority whose actions it finds do not conform with the law's provisions or spirit, specifying steps to conform                                                                                                                                           |          | ✓     |             |         |
| Decisions are binding                                                                                                                                                                                                                                                                            | ✓        | ✓     |             |         |
| In its decision on an appeal commissioner can require public authority to take one of several actions, e.g. provide access to information in a particular form, make changes to records management practices, or compensate the appellant for any loss suffered                                  |          | ✓     |             |         |
| Must lodge a complaint with competent federal authority if finds problems with compliance of ATI                                                                                                                                                                                                 |          |       |             | ✓       |
| May impose a fine on civil servants for non-compliance or other violation of the ATI law                                                                                                                                                                                                         |          | ✓     |             |         |
| May recommend a civil servant for disciplinary action for non-compliance in the matter of an appeal or complaint                                                                                                                                                                                 |          | ✓     |             |         |
| May determine and charge reasonable sums for activities undertaken or services provided as commissioner                                                                                                                                                                                          | ✓        |       |             |         |
| Can issue 'practice recommendation' to a public authority that is not complying with ATI                                                                                                                                                                                                         | ✓        |       |             |         |
| Can issue an 'enforcement notice' to a public authority requiring specific steps to address problems with compliance                                                                                                                                                                             | ✓        |       |             |         |
| May enter into contracts and 'acquire and dispose of land and other property' as sees fit to carry out functions                                                                                                                                                                                 | ✓        |       |             |         |
| May be granted warrant to enter premises of authority suspected of failing to comply with Act and search, inspect and seize documents or other material, or test equipment holding information at the authority                                                                                  | ✓        |       |             |         |

**Figure 1.** Comparison of commissioners' powers.

Note. ATI = access to information.

24). The reasons relatively few penalties are imposed on PIOs are unclear but one may be related to the fact that fining civil servants is a task above and beyond that of hearing appeal and complaint cases and, because that is the commission's first priority, penalties take a backseat. Another, offered by an expert on the law who has spoken privately with several commissioners, is that they want to avoid the humiliation of issuing civil servants with penalties only to be ignored and have to witness the "watering down" of the penalty provision. Other justifications are that it does not make a difference anyway, that it does not do any good; that noncompliance is the system's fault, rather than that of the individual PIO, so issuing a fine is not fair to fine the individual; and, following along the same lines, that it is difficult, if not impossible, to pin down the person responsible for poor compliance in any given case (Interview 24). Perhaps more broadly, the decision to fine a PIO—or

not—is made by weighing the role the commission is supposed to play in RTI enforcement. As one administrative official put it,

They have to act very tough on government to ensure that the public have faith in them—that they are not allying with government. At the same time they have to keep this in view: that this Act changes the fundamentals of thinking and attitude of government officers, which cannot happen overnight . . . They have to tread a very cautious line, gradually bringing both the parties closer in terms of their appreciation, and improve the capability of government offices so that they are more mature to share information and rely less on exemptions and so on. (Interview 17)

One of the commissioners reiterated this by confirming that although he does issue fines, he first tries to take a persuasive approach with the administration. “It’s a combination of trying to coax, trying to persuade and holding the punitive action. It’s a combination—it’s not directly as if I say, ‘OK. I am a commissioner so you have got to . . .’ I don’t think that will work in India” (Interview 23).

What is the consequence of commissioners’ lax use of the penalty provision? In fact, the commission’s lack of use of the power to fine civil servants could make them less effective than if they did not have the power because “there is considerable evidence that cooperative approaches . . . actually discourage improved regulatory performance amongst better actors if agencies permit lawbreakers to go unpunished” (Cunningham, 2010, p. 125). Given that cases are allocated by government organization to the commissioners, if a certain commissioner is known for not imposing fines, the civil servants working for those organizations might become complacent because they know they are in no danger of punishment if they do not conduct their work according to the law:

They feel that, “OK, 5% of the people will file an appeal. So I might be lucky and this guy does not file an appeal. If he files an appeal, it will take six months, eight months, one year to come down the line. By that time I would probably have got transferred from here. Then there is a 30% chance that the appeal might go against the appellant so I have another . . . And if at the end of the day the commission says, ‘Give it,’ I can still not give it and nothing will happen.” (Interview 24)

In Switzerland and Germany, neither commissioner has binding decision power but whether the commissioner would be better off with it is not clear. A Swiss administrative official explained that the authors of the LTrans decided not to include it in the legislation for two primary reasons. First, they

worried that it would be detrimental to the relationship between the commissioner's office and the administration because it would reduce the administrative offices' autonomy and instill in them fear of the commissioner and his decisions (Interview 2; echoed, incidentally, by another administrative official). Second, it did not seem compatible with the mediation process.

