

# INSIGHT ON OVERSIGHT: THE ROLE OF INFORMATION COMMISSIONERS IN THE IMPLEMENTATION OF ACCESS TO INFORMATION POLICIES

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What factors impede “Access to Information (ATI)” laws – or make them effective? Drawing on international experience and analyses of ten different countries, Holsen and Pasquier describe and analyze several different forms of ATI implementation. Factors considered include the oversight bodies’ powers, independence, resources, and leadership. Special consideration is given to appeals processes and types of enforcement. In this context, the benefits of the “Information Commissioner” model have been found to outweigh its drawbacks.

## INTRODUCTION

Over the past decade more than 50 countries have passed access to information (ATI) laws and many are in the process of drafting legislation; the total number of ATI acts in force worldwide now stands at 90 or more.<sup>1</sup> These policies, implemented by government administrative bodies, are founded on the idea that the administration in a given country is obliged to disclose to the public information that it holds and/or creates. The objectives of ATI laws are to increase transparency, accountability, and trust in government; foster better understanding of government decision-making;

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<sup>1</sup> These laws are alternatively called ATI (Access to Information), FOI (Freedom of Information), or RTI (Right to Information) legislation. For the sake of consistency, the term ATI is used in the remainder of this article except when quoting others’ work or referring to the names of laws that use the other two acronyms. Meanwhile, there is no agreement on the precise number of ATI laws in existence. McIntosh argues that it depends on the definition of ATI – whether it is a law that has been passed, signed, or gone into force – as well as what one considers a country, e.g. the Cayman Islands. See Toby McIntosh, “FOI Laws: Counts Vary Depending on Definitions,” *Freedominfo.org*, Oct. 28, 2011, accessed Oct. 1, 2012, <http://www.freedominfo.org/2011/10/foi-laws-counts-vary-slightly-depending-on-definitions/>. Those keeping track, however, agree that the number of ATI policies stands at around 90. See Roger Vleugels, “Fringe Special: Overview of All FOI Laws,” white paper, Oct. 9, 2011, accessed Oct. 1, 2012, <http://right2info.org/resources/publications/Fringe%20Special%20-%2090%20FOIAs%20-%20sep%207%202009.pdf>; Access Info Europe and Centre for Law and Democracy, “Global Right to Information Rating Map,” Sept. 28, 2011, accessed Oct. 1, 2012, <http://www.rti-rating.org/index.html>; Open Society Justice Initiative, “Access to Information Laws: Overview and Statutory Goals,” *right2info.org*, Jan. 2012, accessed Oct. 1, 2012, <http://right2info.org/access-to-information-laws>.

encourage increased participation in the political process; and improve government efficiency through exposure of waste and corruption.<sup>2</sup>

As with all government policies, however, there are problems with the implementation of ATI, which can make it difficult for a law's aims to be achieved. These include an administration's resistance to disclosing information and insufficient resources, both of which can lead to incorrectly or unjustly withheld information and delays in responding to requests. The enforcement of the law is crucial to alleviating or even preventing these problems. Several different kinds of enforcement mechanisms can be found in existing ATI laws. In some jurisdictions information requesters must take their appeals or complaints about improper compliance or non-compliance to court; however, in the majority enforcement is carried out by a quasi-judicial organization that oversees the administration's compliance with the legislation. This entity is commonly called an oversight body.

The two most common types of ATI oversight body are the ombudsman and the information commissioner. The ombudsman, an institution first established in Sweden in 1809, is "a special office or officer to whom people can go with their grievances about the way... large anonymous bureaucracies" have treated them.<sup>3</sup> The office of the information commissioner grew out of the ombudsman tradition but commissioners play a more specialized role than their progenitors. Whereas most ombudsmen handle all complaints of illegal or unjust administration, the information commissioner's remit is specifically limited to ATI-related appeals or complaints.<sup>4</sup> Most information commissioners also fulfill additional responsibilities such as providing guidance to administrative bodies about complying with the legislation and instructing the public on how to use the law; monitoring and assessing the administration's compliance with the legislation; and promoting the policy. The ability to carry out these functions is boosted by powers granted by law such as the authority to access any documents called into question as part of an appeal, or to issue binding (i.e. legally enforceable) decisions. An information commissioner's independence is also considered crucial to the organization's capacity to carry out its mandate.

Notwithstanding the fact that "some independent external review mechanism is critical to [an ATI] law's overall effectiveness," there is little academic research on how oversight bodies work.<sup>5</sup> This article contributes to the literature by providing an overview of the characteristics of the information commissioner that are considered important to their effectiveness. It begins with some background information on ATI laws and then turns to problems with the implementation of these policies. The second half of the article looks at ten information commissioner offices and explains how these organizations fit into the implementation process of their respective ATI regimes, including the

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<sup>2</sup> Toby Mendel, *Freedom of Information: A Comparative Legal Survey*, 2nd Ed. (Paris: UNESCO, 2008); Robert Hazell, Benjamin Worthy, and Mark Glover, *The Impact of the Freedom of Information Act on Central Government in the UK: Does FOI Work?* (Hampshire, UK: Palgrave Macmillan, 2010); Transparency International, *Global Corruption Report 2003: Special Focus: Access to Information* (London: Profile Books, 2003).

<sup>3</sup> Gerald E. Caiden, Niall MacDermot, and Ake Sandler, "The Institution of Ombudsman," in *International Handbook of the Ombudsman: Evolution and Present Function*, ed. Gerald E. Caiden (Westport, Connecticut: Greenwood Press, 1983), 3.

<sup>4</sup> Personal communication with Linda Reif, International Ombudsman Institute, Nov. 14, 2008.

<sup>5</sup> Laura Neuman, "Access to Information Laws: Pieces of the Puzzle – An Analysis of the International Norms," white paper, The Carter Center (2006), 10.

tasks they carry out, the powers they are granted by law, and the legal conditions that contribute to their independence. It then offers some points for consideration when assessing the effectiveness of the information commissioner model.

## HISTORICAL AND PROCEDURAL BACKGROUND ON ATI LAWS

The modern ATI law's predecessor made its appearance in 1766 when the Swedish government included in the country's constitution the right to information for the general public and specific rights to information for members of the press.<sup>6</sup> The United States Freedom of Information Act, passed 200 years later, influenced the countries that followed: for example Australia (1982), Canada (1982), Japan (1999), and the United Kingdom (2000).<sup>7</sup> Prior to the mid-1990s fewer than 20 laws existed; since 2001 over 50 nations have granted people the right to access information. Recognition of the importance of openness can be seen in the fact that the passage and implementation of an ATI law is one of four criteria countries must fulfill to be considered for membership in the new Open Government Partnership initiative, an international effort formed in September 2011 to "secure concrete commitments from governments [around the world] to promote transparency, empower citizens, fight corruption, and harness new technologies to strengthen governance."<sup>8</sup>

One significant influence on the effectiveness of access regimes, according to academic consensus, is the "strength" of the procedural mechanisms specified in the laws. These include who can make a request, how a person can request information, 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. Although a few countries have laws requiring that the requester be a citizen, a resident, or a company based in the country (e.g. Canada, New Zealand, India), in most jurisdictions anyone can request information from the government (e.g. United States, Mexico, Slovenia, Japan). Requests in a few jurisdictions can be made over the phone or in person (e.g. Switzerland, India), but in most they must be submitted in writing (e.g. United Kingdom, United States). In some countries requesters must pay to ask for information (e.g. Ireland, where a request costs €15), but in most there is no set fee, although coverage of administrative costs such as photocopying and postage might be charged (e.g. United Kingdom, United States). Nearly

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<sup>6</sup> Kingdom of Sweden, Fundamental Rights and Freedoms (1766); The Freedom of the Press Act (1766).

