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HABEAS DATA AND  
ACCESS TO INFORMATION REPORT:

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An examination based on the  
revision of files,  
rulings and interviews with  
litigants and judges



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# Introduction [1]

THE HABEAS DATA process was established by the 1993 Constitution with the aim of guaranteeing the right to access public information and the right to informative self-determination, both recognized in articles 2 section 5 and 2 section 6 respectively, of our Constitution.

This process' regulation has been compared from the beginning by legislators to the writ of Amparo, which like Habeas Data, is another of the constitutional processes established by article 200 of the constitution. In fact, the 1994 Habeas Data law 26301 (repealed) established in article 3 that the supplemental regulation for the Habeas Data procedural processing should be that of Amparo. Then, in 2004, the Constitutional Procedural Code (current) was more specific when pointing out clearly that the Habeas Data proceedings should be the same as Amparo's, except for one important matter; the 2004 code eliminated the obligation to be represented by a lawyer in the Habeas Data process.

The unanimous opinion of experts in constitutional law is that optional representation by a lawyer, in the case of Habeas Data, entails the intention of clearing the public's way towards the access to justice. Another reform by legislators regarding that same process was conceived along the same line, when eliminating from the new code the requisite established by the 1994 law that stated that a notarized letter requesting information had to be presented to the State before appealing to the law.

There is no doubt, from the standpoint of this analysis, that this reasoning is evidently sound, as the effects of these two decisions favor access to justice. In fact, it is evident that the obligation to send a notarized letter to the public entity to be sued entailed additional costs, or was an inadmissible and irrational barrier against those who wanted to assert their rights before the law. Regarding the defense council, it was also understood, through an undoubtedly more pragmatic analysis, that professional fees were an expendable cost within the framework of this process, so that the lawyer's signature on the demand could be eliminated, making it even easier to get to the judge.

The problem that arises from optional representation, made evident through the empirical method in this report, is that the effects of electing whether to be represented or not by a lawyer extend beyond the moment of access to justice. The effects of the plaintiff's decision impregnate all of the process' stages and, in

theory, could turn against him if we take into account that the power to choose between a lawyer's knowledge and our own understanding contradict the Habeas Data's procedural regulations, which are those of the writ of Amparo's, and are adapted to the requirement of representation by a lawyer.

In order to explain this idea more graphically let us bear this in mind: if the plaintiff decides to take the process into his own hands, he will have to be able to include in the written document to be presented with the lawsuit, all the formalities demanded by the writ of Amparo. If he does it satisfactorily and the judge admits the lawsuit, his strategic position within the process gets more complicated, as the public entity that is the defendant *must* be represented by the public prosecutor or a hired lawyer during the trial.

The investigation matter of this document exceeds its original scope. It was initially set out to be a revision of the sentence enforcement stage in Habeas Data processes declared founded - totally or partially – by the Constitutional Tribunal (CT). Our initial aim was to understand the motives that lead, in many cases, to favorable sentences but do not entail, necessarily, the handing over of information. Our initial hypothesis for this investigation was that, in general terms, it was more probable that Habeas Data proved to be ineffective when a plaintiff who did not receive counsel from a lawyer requested information from the State.

We realized, as we proceeded with our research, that this took place in the process' final stage, when the sentence was to be enforced, and could not be understood without an examination of the whole process/trial. We discovered some elements that helped us to understand how the Habeas Data process ends up being developed through mainly formal channels, not only those of the writ of Amparo, but also those of the supplemental legislation, even though the Constitutional Procedural Code expressly makes the substitution of formalities entailed in other procedural regulations conditional to their suitability to the Habeas Data's aim, which is to guarantee the prevalence of fundamental rights.

The findings presented in this document intend to open a space in which to introduce hypothesis or questions about the efficacy of the Habeas Data process, from the perspective of the plaintiff's legitimate interest in having his right asserted in court. To provide answers for these questions is not this document's intention.

The universe of files examined does not allow us to present our findings as general rules or characteristics of the Habeas Data processes, but it does establish a baseline from which to develop working hypothesis and more exhaustive investigations. Our analysis has been restricted to the performance of the Judiciary's magistrates, and of the litigants when they present themselves before the courts.

The document's aim is to contribute, through the introduction of information drawn from files and interviews, to the improvement of the Habeas Data process. Although no reliable statistics are available, there is evidence that this is a residual process among the whole series of legal processes, in general, and constitutional ones in particular. This situation places the Habeas Data process in an unfavorable position when it comes to finding people who are interested in subjecting it to a systematic and rigorous evaluation with the aim of implementing improvements. This document aims to contribute evidence about the performance of the parts involved in the process, defining their actions and the results obtained.

Habeas Data is not only interesting in itself, but also because its authority entails the protection of the right to access public and private information. It has been interesting to observe how the interventions of the different parts in the Habeas Data process are analogous to their actions in the administrative procedure to access information. In the same way as the Public Prosecutor – the State's lawyer – employs all kinds of arguments and resources to deny the plaintiff any information, in the administrative stage the person who requests information must also confront all kinds of answers, or in the worst case scenario, the administration's silence.

Following this same line of thought, if during the administrative stage the plaintiff has nobody to turn to, once involved in the legal process to access information, the judge will provide no guidance that could help him understand how to assert his right, thinking maybe that his impartiality would be reviewed. It would be interesting to evaluate the meaning of the concept of impartiality within a constitutional process.

Instituto Prensa y Sociedad's interest in contributing to the debate about possible improvements to the Habeas Data process is based in its legal experience between 2002 and 2008. This was supported from its beginning, both financially and technically, by the Open Society Institute.

This report presents the main findings and conclusions drawn from the revision of 105 Habeas Corpus sentences, declared to be founded by the TC, the detailed analysis of a sample consisting of 58 files<sup>1</sup>, and the results of interviews with twenty-one (21) judges, seven (7) public prosecutors and five (5) plaintiffs.

The original aim of the investigation also had to be modified as we went along. We assumed initially that it would be relatively easy to access the 105 files ruled on by the Constitutional Tribunal, as most of the sentences were at least a year old. We believed, therefore, that the places to look for these would naturally be the archives. Surprisingly, nearly half the files were still being processed, their sentences were being enforced or they had been placed in a provisional archive. This made them hard to access, as authorization from the plaintiffs was required, and they usually prefer to forget the process when it reaches that stage (this is symptomatic of the Habeas Data process).

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1 Of the general universe of 105 cases, the sample consisting of 58 files corresponds to those whose legal process has been analyzed more thoroughly.

