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# Implementing Right to Information A Case Study of Romania



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## Abbreviations and Acronyms

ANI	National Agency for Integrity
ANRM	National Authority for Mineral Resources
ASG	Agency for Government Strategies
CEE	Central and Eastern Europe
CNADNR	National Company for Motorways and Roads
DGS	Department for Governmental Strategies
EC	European Commission
EESC	European Economic and Social Committee
EU	European Union
FOIA	Freedom of Information Act
IPP	Institute for Public Policy
IT	information technology
MP	Member of Parliament
MPI	Ministry of Public Information
NGOs	nongovernmental organizations
PAR	Public Administration Reform
PNL	National Liberal Party
PR	public relations
SAR	Romanian Academic Society
SRI	Romanian Intelligence Service
USAID	United States Agency for International Development

# Preface

The number of countries that have passed Right to Information (RTI) legislation—laws guaranteeing citizens the right to access information about government—has risen dramatically in the last two decades, from approximately 13 to over 90, including many countries in Eastern Europe, Asia, Latin America, and most recently, Africa and the Middle East. Several of these countries face persistent governance problems.

Right-to-information (RTI) laws establish the right of citizens to access information about the functioning of their governments; they can also serve to operationalize rights that have been constitutionally guaranteed. Effective RTI legislation is an essential tool, empowering citizens to access information on public policy choices and decision-making processes, to understand entitlements regarding basic services, and to monitor government expenditures and performance, providing opportunities for more direct social accountability. Because a well-crafted RTI law provides citizens with the right to access government records without demonstrating any legal interest or standing, it can require a significant shift in the way state-society relationships are organized from need-to-know to right-to-know.

Most countries have only recently adopted RTI legislation, often after a difficult and contested process. As a result, a great deal of the research and analytical work that has been conducted in this area has focused on an analysis of the conditions and processes that lead to successful passage of legislation.

Studies about how laws are being implemented—if the necessary capacity and institutional measures for enabling people to exercise the right are in place and if access translates into higher-order goals like participation, accountability, and corruption control—are quite limited.

Case studies were prepared examining the experience of a number of countries that have passed RTI legislation within the last decade or so: Albania, India, Mexico, Moldova, Peru, Romania, Uganda, and the United Kingdom. Each country case study assesses four dimensions critical to the effective implementation of RTI legislation as follows:

- (1) The scope of the information that the law covers, which determines whether an RTI law can serve as the instrument of more transparent and accountable governance as envisaged by its advocates. Clearly, a law that leaves too many categories of information out of its purview, that does not adequately apply to all agencies impacting public welfare or using public resources, or that potentially contradicts with other regulations—like secrecy laws—will not be very effective.
- (2) Issues related to public sector capacity and incentives, additional key functions and demands within the public sector created by RTI, entities responsible for these functions, and various organizational models for fulfilling these functions.
- (3) Mechanisms for appeals and effective enforcement against the denial of information (whether it be an independent commission or the judiciary); the relative independence, capacity, and scope of powers of the appeals agency, and the ease of the appeals process; and the application of sanctions in the face of unwarranted or mute refusals, providing a credible environment.

(4) The capacity of civil society and media groups to apply the law to promote transparency and to monitor the application of the law, and a regulatory and political environment that enables these groups to operate effectively.

The in-depth research presented in these case studies was conducted to examine factors that promote the relative effectiveness of these four

key dimensions when implementating RTI reforms, including institutional norms, political realities, and economic concerns. An analysis was conducted to determine which models have the potential to work in different contexts and what lessons can be drawn from these experiences to help countries currently in the process of setting up RTI regimes.

## Acknowledgments

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# 1. Introduction

After a short period of debate in the media and among the political class, Law 544 on Access to Public Information, also referred to as the Freedom of Information Act (FOIA), was adopted and became effective in Romania in 2001. This was two years after the country was officially accepted as a European Union (EU) candidate (in 1999) and at the beginning of a period of rapid institutional reforms aimed at convincing the EU that the Eastern European state lived up to the higher European standards of public transparency and integrity.

FOIA's scope expanded quickly as a result of pressure from civil society, thus creating a legal basis for free access to public information to all citizens, without discrimination. The FOIA has been used by the media and civil society since its adoption—especially during the peak of the electoral cycles in 2004 and 2008–09; in turn, the law has substantially contributed to their strengthening and professionalization.

## 1.1. Methodology

This case study is based on desk research and interviews conducted with relevant stakeholders—public officials and nongovernmental organizations (NGOs) with extensive experience in applying the legislation—as well as previous studies produced on this subject matter by these stakeholders.

Interviews were conducted with representatives of the Ministry of Justice, the Ministry of Finance, the Ministry of Transport, the National Railways Company (CFR), the National Company for Motorways and Roads (CNADNR), the Ministry of Education, the Health Ministry, the Health Insurance Fund, the National Anticorruption Directorate, the National Integrity Agency, the Prosecutor's office attached to the High Court of Cassation and Justice, the Suceava Court of Appeal, the Mures Court of Appeal, and the University of Bucharest as well as journalists and NGO representatives.

This case study is organized into seven sections. Section 2 provides a brief history of the enactment of Law 544/2001 and section 3 describes the law's main provisions. Section 4 provides an overview of the implementation measures put in place, with data and some illustrative cases. Section 5 presents the system of enforcements and sanctions, while section 6 assesses the impact of the law and the extent to which the law is being used. Section 7 concludes.