We were really convinced that this . . . possibility of dealing in a rather informal way with the problems was more efficient and if you choose this option, you cannot give the power to decide to the commissioner. (Interview 2)

In other words, the law's authors feared that giving too much power to the commissioner would actually work against the aim of increasing transparency, which they were convinced would be achieved in part by using the nonconfrontational mediation process as the way to resolve appeals. However, the commissioner's staff, when asked which additional powers they would like to have, replied that it would be nice to have binding decision power because

this would give us more authority and maybe [more] precision . . . It would be good to have more power just in case that [the administration] do not want to work with us. I mean, it would give us more weight. (Interview 1)

The lack of binding decision power can have effects beyond whether the administration complies with what the commissioner recommends in a certain appeal case. One Swiss administrative official reasoned that because the commissioner can only make recommendations the press are not as interested in what the commissioner's office is doing as they are, for example, in judgments passed by the courts, which are more definitive. "When you read something in the newspaper, you read that 'the court has *decided* [X] . . .' You never read that '[the commissioner's office] *recommended*' [X]" (Interview 14). This lack of coverage in the press is partly to blame for the presumed low awareness of the LTrans in Switzerland.

As in Switzerland, an external expert on the German law was reluctant to support the idea that the commissioner needs binding decision power, explaining that it would not fit the country's legal tradition and could therefore be detrimental to the commissioner's efforts to encourage increasing openness. He expressed the opinion that the lack of such a power "fosters [the commissioner's] moral role" and limits the opportunities for antagonistic exchanges with the administration:

In the German system I think it is more respected that this power to order the release of certain documents is still left with the traditional legal system . . . this

is something the bureaucracy can accept. So if you set up a totally new body that has this ordering power—"release this document now!"—I would assume that the willingness to do that is even less. (Interview 27)

Although the German commissioner does not have binding decision power, if he is compelled to file a formal complaint, his action carries weight because his use of this power escalates the case to the top level of a ministry where the minister has to consider it (Interview 32). This action is helped by the fact that the commissioner is considered the minister's equal. According to the Federal DPA, the commissioner's pay grade (B9) is equivalent to that of a federal department minister (Section 23[7]). Therefore, according to one outside expert, his standing within the administration helps the BfDI influence the administrative offices' decision. "So you have a Head of Department speaking to another Head of Department and in the German context that makes a difference. With the weight of his title and his office, he can enhance [a] cultural transformation [to transparency]" (Interview 27).

On the informal side of things, the activity report that he must write every 2 years grants the German commissioner license to wield the tool of "blaming and shaming" authorities that, in his opinion, have made particularly egregious errors in withholding information or have exhibited serious, systemic problems with implementation of the policy. This can "have political consequences. At least it's not nice if they [the administrative offices] are cited . . . as not cooperating" (Interview 27). In Switzerland, when a particularly tough mediation case presents itself, the commissioner himself gets involved, which puts more pressure on the parties to come to a solution.

### *Limits of This Article*

There are several limits to this article. First, given that we examined only four cases, this research can hardly claim to be representative of the population of ATI oversight bodies. However, it could serve as a basis for developing a broader survey of a number of oversight bodies to be studied along similar lines. Second, although we stand by the criteria by which we selected the four cases, India is quite dissimilar from the other three countries in terms of, for example, annual GDP per capita (US\$1,449 in contrast to a range between US\$41,050 and 83,295 in Germany, Switzerland, and the United Kingdom [The World Bank, 2015]), and the level of corruption from which it suffers (3.1 on Transparency International's 2011 Corruption Perceptions Index vs. between 7.8 and 8.8 in Germany, Scotland, and Switzerland). For these reasons alone, the challenges the CIC has to overcome—resourcing, in particular—are understandably greater than those of its peers in the other case jurisdictions. Third—and

perhaps most importantly—the bureaucratic traditions and legal systems of the administrations whose actions and decisions the commissioners oversee vary greatly, but this has not been included in the scope of the study. A better understanding and incorporation of bureaucratic norms and legal structures in each of the countries would likely illuminate several of the differences among the commissioners’ offices and to what extent these make recommendation or binding decision power more effective.