## Sentences issued by the Judiciary in the universe of examined files

[2]

CHART 1 SHOWS, in a brief but precise manner, the rulings that each of the 58 examined cases merited in each instance. The fact that the plaintiffs had the law behind them did not prevent the last judicial instance to reject their lawsuits before they were evaluated by the CT as an extraordinary instance. In spite of the rightfulness of each one of them, it was impossible to avoid that they should pass by the difficulties of a verifiably inappropriate and ineffective process to satisfy their interests. They had to wait, unnecessarily and unjustifiably, during an excessive amount of time, as can be seen in some of the charts we will be presenting with our report.

**CHART 1:** SUMMARY OF 1<sup>ST</sup> AND 2<sup>ND</sup> JUDICIAL INSTANCE RULINGS

No. of cases	Request	1st instance ruling	2nd instance ruling
1	Information about the use given to State funds that had a specific purpose	Inadmissible	Inadmissible
1	Request for the rectification of personal information in a State entity's registry	Founded	Unfounded
1	Number and information about ongoing and completed processes against a public entity regarding a specific matter Number of persons who approached the entity to claim a specific right (payment of estimated value for expropriation)	Founded	Inadmissible
1	Certified copy of Administrative Resolution that grants retirement pension	Inadmissible	Inadmissible
1	Copy of urban redevelopment files	Unfounded	Unfounded
1	Request for detailed budget and a description of work done by Municipality	Unfounded	Unfounded
1	Documents pertaining proceedings against Peru in the Inter-American Commission on Human Rights (this case has been concluded)	Founded	Unfounded
1	Request for annual budgets, a list of remunerations, a list of staff, a list of income and expenditures (San Agustín National University)	Inadmissible	Inadmissible
2	Personal evaluation file before the Magistrates' National Council	Founded (2)	Partly unfounded (1) Partly inadmissible (1) Inadmissible (1)
1	Agreement for the appointment of university authorities	Inadmissible	Inadmissible
1	Request for information pertaining the sale of a property (sale by a public limited company)	Founded	Inadmissible
1	Request for information sent to the Municipality of Surco about the participation of officials in a report and property value maps used by certain companies	Founded	Unfounded

No. of cases	Request	1st instance ruling	2nd instance ruling
1	Information pertaining the lease of machinery and the number of hours it operated requested from the Municipality of Ferreñafe	Unfounded	Unfounded
1	Request for IT information, passwords and copies of the documents that the Banco del Nuevo Mundo auditors, designated by the SBS, may have delivered to the Banco Interamericano de Finanzas <sup>2</sup>	Founded	Unfounded
1	Certified copy of the report produced by the Placement office (National Congress) which includes working background and other information	Partly founded and partly unfounded	Inadmissible
1	The plaintiff requests certified copies of the administrative file showing his resignation/cessation as a worker in Congress and a report of his daily attendance	Founded	There is no point in issuing a statement (the request was dropped)
1	Report of the Permanent Commission for the Selection and Appointment to the National Magistrate's Council, generated from an accusation made by the interested citizen regarding an applicant to the position of judge <sup>3</sup>	Founded	Unfounded
1	Information about the procedure followed by the Notaries' Association to monitor notaries' compliance with laws and regulations	Inadmissible	Inadmissible
39	Personal file generated by a process involving the Executive Commission for the assessment of arbitrary layoffs	Founded (17) Unfounded (5) Inadmissible (18)	Unfounded (8) Inadmissible (31)

<sup>2</sup> A case that could allow some level of controversy within the framework of the whole sample.

<sup>3</sup> A case that could allow some level of controversy within the framework of the whole sample.

## Findings based on the examination of files and rulings

[3]

**CHART 2:** TYPES OF FIRST INSTANCE SENTENCES

Type of sentence	Total	Partial sample
Founded <sup>4</sup>	43	24
Unfounded <sup>5</sup>	19	10
Inadmissible <sup>6</sup>	42	24
Request was dropped	1	
<b>TOTAL</b>	<b>105<sup>7</sup></b>	<b>58</b>

Although the plaintiffs had the law behind them, nearly 60% of the habeas data lawsuits were rejected in the first instance.

**CHART 3:** TYPES OF SECOND INSTANCE SENTENCES

Type of sentence	Total	Partial sample
Unfounded <sup>8</sup>	25	17
Inadmissible <sup>9</sup>	77	40
Request was dropped	2	1
<b>TOTAL</b>	<b>105</b>	<b>58</b>

4 When the judge declares the demand founded or unfounded, he is ruling on the controversy's substance and he declares the parties' rights.

5 Because there are few resolutions that are partly unfounded (5) they are included among those declared totally unfounded (14).

6 When the judge declares a demand to be inadmissible, he is ruling about aspects related to its form that he considers irremediable and are the reason why he cannot address the information request presented

7 We could talk of 105 first instance sentences in total, inasmuch as two rejections in limine were declared void by the Superior Court.

In both cases, in a second ruling, the courts declared the demands founded. This ruling is the one considered in this chart.

8 Of the 25 resolutions declared unfounded, two were unfounded partially.

9 Because there are few resolutions that are partly inadmissible (1) they are included among those declared totally inadmissible (76).

In nearly all known second instance cases, except those that did not lead to a judge's ruling because the material was dropped, the lawsuits were declared unfounded. In 43 of them the first instance ruling was overruled.

With regard to the studied cases, we must point out, firstly, that they are requests for evidently public information, which leads us to ask about the motives for these requests to be aired in court. Secondly, all second instance sentences rejected the right to access information, while in the case of first instance rulings 60% of them did. Evidence allows us to identify a pronounced judicial tendency to stay within the formal rules of proceeding, and to a limited resort to the Transparency and Access to Public Information Law, which is precisely the one that defines and classifies information as secret, classified or confidential.

### 3.1. Public prosecutors' strategies

Even when it is evident that the law is behind the plaintiff, public prosecutors base their defense on aspects which differ from the exceptions established by the Transparency and Access to Public Information Law. Of the 16 cases<sup>10</sup> in which the public prosecutors asked that a writ of Habeas Data be declared unfounded (of the 58 cases sample), they only based their arguments on the exceptions mentioned by that Law in 5 cases. In the other cases (11), added to the 42 in which they asked for the lawsuit to be declared inadmissible (53 in total), their arguments responded to objections based on formal aspects of the demands, such as the following:

- The plaintiff has to prove that the information requested exists.
- The request for information is rejected because of the reasons that motivate it, not because the information is secret, classified or confidential.
- The plaintiff has to prove that the information requested is public.
- Even when formalities must adapt to the process' specific aims, pleas of inadmissibility concerning the plaintiff's lack of locus standi are presented when, within a same Sector or entity, he requests the information from a different authority or office than the one in charge of providing it, or the one that is in possession of it.