## 2. Passage of Law: Context and History

Like many similar cases over the past decade, the main political driver for the passage of Law 544/2001 was the process of accession into the European Union (EU). For all the countries who managed to complete it,<sup>1</sup> this was a decade-long process of technical and political negotiations aimed at aligning their policies and administrations in key areas of common interest. Every member country had to transpose into its national legislation as well as implement a vast and complex body of EU laws and regulations—the so-called *acquis communautaire*.<sup>2</sup>

Before the technical negotiations even began, potential member states had to be able to prove that they fulfilled certain prerequisites: they had to convince the European Commission (EC)<sup>3</sup> and other member states that (1) their politics were fully democratic and accountable, (2) their civil service was depoliticized and effective, and (3) that the rule of law was in place. These are dimensions on which progress is difficult to measure objectively; prescriptions for reform are hard to operationalize because improvements, when necessary, require profound changes in the politico-administrative system. European decision makers have had to rely on peer reviews and periodical political reports to assess improvements in these areas. The existence of additional mechanisms such as ATI legislation, although not mandatory as such under the EU rules, is perceived as a convincing milestone on the road toward public administration improvement.

Governments in candidate states faced substantial pressure from their civil societies to implement the required reforms as soon as possible: joining the EU is regarded as a highly desirable goal due to its demonstrated prosperity.<sup>4</sup> In all of the countries, league tables were regularly published and discussed by the media, and government effectiveness judged by how well they performed compared to their peers. In the countries that were the least prepared (Romania and Bulgaria), the public was the most enthusiastic about joining the EU (over 80 percent), creating tremendous pressure on governments to

demonstrate progress with the negotiations. As a result, new legislation was adopted in both Bulgaria and Romania in the late 1990s and early 2000s.

There is no specific EU-level regulation or directive dealing with overall access to information (ATI). Public procurement is an exception: because the union's founding principle is a free and open common market with no hidden state aid or privilege for domestic actors, the process of public procurement is strictly regulated in terms of openness and transparency. But other than this, there is no formal obligation for a member state to adopt ATI legislation in order to be accepted into the union. That said, EU actors applied political pressure to the governments of candidate countries, formally and informally, to address their well-known lack of transparency. A “soft” *acquis* emerged over the years dealing with the rule of law, anticorruption framework, civil service reform, and media access to information, which was regarded as a prerequisite to the official start of negotiations on technical chapters. But even as candidate countries considered ATI legislation, they overlooked the impact analysis and budget planning needed for its effective implementation.

NGOs<sup>5</sup> and members of parliament (MPs), mainly from the opposition National Liberal Party (PNL), promoted ATI legislation in Romania in 2001. A new cabinet had just been installed in Bucharest the year before, the country was still in the early stages of the road toward membership, and the ruling party was eager to follow up on the promises made by its predecessors when the commission began negotiations with Romania in 1999–2000.

Because this type of law was judged to be popular with the media and public in general, it was included on the agenda of the media-conscious Social-Democratic cabinet, emulating the example of New Labour under Tony Blair. Indeed, arguing that mass media institutions should have privileged ATI (that is, shorter deadlines for

response from public bodies), an idea that was eventually accepted, the minister in charge made explicit references to the best practices in the old EU member states.<sup>6</sup> Meanwhile, the center-right opposition, with largely Liberal leanings, came up with its own alternative text for the law.<sup>7</sup> In fact, the opposition's draft came to the Chamber floor first, about half a year before the government's.

The process of adopting this new law was in the broader context of Public Administration Reform (PAR), for which a special unit had been created at the prime minister's level to coordinate assistance from donors (mainly the EU and World Bank). While there were about 30 chapters of technical *acquis communautaire* that the candidate countries needed to adopt, no such formal blueprints existed for PAR or for judiciary reform beyond general requests that fairness, professionalism, efficiency, and depoliticization be strengthened. Progress on these dimensions was—and still is—monitored by a system of self-commitments in the form of agreed action plans, in addition to monitoring performed either by the commission or the other member states (peer reviewing). Under the new legislation, classification was the only justified exception to access. Until then, administrative transparency had not been enshrined in law, but there were laws on state secrets and their protection.<sup>8</sup>

In March 2001, a civil society coalition was forged that effectively facilitated consultations between the government's Ministry of Public Information (MPI) and the opposition (mainly the PNL). A facilitator was needed, since NGOs did not have the legal power to push the initiation of this legislation. A conservative group of MPs (mainly from the ex-Communist party and the extreme right) were pushing a draft of the Classified Information Act<sup>9</sup> in the chamber at the same time, so the need to move fast and with a reasonably good draft was critical. Both the modernizers in government (mainly the leadership of the MPI) and civil society perceived this as a threat,<sup>10</sup> not necessarily because of its provisions (although until then the tendency had been to interpret such clauses primarily as vehicles for restraining media freedom) but because of its timing.

If a classified information law was passed before a freedom of information law, then nondisclosure would be taken as the norm and disclosure the exception simply because that the latter law would have to reference the former. Due to the high level of public attention to the issue, the freedom of information law was adopted first (in 2001); the classified information law subsequently (as Law 182/2002),<sup>11</sup> closely following and operationalizing the system of exceptions created by the FOIA (see the next section).

The result was a common agreement by all parties to a draft freedom of information law (a rare consensus in the Romanian Parliament) that was subsequently adopted by the chambers in September 2001. The PNL caucus in the lower chamber had a strong leader on this issue—deputy Mona Muscă<sup>12</sup>—who had been close to civil society for years and was a strong advocate of transparency. They organized two public hearings on the subject, which were broadly advertised, and the ministry took the unprecedented step of sending top representatives to these debates. As a result of this bipartisanship, the final version of the law was a merger between the ministry and opposition drafts, plus articles and concepts proposed by NGOs and embraced by the legislators. This consultative process represented a best practice at the time in terms of civil society's cooperation with the government and other political actors.