<sup>7</sup> Christopher Hood, "Transparency in Historical Perspective," in *Transparency: The Key to Better Governance?*, ed. Christopher Hood and David Heald (Oxford: British Academy/Oxford University Press, 2006), 3-23; David Banisar, "Freedom of Information Around the World 2006: A Global Survey of Access to Government Information Laws," white paper, Privacy International (2006), accessed Oct. 1, 2012, [http://www.freedominfo.org/documents/global\\_survey2006.pdf](http://www.freedominfo.org/documents/global_survey2006.pdf).

<sup>8</sup> Open Government Partnership, "About," accessed Oct. 1, 2012, <http://www.opengovpartnership.org/about>. The remaining three criteria are fiscal transparency, citizen participation, and disclosure of elected and senior public officials' income and assets. A country can earn a set number of points within each of these categories; a successful candidate country will have 75% or more of the total possible points. In the category of ATI policy, a country receives four points for having a law in force; three for having the principle of access to information in its constitution; or one for having a draft law prepared for enactment. At the time this article was written, 55 countries had fulfilled the requirements to join the Open Government Partnership.

all ATI laws require that administrative offices disclose requested information within a set timeframe, which ranges from 15 days in Canada to 30 days in the United Kingdom and India.

A frequently cited influence on the scope of information released in each country is the extent of information that need not be disclosed because it is specifically exempted. Government administrations are often criticized for generously applying exemptions to information requests in order to avoid disclosure. Common exemptions include national security, personal data, and international relations. Some laws also include blanket exemptions, which apply to all information held by a specific government organization, for example the Australian Inspector-General of Intelligence and Security.<sup>9</sup> Some exemptions are absolute and protect data such as court records, third party personal data, and information given in confidence (e.g. by or to third parties) from unauthorized access. Others are subject to a public interest test, which requires the public authority to weigh whether the public interest in disclosing the information is stronger than that of withholding it.

In all ATI laws, requesters can pursue at least one of several avenues of recourse if they do not receive the information they request or if they believe an administrative office has otherwise complied incorrectly with the act. These are internal review, external review, and litigation through the courts. See Table 1 below for a sample of appeal options in ten jurisdictions. Under internal review, a dissatisfied requester asks the office to which the request was submitted to reconsider its position. External review involves an appeal to an oversight body. If these fail to produce the desired outcome, requesters can take their appeal to the courts but often only on a point of law. The next section looks at the specifics of oversight bodies after a discussion of the implementation problems that prompt the need for an enforcement mechanism.

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<sup>9</sup> Commonwealth of Australia, "Secrecy Laws and Open Government in Australia" (ALRC Report 112) (Australian Law Reform Commission, Mar. 11, 2010), 549, accessed Oct. 1, 2012, <http://www.alrc.gov.au/sites/default/files/pdfs/publications/ALRC112.pdf>.

Table 1: Appeal Process Stages

Country	Internal review →	Oversight body →	Courts*
Canada		✓	✓
Germany	✓	✓†	✓
India‡	✓‡	✓	✓
Ireland	✓	✓	✓
Mexico	✓†	✓	✓
Slovenia		✓	✓
Scotland	✓	✓	✓
Switzerland		✓	✓
United Kingdom	✓	✓	✓
Australia	✓†	✓	✓

\* This column does not display the various levels of the judiciary to which requesters can go in some countries, e.g. there are three in Germany: the Administrative Court, the Higher Administrative Court, and the Federal Administrative Court.

† This denotes an optional step; a requester can opt to skip this and start with the following step.

‡ In India there are two routes of appeal, one of which requires an internal review before going to the oversight body, the other of which allows the requester to go straight to the oversight body.

## ATI IMPLEMENTATION PROBLEMS

By passing an ATI law a government pledges to the public that more information will be available than before the legislation went into force.<sup>10</sup> This does not mean, however, that all requested information that *should* be disclosed *will* be disclosed, that requested information will be released within the stipulated timeframe, or that members of the public will even know the law exists. Scholarly work on ATI, which includes studies conducted in the U.S., U.K., India, Mexico, and China, reflects a growing awareness of implementation problems such as unjust withholding of information, significant delays in disclosure, and lack of awareness of the policy.<sup>11</sup> Research has shown that most, if not all, countries that have put ATI legislation into force experience problems with their implementation, which Roberts divides into insufficient administrative capacity, access

<sup>10</sup> Alasdair Roberts, "Dashed Expectations: Governmental Adaptation to Transparency Rules," in *Transparency: The Key to Better Governance?*, ed. Christopher Hood and David Heald (Oxford: British Academy/Oxford University Press, 2006), 107-125.

<sup>11</sup> Alasdair Roberts, "A Great and Revolutionary Law? The First Four Years of India's Right to Information Act," *Public Administration Review* 70, no. 6 (2010): 925-933.

barriers, and enforcement issues.<sup>12</sup> A selection of implementation problems in four select jurisdictions can be seen in Table 2 below.

Table 2: *ATI Implementation Problems in Four Select Jurisdictions*<sup>13</sup>

		Germany	India	Scotland	Switzerland
Problems with administrative capacity	Lack of resources	✓	✓	✓	✓
	Lack of leadership; bureaucratic culture of secrecy	✓	✓	✓	✓
	Civil servants poorly trained to understand ATI policy and how to answer requests	✓*	✓		✓
	Records management inadequate for locating information		✓		
	Crude (or non-existent) system for recording and keeping track of requests		✓		
Access barriers	Refusal to accept requests, mute refusals, and overgenerous use of exemptions		✓	✓	
	Delays in response and/or extensive backlog	✓	✓	✓	
	High fees charged for making requests	✓			
	Low awareness of the policy; lack of public understanding of how to make a request	✓	✓		✓

\* This was particularly a problem in the first two years after the law came into force.

Insufficient administrative capacity encompasses two main implementation problems: a lack of resources allocated to ATI and inadequate leadership within administrative organizations on matters of compliance. These problems manifest themselves as inadequate records management systems and poor staff training – issues that, in turn, result in inappropriate handling of requests, delays in

<sup>12</sup> Ibid.

<sup>13</sup> Sources for this table: interviews by authors; Democratic Republic of Germany, *Activity Report on Freedom of Information: 2006/2007* (Berlin: The Federal Commissioner for Data Protection and Freedom of Information, 2008); PriceWaterhouseCoopers, “Final Report: Understanding the Key Issues and Constraints in Implementing the RTI Act,” white paper, Delhi, India, June 2009; Eleanor Burt and John Taylor, *The Freedom of Information [Scotland] Act 2002: New Modes of Information Management in Scottish Public Bodies?* (Glasgow: University of St. Andrews and Glasgow Caledonian University, 2007); Martial Pasquier and Philomène Meilland, “Evaluation De La Loi Sur La Transparence,” white paper, Idheap (2009), accessed Oct. 1, 2012, <http://www.edoeb.admin.ch/dokumentation/00652/01405/index.html?lang=fr>; Sarah Holsen and Martial Pasquier, “The Swiss Federal Law on Transparency: Much Ado About Nothing?,” paper presented at the Fifth Transatlantic Dialogue, Washington DC, June 2009.

responding to requests, low awareness of the policy and lack of understanding of how to make a request, and high fees charged to requesters.

A dearth of resources is one of the most commonly cited problems faced by ATI implementers and street-level bureaucrats – those who deal directly with members of the public. Without the necessary resources, staff members do not receive proper training in how to implement the policy, and the infrastructure necessary for answering requests is not put into place. Training and educating staff to understand the law is crucial because “bureaucratic knowledge of legal requirements is essential for implementation,” and it requires resources.<sup>14</sup> Spending on new and/or improved infrastructure, such as records management and information systems through which information requests can be recorded and processed, makes it possible for street-level bureaucrats to locate the information that is requested from the public and coordinate efforts to answer a request. A lack of resources in these areas can result in a haphazard or delayed implementation. It is also crucial that funding for training and infrastructure continue to be allocated to ATI as the policy implementation evolves. If funding decreases to an insufficient level, new employees can be left untrained to comply with the law, thus leading to inconsistent compliance practices within the organization.