## **Conclusion**

Intragovernmental regulation and ATI implementation literature argue that an oversight body’s power to issue binding decisions makes a difference to how effectively they are able to enforce their policy. However, as this article shows, one should take a step back before asking “how does binding decision power impact his or her effectiveness?” and first make clear what it means to be granted binding decision power by law. In fact, the definitions of binding decision power differ across jurisdictions. In Scotland, binding decision power means that the commissioner can hold an administrative office in contempt of court for noncompliance with one of his decisions. In contrast, while the Indian law states explicitly that the commissioners’ decisions are binding and noncompliance with a decision can be punished by a fine imposed on the individual PIO, the commissioners have no further means of redress. So while on the surface both OSIC and CIC have binding decision power, the basis of the power is different.

In addition to differences in what the power allows the oversight body to do in theory, there are notable differences in what the power means in practice. For example, although the ATI law may grant binding decision power, the oversight body might choose not to use it or its use may not lead to the expected outcome. The commissioners in India generally do not know whether a decision they issued has been obeyed, which makes it difficult, at best, to follow up noncompliance with a fine; moreover, the CIC’s use of the power to fine PIOs if they do not comply with a decision is inconsistent—both across cases and commissioners—and even when they use it they cannot be sure the fine will be paid, at which point their involvement in the case is over. Along similar lines, the Scottish commissioner and his staff have never used the power to its ultimate end and held an administrative office in contempt of court, although this could be because administrative offices—just knowing that they could be taken to court—routinely comply with decisions when ordered to do so. Their reluctance to fully deploy instruments may also be illustrative of the fact that, like a presidential veto, full powers must be used infrequently to avoid overt or overly disruptive conflict, and that ICs operate



often on informal relation and cooperation with government; too much disruption could undermine these and use up resources in battles no one will "win."

Turning to oversight bodies that do not have binding decision power, it is also difficult to say to what extent their lack of binding decision power affects the respective administration's willingness to open up and disclose information. In Switzerland, the authors of the LTrans feared that giving the commissioner binding decision power would be going too far in granting a nonjudicial organization judicial power and would, in fact, negatively affect the body's ability to engender greater transparency. On the flip side, however, one Swiss interviewee commented that the press does not cover the FDPIC's nonbinding recommendations the way it does legal decisions issued by the courts because they do not carry the same weight. In a country where awareness of law is assumed to be low, this lack of press coverage hinders a growth in awareness of the policy. There might well be greater openness in Switzerland today if the FDPIC had been granted binding decision power. In Germany, there was also fear that granting the BfDI binding decision power would be too drastic a step (more fundamentally, of course, that step was not possible, given the country's legal system.) However, in the German case, the commissioner has exercised his power to file formal complaints at the ministerial level when administrative offices refuse to disclose information and does not hesitate to use his informal power to "shame" an administrative office in the organization's biannual report if he feels it will bring about better compliance with the law, similar to the UK commissioner's online publication of a list of public authorities being monitored for delays, which they change every 3 months. In this way, the commissioner has worked around the absence of binding decision power to compel compliance.

Withholding information can also be more expensive than the fallout caused by a sensational appeal case. Roughly, the same percentage of appeal cases result in disclosure of information in Switzerland, where the commissioner does not have binding decision power, and Scotland, where he does,<sup>1</sup> but from a qualitative point of view, that small proportion that make it to the commissioner in either country also tend to be ripe for publicity because they are often made by people who know how to use the appeal system *and* the media to make noise and "get the message out." Note the huge story journalists in the United Kingdom wrung out of pursuing the MP expenses story, which took several years and stages of appeal. From the other perspective, OSIC's staff prefer to issue a decision notice when the case is precedent-setting and the decision can become an educational tool for requesters and administration alike.

While this article offers too small a sample from which to generalize, it does illustrate that binding decision power does not ensure that the oversight

body will be more effective. The answer to the question posed at the beginning of this article, then, must start with “it depends.” It depends on what binding decision power means, whether a body that is granted the power actually uses it, and what happens as a result of using the power. While one could simply presume that having binding decision power is enough to compel more disclosure of information—and thereby engender greater transparency—this assumption does not hold true across these four cases.

Governments grappling with the creation of or change in an ATI oversight mechanism have to take myriad factors into account when making their decision. These include bureaucratic culture (to what extent would an oversight body challenge administrative secrecy?), legal system and institutional design (is there already an established ombudsman tradition? How are other disputes with government handled?), and levels of support, independence, and freedom the government is willing to cede the commissioner. In answering these questions, the decision of whether to grant binding decision power should be easier to make.

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### **Note**

1. There are not enough data on case outcomes in India or Germany to include them in the comparison.

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