



Currently, 65% of Latin American countries have Freedom of Information Acts, some of which incorporate innovative elements that go beyond the minimum standard for transparency and access to information.

## BUILDING THE LEGAL FRAMEWORK TO SUPPORT TRANSPARENCY AND ACCESS TO INFORMATION IN LATIN AMERICA



### SUMMARY

In the last two decades, Latin American countries - including Brazil, Chile, Colombia, Ecuador, El Salvador, Guatemala, Honduras, Jamaica, Mexico, Nicaragua, Panama, Peru and Uruguay, among others - have designed and adopted Freedom of Information Acts (FOIAs). These FOIAs have increased transparency of government actions, ensured citizens' right to request and access public information, and enhanced overall accountability. This Brief describes and analyses critical features of these Latin American legal frameworks, highlighting their originality, design, preliminary outcomes, and the contextual factors that enabled their adoption. The lessons coming out of Latin American countries' experiences in designing their FOIAs will likely be of use to countries in other regions that are looking to either create or strengthen their own legal framework supporting access to information.

### MOMENTUM FOR ADOPTING FREEDOM OF INFORMATION ACTS IS BUILDING AROUND THE WORLD

FOIAs are crucial for promoting transparency because through them governments acknowledge and realise the human right to information. FOIAs set the legal foundation and the specific conditions under which this right can be exercised.

In the last two decades, Latin American countries have been at the forefront of designing and enacting laws on access to information that not only meet international standards, but actually go beyond those standards, introducing innovation and comprehensiveness. Currently, 65% of Latin American countries have a FOIA, as do 57% in

### KEY LESSONS LEARNED

A legal framework with a comprehensive scope and clear sanctions in the case of non-compliance ensures greater access to information and transparency.

An independent oversight body monitoring FOIA compliance can enforce the right to access information more effectively, thus legal frameworks including an agency like this are stronger.

By mandating governments to make public information accessible to all citizens, and particularly to vulnerable groups, FOIAs can promote not only greater accountability, but also participation and social justice.



South Asia and 17% in Sub-Saharan Africa.<sup>1</sup> The legal reforms designed in the Latin American region could be interesting in particular for the South Asian and Sub-Saharan countries that are currently discussing, drafting or adopting FOIAs, or for countries that want to strengthen their existing FOIA.

Figure 1: Map of National Right to Information Laws, Regulations and Initiatives Around the World - 2011



Source: David Banisar, [National Right to Information Laws, Regulations and Initiatives 2011](#), Article 19: Global Campaign for Free Expression, November 22, 2011.

## INNOVATIVE ELEMENTS OF LATIN AMERICAN FOIAS

Comparing and analysing across the many Latin American countries that have designed and enacted FOIAs helps highlight some of the more successful elements of countries' design of their legal framework.

In particular, this Brief focuses on five key elements of good practice and innovation demonstrated by the Latin American cases:

- Scope
- Sanctions
- Making requests citizen-friendly
- Independent oversight and appeal
- Proactively providing information

Though implementation is of course related to design, this Brief focuses on the latter; implementation of FOIAs in Latin America is discussed in the [ELLA Transparency and Access to Information Guide](#).

### Scope:

The scope of a FOIA refers to the number of agencies that fall under the law and are mandated to provide the public

information requested. The FOIAs of countries like El Salvador, Guatemala, Nicaragua and Peru are considered good practices because of their comprehensive scope. These four countries include a broad definition of 'public bodies' in their laws, ensuring that all agencies that receive or manage public funds or perform public functions are covered by the FOIA - from all branches and levels of government, to autonomous institutions, oversight bodies, state enterprises and even private entities.<sup>2</sup>

### Sanctions and protections:

A FOIA is considered a strong legal framework with regards to sanctions and protections if it includes two elements:

1. It is binding, establishing specific sanctions in the case of non-compliance
2. It offers protection for 'whistleblowers', meaning employees who disclose information to highlight possible misconduct in public agencies

Almost all Latin American FOIAs establish sanctions - either penal (Guatemala and Peru) or administrative (Chile or Mexico) - for people not complying with, or undermining, the right to access information.<sup>3</sup> Particularly interesting are the FOIAs of Chile and El Salvador, as both allow for monetary sanctions. In Chile, sanctions range from 20-50% of public officials' salary, while in El Salvador, fines can range from 1 to 40 times the minimum wage, depending on the severity of the misdemeanour.<sup>4</sup>

As for protection for whistleblowers, only Jamaica in its Protected Disclosures Act, and Chile in some laws, offer this type of protection.<sup>5</sup> For example, the Jamaican Act protects whistleblowers from dismissal, suspension, demotion, harassment, intimidation and involuntary transfer, among others.