<sup>10</sup> In six of these cases the prosecutors requested, in turn, that the demand should be declared unfounded or inadmissible.

- Even when the information refers to the interested parties' personal details, regulations conceived to protect it from being relayed to third parties are invoked. That is, a person who expresses and shows a personal and direct interest in the requested information is treated as a third party.
- Information is presented as classified and third parties' rights are invoked, even when the requested documents became public information when they were incorporated into administrative processes of that nature; etc.

We need to point out that when faced by a request for information, the State can only refuse it if the Law expressly states that it should, as is the case with the exceptions stipulated in the Transparency and Access to Information Law, when the information is classed as *secret, classified or confidential*. However, we have seen that this justification, which in theory should be the only one, was only invoked in 5 of the 58 cases examined. In all other cases the refusal was based on objections based on formal aspects of the demand that were corrected in due time by the CT, which ruled in favor of the plaintiffs in all cases. We must point out that even when a case was processed before the Transparency and Access to Information Law came into force (only 5 of the 58 cases), these exceptions could be inferred from article 2 section 5 of the Political Constitution<sup>11</sup> or other special regulations; however, in at least two of these cases, none of these were invoked.

It has become clear that the issues debated during an Habeas Data process bear no relation to those imposed by the law. A wide range of legal resources can be invoked by the public prosecutors, and they are especially interested in avoiding a discussion involving the substance of the law.

We have been able to observe that the public prosecutor's intervention, as a State official, aims to cover up arbitrary decisions made by the public administration by presenting before the judicial authority a type of controversy that aims to avoid a debate about the substance of the law. The files that are part of our sample also

11 Article 2: Every person has the right to:  
(...)

5. Request, without stating reasons, any information he requires, and to receive it from a public entity in the time established by law, having paid the cost of the request. Information that affects a person's privacy, and that which is expressly excluded by law or by motives related to national security, is excepted.

Bank secrecy and classified tax information may be lifted if a judge, the Prosecutor General or a board of inquiry appointed by Congress request it, according to the law, and providing it is related to the case being investigated.

reveal that filing for an appeal becomes filing for the sentence to be postponed. This, however, finally leads to a ruling against the public entity (not by a second instance court, but by the Constitutional Tribunal) as there is no reason to refuse access to information in the cases analyzed.

We have also been able to observe, when examining the 58 files and in the general revision of 105 sentences by the CT, that the prosecutor has no desire to conciliate. This generates judicial controversies that the judge would not appear to be able or to wish to avoid.

### 3.2. The judges' direction of the process

Although the Law evidently favored the plaintiff, 34 first instance rulings declared the demands as unfounded or inadmissible (CHART 2 – partial sample), 10 of them were declared unfounded in this instance, and none of the rulings were based in the exceptions established by the Transparency and Access to Information Law.

Bearing in mind these last 10 resolutions, it is a matter for concern that the 34 cases in question are based on formal objections that do not include the exceptions to the law. This is evidence (bearing in mind the CT's final sentences), that in those cases the formalities of the process were not adapted to the constitutional process' purpose of protecting the public's best interest.

Although the law favors the plaintiff, 57 second instance rulings declared the demands unfounded or inadmissible (CHART 3 - partial sample). The analysis of this universe of cases lead us to verify that of the 17 demands declared unfounded, only 5 of the rulings were based on the exceptions established by the Transparency and Access to Information Law.

Just like the first instance courts, the Superior Courts do not base their resolutions on the exceptions established by the Transparency and Access to Information Law. Fifty-two sentences – dismissive – based on formal objections, are evidence of this.

Having observed the procedural results in the second instance processes, we present as an hypothesis for a later investigation the fact that the Habeas Data

process, against its constitutional and protective nature, finds itself entrapped by taking on a technical and complex procedural dynamic that involves the plaintiff unnecessarily.

We can advance the following finding: that Habeas Data processes, according to the sample analyzed, are affected on the one hand by the public prosecutors' procedural initiatives – mainly through the indiscriminate presentation of contest resources improperly upheld – and on the other hand, by the judiciary's responses, insofar as priority is given, in nearly all the cases that make up the sample, to those formalities that, depending on each case, could well have been adapted to the constitutional process' aims.

Of the 10 lawsuits declared unfounded in the first instance courts (CHART 2 – partial sample), where rulings were not based on the exceptions established by the Transparency and Access to Information Law, we present the following examples:

- The request for information was denied because it was believed that the defendant was not its depository. The odd thing is that the defendant, the Ministry of Labor, had a direct link with the entity that – according to the trial court – allegedly had to be sued, the Collective Dismissals Evaluating Commission, as the latter was presided over by a representative of the former. In spite of this link and the similarity of functions, to the point that the law establishes that the Commission's archive should be sent to the Ministry of Labor when its work is done, the court chose to refuse the request instead of redirecting the process.
- The request was refused because the plaintiff had to prove that the defender was in possession of the requested information.

Of the 24 first instance lawsuits declared inadmissible (CHART2 – partial sample), the following examples represent the quality of these resolutions:

- Refusal to hand over a public document because of the use the interested party may put it to, such as using it as the medium to contest later the validity of an administrative act. That is, the reason for the request is questioned, but not the fact that the requested information is public.

- The request is sent to an administrative body and not to the head of a particular Sector. That is, even when dealing with the same public entity, the information is refused because the request is not sent to a particular official or office.

In the case of the 17 second instance lawsuits declared unfounded (CHART 3 – partial sample), where the ruling was not based on the exceptions established by the Transparency and Access to Information Law, these were some of the reasons given:

- The public nature of information related to the land registry issued by the Real Estate Tax Registry of the Municipality of Surco is denied.
- The request for information is believed to have been taken care of without taking into account that the costs demanded for the reproduction of the information are equivalent to more than 500% of their market value. In this case, the access to information is limited by the overvaluation of the copies of the requested information, an aspect that was ignored by the superior court.
- The request does not include a date certain, according to article 245 of the Civil Procedural Code.

In this last case, the court stated that the date certain could only be provided through a notarized letter. This is absolutely false, as both the Judiciary and the Constitutional Tribunal’s jurisprudence accept that this requisite has been complied with when the public entity receives the request and stamps it.

The following are examples of the most common reasons given to declare as inadmissible 40 of the second instance lawsuits, even though the law favored the plaintiff.