Adequate resources are only part of the story, however; leadership and a bureaucratic culture that supports compliance are also important. As stated above, it is the implementers and policymakers who make decisions about resourcing, but they also set the tone for how much (or little) importance is placed on proper compliance with the law. Insufficient commitment to ATI compliance on the part of administrative officials due to the absence of a bureaucratic tradition of conforming with regulations, or a “deeply rooted history of secrecy,” can negatively affect implementation of the policy.<sup>15</sup> Throughout implementation – from just after the law is passed to changes made as the implementation evolves – leadership must provide the basis from which the rest of the staff take their cues about how to deal with requests. The Information Commissioner of Canada, whose office assesses administrative offices’ compliance with the Access to Information Act on a regular basis, has found that “strong leadership [is] the most important factor for the successful operation of an access to information office.”<sup>16</sup> Managers’ lack of commitment to proper compliance with the policy contributes to delays, backlogs, and negative attitudes about ATI among the staff – from indifference to hostility.<sup>17</sup> In Scotland, the lack of administrative leadership on ATI implementation

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<sup>14</sup> Helen Darbishire and Thomas Carson, *Transparency and Silence: A Survey of Access to Information Laws and Practices in 14 Countries* (New York: Open Society Institute, 2006), accessed Oct. 1, 2012,

[http://www.soros.org/sites/default/files/transparency\\_20060928.pdf](http://www.soros.org/sites/default/files/transparency_20060928.pdf); Suzanne J. Piotrowski, Yahong Zhang, Weiwei Lin, and Wenxuan Yu, “Key Issues for Implementation of Chinese Open Government Information Regulations,” *Public Administration Review* 69, no. S1 (2009): S129-S135.

<sup>15</sup> Laura Neuman, “Enforcement Models Content and Context,” Access to Information Working Paper Series (Washington D.C.: World Bank Institute, 2009), 13, accessed Oct. 1, 2012, <http://siteresources.worldbank.org/EXTGOVACC/Resources/LNEumanATI.pdf>; Laura Neuman, “Mechanisms for Monitoring and Enforcing the Right to Information Around the World,” in *Access to Information: Building a Culture of Transparency* (Atlanta: The Carter Center, 2006), 52, accessed Oct. 1, 2012, [www.cartercenter.org/documents/2364.pdf](http://www.cartercenter.org/documents/2364.pdf).

<sup>16</sup> Canada, Office of the Information Commissioner, “Measuring Up: Improvements and Ongoing Concerns in Access to Information, 2008–2009 to 2010–2011,” Special Report to Parliament (May 2012), 11, accessed Oct. 1, 2012, [http://www.oic-ci.gc.ca/eng/rp-pr\\_spe-rep\\_rap-spe\\_rep-car\\_fic-ren\\_measuring-up-etre-a-la-hauteur.aspx](http://www.oic-ci.gc.ca/eng/rp-pr_spe-rep_rap-spe_rep-car_fic-ren_measuring-up-etre-a-la-hauteur.aspx).

<sup>17</sup> Roberts, “A Great and Revolutionary Law?”

has been seen “as a crucial impediment to transforming... records management and information systems.”<sup>18</sup> Moreover, if the staff are not supported or respected for their work on ATI, there could be “considerable turnover and a high burnout rate, because of the extremely tedious character of much of the work.”<sup>19</sup>

Lack of resources and weak leadership lead to barriers to information access, which include poor handling of requests, delays and backlogs, inappropriate fees charged to requesters, and low awareness of the policy. Without proper training and incentive by management to release information as intended under the law, street-level bureaucrats may ignore requests outright, delay responding to them in favor of carrying out other tasks, apply exemptions over-generously, or charge inappropriate fees in order to dissuade requesters from pursuing their requests. In Mexico, the number of ATI requests that have been rejected due to “non-existent information” has risen since 2008 and the number of complaints filed with the ATI oversight body rose 30% between 2007 and 2008, and another 30% the following year, because of an unsympathetic view toward transparency by the Calderón administration.<sup>20</sup> Poor records management in Ireland has consistently hindered ATI request processing.<sup>21</sup> Fees may either discourage a potential requester from making a request in the first place or push a requester to drop his request after he finds out how much he has to pay. In the first two years of implementation of the German federal ATI, the information commissioner identified three recurring fees issues: access contingent on the payment of an estimated (and often considerable) sum; notification that access would likely cost a great deal, followed by a question to the requester about whether he/she wants to follow through with the request; and large fees based unfairly on the administrator’s hourly salary rate multiplied by the amount of time needed to prepare the information.<sup>22</sup> The commissioner pointed out that these practices had the effect of dissuading requesters from following through with their requests or from making them in the first place. The Slovenian Information Commissioner has remarked in her last three annual reports that public authorities have been charging high fees for access to information, which she suspects they do to reduce the number of requests and which she has warned them to stop doing.<sup>23</sup>

Insufficient administrative capacity can also lead to low awareness of the ATI law and a lack of understanding on the part of the public about how the request process works. Awareness of the law is key to usage. Without knowing that they have the right to obtain information from the

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<sup>18</sup> Burt and Taylor, 75.

<sup>19</sup> David H. Flaherty, “Managing Response Times Under Canadian Access to Information Legislation,” Government of Canada: Access to Information Review Task Force (2002), accessed Oct. 1, 2012, <http://www.atirtf-geai.gc.ca/paper-responsetimes1-e.html>.

<sup>20</sup> Zachary Bookman and Juan-Pablo Guerrero Amparán, “Two Steps Forward, One Step Back: Assessing the Implementation of Mexico’s Freedom of Information Act,” *Mexican Law Review* 1, no. 2 (2009): 49.

<sup>21</sup> Emily O’Reilly, “Freedom of Information: The First Decade,” speech at the 10th Anniversary Conference of Freedom of Information in Ireland (Dublin, May 15, 2008), accessed Oct. 1, 2012, <http://www.oic.gov.ie/en/MediaandSpeeches/Speeches/2008/Name,8400,en.htm>.

<sup>22</sup> Democratic Republic of Germany, 18-19.

<sup>23</sup> Information Commissioner of the Republic of Slovenia, *Annual Report 2010* (Ljubljana: Information Commissioner of the Republic of Slovenia, June 2011), accessed Oct. 1, 2012, [https://www.ip-rs.si/fileadmin/user\\_upload/Pdf/porocila/Annual\\_Report\\_2010.pdf](https://www.ip-rs.si/fileadmin/user_upload/Pdf/porocila/Annual_Report_2010.pdf).



government, people are unlikely to make requests. As indicated by Hubbard, a lack of public awareness leads to “a low number of information requests even in countries with a long history of freedom of information laws.”<sup>24</sup> The number of ATI requests made in Switzerland and Germany since those countries’ laws went into force in 2006, for example, is miniscule in comparison to other jurisdictions, which is attributed in part to presumably low public awareness of the policies.<sup>25</sup>

## ENFORCEMENT OF ATI

Proper enforcement of the policy by an external body is crucial to overcoming – or even preventing – these implementation challenges. Pearlman argues that “the most liberal [ATI] laws are essentially useless if there’s no practical means of enforcing them.”<sup>26</sup> 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.<sup>27</sup>

There are four main types of bodies independent of government that resolve information requesters’ complaints under ATI – an ombudsman’s office, a commission’s/commissioner’s office, a tribunal, and a court.<sup>28</sup> Of the roughly 90 countries that had passed an ATI law by 2011, approximately one-third had given enforcement responsibility to an information commission or commissioner, less than one-third to an ombudsman, and the remainder to a tribunal, the courts, or an administrative office.<sup>29</sup>

The main advantage of giving enforcement responsibility to an oversight body (an ombudsman or information commissioner) is that appealing to an oversight body is not as time-consuming, costly, or intimidating for requesters when compared to going to court.<sup>30</sup> 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 compliance or non-compliance, Allan and Currie concluded that

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<sup>24</sup> Quoted in Piotrowski et al., 133.