### Making requests for information citizen-friendly:

Though a FOIA may guarantee the right to access information, the process by which citizens actually exercise that right may be so cumbersome that few citizens actually undertake it. Latin American countries have shown how to make the request for information process citizen-friendly, focusing on

<sup>1</sup> R. Vleugels. 2001. [Fringe Special: Overview of All FOI Laws](#). The Netherlands.

<sup>2</sup> FOIAs of El Salvador, Guatemala, Nicaragua and Peru

<sup>3</sup> Mendel T. 2009. [The Right to Information in Latin America: A Comparative Legal Survey](#). UNESCO, Quito.

<sup>4</sup> FOIAs of El Salvador and Chile

<sup>5</sup> Centre for Law and Democracy and Access Info. 2011. [Global Right to Information Rating](#).



three key elements:

1. Make the process easy to use, allowing citizens to submit requests by any means of communication, and to be assisted in case they need support
2. Make the process economically accessible for all
3. Establish clear timelines for compliance

In terms of making the process easy to use, Guatemala can be considered a good practice as it even allows for citizens to make requests orally.<sup>6</sup>

Furthermore, the Mexican and Jamaican FOIAs mandate public agencies to provide support to citizens making requests. In Mexico, the law requires the government units in charge of reviewing and answering information requests to help individuals make those requests, especially if they do not know how to read or write.<sup>7</sup>

In terms of costs, the Jamaican FOIA considers fee waivers for citizens with limited resources. In other Latin American countries like Chile, Guatemala and Honduras, citizens only pay for the cost of reproducing the information.<sup>8</sup>

Finally, the Guatemalan, Mexican, and Uruguayan FOIAs, for example, establish clear procedures and timelines – less than 20 working days – for providing the information. If public bodies breach these timelines and procedures without the consent of the oversight body, they are mandated to provide the information, and for free.<sup>9</sup>

#### Appeal mechanisms and independent oversight bodies:

An appeal mechanism in place is necessary to review cases in which information is denied or when citizens feel their requests were not properly addressed. Best practices mandate that appeals are reviewed by an independent oversight body, with expertise on access to information and whose resolutions are binding. [Chile](#), El Salvador, [Honduras](#) and [Mexico](#), created independent oversight bodies for reviewing appeals, that have financial and administrative autonomy and their decisions are binding.<sup>10</sup>

Political independence has been achieved by involving various branches of government and public agencies in

the appointment of Information Commissioners. In Mexico and Chile, the President appoints Commissioners and the Senate approves or rejects them. In El Salvador, the President elects Commissioners, but chooses from a list of candidates proposed by independent associations of the private sector, universities, professionals, journalists and unions. The Chilean, Honduran and Mexican FOIAs also mandate that Information Commissioners have knowledge and experience of issues related to access to information and provide them with security of tenure to ensure they are not arbitrarily dismissed.<sup>11</sup>

#### Providing information proactively:

The FOIAs of Chile, Colombia, Dominican Republic, Ecuador, Guatemala, Honduras, Mexico, and particularly Peru, go beyond merely waiting for citizens to request information by mandating that public bodies publish proactively and periodically an extensive list of information. This includes annual performance and financial reports, requirements for accessing public services, public officers' salaries, databases of social programmes' beneficiaries, procurement information, organisational structure, budget information and evaluations of programmes and policies.<sup>12</sup>

#### Making proactive information accessible to citizens: Latin American innovations

Some FOIAs mandate public agencies to make proactive information not only available, but 'accessible' to citizens. Given the region's persistent social and economic inequalities, this innovation helps ensure all citizens can access sufficient information to participate in public decisions, hold governments accountable and benefit from public services. Some noteworthy examples are:

- In Nicaragua, the FOIA acknowledges the country is multi-ethnic so public agencies must provide information in all local languages
- In Peru, the information provided on agencies' websites should also be made available in printed publications and disseminated in areas with low population density
- In the Dominican Republic, the way information is presented should make it accessible and easy to understand for all citizens

Source: Mendel T. 2009. [The Right to Information in Latin America: A Comparative Legal Survey](#). UNESCO, Quito.

<sup>6</sup>Política de Guatemala (Politics of Guatemala), "[Ley de Acceso a la Información Pública](#) (FOIA of Guatemala)", April 21st, 2009.

<sup>7</sup>FOIAs of Jamaica and Mexico.

<sup>8</sup>Centre for Law and Democracy and Access Info 2011, above n 5.

<sup>9</sup>Mendel 2009, above n 3; Mexican FOIA.

