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Handbook on Freedom of Information in the South Caucasus Countries

TRANSITION
Ministry of Foreign Affairs of the Czech Republic

The project is financed from the Transition Promotion Program of the Ministry of Foreign Affairs of the Czech Republic.

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The survey on freedom of information in Georgia, Armenia and Azerbaijan was conducted by the Caucasus Research Resource Center.

This report was produced as a part of the regional research project "Freedom of Information in the South Caucasus". The project is financed from the Transition Promotion Program of the Ministry of Foreign Affairs of the Czech Republic.

June 2012

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Executive Summary

Armenia, Azerbaijan and Georgia have made significant progress toward protection and guaranteeing freedom of information to its citizens. These countries have ratified the most important human rights instruments containing relevant provisions on the fundamental right of freedom of information. With due attention to best practices and relevant international standards all three jurisdictions have adopted extensive domestic provisions that regulate access to information.

From all three jurisdictions Armenia and Azerbaijan[1] seem to have the most extensive legal provisions guaranteeing access to information. For example, in the two mentioned countries the obligation to provide state-held information covers such information holders as state central and local bodies, legal persons performing public functions, commercial and non-commercial entities funded by the state, but also legal entities with predominant positions in the commodity market, or natural monopolists. In Georgia this obligation applies exclusively to administrative body and a legal entity of private law funded from the state or local budget within the scope of such funding.

National laws of Armenia and Azerbaijan allow both verbal and written form for submitting a FoI request. In Georgia those interested in accessing information should mandatorily submit a written application to the respective agency, a provision that limits freedom of information at certain extent.

Only in Azerbaijan an independent oversight body to control compliance with freedom of information requirements was created, *i.e.* the Ombudsman, however, all observers agree that at the moment *de facto* this is not an effective mechanism. Armenian and Georgian law fails to provide for an independent supervisory body to oversee the information holders' behavior in compliance with the law.

In Azerbaijan and Armenia responsible officials are held liable according to the legislation for illegal refusal to provide information, or for the incorrect information disposal, as well as for other infringements of freedom of information under both Administrative Offences and Criminal Codes. In Georgia there is no responsibility provided in the law for illegal refusal to provide information. The only means is to pursue a civil action in court; however the state fees for such an action are exorbitant.[2]

[1] As of date of finalization of this report the Parliament is discussing an initiative that if adopted will limit freedom of information. For details see the respective section.

[2] According to the Law of Georgia on Court Fees, 29/04/98, the fees are the following: first instance court- 100 GEL (approx. 61 USD); appeal - 150 GEL (approx. 92 USD) and Supreme Court of Justice - 300 GEL (approx. 185 USD).

Armenians, Azerbaijanis and Georgians are quite passive when it comes to exercising their right to access to information. The majority of Armenians, Azerbaijanis and Georgians would not exercise their right of freedom to information in order to access public information related to the officials' salary, public procurement, party financing, defense, education and not even private ownership. The passivity of Georgians and Azerbaijanis could be partly explained by the fact that they feel that if they wanted they would in principle freely access such information. At the same time they showed disinterest in such matters. On the other hand Armenians believe that accessibility of such information would be quite problematic, however as their neighbors they are not quite interested in these issues.

The more closely we are watched, the better we behave.

Jeremy Bentham

Introduction

Freedom of information has been rightly named as the 'oxygen of democracy'[3] that gives meaning to such notions as participatory democracy, accountability and good governance. At the same time freedom of information is a fundamental human right, guaranteed under international and national laws. This freedom is intrinsic to any democratic society as it primarily aims at guaranteeing that the public in a democratic society is adequately informed, a tool that allows individuals to protect their rights and interest, participate in decision-making process, and last but not least make government bodies work better, be transparent easily accessible.

Freedom of information refers primarily to the right to access to information held by public bodies. This freedom bears the rationale according to which public bodies hold information not for themselves but for the public good. That is why information must be accessible to the public except when there is an overriding public interest.

This logic is followed by the relevant legislation of the South Caucasus states as well. After the collapse of the USSR, Georgia was the first country in the region to adopt a Freedom of Information Law in 1999. In Armenia the Law on Freedom of Information was unanimously approved by the Parliament in 2003, and in Azerbaijan the Law on the Right to Obtain Information was approved in 2005 to fill the gaps of the Law on Information, Informatization and Protection of Information adopted back in 1998. Despite positive developments at the *de jure* level there are still serious problems with the implementation of the existing laws in practice in all of the three countries.[4]

The present handbook is a detailed compilation of international and national standards relevant for South Caucasus region on freedom of information, which can be used by human rights activists, lawyers, and representatives of the public bodies, civil society and general public. The aim of this handbook is to serve as a primary source to anyone who is interested in the right to access to information. Though the present study does not aim primarily at identifying the *de facto* problems and shortcomings related to the right to freedom of information in the three countries under review, it nevertheless tests different public agencies in performing their duty to provide requested information under the relevant laws. At the same time the study looks at the public opinion on the right to access to information in Armenia, Azerbaijan and Georgia in order to reveal the degree of awareness and knowledge among the population about their fundamental right to know.

[3] Article 19, Freedom of Information and the Media in Armenia, Azerbaijan and Georgia, April 2005.
[4] *Ibid*, p. 2-3.

The study begins with an overview of the international standards on the fundamental right of access to information developed by the United Nations, Council of Europe, and the European Union.

The second chapter describes the international best practice by referring to minimum key features to which freedom of information legislation should aspire.

The third chapter contains detailed analysis of the national developments on freedom of information in Armenia, Azerbaijan and Georgia. This part of the study considers the national legal framework of each of the above mentioned jurisdictions that have evolved over the period since they gained independence after the collapse of the URSS in 1991.

This section is followed by the analysis of the results of freedom of information request that were sent to more than thirty public agencies in all three jurisdictions.

The next section of the chapter presents the results of the poll conducted in Armenia, Azerbaijan and Georgia, where people were requested to provide their opinions on a variety of issues related to access to information.

The last chapter of the report summarizes in a comparative perspective the legal framework of freedom of information in the South Caucasus and public's awareness and interest in the right of access to information.

International standards

Freedom of information has been recognized as one of the cornerstones of democracy, accountability and open governance. It is a fundamental right protected under international human rights law. Below are enumerated the most important instruments and interpretations by relevant competent international bodies, developed under the auspices of the United Nations (UN), the Council of Europe and the European Union (EU).

United Nations

The importance of freedom of information was recognized by the UN from the very beginning. During its first session the UN General Assembly affirmed that the fundamental importance of freedom of information, describing it as the "touchstone of all the freedoms to which United Nations is consecrated".[5]

Freedom of expression and information was enshrined in the Universal Declaration of Human Rights.[6] Needless to say, this instrument represents the cornerstone for the advancement of international human rights and "a common standard of achievement for all peoples and all nations". Article 19 of the Universal Declaration states that:

> Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

The International Covenant on Civil and Political Rights (ICCPR), an instrument that imposes legally binding obligations on the States Parties, similarly guarantees the right to freedom of opinion and expression, in Article 19 (2):

> Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

The Human Rights Committee, responsible for monitoring the implementation of the ICCPR by States parties, in its recent General Comment No. 34[7] referring to Article 19 (2) emphasized that the legal provision embraces a right of access to information held by public bodies. The Committee went further to state that such information includes records held by a public body, regardless of the form in which the information is stored, its source and the date of production. In this context, public bodies refer to all branches of the State (executive, legislative and judicial) and other public or governmental authorities, at national, regional or local level, which are in a

[5] United Nations General Assembly Resolution 59(1), 14 December 1946.
[6] United Nations General Assembly Resolution 217 A (III), 10 December 1948.
[7] General Comment No. 34 on Article 19 (Freedom of opinion and expression), July 2011.

position to engage the responsibility of the State party. The designation of such bodies may also include other entities when such entities are carrying out public functions.

In addition, to give effect to the right of access to information, States parties should proactively put in the public domain information of public interest held by the government. States parties should make every effort to ensure easy, prompt, effective and practical access to such information. The procedures should provide for the timely processing of requests for information according to clear rules that are compatible with the ICCPR. Fees for requests for information should not be such as to constitute an unreasonable impediment to access to information. Authorities should provide reasons for any refusal to provide access to information. Arrangements should be put in place for appeals from refusals to provide access to information as well as in cases of failure to respond to requests.

Elements of the right to freedom of information can be found in other articles of the ICCPR as well.

For example, Article 25 consecrates the right of every citizen without discrimination to *inter alia* take part in the conduct of public affairs and to have access, on general terms of equality, to public service in his or her country. This provision taken together with the right of access to information includes a right whereby the media has access to information on public affairs[8] and the right of the general public to receive media output.[9]

The right to privacy, enshrined in Article 17 of the ICCPR is also closely related to the right of access to information. The Human Rights Committee noted in its General Comment No. 16[10], regarding Article 17 of the ICCPR, that every individual should have the right to ascertain in an intelligible form, whether, and if so, what personal data is stored in automatic data files, and for what purposes. Every individual should also be able to ascertain which public authorities or private individuals or bodies control or may control his or her files. If such files contain incorrect personal data or have been collected or processed contrary to the provisions of the law, every individual should have the right to have his or her records rectified.

The Human Rights Committee, in General Comment No. 32 on Article 14 of the ICCPR, by interpreting the notion "adequate facilities" set out the entitlements to information that are held by those accused of a criminal offence, such as access to documents and other evidence; this access must include all materials that the prosecution plans to offer in court against the accused or that are exculpatory. [11]

Provisions targeting freedom of information can be also found in UN specialized treaties.

[8] See Communication No. 633/95, *Gauthier v. Canada*.
[9] See Communication No. 1334/2004, *Mavlonov and Sa'di v. Uzbekistan*.
[10] General Comment No. 16, Article 17 (The right to respect of privacy, family, home and correspondence, and protection of honour and reputation), April 1988.
[11] General Comment No. 32, Article 14(The right to equality before courts and tribunals and to a fair trial), para. 33, August 2007.

For instance, the Convention on the Rights of the Child in Article 13(1) states that:

> The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice.

The Committee on the Rights of the Child, responsible for monitoring the above mentioned Convention, in the General Comment No. 12 on the right of the child to be heard, highlighted that for the realization of the right of the child to express her or his views in the context of the right under discussion, the child should be informed about the matters, options and possible decisions to be taken and their consequences by those who are responsible for hearing the child, and by the child's parents or guardian. The child must also be informed about the conditions under which she or he will be asked to express her or his views. The Committee concluded that this right to information is essential, because it is the precondition of the child's clarified decisions.[12]

Convention on the Elimination of All Forms of Racial Discrimination contains relevant provisions that purport the scope of the right of access to information, namely in Articles 4 and 5.

Convention on the Rights of Persons with Disabilities expressly refers to freedom of expression and opinion, and access to information, which includes the freedom to seek, receive and impart information and ideas of persons with disabilities on an equal basis with others and through all forms of communication of their choice including by:

> a. Providing information intended for the general public to persons with disabilities in accessible formats and technologies appropriate to different kinds of disabilities in a timely manner and without additional cost;
> b. Accepting and facilitating the use of sign languages, Braille, augmentative and alternative communication, and all other accessible means, modes and formats of communication of their choice by persons with disabilities in official interactions;
> c. Urging private entities that provide services to the general public, including through the Internet, to provide information and services in accessible and usable formats for persons with disabilities;
> d. Encouraging the mass media, including providers of information through the Internet, to make their services accessible to persons with disabilities;
> e. Recognizing and promoting the use of sign languages.[13]

Article 10 of the UN Convention on Anti-corruption[14] calls on the State parties to take such measures as may be necessary to enhance transparency in its public administration, including

[12]General Comment No. 12 (2009) The right of the child to be heard of the Committee on the Rights of the Child, Fifty-first session Geneva, 25 May-12 June 2009.
[13] United Nations Convention on the Rights of Persons with Disabilities, adopted on 13 December 2006, Article 21.
[14] United Nations Convention against Corruption, General Assembly Resolution 58/4 of 31 October 2003.

with regard to its organization, functioning and decision-making processes, where appropriate. Article 10 goes further by providing a non-exhaustive list of measures, which should be undertaken by the signatory parties:

> (a) Adopting procedures or regulations allowing members of the general public to obtain, where appropriate, information on the organization, functioning and decision-making processes of its public administration and, with due regard for the protection of privacy and personal data, on decisions and legal
> acts that concern members of the public;
> (b) Simplifying administrative procedures, where appropriate, in order to facilitate public access to the competent decision-making authorities; and
> (c) Publishing information, which may include periodic reports on the risks of corruption in its public administration.

At the same time, each State Party should take appropriate measures to ensure that the relevant anti corruption bodies are known to the public and shall provide access to such bodies, where appropriate, for the reporting, including anonymously, of any incidents that may be considered to constitute an offence established in accordance with the Convention.

The Aarhus Convention[15] provides for access to information, public participation in decision-making and access to justice in environmental matters. The standards provided in the Convention calls for government's accountability, transparency and responsiveness. It grants the public rights and imposes on State Parties obligations regarding access to information and public participation in environmental matters. The main idea is that any citizen should have the right to get a broad and easy access to environmental information. Public authorities must provide all the information required and collect and disseminate it in a timely manner.[16] Access to information may be refused in limited expressly provided circumstances.[17]

Remaining in the realm of environmental matters it has to be noted that the UNEP Access Guidelines provide for voluntary general guidance with regard to access to environmental information. The guidelines seek to assist countries in filling possible gaps in their respective legal norms and regulations as relevant and appropriate to facilitate broad access to information, public participation and access to justice in environmental matters. Governments are invited to take the guidelines into consideration in the development or amendment of national legislation. Where existing legislation or practice provides for broader access to information, the guidelines encourage for more extensive public participation or wider access to justice in environmental matters.[18] Under the instrument environmental information in the public domain should include, among other things, information about environmental quality, environmental impacts on health

[15] UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, adopted at Aarhus, Denmark, on 25 June 1998.
[16] *Ibid*, Article 4 (1) and (2) and Article 5.
[17] *Ibid*, Article 4 (3) and (4).
[18] Guidelines for the Development of National Legislation on Access to Information, Public participation in decision-making and Access to Justice in Environmental Matters, adopted by UNEPGCSSXI/5 in February 2010 at the 11th Special Session of the UNEPGC, Bali, Indonesia.

and factors that influence them, in addition to information about legislation and policy, and advice about how to obtain information.

The right to access to information under UN system is followed and scrutinized by the UN Special Rapporteur on Freedom of Opinion and Expression, established in 1993 by the Commission on Human Rights within the UN special procedures. Special Rapporteur has extensively addressed the issue of freedom of information under his mandate.

In his 1998 Annual Report, the Special Rapporteur reiterated that freedom of information is not simply a converse of the right to freedom of opinion and expression but a freedom on its own[19] that and that the right to access to information held by the Government must be the rule rather than the exception.[20] The right to seek, receive and impart information imposes a positive obligation on States to ensure access to information, particularly with regard to information held by Government in all types of storage and retrieval systems.[21]

In his 2000 Annual Report, the Rapporteur highlighted the fundamental importance of the right to access to information which:

> … is one of the rights upon which free and democratic societies depend. It is also a right that gives meaning to the right to participate which has been acknowledged as fundamental to, for example, the realization of the right to development.[22]

At the same time, he endorsed the set of principles that have been developed by the Article 19 and the International Centre against Censorship. These principles, entitled "The Public's Right to Know: Principles on Freedom of Information Legislation", are based on international and regional law and standards, evolving State practice, and the general principles of law recognized by the community of nations.[23] On that basis, the Special Rapporteur urged the Governments to make sure that their relevant domestic legislation is in conformity with these general principles:

> – Public bodies have an obligation to disclose information and every member of the public has a corresponding right to receive information; "information" includes all records held by a public body, regardless of the form in which it is stored;
> – Freedom of information implies that public bodies publish and disseminate widely documents of significant public interest, for example, operational information about how the public body functions and the content of any decision or policy affecting the public;
> – As a minimum, the law on freedom of information should make provision for public education and the dissemination of information regarding the right to have access

[19] Report of the Special Rapporteur on the right to seek and receive information, the media in countries of transition and in elections, the impact of new information technologies, national security, and women and freedom of expression, UN Doc. E/CN.4/1998/40, 28 January 1998, para. 11
[20] *Ibid,* para. 12.
[21] *Ibid,* para. 14.
[22] Report of the Special Rapporteur on access to information, criminal libel and defamation, the police and the criminal justice system, and new technologies UN Doc. E/CN.4/2000/63, 18 January 2000, para. 42.
[23] *Ibid,* para. 43.

to information; the law should also provide for a number of mechanisms to address the problem of a culture of secrecy within Government;

– A refusal to disclose information may not be based on the aim to protect Governments from embarrassment or the exposure of wrongdoing; a complete list of the legitimate aims which may justify non-disclosure should be provided in the law and exceptions should be narrowly drawn so as to avoid including material which does not harm the legitimate interest;

– All public bodies should be required to establish open, accessible internal systems for ensuring the public's right to receive information; the law should provide for strict time limits for the processing of requests for information and require that any refusals be accompanied by substantive written reasons for the refusal(s);

– The cost of gaining access to information held by public bodies should not be so high as to deter potential applicants and negate the intent of the law itself;

– The law should establish a presumption that all meetings of governing bodies are open to the public;

– The law should require that other legislation be interpreted, as far as possible, in a manner consistent with its provisions; the regime for exceptions provided for in the freedom of information law should be comprehensive and other laws should not be permitted to extend it;

– Individuals should be protected from any legal, administrative or employment-related sanctions for releasing information on wrongdoing, viz. the commission of a criminal offence or dishonesty, failure to comply with a legal obligation, a miscarriage of justice, corruption or dishonesty or serious failures in the administration of a public body.[24]

In his 2003 and 2004 Annual Reports, he referred to the importance of access to information for the purposes of education on, and prevention of, HIV.[25] In the subsequent reports, the Special Rapporteaur touched upon such issues as the right of access to information and protection and security of media professionals,[26] and the key trends and challenges to the right of all individuals to seek, receive and impart information and ideas of all kinds through the Internet.[27]

Council of Europe

The recognition of the right of access to information held by public authorities was first supported in the European context in the Recommendation R(81)19 of the Committee of

[24] *Ibid*, para 44.

[25] Report of the Special Rapporteur on access to information for the purposes of education on and prevention of HIV and the right to freedom of expression and counter-terrorism measures, UN Doc. E/CN.4/2003/67**,** 30 December 2002; Report of the Special Rapporteur on implementing the right to access to information, access to information for purposes of education on and prevention of HIV/AIDS, and the right to freedom of expression and counter-terrorism measures, UN Doc. E/CN.4/2004/62**,** 12 December 2003.

[26] Report of the Special Rapporteur on implementing the right of access to information and protection and security of media professionals, UN Doc. E/CN.4/2005/64, 17 December 2004; Report of the Special Rapporteur on access to information, safety and protection of journalists and media professionals, legal restrictions on freedom of expression, and freedom of opinion and expression and the realization of other human rights, UN Doc. A/HRC/7/14**,** 28 February 2008.

[27] Report of the Special Rapporteur on key trends and challenges to the right of all individuals to seek, receive and impart information and ideas of all kinds through the Internet, UN Doc. A/HRC/17/27, 16 May 2011.

Ministers of the Council of Europe adopted on 25 November 1981, which established a set of principles, namely:

> everyone within the jurisdiction of a member state shall have the right to obtain, on request, information held by the public authorities other than legislative bodies and judicial authorities; effective and appropriate means shall be provided to ensure access to information; access to information shall not be refuted on the ground that the requesting person has not a specific interest in the matter; access to information shall be provided on the basis of equality.

This principles shall apply subject only to such limitations and restrictions as are necessary in a democratic society for the protection of legitimate public interests (such as national security, public safety, public order; the economic well-being of the country, the prevention of crime, or for preventing the disclosure of information received in confidence), and for the protection of privacy and other legitimate private interests, having, however, due regard to the specific interest of an individual in information held by the public authorities which concerns him personally.