<sup>25</sup> Sarah Holsen and Martial Pasquier, “What’s Wrong with This Picture? The Case of Access to Information Requests in Two Continental Federal States – Germany and Switzerland,” *Public Policy and Administration* 27, no. 4 (2012): 283-301.

<sup>26</sup> Mitchell W. Pearlman, *Piercing the Veil of Secrecy: Lessons in the Fight for Freedom of Information*, 1st ed. (New Britain, CT: LawFirst Publishing/Connecticut Bar Association, 2010), 130.

<sup>27</sup> John M. Ackerman and Irma E. Sandoval-Ballesteros, “The Global Explosion of Freedom of Information Laws,” *Administrative Law Review* 58, no. 1 (2006): 105; Neuman, “Access to Information Laws: Pieces of the Puzzle,” 10.

<sup>28</sup> A tribunal is a specialized court. Rowat defines tribunals as “court-like bodies that deal with all types of appeals against administrative decisions... [similar to] the ombudsman.” See Donald C. Rowat, “Freedom of Information: The Appeal Bodies Under the Access Laws in Canada, Australia and New Zealand,” *Australian Journal of Public Administration* 52, no. 2 (1993): 217. Since tribunals are in the clear minority when it comes to ATI enforcement bodies, they are only mentioned briefly here.

<sup>29</sup> McIntosh; Vleugels; Access Info Europe and Centre for Law and Democracy; Open Society Justice Initiative.

<sup>30</sup> Kate Allan and Iain Currie, “Enforcing Access to Information and Privacy Rights: Evaluating Proposals for an Information Protection Regulator for South Africa,” *South African Journal on Human Rights* 23, no. 3 (2007): 563-579; Harry Hammit, *Mediation Without Litigation: The FOI Reports* (National Freedom of Information Coalition, 2007); Ackerman and Sandoval-Ballesteros; Miriam Nisbet, Testimony Before the Senate Subcommittee on Information Policy, Census, and National Archives, Washington D.C., Mar. 18, 2010, accessed Oct. 1, 2012, <http://judiciary.senate.gov/pdf/09-09-30%20Nisbet%20Testimony.pdf>.

“litigation is self-evidently too inaccessible and cumbersome to be an effective means to enforce the freedom of information rights.”<sup>31</sup> 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.”<sup>32</sup> 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.”<sup>33</sup>

The key role that oversight bodies play in implementation is that of resolving information requesters’ complaints about procedural issues and/or handling appeals against the withholding of information in a fair and nonpartisan manner.<sup>34</sup> However, some oversight bodies also play a range of crucial secondary roles in the implementation of ATI policies, which include providing support to the administration, offering their expertise to both requesters and the administration, and monitoring implementation.<sup>35</sup> Fulfilling these roles is essential to alleviating implementation problems on the part of the administration. These are discussed in more depth in the following section.

## THE INFORMATION COMMISSIONER

The establishment of an information commissioner as enforcer of an ATI policy is a relatively recent development, one that stemmed from the ombudsman tradition: like the ombudsman, the information commissioner’s primary role is to resolve complaints from citizens about poor compliance or non-compliance 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.<sup>36</sup> Two of the advantages of having a specialist body enforce an ATI policy are that the organization’s staff become experts in the area of access to information 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.<sup>37</sup>

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<sup>31</sup> Allan and Currie, 570.

<sup>32</sup> Government of Canada, *The Access to Information Act: 10 Years On* (Ottawa: The Information Commissioner of Canada, 1994).

<sup>33</sup> Rowat, 215.

<sup>34</sup> Helen Darbshire, *Information Commissioner/s: Comparative Review of Access to Information Oversight Bodies* (Access Info Europe, Nov. 15, 2007), 5.

<sup>35</sup> Mendel, 154.

<sup>36</sup> Personal communication with Linda Reif, International Ombudsman Institute, Nov. 14, 2008.

<sup>37</sup> Mendel, 151; Megan Carter and Yanbin Lv, “Access to Government Information in Europe and China: What Lessons to Be Learned?” white paper, EU-China Information Society Project (2007), 35; Darbshire, 3.

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 ten to twenty years has been to create an information commissioner office to function as the ATI oversight body. There are now roughly 30 information commissioners worldwide at the federal/central government level and more at the state/province 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 of 2010. The South African government is considering a similar change.

There are two information commissioner models: an office headed by one commissioner (e.g. Canada, Slovenia, Scotland, Ireland, Australia, Switzerland, United Kingdom, and Germany), and a commission consisting of several commissioners (e.g. Mexico and India); the former model is more common. While Rowat argues that the plural commissioner model is the stronger of the two because it can help eliminate the risk of error or bias made on the part of one person, having multiple commissioners can also make appeal resolution more complicated if all commissioners must agree on a decision before it is issued, or uneven if the commissioners take radically different approaches to the same kinds of issues.<sup>38</sup>

### *Functions*

Resolving appeals is each oversight body's primary responsibility and generally consists of two main stages. First, many information commissioners try to settle information requesters' appeals in an informal way and find a solution before taking an appeal to a more formal level.<sup>39</sup> The step of informally settling an appeal may be specifically mentioned in the ATI law, as it is in Scotland, or it may simply be the first stage an information commissioner's office has decided to adopt in the appeal resolution process. It can involve either person-to-person meetings with one or both parties (the requester and the administration) or communication via phone and written correspondence. The U.K. Information Commissioner's Office closed over half of the 3,374 appeals it received in 2009-2010 before they reached the stage of formal investigation, while the Irish Information Commissioner settled 28% of the 301 cases that arrived at her office in 2010.<sup>40</sup>

If an appeal case is not settled informally, the oversight body commences a formal process. This can take one of two main forms: an investigation by the oversight body's staff (more common) or a meeting to which the parties to the appeal are invited. During an investigation the commissioner's staff asks the relevant administrative office for its reasons for refusing to disclose the information and to see the documents in question. They may also contact any third parties that could be affected

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<sup>38</sup> Rowat, 220.

<sup>39</sup> Carter and Lv, 38.

<sup>40</sup> United Kingdom, Information Commissioner's Office, "Freedom of Information Regulatory Action Policy," Dec. 2010, 28, accessed Oct. 1, 2012, [http://www.ico.gov.uk/what\\_we\\_cover/taking\\_action/foi\\_eir.aspx](http://www.ico.gov.uk/what_we_cover/taking_action/foi_eir.aspx); Republic of Ireland, Office of the Information Commissioner, *Annual Report 2010* (Dublin: Government of Ireland, May 2011), 25, accessed Oct. 1, 2012, <http://www.oic.gov.ie/en/Publications/AnnualReports/AnnualReport2010/online/index.html>.

by the disclosure of the information and ask the requester for further comments or information regarding their complaint. After weighing the different views and evidence, the oversight body then makes a recommendation to the administration about the case (whether to disclose in full or in part or to withhold) or issues a binding decision to which the administration is obliged to adhere. (See the *Powers* section below for more about the difference between recommendations and binding decisions.)