The conservative groups from Parliament (mainly the far right group that had held sway in the recent past) also raised the issue of public archives. How was information on land and building registration (which in most countries was public, but in Romania at that time was caught up in the process of post-Communist property restitution) to be dealt with? What would be the costs and implications of a large volume of archives being made accessible to the public with tight and strict deadlines? The notion of “information of public interest” was found to exclude such cases and thus limit the bureaucratic implications.

Another discussion of the law's provisions took place when some MPs, also from a fringe-conservative group, wanted to make it mandatory for journalists to publish everything they received as public information during a press conference or following a request, thereby eliminating the possibility of being selective in news editing. This was rejected during deliberations in parliamentary commissions. But similar ideas periodically resurfaced in subsequent years: to create by law an ethics code and forms of associations for journalists; to force the prime-time news channels to keep a "balance between positive and negative news"; or to conduct mandatory psychiatric checks for mass media employees.<sup>13</sup> These were regularly turned down by the majority, either in the committees or the plenum, but their endurance indicates bureaucratic opinion regarding free speech, at least among a minority of Romanian officials.

In general, the mass media played a supportive role in the passing of an ATI law because it was beneficial to their profession. Their only concern was that the formalization of interactions between reporters and the institutions they covered might slow the investigative process, with waiting times measured in weeks. In many instances journalists with privileged contacts in the institutions they covered had managed to obtain inside information in real time through informal channels. With this in mind, the mass media wanted to make sure that the law would not be used as a pretext to excessively bureaucratize ATI and slow down communication, postponing answers to questions until the legal deadline.

## 3. Strength of the Legal Environment

The Romanian law is generally in compliance with the principles set forth in the model law proposed by Article XIX. This includes the scope of the law's application, principles of free ATI held by public entities, mechanisms for filing requests and obligations of public entities to answer such requests, timetables for answering requests, including a special 48-hour deadline for requests of information that could “safeguard the life or liberty of a person,” methods for making information available, and fees that might be charged for the information. The Romanian law also includes an obligation for all relevant entities to appoint a FOIA officer, but it does not provide for the establishment of an information commissioner. However, reports prepared by each institution on the implementation of the FOIA are collected and aggregated annually into a national analysis by the Department of Governmental Strategies (DGS), which acts in part like a central monitoring agency.

The right of ATI has been enshrined in the Romanian constitution in Article 31 since 1991, but legislation giving it full effect came into force 10 years later. Law 544/2001 further describes the content of this right and develops procedures for ATI. To detail the application of the law, the government adopted the Methodological Norms 123/2002.

Two years after the adoption of the FOIA, the Romanian parliament adopted the law of transparent decision making in public administration (Law 52/2003). The law provides for publication and public consultation of all draft regulations before adoption. Drafts must be published at least 30 days before adoption, and there must be a 10-day period for receiving comments from the public that are evaluated by the initiator (who decides what ideas will be included in the final version of the laws). These provisions apply at the national and local levels, but the parliament is not covered. As a result, laws initiated by MPs are exempted from these provisions but draft laws proposed by the

government have to undergo this transparency procedure.

Law 52/2003 also states that meetings of collegial bodies in the public administration are public, and that the timely notice about the location and agenda of such meetings must be published. These provisions are more relevant for local and county councils and are directly applicable to them; no secondary legislation has been adopted to detail them further. But each of the institutions that fall within the scope of the law may include implementation provisions in its internal regulations and must prepare an annual report on the implementation of the relevant legal provisions, to be handed over to the DGS.

### 3.1. Scope of Coverage

The law applies to all public institutions (central and local), as well as to public companies where the state is a majority shareholder.<sup>14</sup> The initial version did not cover public companies at all, but NGOs argued that because an important part of the state budget is being spent on these companies, the law should also cover them, taking into account the particular circumstances in which they operate. No differentiation is made between various public institutions and authorities depending on their fields of competence. All information held by these entities is deemed public unless it is duly classified or related to personal data. In practice, the nature of the public entity's activities dictates the degree of openness: city hall will always be able to provide more public information than the Intelligence Service or the Ministry of Defense, though all are covered by the law.

In Romania, the interpretation of the scope of the law relies heavily on the courts. The precedents created so far—either spontaneously following individual requests or as a result of deliberate, strategic litigation initiated by civic groups—lean toward a liberal, pro-transparency notion of the term “public institution.” Public institutions are thus interpreted as bodies that are financed wholly from the public purse and are subject to

the law as well as those governed by government appointees (such as public companies), especially those operating in a state-protected monopoly (hence, without competitors for their commercial activities), such as the postal service, forest management, and state export-promotion banks).

The emerging doctrine, therefore, is that the government is created not only by treasury funds, but also by regulation, and that it should be subject to the disclosure law. Some ministries (and occasionally, large foreign or domestic investors) were obviously uncomfortable with such decisions, but in spite of the fact that the enforcement of decisions may in itself take some time and effort, there is nothing the ministries, off-budget public bodies, or companies (even multinationals) that have obtained government contracts can do to stop the process. Examples given in the following sections attest to this.

In terms of institutional coverage, the law is comparatively broad, creating obligations for all “public sector” organizations at large. Not only do ministries, central agencies, and local governments have to comply with the FOIA, but so do public universities, hospitals, and many off-budget central and local public companies. The fundamental logic is that if you touch public funds or exert public regulatory power, you must comply with FOIA. But this process has yet to take roots in Romanian institutional culture. In fact, it is in these gray areas of applicability that the public and legal struggles are being fought by the media and civil society in order to create precedents and strengthen procedures. Both chambers of Parliament as well as the judiciary are covered by the FOIA.<sup>15</sup>

### **3.2. Scope of Exceptions**

Every institution must review its existing information, identify and compile a list of documents that may be sensitive or could pose problems by being publically disclosed, and then and classify them according to the standard procedure. The Romanian law thus implies that any information that is not explicitly classified is accessible to the public by default.

