

Implementation Oversight and Enforcement Models

Nicaragua Speech

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Thank you to the organizers of this event, the Grupo Promotor and the World Bank for allowing me to speak on the topic of access to information implementation oversight and enforcement models around the world. My name is Laura Neuman and I am the subdirectora del area de transparencia for the Centro Carter. The Centro Carter, as many of you know, is a non-governmental

can lead to arbitrary denials, or it can foment the “ostrich effect”, whereby there is no explicit denial but rather the government agencies put their heads in the sand and pretend that the law does not exist. Thus some independent external review mechanism is critical to the law’s overall effectiveness.

Models

In the over 68 countries that now count on a statutory right to information, there are a number of different models for implementation oversight and enforcement as well as promotion (for example public education, training of civil servants etc.). Regardless of the model chosen, what has become clear is the need for stronger promotion, monitoring and enforcement in order to ensure compliance by the holders of information. Today I will describe some of these models.

Implementation Oversight:

The first model is an implementation oversight body distinct from the enforcement mechanism. As discussed above, common implementation challenges include¹:

almost every day we read about the increase in documents classified as secret, the reduced number of requests that are satisfied and the long delays in

Implementation and Enforcement:

federal United States. When a request for information is denied, the person must appeal to the federal court in the US case

some power to order or sanction inappropriate denials, the enforcement body may be ignored. In a major review conducted in 2002 of the Canadian Access to Information Act, the task force found that “giving the Commissioner power to make binding recommendations may well provide more incentive to departments to respect the negotiated undertaking to respond within a certain time-frame . . . it is more rules-based and less ad hoc . . . this results in a consistent body of jurisprudence that assists both institutions and requesters in determining how the Act should be interpreted and applied.”

Information Commission(ers) with the power to issue recommendations

The third and in many experts' opinions the preferred model is the one used in places such as Mexico, Ireland, and some US States and Canadian Provinces. In this model there is an independent Commission or Commissioner vested with the power to: oversee the agencies and Ministries; to investigate claims; to set guidelines; to hear cases and subpoena evidence; to make recommendations; and to issue binding orders. This model satisfies the principle of timeliness. For example, in Western Australia, they responded to most written inquiries in a matter of days and in Ireland over 50% of the cases were resolved within 3 months (although in the State of Connecticut where the Commission has order powers the time from the date the complaint is filed until the final decision is made averages 328.4 days). This model is

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- Or as one case in a small state in Mexico where there are 5 steps to selecting the Commission. The first step is voluntary nominations, where interested persons self-nominate. They are each then given a test on their knowledge of budgets, administration, politics, and history of the state. The next step in the selection process is a written psychiatric test. If successful, the candidate then has an in-person meeting with a psychiatrist. Finally, the candidates must develop a work plan and present this to a group of state legislators and civil society representatives. Although perhaps a bit extreme, particularly when you learn that their tenure is only 4 years with no possibility for re-appointment, this does provide for a trusted and independent enforcement body, one in which persons in this state have great confidence.

Other issues related to each model include the number of staff, the annual budgets and from where the money comes, (without sufficient resources, even the best enforcement and oversight model will fail) to whom they report and how they can be removed.

Role of the Ombudsman

Finally, I want to discuss the role of the Ombudsman. Although important that this body is engaged, one should be careful what duties are placed on these bodies. They have been seen to be more effective in promotion of the law, rather than in enforcement of the law. Their role could be grounded in the legislation such as in S Africa or more informal such as in Peru and Panama

In South Africa, the promotion of the law was given to the South African Human Rights Commission as part of their mandate to promote constitutional human rights. In addition to their other multitude of responsibilities, in relation to the access to information law they were tasked with promotion, monitoring, education, advise, mediation, and citizen support in litigation. They did not have any enforcement powers, such as recommendation to the agencies or power to order release of information. After two years of experience with the law, civil society began a campaign to change the Promotion to Access to Information Act to include a separate specialist entity for enforcement. There was some discussion about expanding the role of the Human Rights Commission, which was argued against by civil society leaders for the following reasons: "First, the danger of over-stretch, and related questions of resources. Second, an issue of potential confusion or conflict of roles. Third, strategic and political factors that arise." On the third issue, deciding against the executive may politicize the institution, finding for the government and potentially lose confidence of the people.

In Panama and Peru, the Ombudsman has played a key role in promoting the passage of the law; placing information on their own website, and when the law was passed providing technical capacity building and services to other public entities, such as the “Nodo de Transparencia en la Gestion Publica” of Panama. Other activities have included bringing legal cases, preparation of such manuals and materials, and supporting citizens in their request for information.