There are also oversight bodies that resolve appeals by holding a mediation or hearing to which the requester and administrative official are invited. In Switzerland if the staff of the commissioner's office does not resolve the appeal informally, they schedule a meeting with both parties at their office and play the role of mediator, trying to facilitate a mutually satisfactory solution to the problem the requester has raised in his/her appeal. If the parties do not come to an agreement, however, the commissioner is required to write a recommendation for the case. Members of the Indian Central Information Commission, in contrast, hold hearings at which the requester and administrative official give their points of view on the case, and the commissioner passes a judgment and issues a written decision at the conclusion of the hearing or shortly thereafter.

In addition to reviewing and resolving appeals, most commissioners are required by law to carry out one or more of the following functions:

- 1) Advise and assist people who have questions about using the ATI law and/or specific questions about making an appeal;
- 2) Advise and assist administrative officials with questions on compliance and/or specific ATI requests or appeal cases;
- 3) Assess the administration's compliance with the policy;
- 4) Compile and report their performance on a regular (usually annual) basis;
- 5) Give advice on reform of the ATI law and/or on how the ATI law can affect or be affected by other (including proposed) legislation;
- 6) Promote and raise awareness of the law.<sup>41</sup>

Many oversight bodies are responsible for providing the administration with advice and assistance on understanding and complying with the ATI law. This help can take one of several forms. First, oversight bodies may be required to advise and assist administrative officials who have general questions about compliance with the policy or specific queries about "live" cases with which they are dealing. Second, they may be instructed by law to publish guidance for the administration that clarifies and simplifies compliance activities such as establishing best practices in records management, interpreting exemptions, charging fees, and applying the public interest or harm test. Third, they may be consulted by administrative bodies and/or the legislature on the effect of the ATI law on pending legislation, e.g. e-governance or public participation, or on proposed amendments to the ATI law.<sup>42</sup> A fourth form of advice and assistance is encouraging the

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<sup>41</sup> Neuman, "Enforcement Models Content and Context;" Darbishire; Mendel.

<sup>42</sup> Darbishire, 9.

administration to undertake proactive information disclosure activities. The Irish ATI law, for example, requires the commissioner to “foster and encourage the publication by public bodies, in addition to the publications provided for by sections 15 and 16, of information of relevance or interest to the general public in relation to their activities and functions generally.”<sup>43</sup> Both the Scottish and U.K. ATI laws stipulate that the commissioner assess and approve administrative offices’ publication schemes, which are lists of all categories of information already made available by the authorities on their website and/or in paper form. The Indian Central Information Commission has taken it upon itself to strongly support the administration’s compliance with Section 4 of the Right to Information Act, which requires central government organizations to organize their documents in a way that makes them easily accessible to staff answering information requests and to publish certain categories of information proactively.

In some jurisdictions, the information commissioner is required to take a step beyond aiding and assisting the administration with compliance, and monitor and/or assess how well administrative offices comply with the legislation. In Germany, for example, the commissioner “shall monitor compliance by public bodies of the Federation with this Act,” which it does by carrying out on-site assessments of the bodies’ responses to information requests and other processes involved in compliance.<sup>44</sup> The U.K. Information Commissioner, while not mandated to assess compliance, “may, with the consent of any public authority, assess whether that authority is following good practice,”<sup>45</sup> whereas the Australian commissioner is responsible for “monitoring, investigating and reporting on compliance by agencies with the Freedom of Information Act 1982.”<sup>46</sup>

Many oversight bodies are also required to help members of the public understand and use their ATI law. As with the administration, there are different ways to assist requesters and potential requesters. First, the oversight body can offer people advice on how to make a request and what to do if the decision on an appeal is not made in the requester’s favor. This assistance can take the form of verbal communication as well as printed brochures or information placed on the oversight body’s website. Second, the oversight body might be given the task of promoting the law in order to raise awareness amongst the public of their right to information, as is the case in Scotland.

Going hand-in-hand with promoting the law is the expectation on the part of many that an information commissioner will champion transparency as part of his/her job. Indeed, many commissioners and external experts believe that “an important function of the information commissioner is to create a ‘culture of transparency’ within the public administration.”<sup>47</sup> The newly-created Office of the Australian Information Commissioner is considered, “in essence, an information champion, with a comprehensive range of powers and functions to promote open

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<sup>43</sup> Republic of Ireland, Freedom of Information Act (1997); Freedom of Information Act (2003).

<sup>44</sup> Federal Republic of Germany, Federal Data Protection Act (2003).

<sup>45</sup> United Kingdom, Freedom of Information Act (2000).

<sup>46</sup> Commonwealth of Australia, Australian Information Commissioner Act (2010), No. 52, Section 8.

<sup>47</sup> Darbishire, 7.

government...”<sup>48</sup> The Irish Information Commissioner stated in a speech to fellow commissioners in 2011 that she is “charged by the [legislature] to (amongst other things) champion the cause of FOI and to seek to ensure that our FOI regime actually achieves its objectives.”<sup>49</sup> The Canadian Information Commissioner lists “champion[ing] increased government transparency and the implementation of open government standards” as one the high level activities that are part of the organization’s 2011-2014 strategic plan.<sup>50</sup> In the first part of its mission statement, the Mexican Federal Institute of Access to Information and Data Protection emphasizes “the importance of guaranteeing access to government public information.”<sup>51</sup>

In addition to the above duties, virtually all information commissioners must report to the jurisdiction’s legislative body on an annual basis (bi-annual in the case of the German Information Commissioner). The requisite level of detail to be included in the reports ranges, however, from “data on previous year’s activities as well as estimates and recommendations in the area of... access to public information” in the case of the Slovenian Information Commissioner Act, to “the number of requests for access to information filed with each department and agency; the results obtained; the time of reply; the number and results of the matters brought to the Institute; the status of the claims filed before the control internal bodies as well as the difficulties encountered to enforce the Act,” as stipulated in the Mexican Federal Law of Transparency and Access to Public Government Information.<sup>52</sup> These reports function not only as a means to keep the government and public abreast of developments in the law’s implementation but also to hold the oversight body accountable to the bodies it serves.

### ***Powers***

The powers granted to oversight bodies by law assist them in carrying out their functions. Common across all ten information commissioners listed in Table 3 (displayed at the end of the article) is the right to access any information and/or documents relevant to an appeal case. This ensures that the commissioner(s) and staff have at hand all the necessary information for making a judgment, writing a recommendation, or contributing to mediation. This power is essential to well-crafted responses to appeals; most debates concerning oversight bodies’ powers center instead on whether or not they should have the legal right to issue legally binding orders.<sup>53</sup> Whereas some information

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<sup>48</sup> Commonwealth of Australia, Office of the Australian Information Commission, “Guide to the Freedom of Information Act 1982” (Nov. 2011), 15, accessed Oct. 1, 2012,

[http://www.oaic.gov.au/publications/agency\\_resources/guide\\_freedom\\_of\\_information\\_act\\_1982.pdf](http://www.oaic.gov.au/publications/agency_resources/guide_freedom_of_information_act_1982.pdf).

<sup>49</sup> Emily O’Reilly, “Controlling Access: Responding to Political and Administrative Resistance to Access,” speech at the Seventh International Conference of Information Commissioners, Ottawa, Canada, Oct. 5, 2011, accessed Oct. 1, 2012, <http://www.oic.gov.ie/en/MediaandSpeeches/Speeches/2011/Name,14553,en.htm>.

<sup>50</sup> Canada, Office of the Information Commissioner, “OIC Strategic Plan 2011–2014” (2011), 15, accessed Oct. 1, 2012, [http://www.oic-ci.gc.ca/eng/abu-ans\\_cor-inf-inf-cor-stategie-planning-plan-strategique\\_2011-2014.aspx#f4f08fe5-7bc5-47ec-a78b-b2f54988789a](http://www.oic-ci.gc.ca/eng/abu-ans_cor-inf-inf-cor-stategie-planning-plan-strategique_2011-2014.aspx#f4f08fe5-7bc5-47ec-a78b-b2f54988789a).