<sup>10</sup>FOIAs of Chile, El Salvador, Honduras, and Mexico.

<sup>11</sup>Mendel 2009, above n 3; FOIAs of Chile, El Salvador, Honduras, and Mexico.

<sup>12</sup>H. Darbishire. 2011. [Proactive Transparency: The Future of the Right to Information? A Review of Standards, Challenges, and Opportunities](#). World Bank Institute and the Communication for Governance and Accountability Program, Washington, DC; Mendel 2009, above n 3.



## Exceptions:

Strong FOIAs have only a limited set of exceptions, meaning situations in which the government says public information is justifiably not disclosed. International and regional standards set by organisations such as the [United Nations](#), the [Organisation of American States](#) and the [Council of Europe](#) establish that these exceptions include cases in which releasing the information might ‘harm’ or affect the public interest, such as national security, foreign policy, public health

and safety, prevention and prosecution of crimes, privacy of personal data, and legitimate commercial and other economic interests.

In the region, Nicaragua’s FOIA is considered good practice as it sets a clear list of exceptions that are in line with international standards. Moreover, for all other situations not included in the exceptions rules, the Nicaraguan FOIA and the right to information prevail.<sup>13</sup>

### Key successes and outcomes of FOIAs

Though most of the FOIAs in Latin America were only adopted and implemented in the last five to ten years, some are already showing some preliminary and promising results.

- Requests for information are high in some countries, meaning citizens are using the law: In 2003–2009, 489,739 requests were made to Mexican federal agencies. From July 2009 to September 2011, 13,017 requests were made in Chile.
- Public agencies in countries such as Chile, Honduras and Mexico are complying with publishing the proactive information that FOIAs mandate. In 2010, the compliance rate among central agencies in Chile and Honduras was high (94% and 88% respectively). In 2009, the compliance rate of Mexican federal agencies with regards to publishing proactive information was also high (82%).
- Independent oversight agencies are enforcing the right to information. To date, 98.6% of the 8,884 resolutions to disclose information made by the Mexican oversight institute in the period 2003–2009 have been fulfilled. From June 2009 to September 2011, the Chilean Council for Transparency resolved 1,388 appeals and mandated to disclose all or part of the information requested in 80% of the cases.
- Social control has improved as a result of civil society organisations (CSOs) in countries like Ecuador, Mexico, Peru and Uruguay using the right to information to monitor and evaluate public policies. When assessments have revealed mismanagement practices or ineffectiveness, civil society has held authorities accountable.<sup>14</sup>

Sources: Access to Public Information Institute Honduras. 2010. [Report on the Assessment of Public Institutions’ Compliance with the FOIA](#); Chilean Council for Transparency. 2011. [Statistical Report September 2011](#); Mexican Federal Institute for Access to Public Information. 2010. [Seventh Activities Report to the Mexican Legislature 2009](#); Peruvian Ombudsman Office. 2005. [Ombudsman Report 96: Assessment of the Peruvian FOIA in its first two years 2003–2004](#); [“The Council for Transparency presents its first ranking on Active Transparency”](#); Chilean Council for Transparency, January 18<sup>th</sup>, 2011 (Press Release).

## KEY CHALLENGES

Though having some clear successes, countries in the region have faced challenges in designing and enacting successful FOIAs<sup>15</sup>

Despite enacting FOIAs, a culture of secrecy still prevails among public officials in many Latin American countries who are resistant to providing the information requested. Long-term awareness-building campaigns for public officials have been a key strategy implemented by governments and civil society to address this challenge. Independent oversight bodies’ rulings have been fundamental to enforcing the right to information.

For example, to avoid providing information, many agencies tend to argue that the information falls within the category of exceptions, even if this is not the case. Public agencies have

also contested the FOIAs or the resolutions of oversight bodies mandating the disclosure of the information before the Courts. Finally, in some countries, the agencies in charge of imposing administrative or criminal sanctions, such as the Judiciary and the Comptroller General, ignore the cases reported by Information Oversight Bodies or Commissions.

Some countries have not allocated enough funds to implement the FOIA. In many cases, the lack of adequate physical and human resources prevents public agencies from performing their tasks related to assuring access to information.

Finally, citizen demand for information is still low in most Latin American countries. Journalists, academics, public officials and civil society members tend to be the only ones who request and consult public information, while the average citizen does not.

<sup>13</sup>Centre for Law and Democracy and Access Info 2011, above n 5; FOIA of Nicaragua.

<sup>14</sup>To learn more, including accessing case studies from Mexico, Ecuador and Costa Rica, read the [ELLA Brief: Using Information for Accountability and Justice: Lessons From Latin American Civil Society](#).