- Information concerning statistics regarding the number of expropriation processes during the agrarian reform, carried out by the Ministry of Agriculture, is refused because handing it over may affect the procedural defense strategies adopted by the Sector.
- Regarding a judge who requested information about the evaluation that led to him not being ratified in the position of principal magistrate, the superior

court considered the plaintiff himself as a third party regarding his own personal information.

- Lack of passive legitimacy – of the entity – to act, which takes us back to requests made to a person who is not, although he works in the same Sector or an entity that is directly linked to it, the official who actually has the information.
- The plaintiff has to prove that the defender is in possession of the requested information.
- The request for information is not made to the entity’s head.

Bearing in mind that the CT ruled in favor of the plaintiffs, we should ask what justifies that a request for information should deserve debates or objections based on its form, instead of a redirection of its terms by the judicial authority to facilitate its prompt solution. These indicators highlight the Judiciary’s inability to give procedural formalities an accessory status, which, in the case of the Habeas Data processes evaluated, is incongruent and clearly foreign to the constitutional process’ interest. These indicators allow us to see that the judges’ performance in these cases also plays an essential role in the adequate implementation of the constitutional process with a view to guarantee human rights.

**CHART 4:** HABEAS DATA PROCESSES’ DURATION RANGE

The following time intervals have been verified in 100 of the 105 CT’s sentences examined:

Total time range	Number of cases
From 11 to 18 months	34
From 19 to 24 months	44
From 25 to 30 months	6
More than 30 months	16
<b>Total</b>	<b>100<sup>12</sup></b>

12 We were not able to calculate the duration time of 5 of the 105 cases revised, as all information regarding the starting date of the processes was lacking.

**CHART 5:** FIRST INSTANCE DURATION RANGES

The following time intervals have been verified in the first instance proceedings of 58 of the files examined<sup>13</sup>:

Total time range	Number of cases
From 1 to 6 months	28
From 7 to 12 months	28
From 13 to 18 months	1
More than 12 months	1
<b>Total</b>	<b>58</b>

**CHART 6:** SECOND INSTANCE DURATION RANGES

The following time intervals have been verified in the second instance proceedings of 58 of the files examined:

Total time range	Number of cases
From 2 to 6 months	44
From 7 to 12 months	10
From 13 to 18 months	2
More than 18 months	2
<b>Total</b>	<b>58</b>

**CHART 7:** CT DURATION RANGES

The following time intervals have been verified in the Constitutional Tribunal proceedings of 58 of the files examined:

Total time range	Number of cases
From 2 to 6 months	25
From 7 to 12 months	16
From 13 to 18 months	10
More than 18 months	7
<b>Total</b>	<b>58</b>

The matter of the time invested in the Habeas Data processes constitutes an essential indicator to determine its functionality and opportune response to the requests for information of a public nature. In that regard, and always bearing in mind that we are – in theory – before an easily processed and effective/ expeditive process, CHARTS 4, 5, 6, and 7 show a completely different reality, not at all representative of what should be or what is expected of a process of Habeas Data.

From the information contained in the evaluated files, we find that the prolonged times recorded in each chart are more representative of complex processes, those in which the participation of trial attorneys is obvious and in which eminently technical arguments must be debated and confronted. The times expressed in these charts are related to the findings we described previously regarding a procedural dynamic that bears no relation to the kind of functional process that must characterize Habeas Data. These time intervals express, mainly, the prosecutors' actions to contest the requests and the Superior Court's second instance judges' decisions to dismiss the demand, as well as the common logistic difficulties that are part of any legal process, such as delays in delivering judicial notifications (especially in those cases taking place in faraway regions when the prosecutor has to be notified in Lima), and each of the courts and even the CT's workload.

The judicial instance that takes the most time to process cases is the first instance, and although the times taken by the Superior Court are, on the whole, shorter, the truth is this promptness has only been used, within the universe of our evaluation, to issue judgments of dismissal without an acceptable foundation. This caused the process to be extended until the Constitutional Tribunal settled it adequately (if we take into account the complete sample, the Court's responsibility involves the 105 cases being studied).

It is necessary to point out at this time the fact that a minority of the interviewed judges expressed the possibility of ordering the immediate enforcement of their first instance sentences based on current regulations, although in the case of Habeas Data processes they were not able to identify any cases in which this possibility has been implemented.

### 3.3. Public Prosecutor's Rulings

It is important to point out that in the 4 cases (in one of them even twice) that reported the longest delay in the second instance tribunals, the Superior Courts asked for the Public Prosecutor's opinion before issuing their sentence. This merits a special comment, as a ruling that *demand*s this type of intervention in the Habeas Data process does not exist in the current legislation, nor did it exist in the legislation in force at the time the examined files were processed. Article 114 of the Civil Procedural Code, which can be applied in a supplementary manner in processes regarding this matter, indicates that "When the law requires a ruling by the prosecutor this must be substantiated" however – as we have already mentioned – neither the constitutional procedural law, nor the supplementary legislation, mention the need of a ruling by the prosecutor in this type of process, to which we can add that none of the judgments examined, for which rulings by prosecutors were requested, substantiated the reasons why this opinion was required. In any case, we should ask, considering the fact that there is neither legal requirement nor motive, if that way of proceeding corresponded to the adaptation to formal demands referred to in article III of the Constitutional Procedural Code. From our perspective the result conflicted with the plaintiff's interests as it extended even more the process' duration.

### 3.4. Coercive measures in sentence enforcement

The judge used coercive measures to force the entity to comply with the sentence in only 2 of the 58 processes reviewed, and in those 2 cases at the instance of one party. In one case the measure amounted to threatening the entity with a fine, and in the second one to sending copies of the sentence to the Public Prosecutor so that relevant legal actions would be initiated against the responsible official.

Once the process of enforcing the sentence is underway, the enforcement judge has all the procedural weapons he needs to request the enforcement of a definitive Habeas Corpus sentence. However, the central problem does not originate in the enforcement of sentences, but rather on the time a plaintiff has to wait to obtain a satisfactory sentence within the law.

### 3.5. Restrictions to the access to files in provisional archive

Because of the time passed, we found that when the law enforcing stage was reached, some of the plaintiffs had lost interest – immediate – in obtaining the requested information, or that the information was submitted when it was too late. This led us to understand why some files are in a *provisional archive*, meaning that no activity has been recorded during several months at the law enforcement stage.