In addition, the recommendation provides that any request for information shall be decided upon within a reasonable time. Any refusal to access to information should be based on reasons referring to law or practice and should be subject to review on request.

In 2002 the Committee of Ministers has adopted a new recommendation providing a right to access official documents. It provides for a subjective right of the citizen to have access, on request, to official documents:[28]

> Member states should guarantee the right of everyone to have access, on request, to official documents held by public authorities. This principle should apply without discrimination on any ground, including that of national origin.

For the purpose of this recommendation, the notion of "public authorities" covers government and administration at national, regional or local level, both natural or legal persons, insofar as they perform public functions or exercise administrative authority and as provided for by national law. The "official documents" expand to all information recorded in any form, drawn up or received and held by public authorities and linked to any public or administrative function, with the exception of documents under preparation. An applicant for an official document should not be obliged to give reasons for his request

At the same time, access to official documents might be limited. In this sense, limitations should be set down precisely in the law, be necessary in a democratic society and be proportionate to the aim of protecting: national security, defence and international relations; public safety; the prevention, investigation and prosecution of criminal activities; privacy and other legitimate private interests; commercial and other economic interests, be they private or public; the equality of parties concerning court proceedings; nature; inspection, control and supervision by public authorities; the economic, monetary and exchange rate policies of the state; the confidentiality of deliberations within or between public authorities during the internal

[28] Committee of Ministers of the Council of Europe Recommendation Rec(2002)2 on access to official documents (2002).

preparation of a matter. Access to an official document may be refused if the disclosure of the information contained there would or would be likely to harm any of the interests mentioned above, unless there is an overriding public interest in disclosure.

The recommendation refers to the duty of a public authority "at its own initiative and where appropriate, to take the necessary measures to make public information which it holds when the provision of such information is in the interest of promoting the transparency of public administration and efficiency within administrations or will encourage informed participation by the public in matters of public interest."[29]

This recommendation was the principal source of inspiration for the first binding international legal instrument to recognize a general right of access to official documents, developed by the Council of Europe, Convention on Access to Official Documents[30]. This instrument sets a minimum standard to which all member states should adhere. The Convention establishes a right to request "official documents", which are defined as all information held by public authorities, in any form. The strong point of the Convention is that the right of access to information must apply to all government/administrative bodies at all levels of government, including legislative bodies and judicial authorities in so far as they perform administrative functions according to national law. There is no specific language which permits some publicly funded bodies to be exempted from this obligation.[31] Article 2 (1) states that "Each Party shall guarantee the right of everyone, without discrimination on any ground, to have access, on request, to official documents held by public authorities." This right can be exercised by all persons with no need to demonstrate a particular interest in the information requested.[32] In addition, there may be no charges imposed for filing requests and viewing documents.[33] At the same time, access to official documents is not absolute and can be subjected to limitations. These limitations should be laid down precisely in law, be necessary in a democratic society and be proportionate to the aim of protecting one or more of the following interests: national security, defence and international relations; public safety; the prevention, investigation and prosecution of criminal activities; disciplinary investigations; inspection, control and supervision by public authorities; privacy and other legitimate private interests; commercial and other economic interests; the economic, monetary and exchange rate policies of the state; the equality of parties in court proceedings and the effective administration of Justice; environment; or the deliberations within or between public authorities concerning the examination of a matter. Access to information contained in an official document may be refused if its disclosure would or would be likely to harm any of the interests mentioned, unless there is an overriding public interest in disclosure.[34]

The Convention provides for two situations when access to an official document may be refused, namely, either when despite the assistance from the public authority, the request remains too

[29] Article XI *supra note* 28.
[30] Council of Europe Convention on Access to Official Documents, adopted by the Committee of Ministers on 27 November 2008 at the 1042bis meeting of the Ministers' Deputies. Until now 14 countries of the Council of Europe have signed it. Among countries from South Caucasus only Georgia signed the Convention.
[31] *Ibid*, Article 1.
[32] *Ibid* , Article 4 (1).
[33] *Ibid*, Article 7.
[34] *Ibid*, Article 3.

vague to allow the official document to be identified or the request is manifestly unreasonable. In such cases, a public authority refusing access to an official document wholly or in part shall give the reasons for the refusal, which shall be presented in written form upon the request received from the applicant.[35] Requestors whose request for an official document has been denied are entitled to a review procedure before a court or another independent and impartial body established by law.[36]

When it comes to fundamental human rights within the Council of Europe's system, the European Convention of Human Rights (ECHR)[37] is probably the most important legal authority that provides for a list of human rights, which should be secured by the High Contracting Parties to everyone within their jurisdiction.[38]

There is no express guarantee for the freedom to information in ECHR, access to information is a right linked to freedom of expression provided in Article 10. This provision expressly refers to "freedom … to receive and impart information and ideas without interference by public authority and regardless of frontiers" as part of freedom of expression.[39] The European Court of Human Rights has reiterated in its judgments that Article 10 comprises "the right of the public to be properly informed"[40] and that "the public has a right to receive information as a corollary of the specific function of journalists, which is to impart information and ideas on matters of public interest"[41]. However the Court took a narrow approach for long time in accepting a general obligation for the public authorities to actively inform the public. In *Leander v. Sweden*, the Strasbourg Court held that:

> freedom to receive information … basically prohibits a government from restricting a person from receiving information that others wish or may be willing to impart to him. That freedom cannot be construed as imposing on a state, in circumstances such as those of the present case, positive obligations to collect and disseminate information of its own motion.[42]

In *Sîrbu and others v. Moldova* the European Court of Human Rights made a distinction between "the right to receive information" and "the right of access to state-held documents". In the present case the Court did not find a violation of Article 10 "since the applicants complained of a failure of the State to make public a Governmental decision concerning the military, the intelligence service and the Ministry of Internal Affairs". Referring to its *Leander* judgment the Court reiterated that freedom to receive information" cannot be construed as imposing on a State,

[35] Article (5)-(6), *supra note* 28.
[36] *Ibid*, Article 8(1).
[37] European Convention on Human Rights, adopted in Rome on 4 November 1950.
[38] *Ibid*, Article 1.
[39] For example, the European Court of Human Rights held that preventing a person from lawfully receiving transmission of broadcasting programs is considered as an interference with the exercise of freedom of expression as guaranteed in Article 10 of the Convention . *See Autronic Ag v. Switzerland*, 22 May 1990.
[40] *Sunday Times (n 1) v. United Kingdom*, 26 April 1979, *Ligens v. Austria*, 8 July 1986, *Thorgeir Thorgeirson v. Iceland*, 25 June 1992, *Ukrainian Media Group v. Ukraine* , 29 March 2005.
[41] *Leander v. Sweden (1987), Gaskin v. United Kingdom (1989) and Sîrbu and others v. Moldova (2004).*
[42] *Leader v. Sweden*, 26 March 1987, para. 74.

in circumstances such as those of the present case, positive obligations to disclose to the public any secret documents or information concerning its military, intelligence service or police.[43]

The Strasbourg Court directly applied Article 10 of the ECHR on issues related to a request for access to administrative documents in its admissibility decision in *Sdruženi Jihočeské Matky v. Czech Republic*[44] This case concerned a refusal from the public authorities to grant to an NGO access to administrative documents and plans with regard to a nuclear power station in Czech Republic. The Court viewed the refusal by the public authorities to provide requested documents as an interference with the right to receive information provided by Article 10 of the ECHR. The Court did not find a violation of Article 10 in the circumstances of the present case because the public authorities have reasoned in a pertinent and sufficient manner their refusal. In addition, the request to have access to essentially technical information about the nuclear power station did not reflect a matter of public interest. This decision remains important as it contains an explicit recognition of the application of Article 10 in cases of a refusal of a request to have access to public or administrative documents.

The right to access to state-held information was considered as part of Article 10 of the ECHR in *Társaság a Szabadságjogokért v. Hungary*.[45] The Strasbourg Court declared that withholding information needed to participate in public debate on matters of public importance may violate the freedom of expression guaranteed in Article 10. In the present case the Hungarian Constitutional Court denied the request of an NGO for access to a complaint submitted by a Member of Parliament who was looking to have certain drug-related offences struck from the Hungarian Criminal Code. The Constitutional Court reasoned its refusal on the basis of the fact that a complaint pending before the Court could not be made available to uninvolved parties without the approval of its author. Nevertheless, the Constitutional Court never consulted the MP. The European Court of Human Rights observed that the authorities interfered by creating an administrative obstacle. In the Court's view, the submission of an application for an abstract review of a legislation, especially by a Member of Parliament, undoubtedly constituted a matter of public interest and "it would be fatal for freedom of expression in the sphere of politics if public figures could censor the press and the public debate in the name of their personality rights." The Constitutional Court's monopoly on information amounted to a form of censorship which may result in the media and watchdogs inability to play their vital role to provide accurate and reliable information in public debate on matters of legitimate public concern.

A similar rationale was followed in *Kenedi v. Hungary*.[46] In this case the applicant was a historian doing research on the State Security Service in Hungary. He sought access to relevant information from the Ministry of the Interior for several years, but to no avail. After receiving repeated refusals on the basis that such documents were classified as "state secret", he brought an action against the Ministry. Domestic court ordered to enforce access to requested documents. However, the Ministry of Interior continued to obstruct applicant's access to information. He was later given access to information, but only partly and he was not allowed to publish it.

[43] *Sîrbu and others v. Moldova*, 16 June 2004, paras. 17-18.
[44] *Sdruženi Jihočeské Matky v. Czech Republic,* 10 July 2006.
[45] *Társaság a Szabadságjogokért v. Hungary*, 14 April 2009.
[46] *Kenedi v. Hungary*, 26 May 2009.

Although the European Court of Human Rights did not formulate a general right to access to state-held documents, what is important is that the reluctance of the national authorities to comply with the execution orders was found to be arbitrary. The Strasbourg Court held that "Such a misuse of power vested in the authorities cannot be characterised as a measure prescribed by law".[47] It concluded that in the circumstances of the present case there has been a violation of Article 10 of the ECHR.

In one of the most recent judgments the Grand Chamber of the European Court of Human Rights reversed, at least partly, its earlier reserved approach on the freedom of information and recognized a general right of access to state-held information under Article 10 of ECHR. *Gillberg v. Sweden*[48] involved the refusal of a Swedish university administrator to comply with a domestic court order granting two independent researchers' not connected with the university access to methodological data related to a study on child hyperactivity. The university representatives argued that making the data public would breach confidentiality promises made to the parents of the participating children. The Grand Chamber found that the university administrator's withholding of the data "impinged on [the two requesters'] rights … to receive information in the form of access to the public documents concerned" under Article 10.

In cases involving Article 8 of the ECHR, *i.e.* the right to privacy, the Court also recognized the existence of a limited positive obligation of the public authorities to provide information. In *Gaskin v. United Kingdom* held that Article 8 of the ECHR protected

> a vital interest, protected by the Convention, in receiving the information necessary to know and to understand their childhood and early development. On the other hand, it must be borne in mind that confidentiality of public records is of importance for receiving objective and reliable information, and that such confidentiality can also be necessary for the protection of third persons. Under the latter aspect, a system like the British one, which makes access to records dependent on the consent of the contributor, can in principle be considered to be compatible with the obligations under Article 8 (art. 8), taking into account the State's margin of appreciation. The Court considers, however, that under such a system the interests of the individual seeking access to records relating to his private and family life must be secured when a contributor to the records either is not available or improperly refuses consent. Such a system is only in conformity with the principle of proportionality if it provides that an independent authority finally decides whether access has to be granted in cases where a contributor fails to answer or withholds consent.[49]

The refusal by the British authorities in this case to give the applicant information about his childhood, without adequate procedure, amounted to a violation of privacy right as guaranteed in Article 8 of the ECHR.

In *Guerra and others v. Italy* the Italian government was found in violation of Article 8 positive obligation to provide information, because it failed to give sufficient information about certain

[47] *Kenedi v. Hungary, supra note* 45, *para. 45*
[48] *Gillberg v. Sweden*, 2 November 2010.
[49] *Gaskin v. United Kingdom*, 7 July 1989, para. 49.

health risks caused by a chemical factory in the area where the applicant lived and bout the plans of evacuation in case of accident.[50]

In *Haralambie v. Romania* the Court reiterated the vital interest for individuals who were the subject of personal files held by the public authorities to be able to have access to them and emphasized that the authorities had a duty to provide an effective procedure for obtaining access to such information.[51]

At the same time, Article 8 is not the sole provision to impose a positive obligation on the government to give access to state-held information to specific persons. The same rationale is valid for Article 6, which guarantees of fair trial. According to the Court refusals by national tribunals to give access to certain legal documents can jeopardize the right to fair hearing in civil or criminal procedure.[52]

European Union

In the context of European Union there has been an increase awareness of the right of access to information. Declaration 17 on the right to access to information, attached to the Treaty on European Union signed at Maastricht on 7 February 1992, considering that transparency of the decision-making process strengthens the democratic nature of the institutions and the public confidence in the administration recommended to the Commission and the Council to submit a report on measures to improve public access to the information available to the public institutions. As a response, the Council and the Commission approved a Code of Conduct concerning public access to Council and Commission documents.[53] The Code reflected the general principle according to which "the public will have the widest possible access to documents held by the Commission and the Council. The term 'document' refers any written text, whatever its medium, which contains existing data and is held by the Council or the Commission."[54]

This principle found reflection in the EC Treaty[55], which provides for the right to access to EU documents in Article 255 (1) by guaranteeing that "any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to European Parliament, Council and Commission documents …".

This right is confirmed by the Charter of Fundamental Rights, which similarly provides that "any citizen of the Union, and any natural or legal person residing or having its registered office in a

[50] *Guerra v. Italy*, 29 June 1996.
[51] *Haralambie v. Romania*, 27 October 2009.
[52] *See Mc Ginley and Egan* v. *United Kingdom*, 9 June 1998; *Sutter* v. *Switzerland*, 2 February 1984; *Campbell and Fell* v. *United Kingdom*, 28 June 1984; *B. and P.* v. *United Kingdom*, 24 April 2001; *Donnadieu (no. 2)* v. *France*, 7 Feb. 2006.
[53] Code of Conduct concerning public access to Council and Commission documents, 6 December 1993, OJ 1993 L 340, p. 41.
[54] *Ibid*, Article 1.
[55] Consolidated version of the Treaty Establishing the European Community, OJ C 325, 24 December 2002.

Member State, has a right of access to European Parliament, Council and Commission documents."[56] Taking into consideration that the Charter reflects constitutional traditions of the member States, the inclusion of the right to access to information suggests that it has the status of a fundamental right. In addition to this general right of access to EU documents, the Charter consecrates the specific right of every person to have access to his or her file.[57] The Charter also refers to freedom of information in general, which presupposes the right "to receive and impart information and ideas without interference by public authority and regardless of frontiers".[58]

The right of access to EU documents is further considered in the Regulation (EC) 1049/2001 regarding public access to European Parliament, Council and Commission documents. This regulation aims at giving "the fullest possible effect to the right of public access to documents and to lay down the general principles and limits on such access in accordance with Article 255(2) of the EC Treaty."[59] Accordingly, citizens and any natural or legal persons residing or having their headquarters in a Member State may access any type of documents held by an institution, that is to say, documents drawn up or received by it and in its possession, in all areas of activity of the European Union.[60] At the same time, the EU institutions can refuse access to a document where disclosure would undermine the protection of:

- the public interest as regards public security, defence, international relations, and the financial, monetary or economic policy of the Community or a Member State;
- privacy and the integrity of an individual, in particular in accordance with Community legislation regarding the protection of personal data;
- a person's commercial interests;
- court proceedings and legal advice;
- the purpose of inspections, investigations and audits.

The European institutions may refuse to disclose a particular document if this is justified by an overriding public interest. Access to a document drawn up by an institution for internal use may be refused if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure. [61] Article 9 establishes a special provision for the whole category of the o-called "sensitive documents" which basically constitute classified documents (top secret, secret and confidential) originating from the institutions or other agencies established by them, from Member States, third countries or international organizations . The scope of the documents covered by these special rules includes public security documents and documents relating to justice and home affairs. Applications for access to sensitive documents are handled only by those persons who have a right to acquaint themselves therewith. A refusal to access to a sensitive document shall be justified accordingly.

[56] Charter of Fundamental Rights of the European Union, Nice, 7 December 2000, Article 42.
[57] *Ibid,* Article 41.
[58] *Ibid*, Article 11 (1).
[59]Regulation (EC) 1049/2001 of the European Parliament and of the Council of 29 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ [2001] L 145/43, 31.5.2001.
[60] *Ibid*, Article 2 (1) and (3).
[61] *Ibid,* Article 4.

Both the Court of First Instance (CFI) and the European Court of Justice have elaborated a substantial case-law on the matter of access to EU documents.[62] For instance, *Carvel v. Council*[63] was the first case decided by the CFI on the issue of access to documents. It established the principle that when an applicant requests a document covered by the 'confidentiality' exception provided in the Decision of the Council 93/731/EC on public access to Council documents of 20 December 1993, the institution has to balance its interest against the applicant's and cannot refuse whole classes of documents automatically. In *Interporc (I) v. Commission*[64] it was held for the first time that applicants did not have to show an interest to apply for documents in the light of 1993 regulations. In a more recent cases, the CFI ruled for the first time on both the 'legal advice' exception expressly set out in Article 4 of the 2001 Regulation, and on the 'public interest override' that applies to a number of exceptions in that Regulation. It interpreted the 'legal advice' exception broadly and placed the burden of proof regarding the 'public interest override' on applicants, ruling also that the override could not be invoked in the general interest of transparency.[65] In *Franchet and Byk v Commission* it was ruled on the exceptions for documents concerning 'court proceedings' and 'inspections, investigations and audits' provided in Article 4 of the 2001 Regulation.[66]

Also it has to be noted that in the context of EU there is a well developed legal framework on public's right to access to environmental information.[67]

[62] CFI, *World Wildlife Fund v. Commission*, Case T-105/95 [1997] ECR II-313; CFI, *Van der Wal v. Commission*, Case T-83/96 [1998] ECR II-545; CFI, *Svenska Journalistförbundet v. Council*, Case T-174/95 [1998] ECR II-2289; CFI, *Rothmans v. Commission*, Case T-188/97 [1999] ECR II-2463; CFI, *Hautala v. Council*, Case T-14/98 [1999] ECR II-2489; CFI, *Kuijer (I) v. Council*, Case T-188/98 [2000] ECR II-1959; CFI, *BAT v. Commission*, Case T-111/00 [2001] ECR II- 2997; CFI, *Kuijer (II) v. Council*, Case T-211/00 [2002] ECR II-7 Feb; CFI, *IFAW v. Commission*, Case T-168/02 [2004] ECR II-30 Nov.; CFI, *Verein für Konsumenteninformation v. Commission*, Case T-2/03 [2005] ECR II-13 April; CFI, *Technische Glaswerke Ilmenau GmbH v. Commission*, Case T-237-02, 14 Dec. 2006; ECJ, *Van der Wal and Netherlands v. Commission*, Joined Cases C-174/98 P and C-189/98 P [2000] ECR I-1; ECJ, *Hautala v. Council*, Case C-353/99 P [2001] ECR I-9565 and ECJ, *Mattila v. Council and Commission*, Case C-353/01 P, 22 Jan. 2004.

[63] CFI, *Carvel v. Council*, Case T-194/94 [1995] ECR II-2765.

[64] CFI, *Interporc (I) v. Commission* Case T-124/96 [1998] ECR II-231.

[65] CFI, *Turco v. Council* T-84/03 [2004] ECR II-4061.

[66] CFI, *Franchet and Byk v Commission* T-391/03 and T-70/04, judgment of 6 July 2006.

[67] Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC, OJ [2003] L 41/26, 14.02.2003; Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC, OJ [2003] L 156/17, 25.06.2003; Regulation (EC) 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, OJ [2006] L 264/13, 25.9.2006.