One of the most sensitive areas in any freedom-of-information law is its exceptions.<sup>16</sup> The Romanian FOIA exempts from free access any information regarding personal data as well as classified information on national defense, public order, deliberations of public authorities, and national economic and political interests. It is not enough that the information requested refers to a sensitive subject matter, the institution holding the information may refuse access only if it has classified the data or if the data refer to personal information. Two separate laws have been enacted to further describe the scope of classified information and personal data, which significantly contribute to the shaping of the definition of public information.

The courts not only have the authority to observe procedures followed when a particular piece of information is classified, but they can also analyze the merits of the decision by the institution to classify. Therefore, there is a opportunity for unsatisfied applicants to go before a judge. Here, the burden of proof shifts to the public institution, which must demonstrate that in every case (1) due process was followed when nondisclosure occurred; and (2) the content of information set aside from public view justifies its nondisclosure, following the letter and spirit of the law.

It is very important that the judges have full access to all classified information to be able to evaluate whether or not cases have merit—not only from a procedural standpoint, but also on the substance.<sup>17</sup> The FOIA exempts from classification, information that shows unlawful behavior within public entities; under no circumstances can this information be exempted from public access.

In addition to these traditional categories of exempted information, commercial information is also exempted from access if the release of it would breach intellectual property rights and the principle of fair competition.

The judicial process is another sensitive area where the FOIA has to be reconciled with the provisions included in the various laws regulating judicial proceedings:

- Information with regard to criminal or disciplinary investigations is generally not public due to the confidential character of such proceedings. But according to the European Court of Human Rights, regular information must be provided to the public about high-profile cases (those involving high-level corruption and organized crime). The practice of prosecutors' offices varies across the country: some issue press releases while others are giving the media access to procedural acts (such as indictments). This has in itself been a subject of intense media debate, with prosecutors alternatively criticized for disclosing too much (in order to create a show and put pressure on the courts) or too little. Information regarding disciplinary proceedings is usually not given to the public until a disciplinary sanction is applied.
- Information regarding judicial proceedings may be exempted from free access only if its release would breach the right to a fair trial or the legitimate interest of one of the parties. Again, the practice of courts is uneven: some give full access to the judicial file; others allow the media and public to be present only during the court sessions to hear what is being discussed. This maximal interpretation of the FOIA generated various media scandals—with phone-tapping recordings and other evidence from criminal files being leaked online or to various newspapers.

The exemption most difficult to implement relates to information involving the protection of youth; a similarly worded provision appears in the constitution. To date, no consistent practice exists regarding the scope of this exemption. This exemption, as well as all the other exemptions, were debated by NGOs and public sector representatives; the list that is included in the law reflects the consensus achieved between all parties.

Also important is the fact that the applicant requesting information does not have an obligation to prove s/he has a specific personal interest in accessing the respective information. In practice, especially in the first years after the adoption of the law, state entities tried to use this

argument to justify the restriction of public ATI, but the courts have consistently ruled in favor of applicants.

All persons—natural or legal, Romanian or foreign—are entitled to ask for and receive public information. This provision is very important as it opens public records not only to Romanian nationals, but also to foreign citizens and even persons who do not have citizenship, as long as they can provide a contact address where the response should be sent.

### 3.3. Procedures for Access

Information requests may be submitted in writing or orally, but the majority of requests are submitted in writing (both electronically and on paper). The public information officer performs a *prima facie* evaluation of the request and decides if the information requested is public or if it falls within one of the exceptions. Officers also check if their respective institution holds the information; if not, the public information officer forwards the request to the appropriate entity and informs the applicant about this.

The law has established very strict deadlines<sup>18</sup> for answering information requests:

- Five days from the submission of the request—if access is denied. The refusal must always be explained in writing.
- Ten days from the submission of the request—if access is granted.
- Thirty days from the submission of the request—if access is granted, but the compilation of the answer is complex and time consuming. In this case, the information officer must notify the applicant about the need for extra time within 10 days of the filing of the request.

The media benefit from shorter deadlines: information requested verbally should be immediately or within 24 hours at most. Public entities also have an obligation to hold regular press conferences and allow journalists to actively participate in these events.

If, in responding to public requests for information, the institution incurs costs for copying official documents, the law allows for these costs to be supported by the applicant. This provision was intensely debated and caused problems during the law's implementation because some NGOs claimed it could be used in bad faith by institutions to practically obstruct citizen access to important information by setting high prices for the copies (although this has not been reported as having occurred in practice).

Citizens requests should be compliant with the format provided for in the law's annex.

### **3.4. Implementing Rules/Regulations**

Implementation norms were adopted by the government in 2002 detailing the provisions of Law 544/2001 and making them more user-friendly for public agencies. The main concern of NGOs during the drafting process was to keep the risk of limiting the provisions of the primary legislation through secondary legislation under control. In the end, the norms did not affect the initial text of the law.

The methodological norms include templates and forms to be used by applicants for easy access to information: information requests, administrative complaints, answers to the information requests, answers to the administrative complaints, and the registry for information requests. Very few public institutions have such preprinted documents; in most cases, the applicant must find the information and prepare the request according to the standards imposed.

## 4. Promotion, Capacity, and Monitoring

Immediately after the adoption of the FOIA, the MPI undertook the task of monitoring the implementation of the law throughout Romania, and mobilized resources for capacity building of this new institutional function. The first goal of the ministry was to ensure that information officers were appointed in various public entities and to build a network among them. Even before the FOIA was adopted, information bureaus were set up at the local level and the professionals that staffed them had organized themselves into a countrywide association initially supported by grants from the United States Agency for International Development (USAID).<sup>19</sup> But these had not been systematic efforts and therefore the MPI tried to coordinate between them and commit more substantial resources to the task.