<sup>15</sup>Centro de Archivos y Acceso a la Información Pública, Open Society Foundation. 2011. [Yenciendo la Cultura del Secreto: Obstáculos en la implementación de políticas y normas de acceso a la información pública en siete países de América Latina](#) (Overcoming the Culture of Secrecy: Obstacles in the implementation of Access to Information laws and policies in seven Latin American Countries). Montevideo; Regional Alliance for Freedom of Expression and Information. 2009. [Informe Saber Más. Informe Regional sobre el Acceso a la Información como herramienta para acceder a otros derechos](#) (Knowing More Report: Regional Report on Access to Information as a Tool to Access Other Rights).



# CONTEXTUAL FACTORS

# ENABLING SUCCESSFUL FOIA DESIGN



Even if there are still challenges in effectively enforcing the right to information, the enactment and adoption of FOIAs in many Latin American countries was made possible because governments had the political will to open up their functioning to public scrutiny and to acknowledge citizens' right to access information.

Courts cases – prior to having FOIAs in place - that mandated governments to protect and enforce citizens' right to information set the foundation for later FOIAs to be passed, such as in Uruguay and Chile.

The democratisation process that Latin American countries underwent in the last two decades allowed for the emergence of a vibrant civil society with expertise on access to information. In many countries, notably in Mexico,<sup>16</sup> Uruguay, Ecuador and Chile, civil society was able to coordinate its efforts, form a national network to advocate for the FOIA, and even collaborated in its design with governments and legislators. The media also played a major role.<sup>17</sup>

The [Regional Alliance for the Freedom of Expression and Information](#),<sup>18</sup> a regional network of CSOs from 19 American countries, provided technical and political support to countries and advocated before international organisations like the OAS and the [Inter American Commission of Human Rights](#) for the drafting or adoption of FOIAs.

Indeed, regional organisations played a major role supporting the enactment of FOIAs in Latin America. Through some landmark decisions, the [Inter American Court of Human Rights](#) acknowledged the right to information as a fundamental human right and mandated the implementation of FOIAs in the region.<sup>19</sup> The [Organisation of American States](#) (OAS) drafted a [Model Inter-American Law on Access to Information](#) setting the minimum standards that governments should follow when designing their FOIAs. The OAS' [Office of the Special Rapporteur for Freedom of Expression](#) has actively monitored that states are fulfilling the right to freedom of expression and access information.

## LESSONS LEARNED

- 1 A legal framework with a comprehensive scope, covering all branches and levels of government, tends to ensure to a greater extent citizens' access to public information and transparency.
- 2 An oversight body with political, financial, and management independence, that can review and resolve appeals and whose decisions are binding, is more effective in enforcing the right to information. Legal frameworks that mandate a body like this then tend to be stronger.
- 3 FOIAs should include a clear system of sanctions and enforcement mechanisms for institutions not complying with the law.
- 4 Civil society can effectively collaborate with governments' to design or draft FOIAs.
- 5 The Latin American experience shows how governments can go beyond the minimum standards of FOIAs, including innovative elements like mechanisms to make information requests citizen-friendly and providing information proactively.
- 6 By mandating that proactive information is accessible and disseminated to all, and especially to vulnerable groups, FOIAs can help ensure that all citizens have sufficient information to participate in public decisions, hold governments accountable and benefit from public services.

<sup>16</sup> A. Puddephatt. 2009. *Exploring the Role of Civil Society in the Formulation and Adoption of Access to Information Laws: The Cases of Bulgaria, India, Mexico, South Africa, and the United Kingdom*. World Bank Institute and the Communication for Governance and Accountability Program, Washington, DC; Open Society Institute (OSI). 2006. *Transparency & Silence: A Survey of Access to Information Laws and Practices in Fourteen Countries*. OSI, New York.

<sup>17</sup> For more information on the role of these civil society coalitions and networks in promoting FOIAs in Latin America, consult the [ELLA Guide to Transparency and Access to Information](#).

<sup>18</sup> To find out more about this Regional Alliance, read the [ELLA Brief: Civil Society's Regional Network for Advancing Freedom of Expression and Access to Information](#).

<sup>19</sup> For more information on relevant decisions from the Inter-American Court of Human Rights, read the [ELLA Guide to Transparency and Access to Information](#).

## CONTACT FUNDAR

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To access key publications written about FOIAs in Latin America, read the [ELLA Spotlight on Publications](#). To learn more about Transparency and Access to Information in the region, read the [ELLA Guide](#), which has a full list of the ELLA knowledge materials on this theme. To learn more about other ELLA development issues, browse other [ELLA Themes](#).

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