We want to stress that the administrative classification of an *archive* as *provisional* leads to difficulties for a third party who may be interested in reading the file. The provisional archive does not represent the effective conclusion of the process, so that access to the files or copies of judicial records is reserved only for the parties involved. As the fact that the CT's sentence has been complied with by the defendant is not recorded, it can be assumed that the file is still being processed and it is provisionally filed due to a lack of diligence, which results in access to and examination of it being objectively restricted. That was the case with 8 files<sup>14</sup> found in Lima's Superior Court of Justice, which could not be accessed for this investigation because of those motives.

15 Defensorial Resolution 041-2001/DP, points out that the person who requests information should only pay for the actual cost of reproducing the document requested; no additional costs should be introduced.

### 3.6. Reproduction costs

We found three cases in which one of the issues being discussed was the payment for the costs of reproducing the requested information, the amount for which had been established by the entity being sued. It is important to point out that in one case the plaintiff argued that the established cost exceeded the reproduction's real value, which restricted her right to access the information. Only the first instance sentence, which declared the demand as founded, mentioned that the amount being charged was not proportional to the cost of reproducing the information requested<sup>15</sup>. However, in spite of this, the prosecutor appealed stating that the cost increased according to the amount of copies requested (which is logical) and avoided making any reference to the cost established for each copy (the case shows that the reproduction price per page was overvalued by 500%).

But even more worrying is the fact that in this case, the second instance court made no reference in its sentence to the proportionality of the established cost per page, and only stated that the institution from which the information was requested would hand it over on the condition that the reproduction costs established by its TUPA were paid. With this he revoked the first instance sentence that had supported the demand. According to the second instance court's reasoning, Habeas Data will only proceed in the event that the public entity refuses to provide information. It did not take into account the disproportionate cost demanded to reproduce it as a restriction, even when there is a specific article<sup>16</sup> in the Transparency and Access to Information Law which specifically establishes it.

### 3.7. Exceptional case of acceptance/acknowledgement

There is only one case among the 58 examined files in which the sued entity requests that part of the demand should be declared unfounded, agreeing in practice with the decision made regarding the other parts of the same document. Apart from this kind of tacit acceptance of part of the claim, there is no case among the sample

15 Defensorial Resolution 041-2001/DP, points out that the person who requests information should only pay for the actual cost of reproducing the document requested; no additional costs should be introduced.

16 Article 20 of the TUO of Law 27506: *The person who requests information should only pay for the actual cost of reproducing the document requested.... Any additional costs will be understood as a restriction to the exercise of the right regulated by this law.*

of files examined in which the Prosecutor presented an express request to accept/acknowledge the plaintiff's claims.

### 3.8. Immediate enforcement of sentences as alternative measure to the limitations of the current procedural law

No judge has appealed to alternative arguments, based on a protective interpretation of the current procedural law, to support – by law – the immediate enforcement of sentences, which means, essentially, to order their immediate enforcing in order to block the dilatory effects of the appeals filed by the public prosecutor.

Beyond the favorable opinions of some of the interviewed judges regarding ordering the immediate enforcing of their sentences, none of them had had any concrete experiences applying this kind of alternative in the specific case of Habeas Data. Most of the interviewed judges were cautious to accept its exceptional application. We can conclude from this that currently, to attempt to uphold by law the immediate execution of first instance sentences, even in those cases when the plaintiff is evidently right, is a possible alternative but its application remains – for the time being – a matter of opinion.

Gathering some of the interviewed judges' opinions, an example of this possible alternative could be to uphold – by law – the immediate execution of first instance sentences by the joint application of articles 22<sup>17</sup> y 59<sup>18</sup> of the Constitutional Procedural Code or, by the request of one party (ex parte?), of articles 629<sup>19</sup> and 674<sup>20</sup> of the Civil Procedural Code. However, this proposal – for the time being – is

17 *Article 22. – Sentence Specific Enforcement.- Sentences deemed to be enforceable by constitutional processes shall be enforced according to their specific terms by the judge seeing the demand. (...)*

A sentence that orders someone to give, to do or not to do, should be enforced immediately. (...)

18 *Article 59.- Sentence enforcement. – Notwithstanding that which was established in article 22 of this same code, a final ruling declaring the demand founded must be complied with within two days of it having been notified. In the case of omissions, this time may be doubled.*

19 *Article 629. - Generic precautionary measure. –As well as the cautionary measures regulated in this Code and other provisions of law, others that are not included may be requested and granted, if it guarantees the compliance with the definitive sentence in the most appropriate way.*

20 *Article 674. – Temporary measure about the substance. – Exceptionally, due to a need of those who request it that cannot be referred, or because of the strength of the demand's basis and the evidence contributed, the measure may consist on the early enforcement of what the judge will decide in his sentence, be it in its integrity or only in substantial aspects of it. (repealed in June 2008)*

not clear and there is no conformity in the opinions about its effective merit, as in both cases, interpretation is varied, whether because the execution of resolutions in the first case means for some – apparently – a final ruling, or, in the second case, because the execution of an Habeas Data sentence would be irreversible<sup>21</sup> for the State.

### 3.9. Habeas Data processes and representation by an attorney

In the 58 cases examined, nearly every plaintiff was represented by an attorney. If they were not it was because they themselves were lawyers. This detail shows that optional legal representation is in practice not very feasible, and something that the plaintiffs are not quite ready to assume, maybe because of the process' foreseeable complexities.

One of this investigation's main aims is to verify how functional the Habeas Data process is, considering that someone can file a lawsuit without being represented by a defense attorney. However, one of the things we have gathered from the examination of the files is that in all but 2 of them the plaintiffs were represented by an attorney, which is an indicator of the fact that, as it is currently regulated, the Habeas Data process is not functional and does not assist to make the process simple and informal. We can conclude from the fact that most plaintiffs used the services of a lawyer, that they were either not informed about the possibility of acting without any representation or, that even though they were aware of that option, made use of that service because of the complexities of the case. This goes against the law's apparent aims.

21 *Article 674. – Temporary measure about the substance. – Exceptionally, due to a need of those who request it that cannot be referred, or because of the strength of the demand's basis and the evidence contributed, the measure may consist on the early enforcement of what the judge will decide in his sentence, be it in its integrity or only in substantial aspects of it, only if the effects of this sentence may be reversed and do not affect the public's interest.* (current)

## Findings based on the interviews with the actors involved in the Habeas Data process



AS WELL AS EXAMINING files and rulings, as described in item 3, this current investigation also carried out a series of interviews with the aim of confirming what we had found when examining the files, and to find some reasons that would help to explain the difficulties noticed there, as well as to validate and complement some of the alternative solutions suggested.