International best practices

Freedom of information laws (FoI laws) have existed for more than two centuries, however, even nowadays there are freedom of information legislation being past or developed, in countries in every region of the world. The growing attention to freedom of information is indicative of its status as a fundamental human right. When drafting legislation on freedom of information there are some minimum key features that should underpin any modern freedom of information regime. They refer *inter alia* to the scope of FoI laws, proactive disclosure, exemptions, oversight mechanism and review process.

The scope of FoI laws

The best practices show that the scope of the FoI law should be broad in terms of bodies that bear the obligation to disclose, persons enjoying the right to access to information and categories of information.

One aspect is that the laws should apply to all bodies engaged in public functions, namely, public bodies, non-public bodies engaged in public functions, and even some private bodies. A good model of FoI law will never exempt entire bodies in an effort to exempt certain categories of information from disclosure (e.g. sensitive information), on contrary "every legitimate secrecy interest can be addressed through an appropriate regime of exceptions".[68]

In this context, the best practice is the provision of a broad definition encompassing any body exercising government functions. The Portuguese legislation probably stands out as a good model in this respect.[69] An original approach is also that of Ireland, where lists of bodies are drafted and constantly updated, taking into account the emergence of new agencies and changes in their names or functions.[70]

Best practice requires that non-public bodies engaging in public functions also comply with the FoI law. Taking into consideration the fact that nowadays private entities are assuming more and more functions traditionally exercised by governments, requiring them to comply with FoI legislation is significant in achieving transparency.[71] Although including private bodies, along with public ones, within FoI laws' scope is referenced as a best practice, very few countries have

[68]Mendel T., Freedom of Information: A Comparative Legal Survey, 2003, p. 25.
[69] Portugal Law of Access to Administrative Documents no. 65/93 covers according to Article 3 "…organs of either the State or the autonomous regions that perform administrative functions, by organs of either public institutes or public associations, organs of the local authorities, organs of associations or federations of local authorities, as well as other entities that exercise public authority according to the law."
[70] Ireland Freedom of Information Act 1997 as amended by Freedom of Information (Amendment) Act 2003.
[71]Bertoni E., Sánchez G., Draft Model Law for African Union States on Access to Information 2, Center for Studies of Freedom of Expression and Access to Information, Palermo University School of Law.

actually done this. South Africa extends its FoI law onto purely private bodies as well. The South African Constitution provides for the horizontal application of the right to access to information held by another person to everyone when that information is required for the exercise or protection of any rights.[72] In Denmark, the FoI law also applies to natural gas companies and electricity plants.[73]

Another aspect is that the FoI legislation should cover everyone in a jurisdiction. Not only citizens should benefit from the right of access to information. In addition, an individual requesting access should to information not have to demonstrate any particular status or legal interest in that information. Finland allows explicitly for anonymous requests, in order to remove every possibility of discrimination. A person asking for information is not required to provide reasons for his or her request or to verify their identity unless the requested information is of personal or secret nature.[74]

With regard to the type of accessible information, information should be defined broadly to include all information held by the body in question, regardless of form, date of creation, and its author. The right to information should come hand in hand with the principle of maximum disclosure, which establishes a presumption that all information held by public bodies may be overcome only where there is an overriding risk of harm of a legitimate interest.[75] This rationale is observed in most national laws on FoI, apart from classified information, which some domestic FoI laws admit as an exception. In the Swedish law on FoI, for example, the form of documents is defined broadly to include any "record which can be read, listened to, or otherwise comprehended only by means of technical aids". In addition, letters and other communications addressed to civil servants, which refer to official matters are also considered official documents.[76] Typically, FoI laws refer to the right to access records, official documents, or files. Hence, such a right applies only to information that is recorded.[77] This approach leaves out a certain volume of information that might have been orally transmitted. Provisions on FoI should aim at including orally transmitted information of crucial importance for the final decision-making in the category of accessible information as well. In Denmark, for instance, authorities receiving oral communication from another agency have an obligation to record the instruction.[78] In New Zealand, the right to information has been interpreted to mean that information which the agency possesses but has not yet recorded, must be recorded accordingly, if it is relevant to the request.[79]

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[72] Section 32(1)(b) of the Constitution of the Republic of South Africa, 1996.
[73] Denmark Access to Public Administration Documents Act 1985.
[74] Finland Act on the Openness of Government Activities, No. 621/99, Decree on the Openness of Government Activities and on Good Practice in Information Management (1030/1999).
[75] Mendel, T. *supra note* 68, p. 25.
[76] Sweden Freedom of the Press Act 1776.
[77] Banisar, D., Freedom of Information Arround the World 2006. A Global Survey of Access to Government Information Laws, Privacy International, 2006.
[78] Article 6(1) of the Denmark Access to Public Administration Documents Act 1985 states : " In any matter to be decided by an administration authority, an authority receiving information by word of mouth on facts of importance to the decision or in other manner having notice of such facts, shall make a note of the substance of such information, always provided that such information is not contained in the documents of the matter."
[79] New Zealand Official Information Act of 1982.

Proactive disclosure

A common feature of the best FoI laws is to provide an obligation for government agencies to proactively disclose certain categories of information. In Mexico,[80] India,[81] Hungary[82] FoI legislation provides for proactive disclosure of information. This information includes details of government structures and key officials, texts of laws and regulations, current proposals and policies, forms and decisions, budget and subsidies information, public procurement information, information about FoI, etc.[83] The Council of the EU noted in its 2003 annual report that as "the number of documents directly accessible to the public increases, the number of documents requested decreases."[84] Indeed, the proactive provision of information is also beneficial to the public bodies as it can reduce the administrative burden of answering routine requests and improve the efficiency of information holders in handling information at their disposal. For example, in Mexico[85] and the U.S.[86] FoI legislation provides for automatic disclosure of information if it has been previously requested or is likely to be requested again.[87] Needless to say that it makes sense to publish particular information if is requested frequently by the public, so that in future people do not have to file a request, saving time for both public bodies and requestors.

Another important aspect of proactive disclosure of information is that information should be disseminated through methods most accessible to the public, for example, such as Internet. In the U.S., for instance, the web portal *data.gov* provides for extensive federal datasets.[88]

Exemptions

Limitations on access to information are among the most crucial aspects in FoI regulations. Majority of FoI laws all over the world contain provisions setting out particular categories of information that can be withheld. However, exceptions should not become a rule. It is very important that FoI laws contain an exhaustive list of exemptions, so as to leave as little as

[80] Mexico Law on Transparency and Access to Public Information of 2002 specifies 17 classes of information for proactive disclosure.
[81] India Right to Information Act of 2005 specifies 18 classes of information that should be made public proactively without the need for requests.
[82] Hungary Electronic Freedom of Information Act of 2005 requires proactive disclosure by electronic means of core information held by public bodies.
[83] Darbishire, H., Proactive transparency: The Future of the right to information?, 2010.
[84] *See* Annual report of the Council on the implementation of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, 7 March 2003.
[85] Mexico Federal Law on Transparency and Access to Public Information of 2002 requires public bodies to publish relevant and useful information. The law expressly indicates the way to determine this category is that it "corresponds to the most frequent questions made by the public."
[86] US Electronic Freedom of Information Act of 1996 requires officials to make available for public inspection and copying all records which have become or are likely to become the subject of subsequent requests for substantially the same records.
[87] Darbishire, H., *supra note* 83.
[88] http://www.data.gov/

possible or no discretion to officials in deciding on the character of information that can be legally withheld. Best practices indicate that all exemptions should be established by law, clear and specific. In addition exceptions should be narrowly defined and should exclude only information that the government claims will harm a public interest, for example:

a. National Security Interests: Information where such disclosure would cause harm to the defense or national security of the country.
b. Law Enforcement Interests: Information regarding crime prevention, investigation, and prosecution;
c. Privacy Interests : Information where such disclosure would invade the privacy of a natural third party;
d. Commercial and Confidentiality Interests: Information where disclosure constitutes an actionable breach of confidence, reveals a trade secret, or publicizes information obtained from another State or international organization where disclosure of such information would harm relations with such entity;
e. Health and Public Safety Interest: Information where such disclosure would endanger the life, health, or safety of any individual;
f. Policy Making and Operations of Public Bodies Interests: Information where such disclosure would harm the formulation of government policy, frustrate the success of a policy by premature disclosure, inhibit the free and frank exchange of views in the policy making process, or undermine testing of an auditing procedure used by the government. [89]

It is crucial that the above mentioned categories should be clearly defined. The drafters should be careful as any ambiguity referring to exceptions will create confusion in its interpretation. Best practices point out to the fact that all limitations on dissemination of information must pass the "public interest test". The "public interest test" requires that public authorities and oversight bodies balance the interest in withholding information against the public interest in disclosure. Furthermore, all exceptions should be subject to a public interest override so that where the overall public interest is served by disclosure, the information should be disclosed even if this will harm one of the protected interests.[90] The FoI law should include a provision to the effect that in case of conflict between the FoI law and a secrecy law, the former dominates. In line with the Article 19 Model Law, collisions of FoI provisions between different laws are regulated as follows: "5. (1) This Act applies to the exclusion of any provision of other legislation that prohibits or restricts the disclosure of a record by a public or private body."[91]

Oversight mechanism

The lack of a legal requirement to establish an oversight body to control compliance with freedom of information requirements creates obstacles for proper implementation of respective

[89]Article 19, A Model Freedom of Information Law, 2006, pp. 15-17.
[90] Article 19, Note on the draft Armenian Freedom of Information Law, London 2002.
[91]Article 19, *supra note* 89.

legislation. That is why it is crucial to put in place an independent and impartial oversight mechanism for the purposes of promotion, monitoring and protection of the right of access to information. Best practice points to the need for assignment of an official responsible for public contacts or formation of an information/press department (Spain, Cyprus, Canada). A growing trend is to create an independent information commission. In Ireland, the Information Commissioner is the general Ombudsman. These commissions can be part of the legislative, an independent entity of another government body or the Prime Minister's Office (such as in Thailand) or a completely independent body. More than twenty countries have created similar bodies. In some countries such as Canada and France, the Information Commission has powers similar to an Ombudsman. Many countries, including the UK, Germany, Switzerland and Slovenia combined the Information Commission with the national Data Protection Commission.[92]

Review Process

The best practice shows that a three-tiered appeal process is the most effective in redressing the withholdings of information and guaranteeing the right of access to information. The first level of appeal is usually an internal review exercised by a higher level entity in the body to which the request for information was made. The second tier is an external body. In many countries, the Ombudsman or independent Information Commission[93] is the one to review the decision. However, generally these bodies do not have the power to issue binding decisions. Though, there are several countries where the Information Commission, for instance, can issue binding decisions, subject to limited appeals or overrides by Ministers in special cases.[94] In almost all the countries the final stage of review is an appeal to the national courts.

[92] Freedom of Information around the World 2006, p. 23-24.
[93] In Estonia the Data Protection Inspectorate can initiate supervisory procedures on the basis of an individual complaint or on its own initiative. *See* Article 19, Promoting Practical Access to Democracy: A Survey of Freedom of Information in Central and Central and Eastern Europe, October 2002.
[94] Slovenia, Serbia, Ireland and the UK. *See* Freedom of Information around the World 2006, p. 24.

National Standards

Armenia

A. Freedom of information legal framework

FoI legislation since getting independence

Initially, freedom of expression was set forth in Article 24 of the Republic of Armenia Constitution[95] and stated that "Every person has a right to express his/her opinion. It is forbidden to force one to withdraw from his/her opinion or change it. Every person has a right to freedom of speech, including the search, receipt and dissemination of information and ideas via any channel of information regardless of state boundaries. The provision on access to information for journalists and media was also present in the Law of 1991 "On Press and Other Media Outlets" (Article 4) stipulated as following: "The press and other media outlets have a right to receive information from any state bodies, public, political organizations, their heads…"

After the amendment of the Constitution in 2005 these rights and freedoms were included in Article 27 and were extended to embrace freedom of mass media. In addition, it was supplemented by Article 27.1 stating that "Everyone shall have the right to submit letters and suggestions to the authorized state and local self-government bodies and officials for the protection of his/her personal or public interests and to receive appropriate answers to them in a reasonable time". At the same time Article 43 of the Constitution provides restrictions to the freedom of expression stating those may take place "… only by the law if it is necessary in a democratic society in the interests of national security, public order, crime prevention, protection of public health and morality, constitutional rights and freedoms, as well as honor and reputation of others."

The Law on Mass Media[96] provides for a general right of journalists who work for mass media organizations to operate without unreasonable restrictions. It reaffirms the constitutional right to seek, receive and disseminate information. It prohibits censorship, interfering with "the legitimate professional activities of a journalist", disclosure of sources without a court order for revealing serious crimes, and requires that government bodies do not favor some journalists over others. [97]

The work on the adoption of FoI legislation has started in 1999 by a number of non-governmental organizations. The draft law was discussed among the stakeholders starting with

[95] Constitution of the Republic of Armenia, 05/07/1995.
[96] Republic of Armenia Law on Mass Media, 13/12/2003.
[97] Article 19, Under Lock and Key: Freedom of Information in Armenia, Azerbaijan and Georgia, London. April, 2005.

2002. It was assessed by experts of the international organization "Article 19" and qualified to be in compliance with respective international standards.[98] The Law on Freedom of Information (FoI Law) was approved by the Armenian Parliament in September 2003 and came into force in November 2003.[99]

Additionally, the Law on Personal Data[100] provides for the right of citizens to obtain personal information about themselves from public or private bodies. They can also demand that incorrect information gets corrected.

It should be noted that in 2001 the Republic of Armenia ratified the UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention), which laid ground in the FoI Law for some access to information freedoms related to environment. At the same time, Armenia has ratified the Universal Declaration of Human Rights (in 1993) and the European Convention on the Protection of Human Rights and Fundamental Freedoms (in 2002), these two documents are an integral part of the national legislation. Hence, the national legislation is guided by Article 19 of the Universal Declaration of Human Rights and Article 10 of the European Convention.

FoI Law comprises 15 articles that set forth the main principles; registration, classification and storage of information; access to information and assurance of its transparency; conditions for providing information; restrictions and grounds for a refusal to provide information; procedure for requesting information; responsibility for the violation of freedom of information, etc.

Information holders

Article 3 of the FoI Law defines the list of information holders that include "state bodies, local self-government bodies, state offices, state budget sponsored organizations as well as organizations of public importance and their officials". The notion of "organizations of public importance" is defined in the same article as "private organizations that have monopoly or a leading role in the goods market, as well as those providing services to public in the sphere of health, sport, education, culture, social security, transport, communication and communal services". According to Article 12, information holders are responsible to ensure information access and publicity; record, categorize and maintain information possessed; provide truthful and complete information (possessed by them) to the person seeking information; define their procedures of providing oral and/or written information; appoint an official responsible for information freedom.

[98] Article 19, Note on the draft Armenian Freedom of Information Law, London, 2002.
[99] http://www.freedominfo.org/documents/Armenia%20FOI.pdf
[100] Law of the Republic of Armenia on Personal Data, 08/10/2002.

Conditions, rules and forms for access to information

Article 9 sets forth the procedures of application and discussion of information inquiry, which may be in written and verbal forms. A written inquiry must be signed to include applicant's name, citizenship, place of residence, work or study (in case of legal entities: name, place of residence). In case of verbal inquiry, the applicant must in advance tell his name and surname. Oral requests can be made in cases when it is necessary to prevent harm to State or public security, public order, public health or morals, others' rights and freedoms, the environment and private property, as well as to make sure that the given information holder has the relevant information.

According to paragraph 4, the applicant does not have to justify the inquiry, which is in line with the international standards.[101]

According to Article 9 (11), if the information holder does not possess all the data on the inquired information, then it is obliged to give to the applicant the part of the data that it possesses and, if possible, to indicate in the written answer the place and body that holds the requested information.

Proactive disclosure

Information holders have an obligation to publish a wide range of information regardless of any request. Article 7 (1) of the FoI Law stipulates: "Information holder works out and publicizes the procedures according to which information is provided on its part, as defined by legislation, which he places in his office space, conspicuous for everyone." Paragraph 2 of the Article mandates the information holder to urgently publicize or via other accessible means inform the public about the information that it has, publication of which can prevent danger for the state and public security, public order, public health and morals, others' rights and freedoms, environment, private property. If the body has an official website, then they must publish the information on the site.[102]

Article 7 (3) lists the types of information, or the changes to it, that the information holders have to publish at least once a year. Those are the following:

a) activities and services provided (to be provided) to public;
b) budget;
c) forms for written enquiries and the instructions for filling those in;

[101] Recommendation Rec (2002)2 from 21/02/2002, *supra note* 27, Section 5 stipulates that "the individual requesting an official documents must not be obliged to name the reason why access to the document is wanted."
[102] Currently, almost all information holders have their official websites.

d) lists of personnel, as well as name, last name, education, profession, position, salary rate, business phone numbers and e-mails of officers;
e) recruitment procedures and vacancies;
f) influence on environment;
g) public events' program;
h) procedures, day, time and place for accepting citizens;
i) policy of cost creation and costs in the sphere of work and services;
j) list of held (maintained) information and the procedures of providing it;
j 1. statistical and complete data on inquiries received, including grounds for refusal to provide information;
j 2. sources of elaboration or obtainment of information mentioned in this clause;
j 3. information on person entitled to clarify the information defined in this clause.

According to paragraph 4, changes to the above-mentioned information are to be publicized within 10 days after the adoption.

Proactive disclosure of information is additionally provided by other pieces of legislation, e.g. the Law on Environmental Impact Assessment from 20/11/1995, Law on Urban Development from 05/05/1998, Law on Legal Acts from 03/04/2002 and Law on Procurement from 22/12/2010.

Timing for responses to information requests and transparency of decision-making

According to Article 9 (6) of the FoI Law, the answer to an verbal inquiry is given immediately after listening to the inquiry or within the shortest possible time frame. According to paragraph 7 of the same legal provision, the response to a written inquiry must be normally provided within 5 days, though it may be extended up to 30 days if more work is necessary to prepare the response. In case of extention the requester of information shall be notified about it within 5 days after the application submission, highlighting the reasons for delay and the final deadline when the information will be provided.

Article 10 (1) of the FoI Law implies that the Government should adopt a decision to set the order of provision of information by state and local self-government bodies. No such procedure has been adopted by the Government since the adoption of the law. There are no procedures envisaged by Article 5 in respect of recording, classifying and maintaining information and Article 10 in respect of providing information, hence leaving the accomplishment of these tasks to the discretion of the information holders.

FoI Law contains restrictions for foreign citizens, conditioning the fulfillment of their access to information right with respective provisions of other related legislation and/or international treaties. Meanwhile, in present there are no such acts that regulate access to information by foreign citizens.

The above-mentioned failures seriously diminish the efficiency of the FoI Law with respect to quality of the information provided and the transparency of the decision-making process.

Costs of provision of information

As mentioned above, FoI Law stipulates that "providing information or its copy from state and local self-government bodies is realized according to the Government Regulation of the Republic of Armenia".[103] However, it does not provide limitations for setting fees for information held by state and local self-government bodies. On the other hand, private organizations of public importance have discretion to decide themselves the cost of information and it may not exceed the costs of providing that information.[104]

No fees are charged for answering to a verbal inquiry; for provision of printed or copied information up to 10 pages; providing information via email; declining the information request; the information holder does not possess the information sought or if the disclosure of that information is beyond its powers; and responding to written inquiries that can prevent dangers facing state and public security, public order, public health and morals, others' rights and freedoms, environment, person's property (Article 10, (2)). Also, the entity that has provided untruthful or incomplete information shall provide corrected information free of charge upon the written inquiry (Article 10, (4)).

Limitations on access to information

According to FoI Law, access to information can be limited in cases set forth in the Constitution and other laws. According to Article 44 of the Constitution the right of access to information may be temporarily restricted as prescribed by the law in case of martial law or state of emergency but it shall be within the scope of the assumed international commitments on deviating from commitments in cases of emergency.