In retrospect, it can be said that a truly powerful FOIA coordination agency—one that could entrust higher visibility and political salience to the task—failed to materialize in Romania. While the MPI existed, it organized a few rounds of training for civil servants, but there have been no such systematic initiatives since its closure in 2003. Its successors were increasingly marginal institutions—first an agency and—since 2009—a small department in the government’s Secretariat General. By virtue of law, they continued to collect primary data about FOIA implementation based on the standard fiches filled in by every institution. These data were used for compiling very brief and descriptive annual reports.<sup>20</sup>

There is, however, little control by this department over the consistency of how the activity is quantified, as a series of interviews with sectoral and local practitioners made clear:<sup>21</sup> depending on the sector and nature of activity in every institution, there may be ATI solicitations from citizens that are purely utilitarian or, on the other hand, that do not fulfill all the formal FOIA requirements (for example, urgent requests from journalists). As previously discussed, other institutions with a plausible role in this activity (such as the ombudsman) refrained from taking any action to consolidate various ATI requests

from citizens or from giving any guidance to public entities about how they should address these issues.

### 4.1. Budget

The tasks related to the FOIA in each institution have no dedicated budget; the designated officers are civil servants with various other duties in the hierarchy who merely dispatch ATI requests to the relevant departments. In most of the local institutions analyzed and in the two sectoral ministries where extensive discussions were held (transportation and education), the task of processing the FOIA requests is assigned to a press and public relations office, which registers the requests and monitors their circuit inside the bureaucracy. There is no explicit budget for this activity.

While in principle program-project budgeting was introduced in Romania a few years ago, this element of modern public management has largely remained on paper. Without a proper system of program budgeting, it is difficult to quantify how much the FOIA implementation costs. Simply adding up the salaries of the designated FOIA officers would be inaccurate because very few of them exclusively perform FOIA-related activities in their institutions, and underestimate of the total administrative costs, because most of the time data are collected and responses compiled in the regular, line units, such as the accounting or legal departments.

Big public bodies such as ministries, agencies, or the parliament—where the “institutional distance” between the accounting department and the small unit in charge of the FOIA implementation is large—find it too cumbersome to collect per-service fees from applicants to cover their material costs for FOIA processing, though the law does allow it. Smaller territorial branches or local governments may find collecting money easier, but might choose not to because it may be unpopular with the public or perceived as abusive and challenged by activists.<sup>22</sup>



## 4.2. Records Management

There is a certain inherited discipline in public administration that guarantees the integrity of the archiving process and the flow of papers in general. In the FOIA cycle, as confirmed by most central officials interviewed, the difficulties faced in the early years of the law's implementation have been overcome, at least as far as the basic provisions are concerned.<sup>23</sup>

The handling of data and documents by institutions could be streamlined. Annex 1, which deals with the Ministry of Education, explains some of these difficulties that are also encountered by other public institutions having to respond to thousands of requests asking for data about personal situations, employment records, or old regulations no longer in force. For example, the repeated changes in the national pension system after 2000 created a huge demand for information that people had to obtain from one institution and provide in person to another. Most of this information had to be manually retrieved from physical archives because the introduction of an integrated IT management system was incomplete.

## 4.3. Information Technology (IT)

Because, with a few notable exceptions,<sup>24</sup> there is no systematic electronic record management system within public institutions, IT intervenes in the FOIA cycle in only two ways:

- The creation of basic Web pages—or sections on the page of the institution—to disclose the *ex officio* information specified by law. In general, there is no interactivity on these pages and very little processing of the info to make it more user-friendly for the visitor. For example, staff charts or budgets are scanned and attached as graphic files with poor resolution and budgets cannot be converted into spreadsheets for analysis.
- It is possible for the public to send official FOIA requests by e-mail. This channel of communication, has become more important in recent years for both receiving requests and sending answers: the Ministry of Education reportedly

receives up to 20 percent of its requests by electronic channels (see case 1 in annex 1), which is above the national average discussed in latter sections.

But IT that is used for communication cannot solve the problem of a lack of integrated data management within the concerned institutions. Since most of the requests concern individual cases, there is a lot of effort invested in manually shuffling the physical archives of ministries that have not yet been transferred to e-platforms. Even in the case of legislative repertoires where e-databases were created (on the parliament's Web site or by commercial companies), the staff's tendency is to recover old pieces of legislation from the ministries' physical archives, largely because the object of the FOIA requests is the secondary or tertiary legislation that sometimes does not exist in free-of-charge e-repertoires.

Old employment files or past pension contributions were also not incorporated in e-databases. A lack of integrated management of information makes it difficult even for current news to be recovered and quoted in the official responses to FOIA requests, though they may exist somewhere. For example, sometimes the FOIA units do not have the resources to identify the information that is already posted as an announcement by a different branch of the ministry—not to mention the case of cross-sectoral issues—so time is spent documenting and writing a response even though a link to the announcement would have been sufficient.<sup>25</sup>

## 4.4. Staffing and Training

The first obligation created by the FOIA was for all the public bodies covered by it, depending on their size, to open public relations offices or at a minimum to designate civil servants in charge of FOIA compliance within the institution. The process is currently quite formalized and uniform across public bodies: applications are received by the designated service (or person) and registered; they are then forwarded to the relevant department for a draft response. The draft response is checked by the FOIA officer and countersigned alongside the relevant department head's signature. The official response is sent to

the solicitor in the form preferred (for example, by paper or e-mail).

In the event of an urgent solicitation from a journalist, the process is much less formal (and more expeditious), which is mostly to their advantage. Another positive step is the clear separation of FOIA requests from petitions to institutions that have their own circuit and legal regime.

Information officers are also responsible for disclosing *ex officio* information, usually on the institutions' Web sites, although they do not have direct control over the content or technical parameters of them. Deficiencies in the Web sites is evidence of a lack of capacity, which, while not directly related to the FOIA, may affect compliance with it.