<sup>51</sup> Mexico, Instituto Federal de Acceso a la Información y Protección de Datos, “IFAI: Misión, Visión, Objetivos” (unknown date), accessed Oct. 1, 2012, <http://www.ifai.org.mx/pdf/Folleto%20Mision%20Vision.pdf>. Author’s translation.

<sup>52</sup> Republic of Slovenia, Information Commissioner Act (2005); Mexico, Federal Transparency and Access to Governmental Public Information Act (2002).

<sup>53</sup> Neuman, “Enforcement Models Content and Context”; Rowat; Carter and Lv, 38.

commissioners possess only the power to recommend to the administration a course of action regarding an appeal case, many information commissioners can issue binding decisions.

The sanctions that can be imposed on an administrative office for failing to comply with a binding decision differ across jurisdictions. In the United Kingdom, failure by an administrative office to comply with a decision notice issued by the Information Commissioner's Office (ICO) places it in a position to be held in contempt of court. This means that the ICO can turn over the case to the court, which can then look into the matter and make a finding.<sup>54</sup> The same holds true in Scotland. In Slovenia, however, if an administrative office refuses to comply with the information commissioner's decision, the office can face a fine of roughly €400-1000 for the legal violation (although the commissioner had not yet done this as of 2007).<sup>55</sup> Similarly the Indian Central Information Commission may fine administrative officials personally for non-compliance with Section 20[1] of that country's Right to Information Act.<sup>56</sup>

The general consensus in the ATI community is that an oversight body should be granted binding decision power. The push for granting oversight bodies with binding decision power in ATI laws has been fueled by increasingly established international standards in ATI provisions and lobbying by civil society organizations.<sup>57</sup> The two main arguments for giving an oversight body binding decision power are: 1) that it gives the body "teeth" to force disclosure of information when the administration is reluctant to do so; and 2) its decisions become official legal precedents to which the administration and oversight body staff can refer when dealing with similar requests and appeals.

On the flip side is the argument that oversight bodies without binding decision power – those that can only issue recommendations – are as effective as their peers who have that power. Neuman highlights the fact that a soft approach to appeal resolution can be less intimidating to information requesters; faster, since it limits investigations to "unsworn representations;" and less adversarial, "potentially leading to greater compliance" than the formal approach of issuing binding decisions.<sup>58</sup> McIsaac, in arguing that the Canadian Information Commissioner would benefit from having the power, also acknowledges that the commissioner's current recommendation-only model works well because of its focus on negotiation, low cost, and the fact that current and past commissioners support it.<sup>59</sup>

Whether mediation or investigation, recommendation or binding decision, the outcome of an information commissioner appeal case can significantly impact whether information is released. Some of the Scottish Information Commissioner's case decisions have been groundbreaking,

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<sup>54</sup> United Kingdom, Information Commissioner's Office, "Our Mission and Vision" (Nov. 3, 2009), accessed Oct. 1, 2012, [http://www.ico.gov.uk/about\\_us/plans\\_and\\_priorities/mission\\_and\\_vision.aspx](http://www.ico.gov.uk/about_us/plans_and_priorities/mission_and_vision.aspx).

<sup>55</sup> Darbishire, 7.

<sup>56</sup> Republic of India, Right to Information Act (2005).

<sup>57</sup> Neuman, "Enforcement Models Content and Context."

<sup>58</sup> *Ibid.*, 8.

<sup>59</sup> Barbara A. McIsaac, Q.C., "The Information Commissioner Investigative Powers and Procedures," Government of Canada: Access to Information Review Task Force (May 2002), accessed Oct. 19, 2012, <http://www.atirtf-geai.gc.ca/paper-investigation1exec-e.html>.

including one that resulted in the release of patient mortality rates of individual heart surgeons in Scotland, a category of information that had not been released in any country prior.<sup>60</sup> Another ruling by the Scottish Information Commissioner resulted in disclosure of information to a group that campaigns to keep rural public schools open; when the local council refused to give the requesters some of the information they wanted, they took their case to the commissioner who agreed that most of it should be released. This decision impacted Scottish public policy more broadly when members of the group who were concurrently consulting with Parliament about a new education-related bill convinced lawmakers to include a clause to guarantee access to certain information during school closure consultations.<sup>61</sup>

In Germany, a federal government department twice rejected a journalist's request for information regarding the government's anti-corruption policy. However, when he took his case to the German Federal Commissioner for Data Protection and Freedom of Information, the commissioner formed the opinion that the department decision makers were wrong in arguing that release would compromise the government's anti-corruption strategy. The commissioner's opinion, delivered to the department's minister, had enough weight to result in the release of the information.<sup>62</sup> In a case that made world headlines, the publication of Members of Parliaments' expenses in the U.K. in 2009 was in part a result of the Information Commissioner's Office (ICO) decision on several ATI requests for the information that some of it should be released. Another ruling by the ICO for disclosure of Cabinet Office meeting minutes about the Attorney General's advice on military action in Iraq in 2003, however, was ultimately struck down by ministerial veto in 2009, the first time this power had been used. The case, however, was heavily publicized by a media highly critical of the minister's use of the veto.<sup>63</sup>

### *Independence*

Nearly all scholarly work on ATI oversight bodies prefaces the term "enforcement body" with the word "independent," as if it were a pre-condition of the organization's existence, but few scholars explain what constitutes independence. It is common consensus, however, that two types of independence exist: formal and informal. Formal – or *de jure* – independence is that which an organization possesses according to the law.<sup>64</sup> It consists of the conditions of the oversight body's existence such as the length of an oversight body director's tenure, who funds the oversight body, and who has control over the hiring of the oversight body's staff. Formal independence is important to politicians because the factors of which it consists give them control over the regulator; that is, it

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<sup>60</sup> Scotland, Scottish Information Commissioner, "Scottish Information Commissioner Rules That Mortality Rates for All Surgeons in Scotland Should Be Released," Dec. 8, 2005, accessed Oct. 1, 2012, <http://www.itspublicknowledge.info/home/News/20051208.asp>.

<sup>61</sup> Scotland, Scottish Information Commissioner, *Freedom of Information Annual Report 2009* (Fife, Scotland: Office of the Scottish Information Commissioner, Mar. 2010), 17.

<sup>62</sup> Personal interview with civil servant, German Federal Commissioner for Data Protection and Freedom of Information, Jan. 19, 2011.

<sup>63</sup> United Kingdom, Information Commissioner's Office, *Decision Notice FS50165372 (Cabinet Office)*, Feb. 19, 2008.

<sup>64</sup> Chris Hanretty and Christel Koop, "Measuring the Formal Independence of Regulatory Agencies," *Journal of European Public Policy* 19, no. 2 (2012): 198-216.



sets guidelines for removing the head of a regulating body.<sup>65</sup> Conversely, it matters to the regulators because it provides legal protection, for example, from arbitrary dismissal when they issue an unpopular decision or recommendation.

In contrast, informal – or *de facto* – independence describes the autonomy an institution has in its day-to-day functioning. Informal independence has been described by Maggetti as “self-determination of agencies’ preferences, and their autonomy during the activity of regulation.”<sup>66</sup> In essence informal independence is independence in practice, rather than in law, and includes such dimensions as resourcing (does the oversight body have the budget and staff it needs to carry out its mandate?) and leadership (how does the head of the oversight body use discretion?).