Article 11 of the FoI Law provides the list of grounds for refusal to provide information. Namely, the information holder refuses to provide the information if it contains state, official, bank, commercial secret; violates the secret of private and family life of a person, including the privacy of correspondence, telephone conversations, postal, telegraph and other messages; contains the data of preliminary investigation, not subject for disclosure; discloses information that calls to restrict the access due to the professional activity (medical, solicitor or attorney secret); violates the copyright and/or adjacent rights. These types of information are regulated by respective legal acts (e.g. Law on State and Official Secrets, Law on Personal Data, etc.).

It has to be noted that the Armenian legislation does not define the notion of commercial secret, leaving to the discretion of authorities to refuse access to information on those grounds.

[103] Article 10, (1) of FoI Law.
[104] *Ibid,* Article 10, (3).

FoI Law sets restrictions for access to information in case of verbal inquiries as well. The verbal inquiry can only be responded if it refers to the information the provisions of which "can prevent the danger to the state and public security, public order, health and morals, the rights and liberties of others, the environment, property of people". Additionally, the law instructs the requester to make sure that the given information holder has the relevant information and to clarify the procedure according which the information holder processes the written inquiries.[105] Verbal inquiries are often necessary for journalistic practice to clarify facts and other data, while it turns out in such cases one must make a written inquiry and wait for an answer for five days. This may impede the timely work of the media representatives.[106]

There are some unjustified restrictions concerning foreign citizens. As it is stipulated by Article 6, foreign citizens can enjoy the rights and freedoms foreseen by the following law as defined by the Republic of Armenia laws and/or in cases defined by international treaties. Meanwhile, paragraph 3 of the Council of Europe Recommendation (2002) 2 from 21 February 2002 states that "Member states should guarantee the right of everyone to have access, on requests, to official documents held by public authorities. This principle should reply without discrimination on any ground, including that of national origin."[107]

Article 8 of FoI Law sets forth situations when access to information may not be refused, notwithstanding the regime of exceptions: where the information discloses an urgent threat to public security and health; where a refusal to disclose the information would have a negative impact on the implementation of state programs and when "… it presents the overall economic situation of the Republic of Armenia, as well as the real situation in the spheres of nature and environment protection, health, education, agriculture, trade and culture".

Law on State and Official Secrets[108] sets rules on the classification and protection of information related to military and foreign relations by creating three categories of classification as well as putting temporary restrictions to their access: information "of special importance" and "top secret" that are also regarded as "state secret" shall be kept confidential for 30 years and information classified as being "secret" – for ten years. Disclosing secrets or breaking rules on handling of state secrets is punishable under Article 306 and 307 of the Criminal Code.[109]

In addition the Armenian legislation sets area-specific limitations for access to information. Those include the following:

[105] Article 9 (5) of FoI Law.
[106] Baku Press Club, Committee to Protect Freedom of Expression (Armenia) and Association of Young Lawyers of Georgia, Harmonization of Media Legislation in South Caucasus Countries with European Standards (Baku, 2004).
[107] Committee of Ministers of the Council of Europe Recommendation Rec (2002) 2 from 21/02/2002, *supra note* 27.
[108] Law on State and Official Secrets, 03/12/1996.
[109] Criminal Code of the Republic of Armenia, 18/04/2003.

- Criminal Procedure Code requires that the details of investigation are almost completely closed for the public.[110] Though court litigation is open, in cases of rape, high treason or espionage, as well as adoption and other cases, however, it can also be closed.[111]
- The new Mining Code passed the second hearing in the National Assembly and it contains controversial provisions that inadequately narrows citizens right to access information on the activity of mining corporations without their consent even in cases which relate to issues of vital importance (e.g. uranium mining, use of cyanide on the shores of Lake Sevan, mining in forests, etc.).[112]

It should be noted that in Armenian legislation a code has a superior legal force over a law, hence whereas there are collisions related to freedom of information, the norms prescribed in FoI Law might be discounted.

Oversight over the access to information and liability for non-provision

According to Article 13 (1) of FoI Law, the responsibility for the provision of information lies on the head of the information holder or his/her appointee. But the law fails to provide for an independent supervisory body/official to oversee the information holders' behavior in compliance with the law.

According to Article 11 (4) of FoI law, the decision not to provide information can be appealed either with the state government body defined by legislation or in the court. Armenian legislation, however, does not stipulate efficient mechanisms to overcome the obstacle of non-provision of information. In particular, the FoI Law does not specify which administrative body is to be considered as a competent structure to overrule the decision of the information holder or hold responsible. At the same time court litigation takes too much time and efforts, that it is why it is difficult to be viewed as effective means of protection of the right of access to information.

According to Article 14 (1), responsible officials are held liable according to the Armenian legislation for illegal refusal to provide information, or for the incorrect information disposal, as well as for other infringements of freedom of information. Administrative liability is envisaged by Article 189.7 of the Code on Administrative Offences[113], namely, for illegal refusal to provide information. On the other hand the Criminal Code stipulates liability for "illegal refusal by an official to provide information or materials to a person immediately concerning his rights and legal interests and collected in accordance with established procedure, or provision of incomplete or willfully distorted information, if this damaged the person's rights and legal interests".[114] However, one cannot see precise difference between descriptions of infringements that cause administrative or accordingly criminal liability. The majority of cases related to violation of law

[110] Article 201, Criminal Procedure Code of the Republic of Armenia, 01/07/1998.
[111] *Ibid*, Article 16 and 170.
[112] Articles 9 and 13, Mining Code of the Republic of Armenia, 28/11/2011.
[113] Code of Administrative Offenses of the Republic of Armenia, 06/12/1985.
[114] Article 148 of the Criminal Code of the Republic of Armenia.

requirements actually challenge the infringement of the right of access to information, whereas there are few ones that demand retribution based on the administrative or criminal offences.

Criminal Code also punishes "concealing or distortion of facts, phenomena or events dangerous for human life or health, or the environment, committed by a person in charge of providing such information to the population"[115] and "concealing from people information about environmental pollution dangerous for life and health through radioactive, chemical, bacteriological materials, or providing obviously false information about such pollution, by an official"[116].

B. Testing public agencies

Responsiveness

In total 40 letters with request for information were sent to 34 public institutions and 2 private entities providing public services. 90% of TI Armenia inquiries have been responded.

Table 1. Level of responsiveness

Responded	Not responded	Total sent
36	4	40
90%	10%	100%

Four institutions - Ministry of Defense, Ministry of Labor and Social Issues State Social Security Service, Procurement Assistance Center and Armenian Electricgrid company did not respond to the inquiries.

Timeliness of responses

According to Article 9 (7), the response to the written inquiry must be normally provided within 5 days, though it may be extended up to 30 days if more work is necessary to prepare the response. In case of extention the requester of information shall be notified about it within 5 days after the application submission, highlighting the reasons for delay and the final deadline when the information will be provided. Oftentimes, institutions use up to 30 days for their response without due notification and justification of the delay.

For the purpose of this research, up to 7 days (5 days prescribed by the law and 2 additional days of the delivery) until the receipt of the response is considered to be "prompt". Up to 30 days with or without notification are regarded as "timely". All responses received after 30 days regardless

[115] Article 278 of the Criminal Code of the Republic of Armenia.
[116] *Ibid* Article 282.

whether the delay has been notified or not are considered as "late" ones. Timing is calculated from the day of issuance of all inquiries.[117]

Table 2. Timeliness of responses

Prompt	Timely	Late	Total
5	25	6	36

National Assembly Staff, Ministry of Diaspora, State Property Management Department, Central Electoral Commission and National Commission for Television and Radio responded to the inquiries promptly. Six entities - President's Administration, Government Staff, Ministry of Culture, Prosecutor General, Commission on Economic Competition and Public Services Regulatory Commission sent their answers within 33-40 days. Only the last entity duly - within 5 days - notified about the need for additional work and the possible delay of its response, while a few others made such notification only after 10 days.

Completeness of responses

Responses of entities have been qualified as "irrelevant", "partial" and "complete". Irrelevant responses are considered those where the entity failed to answer to the posed question(s). Partial ones are grouped into "general" and "detailed" categories based on the scope of issues addressed by institutions and the content provided, also taking into consideration respective websites whenever referred. Complete ones are those that provide satisfactory answers to all questions regardless of the judgment on the quality of performance of the institution.

Nine institutions though provided certain answers to the posed inquiries, the content was either not relevant at all or it touched the respective topic but did not provide the answer to the questions. For example, the Prosecutor General and Judicial Department responded that they do not possess the requested information. The Judicial Department, Ministry of Territorial Administration (for 2 inquiries), Ministry of Nature Protection and Chamber of Control referred to webpages, which did not have the required information. The Ministry of Foreign Affairs sent a letter about a completely different topic, while the Ministry of Education and Science and Yerevan Municipality addressed the topic, however did not provide the answer.

Some entities like the Ministry of Culture and Ministry for Urban Development did put significant effort to provide a detailed answer and enclosed respective tables/lists. The Ministry of Sport and Youth Affairs, Ministry of Finance (as readdressed by Government Staff), Ministry of Labor and Social Affairs, Ministry of Healthcare and Commission on Economic Competition also tried to provide detailed responses. The Ministry of Energy and Natural Resources did not provide an answer to several questions, however it referred to its rather informative website as well as named concrete institutions that maintain the requested information. The National

[117] 16 December 2011.

Assembly and Police did not provide much data as is seemed not to be much in their particular cases, however tried to provide some other relevant information, though not requested.

The Ministry of Economy, Ministry of Emergency Situations, State Property Management Department, Ministry of Justice (for 2 inquiries) and State Revenue Committee (for 2 inquiries) provided rather general responses. The Central Electoral Commission's response was comparatively more detailed; however it did not explicitly mention the requested budget information.

In total there were 7 complete and satisfactory responses. Those were provided by the Ministry of Agriculture, Ministry of Transport and Communication, President's Administration, Public Regulatory Services Commission, National Commission for Television and Radio, Civil Service Council and ArmRusGazArd company.

Table 4. Relevance and completeness of response

<table>
<tr><th rowspan="2">Irrelevant</th><th colspan="2">Partial</th><th rowspan="2">Complete</th><th rowspan="2">Total</th></tr>
<tr><td>general</td><td>detailed</td></tr>
<tr><td rowspan="2">10</td><td>8</td><td>11</td><td rowspan="2">7</td><td rowspan="2">36</td></tr>
<tr><td colspan="2">19</td></tr>
</table>

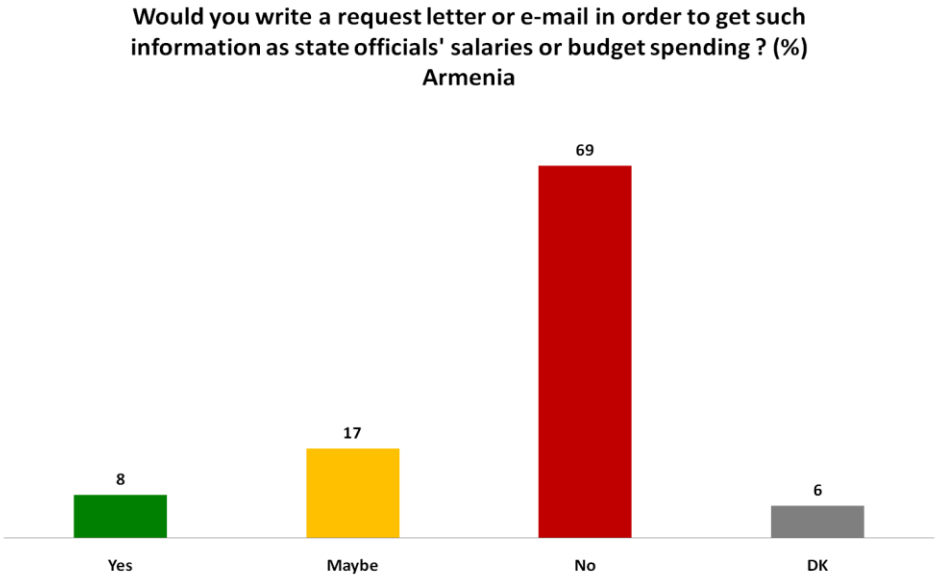
General comments

All of the questions have been formulated as sensitive ones. They either related to expenditures of institutions or requested information that could contribute to the opinion on the quality of their performance. Though some of the entities did not provide detailed answers, this is attributed rather to their reluctance to respond than to the level of sensitiveness of questions. For some institutions (e.g. Ministry of Finance or Committee on State Revenues under RA Government) questions appeared to be rather simple and/or answers less time-consuming than for others, though even in this case they did not provide complete responses. Some entities (e.g. Ministry of Territorial Administration or Ministry of Nature Protection) preferred to direct the requestor of information to their websites, without even making an effort to find out whether those contain the requested data. A few institutions (e.g. Prosecutor's Office or Judicial Department) responded that they do not maintain information on the questions posed in the inquiry, which may be a sign of either their reluctance to direct to the respective institution which maintains the data or the gap within the data collection system. Several institutions (e.g. Ministry of Justice and Central Electoral Commission) did not provide information about their budget, but rather referred to the Official Bulletin of Legal Acts, which has a limited circulation and is not easily accessible.

C. Public perception

In a poll conducted by Caucasus Research Resource Centers (CRRC) [118] both in urban and rural areas of Armenia 2,365 people were asked about a variety of issues related to access to information. Armenian respondents seemed to be rather passive in terms of demonstrating their willingness to exercise their right of access to public information. About 69% of respondents answered that they would not write a letter or send an e-mail in order to get information related to state officials' salaries or budget spending and only 8% said they would exercise their right to freedom of information.

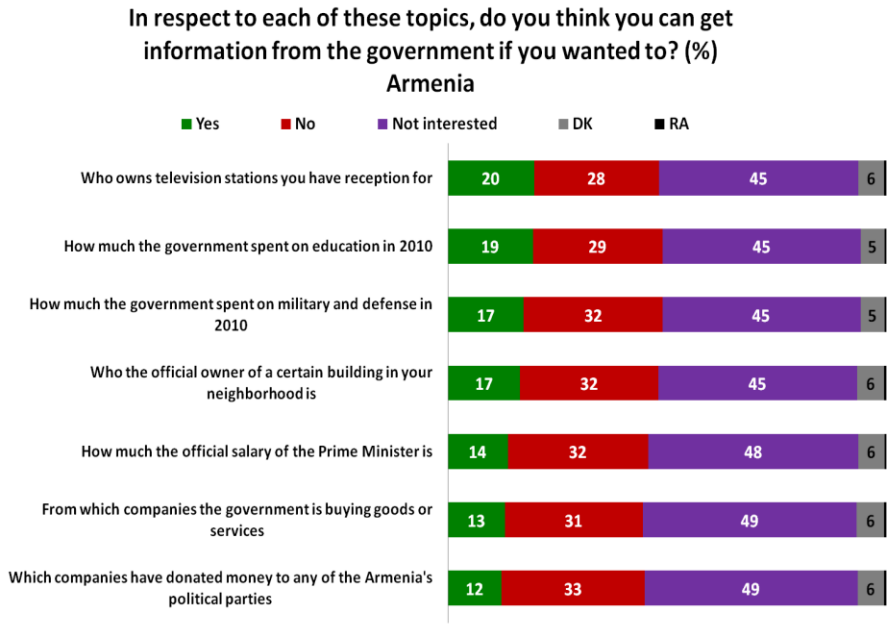
Table 1.



At the same time less than 20% of respondents in Armenia thought that they would be able to get information about the posed issues from the government if they want and more than 45% appeared to be not interested in receiving the mentioned information.

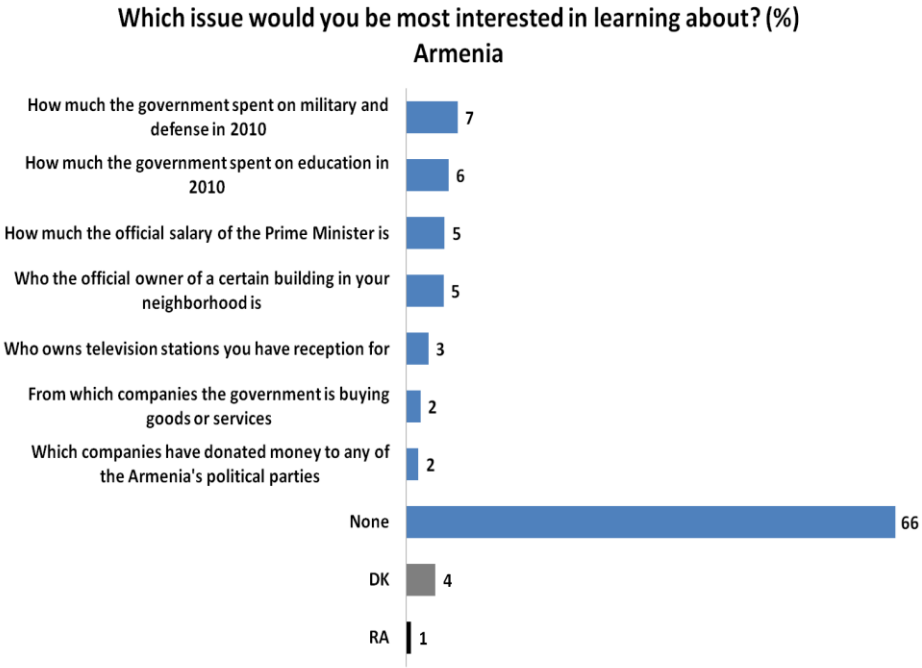
[118] Questions on freedom of information where included in the Caucasus Barometer 2012, which represents the annual household survey about social, economic issues and political attitudes conducted by CRRC in the three countries of the South Caucasus: Georgia, Armenia and Azerbaijan.

Table 2.



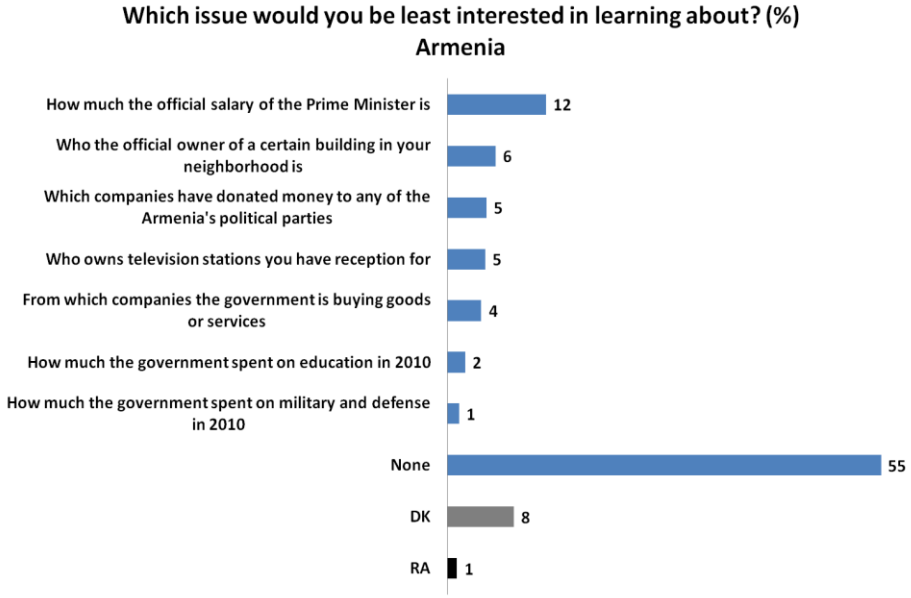
About 66% of the Armenian respondents found that none of the mentioned questions represents an interest to them. The highest interest was expressed for getting information on "how much the government spent on military and defense in 2010" (7%) and "on education" (6%).

Table 3.