In general, there has been relatively little formal training for the concerned civil servants after the law was adopted, although the ministry had initially put a training plan in place. Several rounds of information sessions were organized and a handbook for FOIA implementation was printed and distributed. After the MPI was terminated in 2003, support for the task was reduced even further, especially after its successor agency was also dismantled in 2009. Additional resources were poured into the system by private operators, mainly external donors operating directly or through NGO projects. These activities, either in the form of capacity building or independent monitoring initiatives were, as a rule, more visible than those organized by the central coordinators, but they were far from sufficient to cover the entire administration.

At present, most central and local public institutions have appointed FOIA officers, and they have a reasonable level of awareness of the law's general provisions. The basic contact information and most of the *ex officio* items specified in the law can be found in some form on the institutional Web sites, with the exception of activity reports, the practice of which is uneven.

## 4.5. Monitoring

All entities covered by this law have equal obligations. Apart from designating information officers and information departments, each institution has to publish an annual newsletter strictly related to the FOIA that includes various statistics on the ATI process, such as: (1) the number of submitted requests; (2) the number of requests per topic; (3) the number of requests for which access was granted; (4) the number of requests for which access was denied; (5) the number of requests sent on paper and electronically; (6) the number of requests from natural persons; (7) the number of requests from legal persons; (8) the number of administrative complaints—solved favorably and rejected; (9) the number of complaints to courts—solved favorably, rejected, and pending; (10) the expenditure of the public information department; (11) the price of printing; and (12) the number of visitors to the information center.

Aside from this newsletter, which is a collection of statistics related to the FOIA process, all institutions concerned have a separate obligation to write an activity report "at least annually" (article 5). This important document is, in principle, published in the *Official Gazette of Romania*—the formal channel and archive of the laws, government decisions, and public appointments in the country. This sets a very high threshold in terms of institutional effort and discipline, and most public institutions fail to live up to the standard. Although the law makes it compulsory for public institutions to publish these reports, administrative practices are uneven in this respect, and cases where such reports are not published are numerous. But when explicitly asked to produce these reports, public entities compile and forward them to applicants, which demonstrates that at least they are aware of their obligations. In principle, the FOIA's secondary legislation offers guidelines on how institutional newsletters and reports should be prepared and national-level integrative reports compiled. The FOIA officers are expected to know of these provisions and most are formally aware of them and post the text of the Law 544/2001 on their

institutional Web sites. But introducing meaningful activity reports as a regular practice is an uphill struggle in the Romanian public administration in spite of the legal provisions because this depends on more than the goodwill and determination of the FOIA officers. The functioning and reporting for managerial purposes inside the institution must change, with leadership exerted from the top, for the FOIA officer to be able to compile proper activity reports. For example, a pilot study conducted by a think tank in late 2010 has shown that—even at the topmost level—compliance with this provision of the law is patchy: only 4 out of the 15 Romanian ministries published activity reports in an acceptable form.

The only role the central government played in the process was to annually monitor compliance reports on the law enforcement status. This task was entrusted to the MPI while it existed; after 2003, it was passed to a lesser agency under the government's General Secretariat (the core cabinet chancellery). This body (the Agency for Government Strategies, or ASG) had ambitious goals that it struggled to achieve until it was dismantled in 2009 as part of a bureaucracy-reduction drive and replaced with the lower-order DGS. The attention paid to the issue of monitoring compliance was of minimal consequence.

The statistical data regarding the FOIA process were compiled and regularly published at the national level in the first few years after the passage of the law. But the quality of the information in them was sometimes dubious and made the data hard to interpret. Ministries often mixed up the FOIA requests with other requests they may have received from citizens in their routine activity. Reportedly, the Ministry of Interior included in its reporting all the applications for personal IDs, the traffic fine

administrative appeals, and so on, which pushed its rate of requests into tens of thousands per year; other ministries made similar uncoordinated calculations. After accession to the EU, the attention devoted to this topic almost disappeared, along with the fear of governments that they could somehow be penalized by their European partners.

Even information related to the FOIA process is suboptimal. In annex 1, where data from the Ministry of Education are provided, some data do not add up. For instance, the total for the number of requests received does not correspond in all the tables: the number of oral requests in one place is larger than the overall total in the other, the number of e-mailed requests received appears suspiciously high when compared to the total, and so on. The transportation ministry provides aggregate sectoral data that are even more difficult to make sense of and there is little control over how subordinated public companies like the railways interpret and report requests.<sup>26</sup> These are relatively independent commercial operators and, in practice, it is difficult for a middle civil servant in the ministry, entrusted with what is perceived as a marginal task, to enforce procedural rules.

One more glaring example of poor records management and the inefficient use of existing IT resources is the procedure for centralizing information on FOIA implementation in the DSG. The standard fiches with data (included in annex 1) received from institutions are in Word format and often faxed. In such cases, extra processing is needed and data sometimes has to be manually retyped onto a spreadsheet in order to generate the national-level report. It is unclear why the coordinating agency does not create a universal Excel template to be sent exclusively by e-mail, a measure that would facilitate data aggregation.<sup>27</sup>

## 5. Enforcement and Sanctions

### 5.1. Appeals

In Romania, the process for appealing administration decisions has two phases. First, an administrative complaint is filed with the respective agency. If applicants are not satisfied with the answers received, they may file an administrative complaint to the head of the public entity that refused access. Each public entity has a commission that hears and decides whether or not these complaints are valid and communicates that answer to the applicant. If this response is unsatisfactory to the applicant, it can be challenged in court. This procedure also covers administrative silence: if no answer is provided within the legal time frame, the applicant may consider this to be a negative response.