First instance judges and principal judges of the Superior Courts of Lima, Arequipa, Huancayo, El Santa and Chiclayo were interviewed, as well as some assistant lawyers or delegates of the public prosecutors' offices in charge of representing the State, some of the plaintiffs who live in these regions and even private lawyers hired by some of the requested public entities.

### 4.1. Interviews with magistrates

#### 4.1.1. Habeas Data processes and representation by an attorney

The interviewed magistrates' opinions about the optionality of being represented by a defense attorney are divided. Those who have a favorable opinion about this possibility state that they do because such option does not preclude the possibility of acting with a lawyer. Those who insist on the obligation of being represented by an attorney are clear when they point out that such representation is necessary because many plaintiffs do not know what they can and cannot request, so that specialized advice is always necessary.

The interviewed judges all agree on that:

- ✓ Even when the possibility of acting without a lawyer exists, as a rule, plaintiffs are represented by an attorney.
- ✓ The dynamic of the process itself demands that plaintiffs act with legal counsel. This is in accordance with its multiple difficulties, technicalities, and extended duration (up to more than 30 months in 16 of the general sample's cases).

#### 4.1.2. About the Public Prosecutor's intervention

The interviewees also agreed on the fact that the prosecutor hinders the process' development, because he is the one who resorts to all types of resources to oppose the plaintiff's interests. Regarding the prosecutor's role, there is agreement on that his attitude makes him seem always prone to enter into conflict. The prosecutor defends the State at all costs, even when knowing that the plaintiff is right, an attitude that explains why no prosecutor ever facilitates the acknowledgement of information requests. In Habeas Data cases it is illogical to justify that a State official should defend the State's interests, refusing public information even when knowing that the plaintiff is right.

#### 4.1.3. About the Public Prosecutor's intervention and Habeas Data's regulation

There are two positions among the interviewed judges regarding the current regulation of Habeas Data. One group believes that the process is regulated correctly and that it is the judge's job to make it effective. The other group formulated the need to define a special type of process, tending above all to limit the prosecutor's intervention. This is linked to this last group's consensus about the difficulties presented by the current regulation and the debate about accessory issues based on the contests and exceptions it encourages.

#### 4.1.4. Formalities and specialization in constitutional issues

As part of the accepted attachment to formalities in the process<sup>22</sup>, and in most of the cases, as the product of the magistrates' insufficient specialization in constitutional issues, some of the interviewed judges are willing to direct their intervention in accordance with the procedural text of the law. This is corroborated when some of them specifically criticize – but still apply – a legislative modification that some judges call unwise, which includes a special procedure to define corrections

22 A significant number of the judges interviewed accept they are formalistic when applying the law because of their training which is basically in civil law. Both them and the rest of the judges interviewed (general consensus) agree that judges in charge of constitutional processes should specialize in constitutional law.

of procedural errors in Amparo processes<sup>23</sup>, a procedural incident that could even bring about an appeal to suspend the process filed by the prosecutor and so produce its further delay. Certainly, the procedure applicable to Amparo processes is the same one that applies to the Habeas Data process, so that it is the judges' job to evaluate if the correction of procedural errors agrees with the aims of the constitutional process to be applied, such as in Habeas Data cases.

In any case, the issue is debatable, although it is in some way illustrative of the possibilities available to a judge for adapting the Law's formal demands to the aims of the process. Undoubtedly, to insist on the debate of these controversial issues, or in the judges' specialization in constitutional matters, is an alternative, the indisputable relevance of which was confirmed as we made progress in this investigation.

#### **4.1.5. Alternative measures to the limitations of the current procedural law**

Regarding the possibility of finding alternative options to the law's literal text, through original solutions based on the constitutional process' aims (and in this case, Habeas Data's aims), some of the interviewed judges were not convinced about the idea of developing and expressing them in their resolutions because they fear the control bodies' interventions or, in any case, because some of them, such as the immediate enforcement of Habeas Data sentences, do not incite uniform criteria when put into practice.

Two first instance magistrates in Huancayo were the exception to this conservative opinion. They were willing to innovate and find in the text of the law and the CT's jurisprudence, grounds to justify an expeditive intervention in these cases, even dispensing with the prosecutor in cases where the plaintiff's rights were evident. However, as we have already mentioned, there is no evidence that these innovative ideas have been put into practice.

<sup>23</sup> Modificación introducida al proceso de Acción de Amparo, mediante Ley N° 28946, publicada el 24 diciembre 2006. De acuerdo al Código Procesal Constitucional, la regulación del proceso de Amparo es aplicable al Habeas Data, aún cuando dependerá del Juez adaptar dicho procedimiento a las circunstancias del caso (artículo 65).

#### 4.1.6. Other alternative measures

The possibility of creating an administrative tribunal that centralizes and settles, at a governmental level, every access to information request presented before any State entity, does not generate the same level of consensus, but it does prompt some favorable opinions. This specialized tribunal, to which the most suitable persons would be assigned, would settle in a second and definitive administrative instance every information request that was dismissed, prompting at the same time, if it confirmed the dismissal, a subsequent Habeas Data Process promoted against this administrative body, which would reserve for the Judiciary a judgment on the pleadings, free from the procedural corrections or formal verifications usually invoked by public prosecutors, or by the judges themselves, as has been the case in the examined files.

#### 4.1.7. Intervention of control bodies: A limitation to the alternative proposals

The intervention of control bodies and the judges' negative perception of them (even though this is a job that is carried out by the magistrates themselves), are linked to the former issues, as they discourage any decision that may be controversial or does not observe the Law's express text. An interview with one of the judges who is a member of these control entities, allowed us to see expressions of tolerance towards this kind of creative and innovative jurisdictional practices, providing that they are duly motivated. However, this same magistrate confessed that his opinion does not express his colleagues' common denominator, so that the intervention of control bodies is one of the restricting factors when venturing to suggest controversial adaptations to the current procedural law. We must acknowledge then, that judges have many possibilities before them, but that their interventions are also beset by restrictions.

#### 4.1.8. Sentence enforcement

Regarding the enforcement of sentences and the possibilities that a judge may guarantee the compliance with them, the magistrates showed their knowledge of and the availability of the many coercive measures provided by the law for that purpose, but also stated that they make use of them in very few occasions. These

measures include fines, motions for contempt and even provisional detention (applying the Civil Procedural Code in a supplementary manner).

## 4.2. Other interviews

### 4.2.1. About the Public Prosecutor's intervention

The delegated attorneys in the cities of Chiclayo and Huancayo stated - in both cases - that their defense strategies always depended on the prosecutor's initial plea. They had to take on the official position presented in those terms, always questioning the plaintiff's rightness.