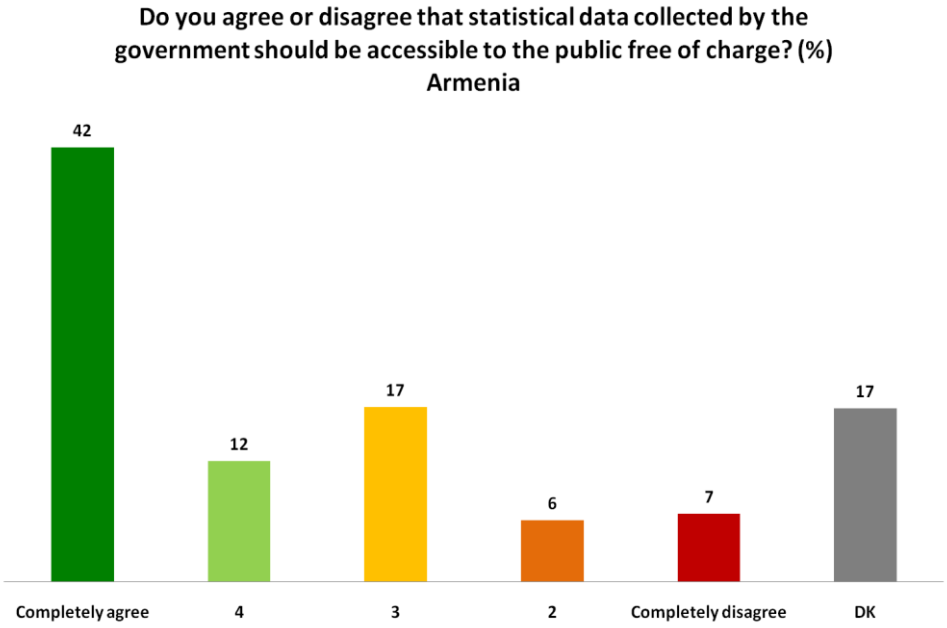
Indifferent attitude towards public information is reiterated by answers given to the question "which issue would be least interested in learning about". Once again, the majority of respondents (55%) stated that none of the matters is of any interest to them. The least interesting issue to learn about was indicated to be "how much is the official salary of the Prime Minister" (12%).

Table 4.



Majority of the Armenian respondents (54%) completely agree that the statistical data collected by the government should be accessible to the public free of charge. Only 17% answered that they actually do not know the correct answer, while about 13% disagreed or completely disagreed.

Table 5.



Azerbaijan

A. Freedom of information legal framework

FoI legislation since getting independence

Article 50 of the Azerbaijani Constitution[119] states that "everyone is free to look for, acquire, transfer, prepare and distribute information through legitimate means" and that "freedom of mass media is guaranteed, [and] State censorship in mass media including press is prohibited". Article 57 of the Constitution states that "citizens of Azerbaijan have the right to approach any public agency in person or in written form, individually or as a group".

The Law on the Right to Obtain Information (LROI)[120], defines access to information as 'unrestrained'.[121] Everybody is entitled to demand information from its holder, either directly or through a mediator. Before the adoption of this law, the matter was partly regulated by the 1998 Law on Information.[122] The law covered several information-related areas other than FoI, but contained anyhow important clues subsequently drawn on by the latest legislation. For instance, Article 3 identified as one of the law's goals "to ensure bodies of the state power, institutions of local government, all enterprises, institutions and organisations regardless of their organisational-legal forms and forms of ownership, and citizens with adequate information based on state information resources". The law then defined information held by state bodies as "information resources" and set protection on such resources.[123] Moreover, the law stated that "a list of bodies and organisations being in charge of formation and processing of information resources shall be established".[124]

LROI regulates conditions, rules and forms of access to information, including forms of disclosure by the information holders and their accountability, notably in case of unjustified refusal. It also envisions the appointment of an Information Ombudsman as a separate entity, until recent amendments delegated these powers to the Human Rights Ombudsman (Amendments to the Law on Ombudsman)[125]. Other issues fall beyond the scope of LROI as they are regulated by specific laws, such as the Law on State Secret[126], the Law on National

[119] Constitution of the Azerbaijan Republic adopted on 12/11/1995.
[120] Law on the Right to Obtain Information, 30/09/2005; Presidential Decree on the Application of the Law on the Right to Obtain Information, 09/12/2005. (LROI)
[121] Article 2 of LROI.
[122] Law on Information, Informatization and Protection of Information, 03/04/1998.
[123] (Article 4) of LROI.
[124] Article 8 of LROI.
[125] Law on Human Rights Attorney (Ombudsman), 28/12/2001.
[126] Law on State Secret, adopted on 07/09/2004; Presidential decree on Application of the Law on State Secret issued on 05/11/2004; Presidential decree on Approval of the List of Information Constituting State Secret issued on 03/06/2005.

Archives[127] and the Law on Procedures for Review of Applications by Citizens[128] (stemming from Article 57 of the Constitution). International agreements with confidentiality clauses also fall outside LROI's jurisdiction.

Article 19, OSCE and the Council of Europe were the international partners who played the most significant role in drafting what can be regarded as a reasonably good law. A working group established at the Milli Məclis (the Parliament of the Republic of Azerbaijan), including also representatives of the civil society, was one of the main national counterparts in providing legal advice. In general, the adoption of the law was considered in Azerbaijan as a tangible success of civil society and journalists. At the time of its adoption, in 2005, the adoption of a law itself was a revolutionary step. International best practice was reportedly taken into account, notably the Council of Europe's model law on FoI, the EU Cabinet of Ministers' recommendations on FoI and the laws of Eastern European countries.

In principle, LROI is a reasonably good piece of legislation. The main shortcoming of the government lies in the lack of a comprehensive strategy and action plan.[129] However, recent trends confirm, on one hand, the wished reduction of the gap between legal provisions and the reality. In this sense it is worth mentioning the fact that the Government is actively introducing e-governance and some public agencies have established viable agency internet resources and mechanisms to obtain information online (notably, the Ministries of Tax and Justice, State Migration Service, and the State Commission on Civil Service)[130]; the responsiveness of public agencies to information requests is improving[131]; civil society organizations – including Transparency International Azerbaijan – run free legal advice centers, which help citizens to put together information requests and those filed by NGOs have much higher chance to be responded than requests filed by citizens (ranging from MRI's 40% to TI Az's 70%). On the other hand, as of date of finalization of this report, the Parliament discussed amendments to several laws aimed to limit access to information discussed in more details below.

Information holders

Information holders are state bodies and municipalities; legal persons performing public functions, notably in the areas of education, health, culture and welfare – whether their activity is regulated by legal acts or they act on a contractual basis. The following are regarded as equivalent to information holders: legal entities with predominant positions in the commodity market, or holders of special/exclusive rights and natural monopolists – in connection with information on the quality and price of goods and services and their relative changes; non-commercial entities fully or partially owned by the State (or dependent on it in other ways, e.g. a

[127] Law on National Archives, adopted on 22/06/1999.
[128] Law on Procedures for Review of Applications by Citizens, adopted on 10/06/1997.
[129] Article19, Time to Reset the Code Locks, 2009.
[130] Report on Implementation of the Presidential Decree "On Some Measures on Organization of Application of E-services by State Agencies" dated 23 May 2011, prepared by Transparency Azerbaijan, Anti-Corruption Information and Cooperation Network of NGOs and Entrepreneurship Development Foundation, December 2011.
[131] Monitoring Report by Media Rights Institute, 17/05/2010.

public agency can be one of the founders), extra-budgetary funds[132], commercial associations owned or participated in by the State – in connection with information on property or funds allocated by the State Budget. Any information holder must ensure free, unrestrained and equal term of access to information to all interested parties in the manner set forth by LROI – ideally by appointing an *ad hoc* official or a special unit for information services.

Conditions, rules and forms for access to information

Information requests may be submitted in verbal or written form. Verbal requests may be submitted by telephone or on the occasion of face-to-face meetings and videoconferences, while written requests shall be forwarded by mail, fax or e-mail. The requester can attach additional conditions to a simple information request, including accessing spaces specifically designated to the acknowledgement of the piece of information; obtaining a copy of the relevant document, including testified copies; obtaining readable copies of shorthand reports or other codified documents; obtaining a translation of the document; obtaining an electronic version of the document.

Proactive disclosure

Importantly, LROI entails the information holder's responsibility to disclose information. To lessen the number of information requests, the information holder should spontaneously publish certain pieces of information – directly produced by it or acquired from other bodies – defined as "public information". In particular, LROI requires information holders to publish: consolidated statistical data (including on criminal and civil offences); budget estimates; statutory acts of State Departments; guidance prepared in connection with the activities of State agencies and municipalities; personal data of staff members working in State agencies and municipalities (such as their identity, telephone number, e-mail address, education, specialization); reports on activities of State agencies and municipalities; personal data of staff members working in the administration of legal entities exercising public functions; information on conditions and results of State and municipal purchases, as well as sales of and changes in ownership rights in State and municipal properties; information on loans and grants to information holders (State authorities and municipalities, legal entities exercising public functions, individuals or legal entities operating in education, healthcare, cultural or social activities on the basis of legal acts or contracts), notably on their terms and utilization; drafts of legal acts, from the date of submission for discussion and approval; legal acts, from the date they enter into force; reports of the activities of legal entities exercising public functions, and information on their income and expenditure; information on State budget and rolling budget; information on environment conditions, especially on dangers and damages to environment; decrees, resolutions and orders of the State agencies and municipalities, from the date they enter into force; drafts of concept and development plans and programs of public importance, from the date of submission for discussion and approval; information on vacancies in State agencies and municipalities; information on products and services provided by State agencies and municipalities; information

[132] According to Art.1.1.5 of the Law on Budget System, extra-budgetary state funds are special purpose state financial funds with the status of a separate legal entity and an independent budget outside State Budget.

on the use of State funds or property contributed to private legal entities established by, or operating with the participation of State agencies and municipalities; programs of public events; information on changes in services provided by State agencies and municipalities, at least ten days before the change becomes effective; information on hours of service of managers of State agencies and municipalities; information on salary rates, guidance on salary payment, bonus policies and special benefits in force in State agencies and municipalities; information available to legal entities exercising public functions – and individuals or legal entities operating in education, healthcare, cultural or social activities on the basis of legal acts or contracts – on the exercise of these functions; information on the quality and price of goods and services and their relative changes held by legal entities with predominant positions in the commodity market, or holders of special/exclusive rights and natural monopolists, at least 30 days before changes occur; information on the use of State funds or property contributed to non-commercial organizations, extra-budgetary funds as well as commercial associations fully or partially owned or controlled by the State; information on public service to the population, notably on changes in service fees before those changes occur; information on judicial acts; information on State registers, to the extent provided by the law; information contained in information holders' registers; results of public opinion inquiries; information on the ownership of information holders, and on the obligations of the information holders' owners; list of secret information; information to be disclosed under special laws, international agreements or legal acts issued on their basis, or other information as considered necessary by the information holder. When the requester needs an official confirmation certifying that information has been disclosed in order to exercise his rights and freedoms or fulfil his duties, the information holder shall issue that official confirmation and attach the information disclosed. Public information as defined above should be published on the internet and be available regardless of information requests. Most observers agree that the fact that LROI gives an exhaustive list of information that information holders should publish regardless of requests is a wrong approach form the law-making point of view. The Law should indicate what is prohibited, with the rest being allowed. Anyway, the Law does not and cannot provide enough details on the matter. The Ombudsman and the Cabinet of Ministers shall prepare and issue a joint document – the Rules of Disclosure of Information – which has not been performed so far.

Information shall be published on the Internet Information Resource, mass media, official publications, libraries, public information centres, or other accessible places. The information holder shall tailor the method used to disclose information to the specific conditions of information and of its target (e.g. avoid resorting exclusively to the internet when disclosing information on agriculture). In practice, this provision is generally followed. For instance, since pensioners are among the least active internet users, the State Social Protection Fund places information on billboards at its regional branches. On the contrary, since applicants for the civil service or high school graduates are among the most active internet users, the State Commission for Civil Service and the Commission for University Admission place a lot of information on internet and offer e-services. If specific methods of disclosure are envisaged by specific laws or international agreements, those methods shall be applied – notably with regard to obligations to disclose information in the Internet Information Resource. The information holder must immediately disclose information on threats to life, to health, to private property or to

environment through mass media in order to prevent this threat or mitigate its probable consequences. Disclosure shall be urgent, and the method is not of vital importance.

Information holders shall create an Internet Information Resource to disclose public information as intended by LROI. Article 1 (8) of the Presidential Decree on the Application of LROI states that executive authorities identified by the Cabinet of Ministers should detail conditions for the creation of the Register by their respective subordinate agencies. This task was delegated to the Ministry of Communication and Information Technologies.[133] The Internet Information Resource has not been created yet.

Timing for responses to information requests and transparency of decision-making

The information holder should not take more than seven working days to process the information request. The term of execution starts on the working day following the date of registration. A shorter procedure is foreseen in case of 'urgent' information requests. In case of a well-grounded suspect of threat to life, to health or to fundamental individual freedoms, the information should be disclosed within 48 work hours. If the information holder receives a large amount of requests at the same time, or the request implies an extensive investigation, the information holder can ask for an extension of the terms to seven additional working days.

Information holders can disclose information by publishing it on their websites, by sending it by e-mail to the requester or by providing a copy or an abstract of the required document in person, by fax or by mail. Information can also be disclosed verbally. If required, the information holder shall arrange access to spaces specifically designated to the acknowledgement of the piece of information. The information holder shall record all information requests on the day of submission. No records are required in case of verbal or anonymous requests, as well as no written response is required in these cases. The possibility of anonymous requests is actually totally excluded by LROI as well as by the other relevant laws – which is considered a weakness by some observers, such as Article 19. Following the registration, the information holder shall make an overall assessment of the request. Upon assessment, the information holder shall respond directly or motivate its refusal to respond or forward the request to what it regards as the actual information holder if it does not hold the required information itself.

The chief of a given agency shall set the internal execution procedures. Information holders are responsible for the arrangement of information accessibility as foreseen by LROI. If the information holder fails to appoint an *ad hoc* officer or to establish a special unit for information services, the officer identified by the body as the implementer of these services shall be regarded as responsible for the execution of information requests. If none of the officers is officially in charge, the responsibility lays on the chief of the agency. One of the main weaknesses of the government is that violations of this responsibility are not effectively sanctioned. The Code of Administrative Violations provides ample and clear mechanisms to penalize those responsible for failure to provide information, and there are several precedents when court cases have been

[133] Presidential Decree on Some measures on Organization of E-Government Services, 23/05/2011.

won by applicant citizens. However, there is no court verdict demanding or defining penalties for failure to provide information.

Cost of provision of information

Access to information is free if the requester recorded or copied the information on his own without any technical support on the part of the holder. In other cases, services may be chargeable, providing that the amount does not exceed the expenses incurred for the preparation and the disclosure of information.

Limitations on access to information

In terms of accessibility, there is a distinction between information for general use and information with limited disclosure. Information lacking any specific limit on disclosure has to be considered as open. Information with limited disclosure is divided into 'secret' and 'confidential'. While secret information corresponds to the category of state secrets as defined by the *ad hoc* law (*supra*), confidentiality pertains to information concerning: agencies, enterprises and organizations established by citizens, regardless of the form of ownership; personal conditions, like information held by professionals such as doctors, lawyers or notaries and limited to protect individual rights; commercial data; investigation and court material. The collection of private information can be open or confidential.

Article 5 of the Law on State Secret identifies secret information as that concerning the military, economic and foreign policy, crime detection, espionage and counter-espionage. Disclosure of this information is punishable under Article 284 of the Criminal Code.[134] The Law on State Secret in some instances gives a too broad definition of state secrets. Still, the major problem is that the law gives too much discretional power to public agencies and they abuse this power by unnecessarily broadening the scope of state secrets.

Confidential information is protected by laws regulating specific areas: child adoption (Article 130 of the Family Code)[135]; commercial or bank secrets (Article 202 of the Criminal Code; Article 361 (3) and Article 967 of the Administrative Code[136]; Article 41 of the Law on Banks[137]; Law on Commercial Secret[138]); supervision of exports (Article 202 (1) of the Criminal Code); medical information (Article 53 of the Law on Health Protection of the Population[139]; Article 7 of the Law on Psychiatric Assistance[140]; Article 15 of the Law on Transplantation of Human

[134] Criminal Code, 01/09/2000.
[135] Family Code, 28/12/1999.
[136] Administrative Code, 11/07/2000 (latest edition 28/10/2008).
[137] Law on Banks, adopted on 16/01/2004.
[138] Law on Commercial Secret, adopted on 04/12/2001.
[139] Law on Health Protection of the Population, 26/06/1997.
[140] Law on Psychiatric Assistance, 12/07/2001.

Organs and Blood Related Services[141]; Article 11 (10) and Article 17 (2) of the Law on Human Diseases Caused by Immunodeficiency Virus[142]; Article 156 of the Criminal Code); information held by journalists (Article 11 of the Law on Mass Media[143]); litigation processes (Article 199, Article 200 and Article 201 of the Criminal Procedures Code[144]), information held by attorneys (Article 92 (10(2)) of the Criminal Procedures Code, Article 17 of the Law on Attorneys and Legal Practice[145]); information held by public notaries (Article 32 of the Law on Public Notary[146]); insurance (Article 35 of the Law on Insurance[147]); information on participants to criminal investigations (Article 11 of the Law on Protection of Participants to Criminal Investigations[148]; Article 316 of the Criminal Code); information on employees of the judicial system and law enforcement agents (Article 9 of the Law on Protection of Employees of the Judicial System and Law Enforcement Agents[149]); postal correspondence (Article 20 of the Law on Postal Communication[150]); information held by accountants (Article 15 of the Law on Accounting Records[151]); activities of the Central Bank of Azerbaijan (Article 60 of the Law on the Central Bank of Azerbaijan[152]); telecommunication secrets (Article 38 and Article 39 of the Law on Telecommunications[153]); individual privacy (Article 32 of the Constitution; Article 155 and Article 156 Criminal Code).

Information holders may restrict access to information intended for internal use for a given period of time (never exceeding five years and dependent on conditions specified below), such as information on: criminal or administrative offence cases (until a case is filed in the court or decided upon); collected by State while exercising its functions of supervision and audits (until decision is made); potentially impeding the execution or the enhancement of State policy in case of premature disclosure (until policy is executed); potentially endangering the effectiveness of financial tests or audits by authorities in case of premature disclosure (until tests or audits are completed); on preventive exchanges of views and consultations between different State agencies involved in decision-making (until decision is made); potentially affecting adversely the execution of economic, monetary, credit or financial policy by authorities in case of premature disclosure (until consistent action is undertaken); potentially harming the administration of justice (until judgment is issued); received from foreign States and international agencies (until mutual agreement on disclosure is reached); potentially endangering the environment (until causes of potential damage are eliminated); violating the information holder's legal interests, or

[141] Law on Transplantation of Human Organs and Blood Related Services, 28/10/1999.
[142] Law on Human Diseases Caused by Immunodeficiency Virus, 11/05/2010.
[143] Law on Mass Media, 07/12/1999.
[144] Criminal Procedures Code, 14/07/2000.
[145] Law on Attorneys and Legal Practice, 28/12/1999.
[146] Law on Public Notary, 26/11/1999.
[147] Law on Insurance, 25/06/1999.
[148] Law on Protection of Participants to Criminal Investigations, 11/12/1998.
[149] Law on Protection of Employees of the Judicial System and Law Enforcement Agents, 11/12/1998.
[150] Law on Postal Communication, 29/06/2004.
[151] Law on Accounting Records, 24/03/1995.
[152] Law on the Central Bank of Azerbaijan, 10/12/2004.
[153] Law on Telecommunications, 14/07/2005.

disclosing information designated for internal use and specifically sanctioned as such by an agreement with private legal persons exercising public functions.