The second line of appeals is to the courts, and enforcement of the FOIA relies almost completely on the judicial system and the deterrence created by court-dictated sanctions. When an institution procrastinates, the persons requesting information must go to court to (re)establish their rights. Therefore, over the years, the law has generated a string of cases and court precedents, like a type of *sui-generis* common law system, although the judges' decisions do not come together easily into a unitary practice—that is, judgments are not always uniform.

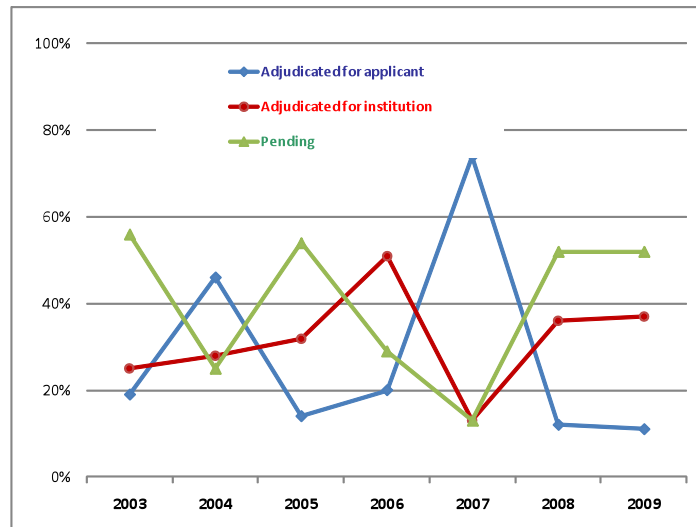
The Romanian FOIA legislation did not entrust the People's Advocate with any specific authority. But given that free access to information is a right guaranteed under the constitution and the general function of this institution is to foster the rights of individuals in their relationship to the public sector and to publicly sanction the deviation of the public sector from the norm, NGOs (such as Transparency International Romania) tried to involve the ombudsman in the implementation of the FOIA. But the People's Advocate did not have the authority to sanction breaches of the law, nor could it force public institutions to behave according to the FOIA. The

effectiveness of such an ombudsman—with only an advisory role—depends on local traditions and administrative culture; for example, the effect on heads of public institutions who are singled out for lack of transparency by a body without any power to punish them, the efficiency of the system of checks and balances and the indirect social accountability in a given area, and the frequency of such transgressions. A large variation exists in this respect between countries, even within the EU: the ombudsman's office in Sweden operates much better and is much more visible than the ones in the new member states.

In practice, the courts shaped the interpretation of the law and set the boundaries of the right to free ATI. NGO advocacy programs focused on testing the FOIA were instrumental in bringing strategic litigation to court, allowing judges to pass rulings in this field. Even nontransparent entities were eventually forced by the decisions of the courts to open their doors.<sup>28</sup> This method of making the law operational is an entrenched habit in Romania, where pronouncements are taken into account by other institutions only if the entity generating them has clear enforcement powers. This tends to be the rule in post-Communist countries, and probably explains why noncompulsory guidance issued by bodies—such as the ombudsman or the information commissioner—tends to be disregarded.

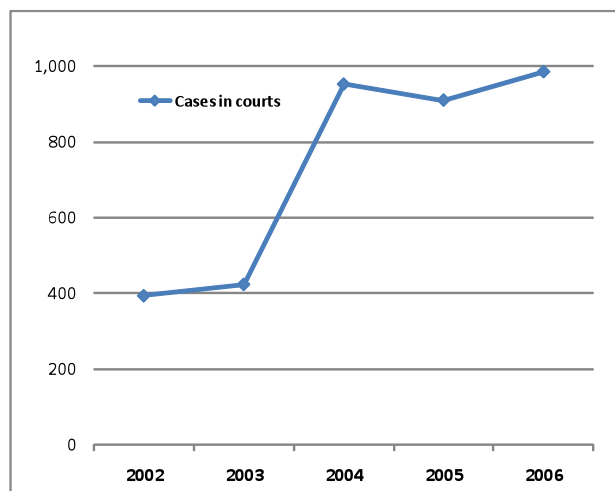
Crucial for the enforcement process—but also for deterrence—is the fact that once a judge has decided against a public institution, the information must be disclosed immediately. If it is not, the judge may impose financial penalties that apply to heads of institution individually or to both the head and the FOIA officer as a fraction of their salaries. The fines accrue daily until the decision of the court is enforced (that is, until the information requested satisfactorily reaches the applicant). The data on administrative complaints and court cases are shown below.

**Figure 5.1. Administrative Complaints**



Source: DGS, Last published annual report (2010) compiled by the DGS.

**Figure 5.2. Cases in Courts**



Source: Last published annual report (2010) compiled by the DGS.

**Table 5.1. Structure of Administrative Complaints**

Percentage of administrative complaints	2003 (%)	2004 (%)	2005 (%)	2006 (%)	2007 (%)	2008 (%)	2009 (%)
In favor of plaintiff	69	92	55	52	79	45	59.88
Rejected	16	5	33	35	17	39	22.65
Ongoing	15	3	11	13	4	16	17.47

Source: Last published annual report (2010) compiled by the DGS.

**Table 5.2. Structure of Court Complaints**

Percentage of complaints in courts	2003 (%)	2004 (%)	2005 (%)	2006 (%)	2007 (%)	2008 (%)	2009 (%)
In favor of plaintiff	19	46	14	20	74	12	11.00
Rejected	25	28	32	51	13	36	37
Ongoing	56	25	54	29	135	52	52

Source: Last published annual report (2010) compiled by the DGS.

