

PROPOSAL FOR ARTIGO XIX, BRASIL  
An Analysis of Freedom of Information Law Oversight Agencies  
On Paper and in Practice

### **Framing the Research**

The objective of this report is to compare the relative effectiveness of enforcement mechanisms safeguarding public records laws. Unlike other studies (Neumann 2009; Nino 2008), the focus here rests on the perspectives and experiences of users and officials. The report analyzes how reforms or “informal institutions” (practices unaccounted for by how institutions work “on paper”) help or hinder enforcement and the resolution of user grievances.

Governmental mechanisms to enforce freedom of information laws vary greatly around the world (Neuman 2009). In some countries well-articulated oversight agencies handle much more than enforcement; they decide on appeals, complaints, and regulation. In other countries oversight agencies have only limited recommending powers. In yet other countries there are no oversight agencies; instead, citizens must rely entirely on various forms of internal appeals or the court system for enforcement. Increasing debate has surrounded whether information commissioners — especially ones that centralize decision-making power over appeals, complaints, and regulation— demonstrate greater effectiveness than more de-centralized systems (Neuman 2009: 11). How well do different systems serve the public, and what are the key obstacles that stand in the way of greater effectiveness?

The proposed report is divided into two parts. A brief introduction and analysis of different enforcement systems comprise the first part. The second part consists of three case studies, those of Mexico, Canada, and the U.S. These two sections are followed by a conclusion in which the aforementioned cases are examined within a broader international context.

The countries at the center of the analysis represent three well-regarded laws of varying vintages (old, younger, youngest) and types of enforcement and power (information commissioners with order-making power and recommending power, respectively, and an “outsourced” system, where enforcement is handled by the judicial system).

### **Format**

This report analyzes these questions in the following format:

PART I.	Page 1-2:	Introduction
	Page 2-5:	Different types of institutional mechanisms governing public records laws, their functions, advantages and disadvantages
PART II.	Page 5-15:	Case Studies on Mexico (4 pages), Canada (3 pages), the U.S. (3 pages) [all case studies look at challenges to greater effectiveness, potential solutions, and recommendations]
	Page 16-18:	Canada, Mexico, and the U.S. in Global Perspective
	Page 19:	Bibliography and resources

The following pages describe the different components of the report and then follow-up with a description of tasks, hourly allocation, and total cost.

## PART I

Part I discusses the following issues:

### **Oversight agencies, examples, and definitions**

What is the role of oversight agencies in disclosure regimes? The introduction first answers this question by briefly describing their technical role and then providing examples of different experiences in a few countries around the world. At end of this section I provide a minimum definition for oversight agencies, specifying necessary and sufficient conditions.

### **Different types of oversight agencies and their functions**

The introduction also discusses the different types of agencies and their various functions. I will follow the model of Laura Neuman (2009) by looking at three broad types of Oversight Agencies that exist:

- The Order-Making Information Commissioner Model
- The Recommending Information Commissioner Model
- The Outsourced Oversight Model (e.g. within the comptroller, justice department, or ombudsman's office, among other locations that are not information commissioners, ultimately decided by the courts).

### **Advantages / disadvantages of the different types of systems**

The introduction also compares the relative advantages / disadvantages of different types of mechanisms used to resolve public disclosure grievances: the court system, and oversight agencies of varying powers. I provide a graphic (a table) that lists advantages / disadvantages for each.

Here, I also describe examples of the sorts of functions oversight agencies perform. This section includes a graphic in the shape of a horizontal cone, listing the functions of agencies, from basic functions (e.g. only appeals) to multiple functions (e.g. appeals, setting regulation, appointing information officers, etc).

## PART II. OF THE REPORT

Each case study will begin with a brief look at the formal system of enforcement in place. Second, it will examine available data. Third, it will systematically analyze the issues set out below, analyzing the obstacles that requesters face, and the institutional challenges. Fourth, it will complement each of these 'challenges' with potential solutions and recommendations. The case studies will be based on primary data, secondary works referenced, and interviews undertaken.