Access to a wide range of private information – related to individual privacy and family life – may be restricted. Partial access notably applies to information on: individual political views (except for information on membership); religious and ideological orientation of private legal entities recorded in compliance with procedures set forth by the law; ethnic origin; collected during criminal or civil litigations – until the case enters the open court or the court renders the verdict – or collected in cases where the law requires the protection of people's morality, private or family life, or of underage victims or witnesses, or collected for the execution of a judgment; on current imprisonment position (as defined Article 83 of the Criminal Code); on health conditions; personal, individual attributes and abilities; applications for social protection and social services in general; mental and physical disability; taxation, except for outstanding tax debts; sexual life; on registration of acts of civil status; adoption. Limits to access to private information are in force for a period of up to 75 years since the date of acquisition or recording of the information, or up to 30 years from the death of the person, or up to 110 years since his or her date of birth.

On 12 June 2012 Parliament adopted amendments to legislative acts which will considerably restrict access to information.[154] According to the amendments, information about the founders and financial resources of legal entities, the amount of their charter capital, and other similar data, will be accessible only to law-enforcement bodies. As of 14 June 2012 the bill has not been signed into the law so far.

Oversight over the access to information and liability for non-provision

The control over the implementation of LROI shall be performed officially by the chief of the information holder, but also by superior bodies and by the Authorized Agent on Information Matters (AAIM, official name of the Information Ombudsman) through monitoring.

The AAIM is elected by the Milli Məclis (Parliament) on the recommendation by the President. Any Azerbaijani citizen with higher education, longstanding experience in the field of FoI and proven high moral qualities may be candidate. The term of office is 5 years and re-election is not envisaged.

The AAIM monitors the information holders' compliance with obligations arising from LROI. The AAIM may initiate an inspection on the basis of complaints by third parties or by his personal initiative.[155] The AAIM has to consider the complaint within 10 working days after the

[154] Namely, the Law on Registration of Legal Entities and State Registry adopted on 12/12/2003 and the Law on Commercial Secret, 04/12/2001 and Law on the Right to Obtain Information, 30/09/2005.

[155] On the basis of a complaint the AAIM may verify: i.) whether the information request has been recorded in accordance with LROI; ii.) whether the information request has been executed in compliance with procedures, terms and conditions set forth by LROI; iii.) whether the refusal to execute information request is justified under grounds

date of submission, verifies if the information holder's activities are consistent with the complaint and gives responses. If the complaint required clarification or additional explanations, documents should be collected to investigate the complaint; the AAIM can extend the term of consideration of the complaint to ten additional days by giving written notification to the complainer.

The AAIM may request reports, clarifications and documents from information holders; has access to documents intended for 'internal use' and may transmit materials on administrative and criminal offences related to violation of LROI requirements to the supreme body of the information holder or to the enquiring court.

The AAIM may reproach the information holder for: unjustified refusal to execute the information request; failure to execute the information request within the terms required by LROI; improper execution; lack of disclosure or insufficient disclosure of public information that LROI demands to be fully disclosed; failure to create an adequate Internet Information Resource of documents; diffusion of inaccurate, false or incomplete information and non settlement of the requester's repeated appeal; setting illegal limits to access to information; disclosure of information that should not be disclosed under LROI requirements.
Having received AAIM's instructions, the information holder should undertake appropriate measures within five days and accordingly notify the AAIM. The AAIM discloses the information received from the information holder on its electronic register. The information holder can file a lawsuit against the AAIM's instructions.

In practice, the Human Rights Ombudsman has been assigned the role of Information Ombudsman (AAIM). Whereas in the earlier version of LROI the AAIM had to be a separate entity, after recent amendments[156] these powers were deplorably delegated to an already existing officer. Even if formally the Human Rights Ombudsman broad powers, however, all observers agree that she is practically not able to effectively ensure access to information – mostly because the institution lacks specific competence.

B. Testing public agencies

TI Azerbaijan sent 39 requests for information addressed to national level public agencies dealing directly with the population or SMEs. Nevertheless, 8 agencies, namely: Ministries of Agriculture, Defense, Health, State Committee for Refugees and Displaced Persons, State Committee for Work with Diaspora, Baku Electric Network, Central Election Commission, Baku

foreseen by LROI; iv.) whether limits to access to information correspond to those envisaged by LROI; v.) whether the information holder fulfils the obligation of public information disclosure; vi.) whether the Internet Information Resource has been created following to LROI requirements. Besides, the AAIM: i.) publicizes the provisions of LROI, provides legal assistance to citizens in obtaining information; ii.) makes suggestions to information holders for the improvement of information services; iii.) cooperates with information holders to ensure effective access to information and arranges informative events to increase professionalism of workers; iv.) examines applications, claims and complaints, giving consistent instructions on how to process them; v.) prepares sample requests; vi.) performs other obligations stemming from the requirements of LROI.

[156] Amendments to the Law on Ombudsman (Articles 1.3. and 13.1).

City Mayor's Office failed to comply with the regulation enforcing to respond to requests. Still, the results are viewed as reasonably good, as according to civil society research, the chances of ordinary citizens to have a request attended to by a public entity fall in the range of 30-40%, while civil society is privileged to have a much higher chance of success. Concretely, under Advocacy and Legal Advice centers projects run by Transparency Azerbaijan since March 2005, the rate of responsiveness is about 75%. [157]

Table 1. Level of responsiveness

Responded	Not responded	Total sent
31	8	39
80%	20%	100%

Timeliness of responses

Under Articles 24 and 25 of the LROI[158], the information holder should not take more than seven working days to process the information request. The term of execution starts on the working day following the date of registration, which is a delay for another several days.[159] If the information holder receives a large amount of requests at the same time, or the request implies an extensive investigation, the information holder can within five working days ask for an extension of the terms to seven additional working days. In contrast to this provision, Article 10 of the Law on Procedures for Review of Applications by Citizens[160] gives a more lax time regime, namely: one month for review of an application, with the exception of cases envisioned by the legislation, while applications, not requiring additional review and inspection, shall be attended to within 15 days, unless other term is stipulated under legislation. So, for the purpose of this research, prompt response will be considered 17 days, 32 days will be assessed as timely response and over 32 days will qualify as late response, starting from the date of the letter posting on 16 December 2011 with 2 extra days for delivery and registration. As seen, the timing is rather lax as compared to more stringent regulation of other countries.

Table 2. Timeliness of responses

Prompt	Timely	Late	Total responded
12	12	7	31

[157] See more information on the project at www.transparency.az

[158] Law on the Right to Obtain Information, 30/09/2005; Presidential Decree on the Application of the Law on the Right to Obtain Information, 09/12/2005.

[159] A shorter procedure is foreseen in case of 'urgent' information requests. In case of a well-grounded suspect of threat to life, to health or to fundamental individual freedoms, the information should be disclosed within 48 work hours.

[160] Law on Procedures for Review of Applications by Citizens, 10/06/1997.

39%	39%	22%	100%

Completeness of responses

Some public agencies offered a broad description of relevant programs or ample references to legal basis, but refrained from a direct response. For example, Ministry of Education instead of a concrete response to the question on the *amount of allocations from the state budget and other source for construction, repair and equipping of schools and actual expenditure* satisfied with *enumeration of the number of schools/classrooms renovated and built in 2011*. Such responses qualify as irrelevant.

Other agencies provided only partial response, describing activities but refrained from responding questions obviously viewed as sensitive. For example, Ministry of Justice responded on *the number of registered NGOs, as well as provided classification of the reasons for refusal of registration thereof,* but abstained from giving *the exact number of NGOs denied registration.* The sensitivity of this question can be illustrated by the fact that courts are flooded with complaints from civil society organizations about refusals to register organizations by the Ministry of Justice, which at best are rejected and at worst completely ignored by the courts.[161]

More than a half of the surveyed provided complete responses, for example, Supreme Court gave detailed information on *the number of complaints against administrative entities for compensation of damages due to unlawful actions and how those have been proceeded with.* Nine agencies surveyed shall be commended for going to special lengths to ensure comprehensive responses, namely: Ministries of Ecology and Natural Resources, Youth and Sports, Internal Affairs, Taxes, Industry and Energy, Culture and Tourism, State Committee for Urban Building and Architecture, State Television and Radio Council, State Service for Anti-monopoly Policy and Protection of the Rights of Consumers under Ministry of Economic Development. For example, Ministry of Culture and Tourism gave *the number of cultural monuments renovated and repaired, as well as the cost of these activities* and additionally supplied *a detailed list of these monuments with their names, location and inventory number indicated.*

In several instances, the responses denied/negated the existence of a problem, hence it was found difficult to assess their veracity, as an outsider is not in a position to either confirm or refute the response. For example, Azerigas denied that *any complaints with regards to the quality of gas were received from customers* and insisted *that the gas supplied to consumers meets all requirements.* Similarly, reportedly, *no complaints related to unethical behavior of Parliament members have been received by the Parliament*, though judging by TV coverage of parliamentary sessions, this is difficult to believe.

[161] European Neighborhood Policy: Monitoring Azerbaijan's Anti-corruption Commitments, Baku, 2010, publication by Transparency Azerbaijan.

Table 3. Completeness of response

Irrelevant	Partial	Complete	Difficult to assess	Total responded
6	5	17	3	31
19%	16%	55%%	10%	100%

General comments

One of the evident tendencies derived from the analysis is that about half of respondents found it difficult to provide precise information of financial character. These questions were either ignored altogether (for example, Ministry of Finance abstained from sharing *information on the total amount of bonus for the employees of the Ministry of Finance)* or references were made to open sources of information, such as official websites, where information could not be found, as the budgets available are usually aggregate and do not provide details. For example, Ministry of Foreign Affairs made reference to the budget which indeed shows budget line on the operation of foreign countries and international missions, however, detailed data, i.e. *how much is spent on rent by the Azerbaijan embassies and consulates abroad* cannot be derived from there. Still some agencies were open enough to provide financial data, for example the Committee for Urban Building and Architecture provided information on the *amount allocated for preparation of new Big Baku Regional Development plan and its two donors, as well as the amount actually spent.*

Table 4. Responsiveness to financial questions

Financial question responded	Financial question avoided	Total financial questions asked
6	7	13
46%	54%	100%

To derive a broader scope of the openness of the public administration system, questions differed in their very nature, some focused on procedures or activities, for example, the State Registry of Real Estate was asked if *permission is required to build a partition to an apartment*. Similar question was addressed to the Ministry of Emergencies to find out *how many people drowned in the 2011 swimming season.* These questions were responded exhaustively. At the same time, questions possibly viewed as sensitive, for example, *how many people drowned in the parts of the sea supervised by the water guards*, raised with the Ministry of Emergencies were avoided. Still, some agencies were open enough, for example, Ministry of Tax did not abstain from providing information on *the number of complaints involving tax officials received and on the number of employees penalized*. The Ministry provided exhausting information, including *types of penalties imposed on tax servants.*

Table 5. Responsiveness to sensitive questions

Sensitive question responded	Sensitive question avoided	Problem denied/negated	Total sensitive questions asked
3	5	3	11
27,5%	45%	27,5%	100%

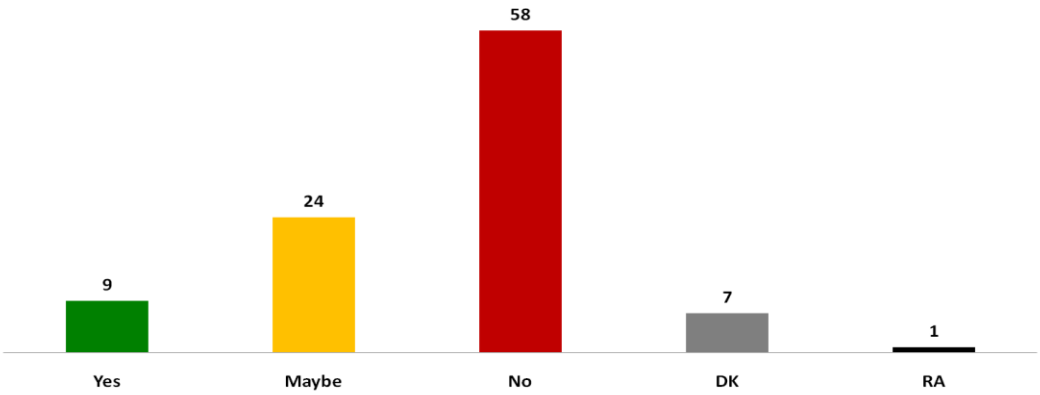
C. Public perception

Azerbaijanis obviously do not make an active use of their right of access to public information. In a poll conducted by Caucasus Research Resource Centers (CRRC)[162] both in urban and rural areas of Azerbaijan 1,481 people were requested to provide their opinions on a variety of issues related to access to information.

Only 9% of respondents would file a request letter or send an e-mail in order to get such information as state officials' salaries or budget spending, while a quarter of respondents do not rule such a possibility out. However, majority of respondents would not even exercise their right of freedom to information in order to access such type of information (58%).

Table1.

Would you write a request letter or e-mail in order to get such information as state officials' salaries or budget spending ? (%) Azerbaijan

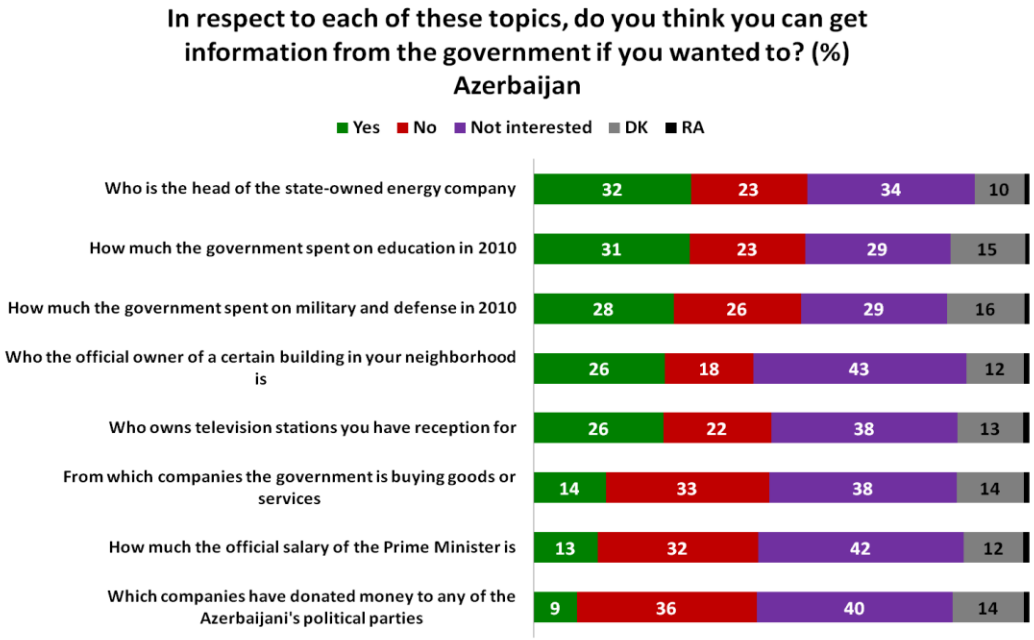


About a quarter of Azerbaijanis (32%) believe that they would be in principle able to obtain from the government information on "who is the head of state energy company". Also, various state expenditures such as "how much the government spent on education (31%) or military and defense" (28%) or questions related to private ownership as «who is the official owner of a certain building in your neighborhood" (26%) and "who owns television stations you have reception for" (26%) seem to be accessible to about quarter of the respondents. The least transparent information as perceived by Azerbaijanis is "from which companies the government

[162] Questions on freedom of information where included in the Caucasus Barometer 2012, which represents the annual household survey about social, economic issues and political attitudes conducted by CRRC in the three countries of the South Caucasus: Georgia, Armenia and Azerbaijan.

is buying goods" (14%) and "what is the official salary of the Prime Minister" (13%). Still, most difficult question seems to involve «donations to political parties" – only 9% believe that they can get a response.

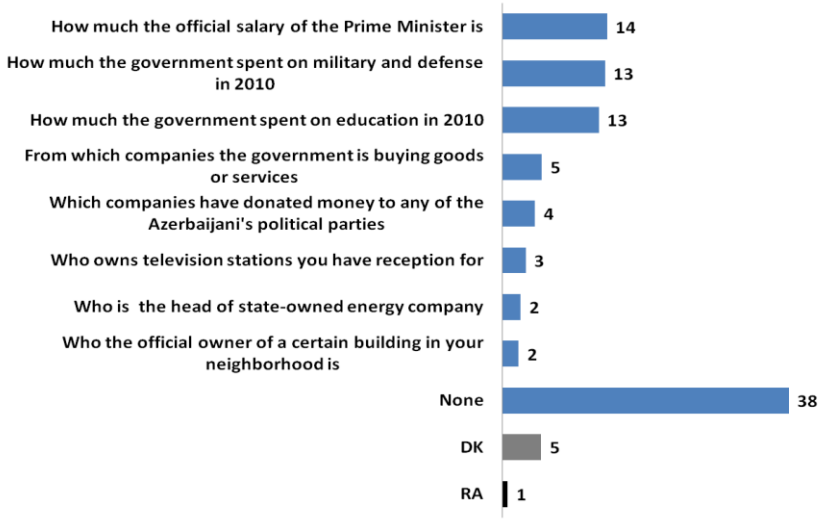
Table 2.



More than third of Azerbaijanis did not believe that they would be able to access these types of information, nor they seem to be generally interested in learning about it. 38 % of respondents found that none of the issues represent any interest to them. Only 14% would be interested in finding out the "salary of the prime minster" (14%) and government's military and defense and education expends (13% each). Most respondents are not interested in governments' procurement (only 5%) or sources of funding for political parties (4%). Private ownership is not of any particular interest as well. Only 3% were interested in the "owner of the television station they had reception for" and 2% were curious about the "official owner of a certain building in their neighborhood". As for the information on "head of the state owned energy company, this information is widely known anyway and therefore of interest only to 2% of all those surveyed.

Table 3.

Which issue would you be most interested in learning about? (%)
Azerbaijan



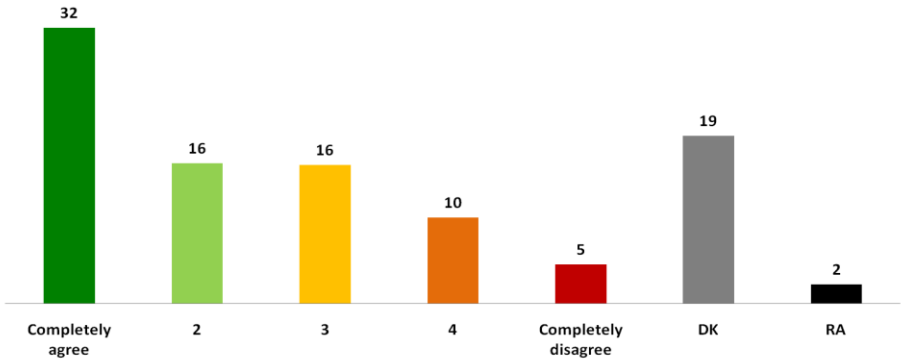
Passivity in learning public information is once again reiterated by the answers given to the question which issue would be least interesting to find out. More than one third answered that actually none of the matters under review would interest them (36%).

Interesting panorama opens when comparing interest to information against its perceived accessibility. Salary of the prime minister is the most controversial issue, as it was found the most interesting topic (14%) and at the same time the least interesting issue (another 14%), while about the same proportion of respondents (13%) believe in its accessibility. Government's expends on military and defense and education are the next most interesting blocs (13% each) and are perceived as accessible as well (28% and 31% respectively). Public procurement is of little interest (only 5% would like to know "what companies the government is buying goods from"), though 14% believe it can be available. Private sector does not evoke much interest (only 2% are interested in learning "who is the official owner of a certain building in their neighborhood" and another 3% would like to learn "who owns television station they have reception for"), but this type of information is believed to be rather accessible (26% each). Funding of political parties is neither of much interest (only 4% would like to learn this information), as well as the least available (only 9% are optimistic that they can get this data).