They state that their role was based on the same premise that guides every prosecutor's intervention: the defense of the State's interests at all costs. This confirms the conclusions drawn from reading the files and gathering the express opinion of the interviewed judges.

### 4.2.2. About the Public Prosecutor's intervention and the law for the judicial defense of the State

These attorneys also stated that both they and the prosecutors have to act in that way because of the sanctions they could be subjected to for negligence in the defense they have been entrusted with.

About this issue, one of the public prosecutor office's attorneys consulted confirmed that opinion; accusations of negligence are used to justify the dismissal of attorneys and prosecutors. This means that, according to the public prosecutors and delegated attorneys consulted, the acknowledgement of a plaintiff's claim in a case of Habeas Data would be considered as negligence by the public entity they represent. Therefore, these officials are forced to assume a determined and preestablished position even though they may be completely convinced of the contrary. This logic has to change, at least within the framework of constitutional processes.

Finally, we can conclude that prosecutors and assistant attorneys and delegates face restrictions regarding their independence to design an intervention strategy,

as there is always some kind of pressure or the risk of being sanctioned hanging over them. Because of this, the prosecutor acts out of habit and always takes on the defense of the State, even when the plaintiff is right, which is often one of the motives why judicial processes go on in an absurd manner, increasing the judges' procedural load.

#### **4.2.3. About the Public Prosecutor's intervention and Habeas Data's regulation**

Regarding the regulation of the Habeas Data process, those delegated attorneys we interviewed agreed in that representation by a lawyer is necessary due to the process' litigious dynamic, and did not see any major problems in the process' regulation. They also accepted that the prosecutor's intervention should be restricted in Habeas Data processes, but did not say in which area.

Even when the lawyer is not, in the strict sense, a prosecutor, interviews with the defense council hired by a municipal public entity revealed a practical but illustrative piece of information about the already confirmed deficiency in the regulation of the Habeas Data process. These lawyers pointed out that even when they agree that the plaintiff is right, their intervention is aimed at satisfying their client's interests. Therefore, if the sued mayor decides to defend himself until the end of the process, the lawyer will make use of all his technical knowledge to release his client from the obligation he is trying to evade, or in the worst case scenario, to delay the moment when he will have to comply with the law. This response gives the State the status of a client, and the prosecutor of a representative who, by law, is forced to defend his client's interests making use of all his legal knowledge.

## Special evaluation of four emblematic files

# [5]

WE HAVE SELECTED FOUR cases to illustrate, in a clear and precise manner, the principal motives that lead to the delay of the Habeas Data processes being analyzed. Even though there are logistical problems implied in these four cases, such as the ever present procedural load difficulties, it is important to highlight two causes in particular:

- ✓ *The prosecutor's actions to contest the request.* – Aiming to delay the process and generally without any legal basis.
- ✓ *Second instance dismissals.* – Because of which the 105 processes had to last even longer, before eventually ending with a favorable sentence for the plaintiff issued by the CT.

The consequences of each of these causes, one of them attributed to the prosecutor's intervention and the other one to the second instance judges, illustrate how something that should in theory be brief and useful, such as Habeas Data, may result in a tiresome process that, because of its duration, many times becomes useless.

The information request demands were declared founded by the first instance court in the four selected cases. It could not have been any other way, due to how evidently right the plaintiff was in each case, how evident the type of opposition presented by the prosecutor was (both when contesting the demand as during the appeal), and the formalistic vision based on which the Superior Courts decided to revoke the access to information.

On the other hand, the fact that we have chosen files in which first instance demands were declared founded, allows us to see clearly the kind of process and time that the plaintiff could have avoided if the Judge who saw his case would have demanded the immediate enforcement of the sentence issued. As we have pointed out before, the lack of consensus regarding the interpretation of the current procedural law justifies opening a debate about the issue, whether in the legislative or the jurisdictional area, with the intention of generating clear rules for enforced compliance.

The four cases that complement the analysis of this report are the following:

CHART 8: EMBLEMATIC CASES

Demand	Response/appeal	Times
Request of information about the number of legal processes regarding the expropriation of lands during the agrarian reform that are being processed by the Judiciary, a list of estates and their location. (Ministry of Agriculture – 2003)  (1 <sup>st</sup> . FOUNDED)	Confidential information prepared by consultants and lawyers who present cases to the Judiciary – their handing over may reveal defense strategies. (confidentiality assumption by the TAL <sup>24</sup> ) <sup>25</sup>	23/04/2003 (demand) 13/05/2004 (1st. Instance Sentence) 23/04/2007 (CT Sentence – Exp. 2193-2006-PHD)  Time 1 <sup>st</sup> Instance: 13 months Total time: 48 months
Request of a copy of the report by the Permanent Commission for evaluation and ratification, regarding performance and suitability for the position (National Magistrates' Council – Dic. 2003)  (1 <sup>st</sup> . FOUNDED)	This is classified information that cannot be handed over either to individuals or authorities. (LOCNM <sup>26</sup> arts. 28 <sup>27</sup> y 43 <sup>28</sup> )  The plaintiff is a Principal Judge.	01/12/2003 (demand) 11/06/2004 (1st. Instance Sentence) 12/08/2005 (CT Sentence – Exp. 4600-2005-PHD/TC)  Time 1st Instance: 7 months Total time: 20 months
Copy of cadastral plan in the hands of the Municipality of Surco, with information about the location of third parties' properties in the district (Municipality of Surco – Aug. 2003).  (1 <sup>st</sup> . FOUNDED)	No reason is given in the request plus this is information pertaining to third parties (LTA)	23/08/2002 (demand is presented) 29/11/2002 (1st. Instance Sentence) 17/10/2005 (CT Sentence - Exp. 0644-2004/HD/TC)  Time 1st Instance: 3 months Total time: 38 months
A request to the Ministry of Justice for copies of a file regarding a completed case presented before the ICHR (Ministry of Justice – 2005)  (1 <sup>st</sup> . FOUNDED)	The request is not refused, but payment for copies at a higher rate per page than 0.56 (500% above the market price) is insisted on	04/11/2005 (demand) 23/12/2005 (1st. Instance Sentence) 09/01/2007 (CT Sentence - Exp. 9125-2006-HD/TC)  Time 1st Instance: 1 month Total time: 14 months

24 Transparency and Access to Information Law

25 Article 17.- Exceptions to the exercise of the right: Confidential information (...)

The information prepared or obtained by the legal counsel or the attorneys representing Public Administration entities, whose publicity could reveal the strategy to be adopted in the defense of an administrative or legal process, or any kind of information protected by client-attorney privilege that the lawyer should keep regarding his client. This exception ends when the process concludes.