### **Problems requesters face when using oversight agencies**

User problems are specified as follows:

- Accessibility (e.g. difficult appeal process, public knowledge, methods [e.g. telephone])
- Responsiveness (e.g. do not acknowledge appeals or complaints, inform on progress)

- Timeliness (i.e. delays)
- Effectiveness (i.e. consistently providing applicants with unsatisfactory outcomes)

### **Challenges to enforcement**

Each case study discusses factors that influence the relative effectiveness of enforcement mechanisms. The main factors are specified as follows:

- a) Adequacy of powers ascribed to enforcement mechanisms.
- b) Adequacy of bureaucratic capacity, training, implementation, motivation, and efficiency.
- c) Adequacy of resources and support to meet its objectives.
- d) Susceptibility to political capture (i.e. to what extent the agency's independence is guaranteed).
- e) External Support: from politicians, public officials, the news media, advocate civil-society organizations, and external actors (i.e. donors, regional and international organizations)

### **Justifying Case Selection**

#### Mexico—Order-making information commissioner

Mexico's information commissioner has received global praise, for its independence, sweeping powers, and its proactive disposition in national, regional, and international terms. There is growing evidence, however, that several problems are undermining this institution's independence (budgetary reliance on Congress) and efficiency (backlog). This case study will evaluate—almost a decade after its establishment—to what degree the order-making information commissioner works. There are those who believe that leaving enforcement to the courts provides for greater insurance of independence and more reliable efficiency. I have many excellent contacts in Mexico and a deep knowledge of the case.

#### Canada—Recommending information commissioner

Canada's information commissioner has the ability to address complaints, but it cannot rule on appeals and its decisions are not binding. In spite of its efforts, the Information Commissioner has not developed a productive relationship with the current Conservative government, which has demonstrated a penchant for secrecy. A parliamentary report calling for "urgent reform" has languished in parliament since 2008. Canadian FOI experts claim that the Information Commissioner lacks the authority to be taken seriously by other federal entities and that the courts are not doing an effective job. Others have claimed that Canada's system works well simply because of the government's high levels of bureaucratic capacity and compliance. Canada's "hybrid" system, which combines an information commissioner with recourse to the courts, provides an informative counterpoint to Mexico's IFAI and the U.S. court-based system.

#### U.S.—Court System

The U.S. system has garnered a mixed reputation. Many experts complain that compliance is weak and that the prevailing reliance on the courts is overly onerous, especially given the financial burdens and delays associated with judicial appeals. Others view the U.S. system as highly flexible, where informal practices of persuasion or "back-door" methods allow aggrieved parties to resolve disclosure difficulties. Either way, the U.S. system has much to teach us about using the court system as an enforcement mechanism.

## **Canada, Mexico and the U.S. Experiences in Global Perspective**

Serving both as a conclusion and a broader analysis, this section will examine experiences of North American countries in the light of other experiences around the world. It will rely principally on an examination of existing literature.

### Proposed Interviews

#### **Canada**

Ross Hodgins (Senior Advisor, Information Commissioner-Canada)

Suzanne Legault (Information Commissioner-Canada)

Toby Mendel (Expert-Canada, Global)

Alasdair Roberts (Expert-Canada, India)

Ken Rubin (Expert, Reporter-Canada)

#### **Mexico**

Daniel Lizárraga (Reporter-Mexico)

Anabel Hernandez (Reporter-Mexico)

FUNDAR (FOI expert-Mexico)

María Marván (Commissioner-Mexico)

#### **U.S.**

Melanie Putsay (Information specialist DOJ-U.S.)

Kate Doyle or Tom Blanton (Experts-U.S.)

Thomas Susman (Expert-U.S.)

#### **Global interviews**

Johan Lindberg (Australia)

Roger Vleugels (Expert-International)

David Banisar or other expert from Article XIX (Expert-UK)

### References to be Consulted and Bibliography for the Report

<http://www.right2info.org/information-commission-ers-and-other-oversight>Article 19

Canadian Association of Professional Access and Privacy Administrators

Carter Center

Commonwealth Human Rights Initiative

Council of Europe Convention on Access to Official Documents 2008

Department of Justice (U.S.)

Fundar (Mexico)

IFAI (Mexico)

International Information Commissioners Conferences (papers)

Office of the Information Commissioner (Canada)

OECD project

Open Society Justice Initiative

Sunshine Initiative (U.S.)

World Bank Institute

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Sobel, David L. et al. 2006. The Federal Institute for Access to Information in Mexico and a Culture of Transparency. University Park, P.A.: Annenberg School for Communication, University of Pennsylvania.

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