The dimensions used to measure regulatory bodies’ formal independence give insight into the aspects that scholars consider important. Gilardi identified five main categories in his measurement of the formal independence of Independent Regulatory Agencies (IRAs) in 17 European countries: “the status of the head of the regulator, the status of its management board, the relationship with government and parliament, financial autonomy, and the extent of regulatory powers.”<sup>67</sup> Little has been written on the essential components of ATI oversight bodies’ independence, however.

Mendel argues that the process of appointing the commissioner or ombudsman is central to guaranteeing independence and lists three additional provisions in ATI laws that strengthen independence: requiring certain characteristics of the director(s) of an oversight body, e.g. expertise in the subject of ATI, a positive moral reputation, and no significant political links; protecting the head of the oversight body from indiscriminate dismissal; and ensuring that staff salaries are linked to administration salary grades.<sup>68</sup> Neuman adds to this by explaining that the appointments process is crucial to independence because trust in the legitimacy of the body depends on whether or not the leader has been selected for appointment for political reasons. She goes on to argue in favor of a reasonable limit for the oversight body director’s term in office (too long a term could allow the person and his staff to become complacent and uninterested in changes taking place in the administration, too short with an option for renewal could lead to currying favor with those who decide whether to keep the person in post for another term); protection from arbitrary dismissal; and budget sovereignty, i.e. no requirement for part of the executive branch to submit and gain budget approval from the legislature.<sup>69</sup> These factors are crucial to independence.

Combining Gilardi’s measurement dimensions and those identified by Mendel and Neuman, five key aspects of information commissioners’ formal independence are identified and included in Table 3: whether the independence of the body is explicitly granted by law; appointment of the

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<sup>65</sup> Fabrizio Gilardi and Martino Maggetti, “The Independence of Regulatory Authorities,” in *Handbook on the Politics of Regulation*, ed. David Levi-Faur (Cheltenham, UK: Edward Elgar Publishing, 2011), 4.

<sup>66</sup> Martino Maggetti, “De Facto Independence After Delegation: A Fuzzy-Set Analysis,” *Regulation & Governance* 1, no. 4 (2007): 272.

<sup>67</sup> Fabrizio Gilardi, “The Formal Independence of Regulators: A Comparison of 17 Countries and 17 Sectors,” *Swiss Political Science Review* 11, no. 4 (2005): 140.

<sup>68</sup> Mendel, 151.

<sup>69</sup> Neuman, “Enforcement Models Content and Context.”

commissioner(s); length of a commissioner's term; dismissal of the commissioner(s); and who funds the oversight body. In seven of the ten cases, the law guarantees independence by stating that "the Commissioner shall be independent in the performance of his or her functions"<sup>70</sup> or "the Information Commissioner is an autonomous and independent state body."<sup>71</sup> Nearly all commissioners are appointed by a combination of legislative and executive officials in government, in some cases on the recommendation of the administration. All have between four and seven years in the job; some can have their post renewed, others not. Only the Swiss commissioner may remain in the post indefinitely. Dismissal is universally allowed only if the commissioner is found guilty of misbehavior or incapacity to hold office. Funding, however, is a more complex issue. While for all bodies the legislature is responsible for ruling on the administration's budget, some commissioners' budgets are part of a specific administrative office (India, Germany, U.K.) while for others the commissioner can count on near autonomy in deciding the budget (Scotland, Slovenia, Mexico).

### *Effectiveness of the Information Commissioner Model?*

So is the information commissioner model an effective one for the enforcement of ATI policies? As it is not the focus of this article to compare the information commissioner model to the ombudsman or court-based complaint resolution process, it cannot answer whether the information commissioner is the best of the three main enforcement models that exist; however, some conclusions about whether it is a strong option for ATI enforcement can be drawn from the information provided above.

First, one must decide what the overall goal of the body is. Even if it is only to resolve appeals and complaints, the information commissioner is a good option in comparison to the courts and ombudsman simply because the commissioner's office focuses only on information-related cases. This means that the information commissioner and his/her staff are specialists on the topic of information access and, therefore, their level of knowledge about the law and the issues surrounding it are higher than a generalist ombudsman or court. However, if the aim is to give the enforcement body more responsibilities than just resolving cases, the information commissioner model is clearly superior to those of the ombudsman and court because nearly all commissioners carry out additional functions in line with increasing transparency, including educating the administration and the public about the policy, providing information about the law's application, and, in many cases, promoting the law. Of course, whether the commissioner can successfully carry out these tasks depends on his level of independence and resourcing (see below).

While it is generally true that appealing to an information commissioner is less expensive and intimidating than taking a case to court, it is not always free. In Ireland, for example, one must pay up to €150 to appeal to the commissioner.<sup>72</sup> Moreover, the argument that the information

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<sup>70</sup> Republic of Ireland, Freedom of Information Act (1997), Part IV 33[2].

<sup>71</sup> Republic of Slovenia, Information Commissioner Act (2005), Article 2[1].

<sup>72</sup> If the information requested is personal in nature or if the appeal concerns a delayed response by the public authority, no fee is charged. Medical card holders and their dependents, as well as third parties, pay a reduced fee of €50. Republic of Ireland, Office of the Information Commissioner, "Fees for Review by the Commissioner, Office of the Information

commissioner resolves cases faster than a court only holds if the commissioner's office is sufficiently resourced to efficiently handle his/her caseload. In a country where demand for information is high and appeals pile up on the desks of the commissioner and his/her staff, the case completion time could grow to a level that discourages information seekers from using the enforcement service.

In a study based on a descriptive statistical analysis of the U.K. Information Commissioner's case log, the Campaign for Freedom of Information found that the severe delays in the Information Commissioner's Office investigations of appeal cases "undermine the FOI Act's effectiveness and public confidence in it" because:

- The information requested may no longer be of help if/when it is finally released;
- Requesters waiting a long time for the resolution of their case could become discouraged from making other requests;
- Similar mistakes could be made by administrators on other cases before an appeal decision is released;
- Before a decision is made, other requesters might make similar complaints, which serves to increase the oversight body's workload even more;
- The administration may reason that delays by the oversight body mean that they can withhold information for a longer period of time because an appeal would take so long anyway.<sup>73</sup>

Finally, the information commissioner must enjoy autonomy and independence in order to confidently carry out his/her functions. This requires sufficient resourcing, administrative distance from the government, and the capacity to decide the use of the funds granted by government. Without these the commissioner almost necessarily has to choose among the tasks assigned to him and sacrifice the least pressing to, for example, case adjudication.

For a government considering whether to set up an information commissioner's office or give responsibility for ATI enforcement to an already established ombudsman's office, there are two additional points to consider. The first is effort and cost – it is simpler and less expensive to hand over additional responsibilities to an ombudsman that already has the infrastructure in place and staff at hand (although more employees might be needed) than it is to open a new institution. Second, while people may be familiar with the ombudsman and what he/she does, they will not know about the information commissioner until/unless there is publicity about his/her office and the functions the office carries out. This means that it might take a while for people to become familiar with the institution that provides the resolution service and their rights to appeal. However,

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Commissioner," (unknown date), accessed Oct. 1, 2012, <http://www.oic.gov.ie/en/ReviewbytheCommissioner/HowtoApplyforaReviewbytheCommissioner/FeesforReviewbytheCommissioner/#d.en.201>.

<sup>73</sup> Maurice Frankel and Katherine Gundersen, *Delays in Investigating Freedom of Information Complaints* (London: Campaign for Freedom of Information, 2009), 7.

in a country like Mexico, the fact that the IFAI was a brand new organization has contributed to its high level of integrity precisely because it had no past – and no negative legacy.<sup>74</sup>

## CONCLUSIONS

Access to information laws are proliferating worldwide. With at least 90 laws in force at the national level, ATI is increasingly mentioned as an important means of increasing transparency and accountability and thereby strengthening relations between citizens and the state. However, policy implementation problems can hinder the achievement of these objectives.