26 Magistrates' National Council's Organic Law

27 Article 28.- Counselors should maintain confidentiality regarding information and deliberations received and made in the evaluation of candidates.

28 Article 43.- The issuing of certificates or information of any kind to individuals or authorities regarding the data contained in the registry is forbidden; except in cases determined by Article 96 of the Constitution or injunction.

The first case does not deserve much discussion about the public nature of the information requested and because of that, its classification as confidential at the level of the public administration is incomprehensible. The merely statistical information and the list and location of the estates referred to in the information request do not contain any elements that could be subject to be classed as confidential. However, the prosecutor requests that the information should be declared confidential arguing that making it public would reveal the sued entity's legal strategy. This argument is included both in the demand and in the appeal. It was accepted in the second instance court, which led to a delay of 48 months, no less than 4 years.

Although the first instance process was also long (13 months), the immediate enforcement of the sentence at that stage would have maybe prevented the excessive delay in the process. There is no doubt that the consequences of the appeal presented by the prosecutor, even without a reasonable basis, were a decisive factor to prevent the plaintiff's right from being recognized in a timely manner.

Beyond all that, and the evident lack of precision in the interpretation of the Transparency and Access to Information Law's reach when defining what confidential information is, we should ask if it is reasonable that a request as the one presented in this case should wait for 48 months before obtaining a favorable sentence. That in itself raises questions about the Habeas Data process' efficacy in satisfying the kind of claim proposed by the plaintiff.

In the second case, we are before a judge whose familiarity with procedures and legal processes did not prevent his case from being solved nearly two years after he filed the lawsuit. Once again, the prosecutor is the first culprit of the process' delay, followed by the Superior Court. They justified their opposition to the request stating that the requested information was classified, according to the National Magistrates' Council Organic Law, and could not be handed over to anyone. However, as the first instance judge had ruled, these regulations could not be applied in the case of the plaintiff, as he could not be considered a third party regarding information that pertained to him. The plaintiff had requested a copy of a report regarding an evaluation that led to him not being ratified in the position of magistrate.

The judge in charge of the process' correct interpretation of the law determined that, 7 months after the demand was filed, the plaintiff had a favorable sentence. However, because this resolution was appealed, and the request later dismissed, the case had to wait 20 months to be solved, after the demand was filed, when the CT recognized the plaintiff's right agreeing with the resolution issued 14 months earlier, at the completion of the first instance of the process. Was all that waiting worth it?

In the third case, workers who had been fired sued the Ministry of Labor, requesting the documents where the decision not to include them in the lists of workers who were reincorporated to the Public Sector appeared. This case is illustrative of a recurrent response by public prosecutors (in this and other identical cases), where far from discussing whether the information requested is public or not, they choose to question the reasons for the request.

Apparently, this kind of questioning is evidence of procedural bad faith, rather than ignorance, by the public prosecutor in charge of the case, and the consequence of it is a delay in the process of 5 months to more than a year. It seems that any of the State representative's moves, however unjustified they may be, merits the suspension of the sentence's effects and with it, the unavoidable delay in the process.

The fourth case illustrates a way of restricting access to public information by setting the reproduction cost of documents at a disproportionate rate, higher than the real cost of reproduction and of the market average. In this case, for example, the cost by page estimated by the Ministry of Justice was 0.56 cents, five times the market price (and it is even possible to find more economical offers).

It will come as no surprise that the public prosecutor believed that the request for information had been satisfied, i.e. he considered the State entity had proceeded correctly by charging a price established in its TUPA, without stopping to think that the entity had decided on the price itself, and that this constituted an evident restriction to the access to public information. The demand was declared founded by the first instance court, but the superior court, far from considering the price a restriction of the plaintiff's right, endorsed the State entity's actions based on the arguments put forward by the public prosecutor.

In this case, the time taken by the process illustrates both the prosecutor and the Superior Court's interventions. The first instance judge ruled, based on a correct interpretation of the Transparency and Access to Information Law, that the reproduction cost established by the Office of the Public Prosecutor's TUPA was not proportional to the real cost of reproduction that the plaintiff had to pay, and that he was only obliged to pay the amount that corresponded to the real cost and not the excess. This resolution was issued a month after the demand was filed. However, thanks to the public prosecutor and the superior court's interventions, 14 months had to go by before the CT confirmed the first instance judge's initial decision.



## Conclusions [6]

- The Habeas Data process is complex from the perspective of citizens, as it incorporates the procedural possibilities of a writ of Amparo, which entails the obligation of being represented by a lawyer.
- The public prosecutor has no strategic independence and is forced to use every procedural resource available to avoid the handing over of information or to delay the process' result. This kind of subordination affects the speed and the efficacy of the Habeas Data process.
- Recurrent logistical problems exist in every legal process, such as the judges' procedural load. From the analysis of the files we can surmise that slowing down the process by delays in notifying proceedings and procedural acts is not infrequent.
- The judge proves through his interventions, and in some cases recognizes, his attachment to the process' formalities, but paradoxically, although criticism of this kind of intervention is based on that formalities are given priority even over the validity of fundamental rights, the judges' response is that guaranteeing respect for formalities results in guaranteeing a due process.
- The examination of files has proven that seven years after the Transparency and Access to Public Information Law came into force there are still magistrates in the judiciary who are not aware of its basic content.
- The judges consider that the legislation applicable to Habeas Data does not clearly facilitate resource to alternatives to the legally established formalities, nor does it facilitate ordering the immediate enforcement of sentences.
- There is no evidence in the examined files of the rigorous use of the different categories of classified information found in the Transparency and Access to Information Law.

- The duration of the analyzed processes does not correspond to an expeditious and simple process such as is Habeas Data. Evidence found in the examined files points to the fact that the Habeas Data process is neither functional nor effective in guaranteeing the timely protection of the right to access information when the plaintiff is not represented by a lawyer.
- The enforcement of sentences represents a special problem within the Habeas Data process. The judges do not systematically use the legal resources available to them to obtain a response from the public entity involved in the demand. It is an extremely prolonged stage.
- On the basis of the examined files, the participation of a lawyer as counsel to the plaintiff does not affect the possibility of obtaining, at least during the litigation stage that corresponds to the Judiciary, a reasonably fair sentence.
- On the basis of the examined files, the participation of a lawyer as counsel to the plaintiff in the sentence enforcement stage affects neither the timeliness nor the quality of the sued entity's response.