One fifth of Azerbaijanis are not quite sure if the statistical data collected by the government should be accessible to the public free of charge. 20% answered that they actually did not know. 32% completely agreed with the statement that such data should be accessible free of charge and only 5% disagreed.

Table 4.

Do you agree or disagree that statistical data collected by the government should be accessible to the public free of charge? (%)
Azerbaijan



Georgia

A. Freedom of information legal framework

FoI legislation since getting independence

Following the ratification by Georgia of the Universal Declaration of Human Rights (1991) and the European Convention on Human Rights (1999), the compliance of domestic legislation with these documents was placed on the agenda of the government, including freedom of information. To secure international standards, the guaranteed right to freely receive information was first enshrined in the supreme law of the country - the Constitution of Georgia, pursuant to Article 24 "Everyone has the right to freely receive and impart information, to express and impart his/her opinion orally, in writing or otherwise."

Further, according to Article 41 of the Constitution:

> Every citizen of Georgia shall have the right to become acquainted, in accordance with a procedure prescribed by law, with the information about him/her stored in state institutions as well as official documents existing there unless they contain state, professional or commercial secret.[163]

Although the Constitution of Georgia adopted in 1995 and the relevant legislation[164] provided for the possibility to issue the information stored in public institution to an interested person, there was no normative act that would define the notion of public information and the procedures for issuing, searching, and disseminating such information. This was regulated by the adoption of the General Administrative Code of Georgia[165], Chapter 3 of which was entirely dedicated to the freedom of information, terms for getting acquainted with it, grounds for refusal to issue such information, and other issues.

Notably, the Law on Procedure of Examination of Applications, Complaints and Requests to the State Authorities, Enterprises, Institutions and Organizations, which was invalidated by the adoption of the General Administrative Code, protected the right of Georgian citizens, stateless persons and foreign nationals to address any public institution with an application, complaint, and proposal.[166] Pursuant to the same law, an administrative body was obligated to examine an application, complaint and request submitted by a citizen within 10 days from its receipt,[167] while if it required further examination or inspection, within one month the latest.

[163] Constitution of Georgia, 24/08/1995.
[164] Law of Georgia on the Procedure of Examination of Applications, Complaints and Requests to the State Authorities, Enterprises, Institutions and Organizations, 24/12/1993.
[165] General Administrative Code of Georgia, 18/09/1999.
[166] *Ibid* Article 2.
[167] *Ibid* Articles 14 and 15

Information holders

Under the current legislation, the holder of public information and consequently the issuer of this information is an administrative body and a legal entity of private law funded from the state or local budget within the scope of such funding.[168]

An administrative body, which discharges public legal powers, is obligated to issue public information unless it contains a state, commercial or private secret. Same obligation applies to the legal entities of private or public law funded from the state or local budget.

Conditions, rules and forms for access to information

It is unquestionable that access to information is a significant source of formation in a democratic society. Conditions set up by the state for securing this right is of major concern.

The current FoI legislation in Georgia may require some amendment and update since it is quite old. The general right to receive public information in Georgia currently is provided in the General Administrative Code of Georgia:

> Everyone may request public information irrespective of its physical form and the condition of storage and choose the form of receiving public information in case there are several types, as well as get familiar with information in its original form.[169]

Pursuant to the relevant legislation, subject of publicity is an official document (including a chart, model, plan, diagram, photograph, electronic information, video and audio records), *i.e.* information held by a public agency, or that received, processed, created or sent by a public agency or a public servant in connection with official activities.[170]

To receive public information, an interested person must submit a written application to a respective agency. The applicant is not required to indicate the motive or purpose behind the request of the public information.[171]

Proactive Disclosure

General Administrative Code states that:

> Public institution shall be obligated to enter public information kept in this institution in

[168] Article 27, sub-para. a) of the General Administrative Code of Georgia.
[169] *Ibid* Article 37 (1).
[170] *Ibid* Article 2 sub-para. l).
[171] *Ibid* Article 37 (2).

> the public registry,[172] regardless of non-existence of information requests. Reference to public information shall be entered into the public register within 2 days after its receipt, creation, processing or publicizing, indicating its title and the date of receipt, creation, processing, and publicizing of the information, and the title or name of physical person or legal entity, public servant or public agency, which provided this information and/or to which it was sent.[173]

This is the requirement prescribed by the law for administrative agencies with regard to storing the information they have created and processed in the integrated database. Yet, the type of the data registry is still undefined. This function is primarily discharged by the chancelleries of administrative agencies.

General Administrative Code was amended[174] quite recently, according to this amendment an administrative agency is authorized to store and issue in an electronic form any document it has created or that it keeps.[175] Unfortunately the current legislation does not provide for an obligation of public institutions to proactively disclose public information on their website. That is why publicizing of information through a web site (such as decrees, orders, budget, etc.) depends on an administrative agency's good will only.

Notwithstanding the absence of such an obligation, in order to improve the transparency of activities of public institutions in the field of freedom of information, in last several years Georgia has witnessed significant progress. The public registry database[176] (register of property owners), entrepreneurs' registry,[177] debtors' registry,[178] integrated electronic system of state procurements,[179] and the integrated electronic system of declarations[180] attest the fact that the idea of proactive disclosure of public information is being successfully implemented in Georgia. However, despite positive trends, proactive disclosure of public information is not institutionally strengthened in the country yet. This is corroborated by the monitoring results of 2011 published by a non-governmental organization Institute for Development of Freedom of Information,[181] according to which the rating of informative transparency of governmental web sites does not exceed 27.10%.

The launch of the Supreme Court's decision search system[182] and the court archive on-line program[183] must be hailed. This novelty, which soon will encompass the entire court system, is undoubtedly a positive trend that increases the level of access to public information and reduces the workload of the courts' administrative staff.

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[172] In practice each public agency has its own public registry, which is not accessible to the public.
[173] Article 35 of the General Administrative Code of Georgia.
[174] Amendments to the Georgian General Administrative Code, N 5747, 02.03.2012.
[175] Article 35^1 of the General Administrative Code of Georgia.
[176] http://reestri.gov.ge/
[177] https://enreg.reestri.gov.ge/main.php?m=new_index&state=search
[178] https://debt.reestri.gov.ge/
[179] http://procurement.gov.ge/
[180] http://www.declaration.gov.ge/csb/main.seam
[181] http://www.idfi.ge/?cat=monitoring_2011_charts&lang=en&filter=all
[182] http://prg.supremecourt.ge/
[183] http://archive.supremecourt.ge/

Finally, in 2011 Georgia has joined the Open Government Partnership initiative,[184] which is focused on boosting the accountability of governments, and enhancing the transparency and openness of their activities. Among several challenges undertaken by Georgia within the partnership framework is the introduction of better management of public resources, which aims to proactively disclose on web sites of all public agencies the information existing with them and provide a possibility to request public information on-line. In addition, the integrated web page of public information - ***data.gov.ge*** - will be set up, which will host the information of interest to public, including on the state finances and budgets.

Timing for responses to information requests and transparency of decision-making

Following the submission of a written application requesting public information, an agency is obligated to issue the public information immediately or no later than 10 working days, if responding to a request for public information requires:

> a) collecting and processing of information from its structural subdivision operating in another settlement point or other public agency;
> b) collecting and processing of separate and voluminous documents that are not interrelated;
> c) consultation with its structural subdivision operating in another settlement point or other public agency.[185]

If the release of public information requires a 10-day term, a public agency shall immediately inform the applicant thereof.[186] Whereas if a public agency refuses to release the information, this must be immediately communicated to the applicant. Further, in case of refusal to release public information, the applicant must be provided with information in writing on its rights and procedures for appeal the refusal within 3 days from rendering the decision.[187]

Costs of Provision of Information

The receipt of public information in Georgia is free of charge, apart from necessary costs for making the copies. The fee of making a copy of public information and procedure for its payment is defined in the relevant law,[188] pursuant to which a copy of one page of A4 and A5 format costs 0.05 GEL[189] (US $0.03 equivalent in GEL), while printed on a laser printer - 0.10 GEL[190] (US $0.06 equivalent in GEL). It is also possible to receive public information on a

[184] http://justice.gov.ge/index.php?lang_id=GEO&sec_id=796
[185] Article 40 of the General Administrative Code of Georgia.
[186] *Ibid,* Article 40 (2).
[187] *Ibid,* Article 41.
[188] Law of Georgia on Fees of Making Copies of Public Information, 13/05/2005.
[189] *Ibid* Article 6 (a).
[190] *Ibid* Article 6 (b).

compact disk, floppy disk, video and audio tape.[191]

The fee of making a copy of public information is not payable, when:

a) Requested information is recorded on a floppy disk or a compact disk;
b) public information is sent by e-mail;
c) making the copies for physical persons of personal data existing on them in a public agency.[192]

Notably, a public institution is authorized to determine the minimum volume of public information that may be requested during one year without paying fees[193], and usually this figure depends on the budget of the administrative body, as well as on the degree of public need or interest towards the information stored.

Limitations on access to information

Apart from ensuring the guaranteed right to publicity of information stored in public institutions, the legislation of Georgia imposes limitations on disclosure of such information, if it contains a state, commercial secret or private information.[194]

State secret – is a type of information that includes data containing state secret in the areas of defense, economy, foreign relations, intelligence, state security and legal order, the disclosure or loss of which can undermine the sovereignty of Georgia or a party to international treaties and agreements, constitutional order, and political and economic interests, which under the procedure established by the law and/or international treaty or agreement is recognized as state secret and is subject to state protection.[195]

Article 7 of the Law of Georgia on State Secret includes a list of information, which may be considered as state secret and the term for its disclosure depends on the degree of secrecy.[196]

Commercial secret – is information concerning the plan, formula, process, or means that constitute a commercial value, or any other information that is used to produce, prepare, or reproduce goods, or provide service, and/or which represents an innovation or a significant technical accomplishment, or any other information, disclosure of which could reasonably be expected to cause harm to a person's competitiveness.[197] Information will be considered as commercial secret if a person indicates that this information is its commercial secret and a public

[191] Article 6 (c), (d), (e) and (f) of the Law of Georgia on Fees of Making Copies of Public Information.
[192] *Ibid* Article 7.
[193] *Ibid,* Article 8 (1).
[194] Article 10 (1) and Article 28 of the General Administrative Code of Georgia.
[195] Article 1 of the Law of Georgia on State Secret, 28/10/1996
[196] *Ibid* Article 14.
[197] Article 27^2 (1) of the General Administrative Code of Georgia.

agency renders the decision on classifying the submitted information. However, any information about a public agency cannot be classified.[198]

Information that allows to identify a person represents **personal (private) information** and whether it constitutes a secret is decided by a person, whom this information concerns. This regulation does not apply to public officials;[199] the secrecy of this type of information is limited by Article 44 of the General Administrative Code of Georgia.

It is noteworthy that the relevant legislation obligates a public agency not to collect, process, and store or release such personal data, which is related to a person's religious, sexual or ethnic belonging, and political or ideological views.[200] The law entitles all persons to get familiar with his/her personal data existing in a public institution and receive copies of these data free of charge.[201]

Notwithstanding these restrictions, Georgian legislation provides for cases when access to information containing personal data and commercial secret is granted. An interested person will be granted access to personal and commercial information, if he/she submits to an administrative body a written consent of the person, whose personal or commercial secret is contained in the respective piece of information.[202] As for the information containing state secret, as already noted above the list of such information is provided in the Law of Georgia on State Secret and it can be disclosed after the expiration of the classifying term.

Access to information targeting the activities of executive authorities, which are related to pending legal proceedings before international arbitration, foreign or international courts, where the Georgian state is a party to the case, is also limited until the final decision is delivered. Prior to rendering a final decision by a court, information can be released if the government dicedes to give access to such information pursuant to international treaty and agreement of Georgia and/or the rules of courts.[203]

Oversight over the access to information and liability for non-provision

According to Article 36 of the General Administrative Code of Georgia, a public agency is obligated to designate a public servant responsible for ensuring access to public information, who is appointed by the head of an administrative body. Legislation does not prescribe qualification requirements necessary for this position. This person can be the employee of the same institution, who will in fact also cover the obligations on ensuring access to public information.

[198] Article 27^2 (2) of the General Administrative Code of Georgia.
[199] Pursuant to Article 27 sub-para. (d) of the General Administrative Code of Georgia, a public official - an official defined under Article 2 of the Law of Georgia on Conflict of Interests and Corruption in Public Service, 01/11/1997.
[200] Article 43 of the General Administrative Code of Georgia.
[201] *Ibid* Articles 27^1 and 39.
[202] *Ibid* Article 37^1 (1).
[203] *Ibid* Article 3 (5).

Pursuant to Article 49 of the General Administrative Code, on 10th of December of every year a public agency shall report to the President and Parliament of Georgia on the number of decisions concerning the release or refusal to release public information requests throughout the year. Persons responsible for ensuring access to public information are usually responsible for processing and submitting this information.

In case of denial of access to public information by a public agency, an interested person may appeal the decision of an administrative body in court within 1 month time-limit.

In accordance with the information published on the web site of the Tbilisi City Court,[204] 177 cases were submitted in the last 5 years (2007-2011) concerning public information requests. From these, favorable judgments were rendered in 21 cases only. In the remaining cases the statements of claim were either dismissed, were left without consideration, or the proceedings were terminated.

It appears that obtaining public information through courts becomes more and more relevant, which proves that there is an interest towards the activities of the public institutions, but also that there are problems related to access to information.[205] Although the number of decisions rendered in the claimants' favor increases by 1 unit annually, the growth of index by 1 unit only in proportion to the number of claims filed annually speaks of an ineffective remedy with respect to obtaining the public information through courts.

B. Testing public

During the reporting period a total of 33 letters were sent to various public agencies. The index of correspondence generated from the sent letters was determined at 84%. The letters were left without any response by the staff of the Prime Minister of Georgia, Chamber of Control of Georgia, the Ministry of Culture and Monument Protection, the Ministry of Defense and the Ministry of Education.

Table 1. Level of responsiveness

Responded to	Not responded to	Total sent
28	5	33
84%	16%	100%

[204] http://www.tcc.gov.ge/index.php?m=534&newsid=178
[205] http://www.opendata.ge/?lang=kaen#!lang/en/cat/georgian_judicial_practice

Timeliness of responses

The holidays and weekends were omitted when calculating the index of timely correspondence.[206] The term of timely correspondence (including forwarded letters) is counted from the day when the letter was received[207] by an administrative body until the date of prepared. A response received within 4 days is considered as issued immediately (promptly).

As already noted, a public agency is obligated to issue public information immediately or no later than 10 working days and a person responsible for issuing the public information is usually ensuring that the public information is released. Out of 28 letters sent by the organization and subsequently responded by a public agency, the timely correspondence index was distributed as follows:

Table 2. Timeliness of responses.

Prompt	Timely	Late	Total responded to
2	14	12	28
7%	50%	43%	100%

Sent letters were immediately and exhaustively responded by the Ministry of Energy and Natural Resources of Georgia and the State Minister on Diasporas. Whereas, out of the 12 late responses the worst results accounted for the Ministry of Regional Development and Infrastructure of Georgia - 37 days, the Ministry of Economy and Sustainable Development - 41 days. In addition, unjustified refusals to disclose the information were issued by the Administration of the President of Georgia - 41 days, and the Ministry of Labor, Health and Social Welfare - 58 days.

Completeness of Responses

In view of the guaranteed right of publicity of information, the public information issued by an administrative body must be complete, exhaustive, and responsive to the contents of requested information. The content degree of 33 letters sent by Transparency International Georgia requesting the public information and 28 responses received was distributed as follows:

Table 3. Completeness of responses

Irrelevant	Partial	Complete	Total
4	5	19	28
14%	18%	68%	100%

[206] Article 15 of the General Administrative Code of Georgia.
[207] The letters were sent on 17 December 2011.

Out of 28 received letters, five public institutions used reference to a webpage as the means of issuing public information. For instance, to the organization's question about the number of plea bargains concluded in 2010-2011 and the total amount of financial means generated, the Chief Prosecutor's Office of Georgia stated that this information was available on the webpage of the Ministry of Justice - www.justice.gov.ge. The indicated source, apart from the incomplete link,[208] did not contain the content of requested information at all, based on which the released information was categorized as irrelevant. The webpage indicated without a detailed link was considered also unsatisfactory in case of the Tbilisi City Assembly's Office of Municipal Improvement. As for the remaining 3 public institutions - the Procurement Agency, the Ministry of Justice of Georgia and the Ministry of Energy and Natural Resources of Georgia demonstrated best results in terms of issuing timely responses and providing complete information. Apart from fully responding the submitted requests, their response letters contained additional information with references to relevant websites.

C. Public perception

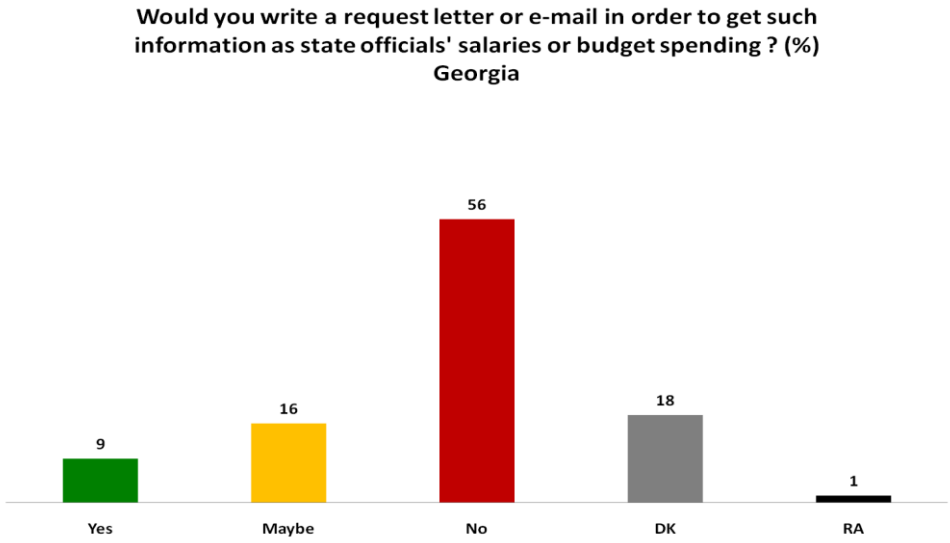
Georgians seem to be quite passive when it comes to exercising their right of access to public information. In a poll conducted by Caucasus Research Resource Centers (CRRC)[209] both in urban and rural areas of Georgia 2,287 people were asked about a variety of issues related to access to information.

Only 9% of respondents would file a request letter or send an e-mail in order to get such information as state officials' salaries or budget spending. The majority of respondents would not exercise their right of freedom to information in order to access such type of information (56%).

[208] http://www.justice.gov.ge/index.php?lang_id=GEO&sec_id=169

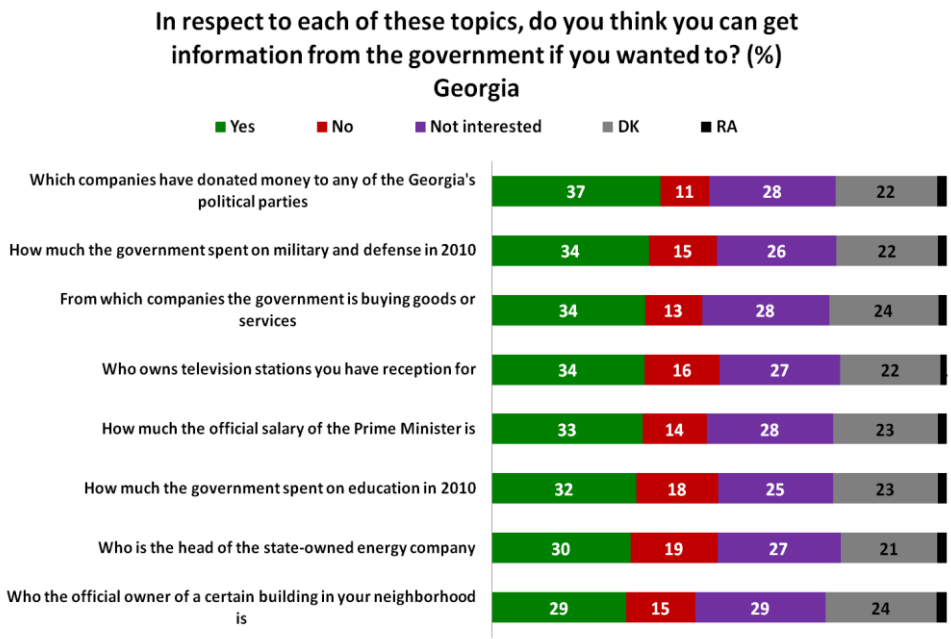
[209] Questions on freedom of information where included in the Caucasus Barometer 2012, which represents the annual household survey about social, economic issues and political attitudes conducted by CRRC in the three countries of the South Caucasus: Georgia, Armenia and Azerbaijan.