The oversight body is an essential component of ATI law enforcement because it contributes to the solution of implementation problems. The primary function oversight bodies play is to resolve appeals and complaints made by information requesters when information is withheld from them or they face other issues of non-compliance on the part of the administration. Information commissioners, a type of oversight body specifically dedicated to the enforcement of ATI policies, must also fulfill obligations such as providing advice and assistance to administrative officials and information requesters, monitoring the administration's compliance with ATI, compiling and reporting statistics on use of ATI and the appeals they receive, and promoting the law to the public. By carrying out these tasks, information commissioners and their staffs can be especially helpful in combatting issues such as poor compliance training, delays and refusals to disclose information, and low public awareness of the policy.

An information commissioner's effectiveness in fulfilling his/her role depends in part on the powers it has at its disposal and the independence it is granted by law and in practice. Many experts on ATI argue that an oversight body should have the power to issue binding decisions because it allows the organization to "push the envelope" by requiring – rather than merely suggesting – an administrative office's disclosure of information when it would prefer to withhold. The body of case law that develops as binding decisions are issued can also be helpful to appellants and administrative officials dealing with similar cases. However, a strong argument for the effectiveness of "soft" negotiations through recommendations has also been made.

An information commissioner's level of independence is understood to be important to the body's ability to operate autonomously and fairly. The extent of an oversight body's independence is difficult to measure, especially when discussing independence in practice. However, there is some consensus on the importance of a rigorous appointment process, absence of indiscriminate dismissal clauses, and a commissioner's control over the organization's finances. More needs to be explored on this topic in order to make solid suggestions for changes to existing laws or drafts of newly conceived legislation.

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<sup>74</sup> Jonathan Fox and Libby Haight, "Mexico's Transparency Reforms: Theory and Practice," *Research in Social Problems and Public Policy* 19 (2011): 369.

When considering whether to adopt the information commissioner model for enforcement of an ATI law, a government must consider several factors. First, what exactly does the government want the oversight body to do: solely mediate disputes or take on a broader role of educator, assessor, and promoter of the law? Second, which powers will the oversight body be granted? Third, which safeguards for the oversight body's independence will be included in the law, taking into consideration how these might work in practice? And finally, how many resources is the government willing to commit to the organization's work? The answers to these questions will ultimately add up to the potential effectiveness of the institution.

Table 3: Details on Ten Information Commissioners

		Australia	Canada	Germany	India	Ireland
Name of ATI law		Freedom of Information Act, 1982	Access to Information Act	Federal Act Governing Access to Information held by the Federal Government	Right to Information Act, 2005	Freedom of Information Act
Coverage of law		Federal organizations only	Federal organizations only	Federal organizations only	All government organizations; Central Information Commission takes appeals on requests to central level only	All levels of government
Year law in force		1982	1983	2006	2005	1998
Title of oversight body		Office of the Australian Information Commissioner	Office of the Information Commissioner of Canada	Federal Data Protection and Information Commissioner	Central Information Commission	Office of the Information Commissioner
Year oversight body established		2010	1983	2006	2005	1997
Responsible for other laws?		Privacy and information policy more generally	No	Data protection, Environmental Information Regulations	No	Ombudsman; Environmental Information Regulations
Appeal resolution method		Case settlement or written decision; occasional hearings	Investigation and mediation	Case opinion	Case decision following hearing	Case decision
Functions	Advise and assist requesters	✓				
	Advise and assist administration	✓		✓		
	Monitor and/or assess compliance by administration	✓		✓		✓
	Report to legislature/public	✓	✓	✓	✓	✓
	Advise on related legislation/amendments to law	✓				
	Promote ATI	✓				
Powers	Binding decision power	✓			✓	✓
	Access to any information and/or documents relevant to procedure of mediation	✓	✓	✓	✓	✓
	May impose a fine on civil servants for non-compliance				✓	✓
Components of independence	Explicitly stated in law?	No	No	Yes	Yes	Yes
	Commissioner appointed by	Governor-General	Governor in Council on approval by House of Commons and Senate joint resolution	Bundestag following a proposal of the Federal Government	By President on nomination of Prime Minister, Leader of the Opposition in the Lok Sabha, one Union Cabinet Minister	President of Ireland on recommendation of each of the Houses of Oireachtas
	Length of appointment	5 years	7 years (renewable once)	5 years (renewable once)	5 years (non-renewable)	6 years (renewable once)

	Dismissal	For misbehavior or incapacity	By the Governor in Council on address of Senate and House of Commons	If grounds which would justify dismissal from service in the case of a judge with life tenure	If the Supreme Court reports that he/she is guilty of misbehavior or incapacity	Only for stated misbehavior, Incapacity, or bankruptcy
	Funding decided by	Attorney-General's Office		Federal Parliament	Central Government	

		Mexico	Scotland	Slovenia	Switzerland	U.K.
Name of ATI law		Federal Law of Transparency and Access to Public Government Information	Freedom of Information (Scotland) Act, 2002	Access to Public Information Act	Federal Act on Freedom of Information in the Administration	Freedom of Information Act, 2000
Coverage of law		Federal organizations only	Scottish public authorities	All levels of government	Federal organizations only	All levels of government
Year law in force		2003	2005	2003	2006	2005
Title of oversight body		Federal Institute for Access to Public Information	Scottish Information Commissioner	Inspectorate for Personal Data Protection and Commissioner for Access to Public Information	Federal Data Protection and Information Commissioner	Information Commissioner's Office
Year oversight body established		2003	2003	2003	2006	2001
Responsible for other laws?		Privacy	Environmental Information Regulations, Public Interest Disclosure Act 1998	Data protection, Re-use of Public Information, Public Media Act	Data protection	Data protection, Environmental Information Regulations
Resolution of appeals		Investigation and case decision	Case decision	Case decision	Mediation (and written recommendation if necessary)	Case decision
Functions	Advise and assist requesters	✓	✓		✓	✓
	Advise and assist administration	✓	✓			✓
	Monitor and/or assess compliance by administration	✓	✓			✓
	Report to legislature/public	✓	✓	✓	✓	✓
	Advise on related legislation/amendments to ATI law		✓	✓	✓	✓
	Promote ATI	✓	✓			✓
Powers	Binding decision power		✓	✓		✓
	Access to any information and/or documents relevant to procedure of mediation	✓	✓	✓	✓	✓
	May impose a fine on civil servants for non-compliance			✓		
Explicitly stated in law?		Yes	Yes	Yes	Yes	No
Commissioner appointed by		Executive Branch but can be vetoed by majority vote of Senate or Permanent Commission	Formally appointed by the Queen on the nomination of the Scottish Parliament	National Assembly of the Republic of Slovenia on proposal of the president of Republic of Slovenia	Federal Council	Commissioner appointed by Queen on nomination of Government

Length of appointment	6 years (non-renewable)	6 years (non-renewable)	5 years (renewable once)	4 years (indefinitely renewable)	5 years (renewable once)
Dismissal	Only if violates Constitution or FOI law, when actions or failures to act affect Institute's prerogatives, or convicted of felony that merits imprisonment	If believed that has breached the terms and conditions of office or Parliament decides it has lost confidence in the person's ability to perform functions	Only if convicted of a criminal offense followed by custodial sentence or in case of permanent loss of working abilities for performance of his function	If violates duties or is unable to fulfill duties	May be removed from office by Her Majesty in pursuance of an Address from both Houses of Parliament
Funding decided by	Budget prepared by Commission and presented to Secretariat of Treasury and Public Credit as part of Federation Budget	Scottish Parliament	National Assembly of the Republic of Slovenia on proposal of the Information Commissioner	Federal Council	Ministry of Justice



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