Table1.



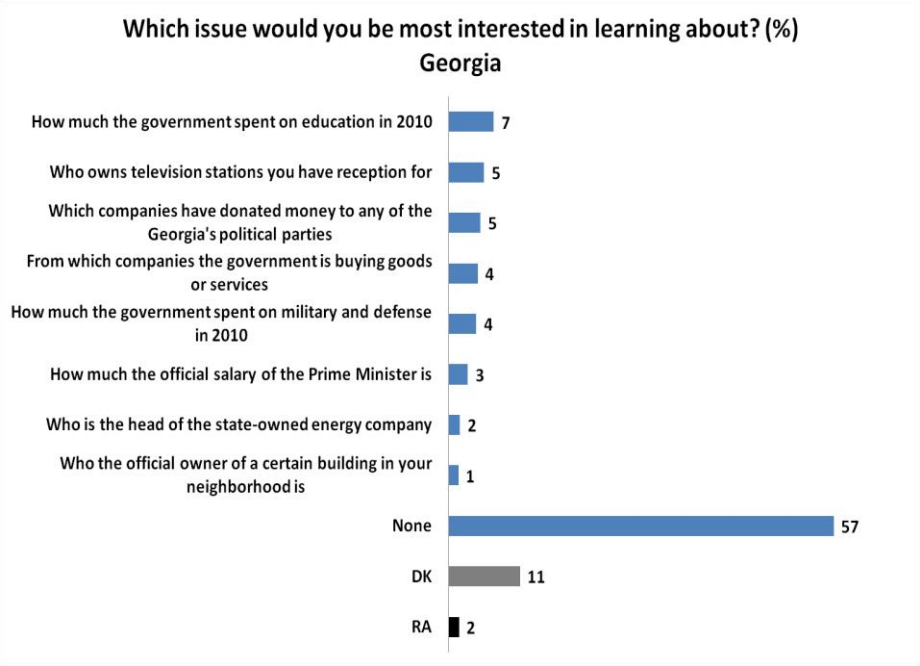
A majority of Georgians believe that they would be in principle able to obtain from the government information on various state expenditures such as "how much the government spent on military and defense" (34%) or on education (32%). Georgians also believe that they would be able to have access to such information as "from which companies the government is buying goods" (34%), "what is the official salary of the Prime Minister" (33%) or "who owns television stations you have reception" (34%).

Table 2.



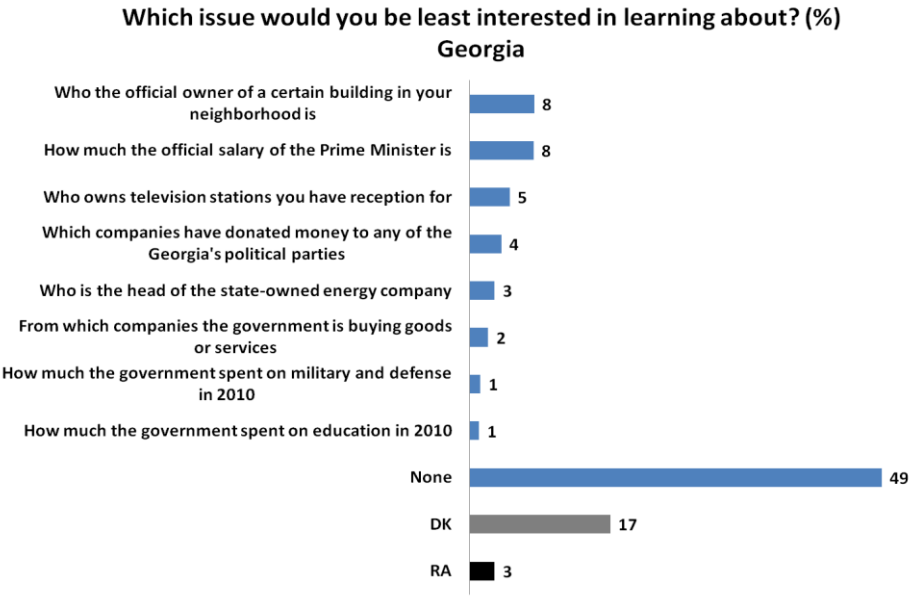
Though majority of Georgians believe that they would be able to access this type of information, it seems they are not generally interested in learning about it. 57% of respondents found that none of the issues represent an interest to them. Only 7% would be interested in "how much the government spent on education in 2010" and even state expenditures on military and defense does not seem to be one of the issues that would interest Georgians the most.

Table 3.



Passivity in learning about public information is once again reiterated by the answers given to the question which issue you would be least interested in learning about. Once again majority answered that actually none of the matters under review would interest them (49%).

Table 4.

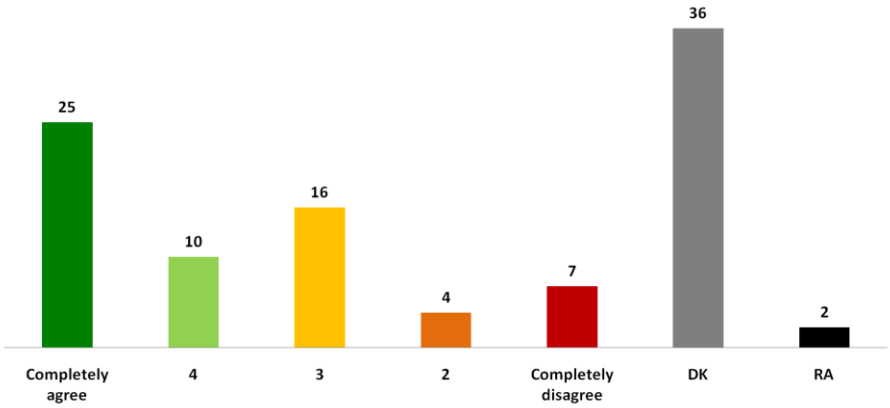


It seems that Georgians have very small interest when it comes to private sector, only 1% of the respondents would be interested in learning "who is the official owner of a certain building in their neighborhood" and another 5% would like to learn "who owns television station they have reception for"), though this type of information is believed to be rather accessible (27% and 29% respectively). Public procurement is of little interest as well, only 4% would like to know "what companies the government is buying goods from", though 34% believe it can be available. Funding of political parties is neither of much interest only 5% would be interested in learning "which companies have donated money to any of the Georgia's political parties", but at the same time this information is considered by Georgians as the most accessible one (37% stated that they would get this type of information from the government if they wanted).

Georgians are not quite sure if the statistical data collected by the government should be accessible to the public free of charge. 36% answered that they actually do not know. 25% completely agreed with the statement that such data should be accessible free of charge and only 7% disagreed.

Table 5.

Do you agree or disagree that statistical data collected by the government should be accessible to the public free of charge? (%)
Georgia



Comparative overview

A. Freedom of information legal framework in the South Caucasus

FoI legislation since getting independence

Freedom of speech, including the right to search, receive and disseminate information and ideas is to a full extent guaranteed by Constitutions of all three countries. These rights extend onto media outlets, as well as ordinary citizens and are further specified in specialized laws, which regulate conditions, rules and forms of access to information and other relevant issues. Restrictions to the freedom of information are prohibited unless specifically laid down in the law. It shall be mentioned that the legal framework is reasonably good in the South Caucasus and international best practice was reportedly taken into account.

In Azerbaijan the main shortcoming of the government lies in the lack of a comprehensive strategy and action plan to ensure implementation of the provisions of the law, though recently notable improvements are observed with active introduction of the e-government strategy. Armenia and Georgia have developed extensive action plans recently as commitments undertaken under "Open Government Partnership" initiative.

In all three countries civil society's input is significant. In Armenia the 2003 Law on Freedom of Information was a culmination of efforts started in 1999 by a number of NGOs. In Azerbaijan the adoption of the Law on the Right to Obtain Information back in 2005 was considered as a tangible success of civil society and journalists, while in Georgia there is no specialized law exclusively dedicated to FoI. This matter is regulated by the General Administrative Code.

Information holders

The concept of "information holders" is rather well defined in Armenia and Azerbaijan, where apart from state institutions and enterprises, state funded entities or municipal bodies, it extends onto private sector with monopolistic or leading role in vital sectors. It has to be noted that in Georgia the concept of "information holders" is the most restrictive one as it covers only public agencies and legal entities of private law but only if they are funded from the state or local budget and only within the scope of such funding. In Armenia, NGOs started to advocate for broadening of the scope of the law to include companies that make profits from the use of public goods, such as natural resources, cultural monuments, public spaces, etc.

Conditions, rules and forms for access to information

National laws of Armenia and Azerbaijan do not differ very much and allow both verbal and written form using a range of transmission methods. The situation in Georgia is completely different; according to the relevant legal provisions those interested in accessing information should mandatorily submit a written application to the respective agency.

In all three countries requestors are entitled to obtaining copies of various documents. In addition the applicant is not required to justify its request or indicate the motive of requesting the information.

Proactive disclosure

Importantly, the relevant legal framework in all three countries provides for proactive disclosure to lessen the number of information requests. However, the Georgian legislation does not provide for an obligation of the public institutions to proactively disclose public information, disclosure at this point is under full discretion of the public entities. Though there is no such an express obligation in the Georgian law in practice many public agencies are quite active in publishing information they hold.

The scope of data to be disclosed to the public proactively is largely different across the countries. Armenian FoI law provides a short list of proactively disclosed information, which includes the activities and services of state bodies, budgets, service prices, information about the institutions' personnel, salaries and recruitment, list of information held, procedures for information requests, public events and environmental data, which however is extended by access to information provisions of other legal acts. Azerbaijani LROI provides a broader range, supplementing items listed in the above-mentioned provisions of the Armenian FoI law with various statistical data, legal acts, drafts of acts and development plans, reports on activities, information about procurement, loans and grants, use of funds and property, etc.

The exhaustive list of information that Azerbaijan information holders should publish regardless of requests is quite a restrictive approach. The law should rather leave the list open and give a margin of appreciation to public agencies that would have the discretion to publish more that included in the list. The Ombudsman and the Cabinet of Ministers shall prepare and issue a joint document – the Rules of Disclosure of Information – which has not been performed so far.

In Azerbaijan information holders shall create an Internet Information Resource to disclose public information, while Ministry of Communication and Information Technologies should detail conditions for the creation of the Register for the Resource. The Internet Information Resource has not been created so far. The absence of a single format among different public agencies' websites presents quite a challenge for internet users, while absence of unified web scripts creates obstacles in exchange of information between various public agencies. Armenian Law on FoI does not have a requirement to create such a resource.

In Georgia at the moment there is a legislative initiative before the Parliament, which if adopted will introduce the obligation of the public agencies to publish proactively information they hold on their webpage.

Timing for responses to information requests and transparency of decision-making

Normally a written request shall be satisfied within 5 days in Armenia, while Azerbaijan LROI offers more lax conditions at 7 working days starting on the working day following the date of registration, in Georgia the law provides for two possibilities either for an immediate response or within a time-limit of maximum 10 working days, no other prolongations are possible. If more work is necessary to prepare the response, the term might be extended up to 30 days in Armenia or extended for 7 additional working days in Azerbaijan with notification of the requestor. In contrast to this provision, LPRAC gives a more lax time regime, namely: one month for review of an application, with the exception of cases envisioned by the legislation, while applications, not requiring additional review and inspection, shall be attended to within 15 days, unless other term is stipulated under legislation

In Azerbaijan a shorter procedure is foreseen in case of 'urgent' information requests (within 48 work hours), while in Armenia this provision does not exist. The Georgia legislation also provides for 'urgent" information requests, however these provisions do not refer to a time-limit.

Armenian law has limitations for access to information by foreign citizens. Such a limitation does not exist in Azerbaijan and Georgia.

In all three countries the information holder shall motivate its refusal to respond or forward the request to what it regards as the actual information holder if it does not hold the required information itself.

Cost of provision of information

Access to information is free if the requester recorded or copied the information on his own without any technical support on the part of the holder. In other cases, services may be chargeable, providing that the amount does not exceed the expenses incurred for the preparation and the disclosure of information.

Limitations on access to information

In terms of accessibility, there is a distinction between information for general use or open information and information with limited disclosure. In Azerbaijan information with limited disclosure is divided into "secret/state secret" and "confidential." Azerbaijani classification is based on the type of information: state secrets as defined by the *ad hoc* law (*supra*) and

confidentiality information. However, on 12 June 2012 the Parliament adopted amendments to several laws aimed to limit access to information on founders and financial resources of legal entities[210]. Armenian Law on State and Official Secret categorizes confidential information into three groups - of "special importance" (closed for 30 years), "top/state secret" (closed for 30 years) and "secret" (closed for 10 years), based on the extent of possible damage of disclosure to the national security. In Georgia, general provisions on freedom of information enumerate three types of information with limited disclosure, namely "state secret", "commercial secret" and "personal data".

All three legal systems also set area-specific limitations for access to information concerning details of investigation, some specific court litigation cases (rape, high treason or espionage, as well as adoption and other cases), private and family life, commercial or professional secrets (medical, solicitor or attorney); violates the copyright and/or adjacent rights. Still, the major problem is that the law gives too much discretional power to public agencies and they abuse this power by unnecessarily broadening the scope of information with limited disclosure.

Oversight over the access to information and liability for non-provision

The responsibility to satisfy information requests lays with an *ad hoc* officer or a special unit for information services, and if none in existence, then with the chief of the agency.

In Armenia and Georgia the law does not provide for an independent supervisory body/official to oversee the information holders' behavior in compliance with the law and generally does not stipulate efficient mechanisms to overcome the obstacle of non-provision of information. In contrast, in Azerbaijan the Authorized Agent on Information Matters (recent changes delegated this function to Ombudsman) shall perform overseeing functions through monitoring, Even if formally the Ombudsman has broad powers, however, all observers agree that she is practically not able to effectively ensure access to information – mostly because the institution lacks specific competence.

In Azerbaijan and Armenia responsible officials are held liable according to the legislation for illegal refusal to provide information, or for the incorrect information disposal, as well as for other infringements of freedom of information under both Administrative Offences and Criminal Codes. Armenian legislation does not provide for a clear difference between descriptions of infringements that cause administrative or criminal liability. Majority of actual cases challenge violations of the right of access to information, and there are few that demand retribution based on the administrative or criminal offense. In Azerbaijan the Code of Administrative Violations provides ample and clear mechanisms to penalize those responsible for failure to provide information. The problem is that violations of this responsibility are not effectively sanctioned, and there are several precedents when court cases have been won by applicant citizens. In Georgia there is no responsibility provided in the law for illegal refusal to provide information.

[210] As of date of finalization of this report on 14 June 2012 the bill was not signed into law.

The only means is to pursue a civil action in court and ask for damages, however if they are awarded the institution pays the damages and not the responsible official.

In all three countries, the decision not to provide information can be appealed in the court. However, court litigation being a time consuming and cumbersome procedure cannot be viewed as an effective means of protection of the right of access to information.

B. Public perception on access to information in the South Caucasus

Armenians, Azerbaijanis and Georgians proved to be quite passive when it comes to exercising their right of access to public information. [211] Only 9% of Georgian and Azerbaijani respondents and 8% of Armenians stated that they would file a request letter or send an e-mail in order to get such information as state officials' salaries or budget spending. Unfortunately, the majority (more than 50%) of Azerbaijanis and Georgians would not exercise their right of freedom to information in order to access such type of information. Armenians proved to be also very passive, about 69% of respondents expressed that they are not willing to write a letter or send an e-mail in order to get information related to state officials' salaries or budget spending.

Though Azerbaijanis and Georgians proved to be quite passive when it comes to filing freedom of information requests, they believe that overall public information would be accessible. More than a quarter of Georgians have a perception that in principle they are able to obtain from the government information on such issues as government spending, public procurement, public salaries, party financing and ownership. Azerbaijanis have a comparable perception as Georgians when it comes to access to information, though the picture is different when it comes to information targeting public salaries, public procurement and party financing. Azerbaijanis feel that this type of information is quite inaccessible. Accessibility of public information in Armenia proved to be most problematic; here less than 20% of respondents thought that they would be able to get information about the posed issues from the government if they want.

Though Georgians and Azerbaijanis believe that they would be able to access public information, it seems they are not generally interested in learning about it. 57% of Georgian respondents and 38% of Azerbaijanis respondents found that none of the issues represent an interest to them. Armenians also proved to have an indifferent attitude towards public information more than 45% appeared to be not interested in receiving the mentioned information.

When it comes to accessibility of public statistics free of charge the majority of Armenians (54%) proved to be the ones who expect that this information should be made available to the public free of charge and only 13% disagreed or completely disagreed. In Azerbaijan 32% completely agreed with the statement that such data should be accessible free of charge and only 5% disagreed. On contrary Georgians proved to be not quite sure if the statistical data collected

[211] The poll was conducted by Caucasus Research Resource Centers (CRRC) in the framework the Caucasus Barometer 2012. For details see respective sections.

by the government should be accessible to the public free of charge. 36% answered that they actually do not know. 25% completely agreed with the statement that such data should be accessible free of charge and only 7% disagreed.

Conclusion

The transparency of government is crucial in a democratic society. Unhindered access to information on issues of general interest allows the public to be informed, form an adequate view of, and consequently have an opinion on the matters that are important for the society in which they live. In addition, a society that is effectively and accordingly informed on public matters is a society where the government is transparent and accountable. The same rationale applies to the three jurisdictions under review, *i.e.* Armenia, Azerbaijan and Georgia. All three governments acknowledge the importance of the right to freedom of information and guarantee it as a right of constitutional value.

At the *de jure* level Armenia, Azerbaijan and Georgia have made significant progress toward protection and guaranteeing freedom of information to its citizens. At the same time the countries are Members States of the United Nations, Council of Europe and are aspiring to European values. All of them have ratified the most important human rights instruments containing relevant provisions for the fundamental right of freedom of information. With due attention to best practices and relevant international standards all three jurisdictions have adopted extensive domestic provisions that regulate access to information. However *de facto* there are still many obstacles in accessing information that would trigger such issues as state expenses and financial means or matters related to defense.

Armenians, Azerbaijanis and Georgians are quite passive when it comes to exercising their right to access to information. Strikingly the results of the survey showed that actually the majority of Armenians, Azerbaijanis and Georgians would not exercise their right of freedom to information in order to access public information related to the officials' salary, public procurement, party financing, defense, education and not even private ownership. Armenians proved to be the most passive from the South Caucasus in expressing willingness to exercise their right to access to information. The passivity of Georgians and Azerbaijanis could be partly explained by the fact that they feel that if they wanted they would in principle freely access such information. At the same time they showed disinterest in such matters. On the other hand Armenians believe that accessibility of such information would be quite problematic, however as their neighbors they are not quite interested in these issues.

These results clearly indicate that in all three countries of the South Caucasus people do not really comprehend the importance of this right. This would give an opportunity to both the government and the representatives of the civil society to unite their efforts in raising awareness within the population about the crucial importance of the right to freedom of information.

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