As the data above show, in the first years after the adoption of the FOIA, there were not many court complaints: up to 400 in 2003, they reached a plateau of about 1,000 for the interval 2006–09. This increase was mostly due to an accumulation effect. It takes over a year for a full action before a court to be finalized; therefore, a case is also counted in the following year. The other explanation for the immediate increase since 2003 is the strategic litigation initiated by NGOs as a result of unsatisfactory responses received from public entities. Their actions in the courts—highly visible and covered by the media—may have had an effect both on the administration, by making it treat such requests more diligently, and on the general public, by encouraging them to pick up the law and use it. After an initial increase, the number of complaints stabilized in the subsequent years. The practice of the courts also fluctuated—as can be seen in the charts in figure 5.2.

The high percentage of solutions to administrative complaints in favor of the plaintiff, especially in the first years after the adoption of the law, is probably a reflection of a learning process: civil servants who were directly responsible took time to understand how the law worked, and the FOIA process took some time to be institutionalized. It is encouraging that the heads of institutions, to which the administrative complaints were submitted, have more often than not stood with the plaintiffs (69 percent in 2003; 92 percent in 2004; 79 percent in 2007; and in more than 50 percent of cases in all years), which demonstrates that there was not much procrastination regarding enforcement—at least in statistical terms.

## 6. Compliance

### 6.1. Proactive Disclosure

All entities covered by the law must publish proactively (without a prior request) the following information:

- the laws and regulations governing the respective entity;
- the organizational structure, the competences of each department, the opening hours, and the schedule for holding audiences;
- the names of the persons leading the respective entity and the name of the public information officer;
- the contact details of the entity: headquarters, phone number, fax, e-mail, Web site;
- financial sources, the budget, and the executed budget;
- programs and strategies;
- a list of documents that are of public interest;
- a list containing all documents generated or administered by the respective entity; and
- an outline of the appeals procedure if a person is unhappy with the public entity's answer.

People may access this information either by going to the public entity's headquarters or by consulting its Web site. Information regarding private<sup>29</sup> and public procurement contracts<sup>30</sup> should also be provided to the public at the entity's headquarters. Many public institutions did start to post more information ex-officio on their Web sites after the FOIA was adopted. There was a general understanding that the leadership should be identified, contact data should exist, the institution's budget should be made available (although the format of the budgets continued to be a problem), and a link to an *FOIA officer*, with an explanation provided about the procedures for requesting information that is not available online. This was generally the situation with "core government" institutions; 10 years after the law was passed, public school, university, and hospital management remained unaware that they had similar obligations under the FOIA.

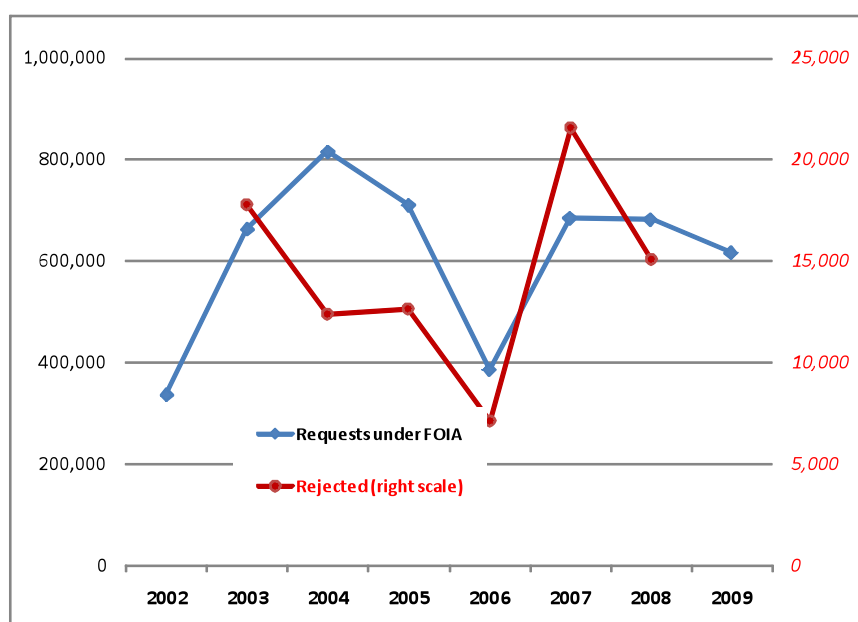
The quality and completeness of information posted online is still weak. A top-level decision was made to reduce compliance costs across the entire public administration with the posting of more relevant information online in the correct format, reducing the need for active requests; however, there are few signs of this occurring in practice. On average, 50 percent of central institutions used their Web sites to publicize information covered by Law 544 in 2008; at the local level, the figure was about 25 percent.

### 6.2. Requests and Responsiveness

The most encouraging development was the appearance of several active stakeholders in civil society who picked up the law and used it: citizens with individual requests; journalists conducting investigations; NGOs conducting systematic monitoring that reinforced the rules within institutions and witnessed the emergence of a critical mass of court decisions predominantly leaning toward disclosure—at least in high-profile, flagship cases. The issue was also signaled in cross-country quality of governance ratings; as a result, scores on voice and media freedom have improved.<sup>31</sup> Applicants also quickly learned how to use the procedures, resulting in a decline in the number of rejected requests.

The total volume of requests was relatively high (see table 6.1 and figure 6.1) and the rate of response good, according to reports compiled by the central government unit (ASG until 2009; then DGS).<sup>32</sup> Most of the solicitations (70–80 percent in the interval analyzed) came from individuals; all others came from legal persons (see table 6.3). Solicitations were usually turned down because (1) the information requested did not exist in the institution (in which case the applicant may or may not have been properly redirected); or (2) the information requested was exempted from publication under the law. None of the key persons from central institutions interviewed was able to explain why the percentage of refusals went up so dramatically—from 1–3 percent before 2006 to 39 percent in 2008 (see table 6.1).

**Figure 6.1. Total Number of Requests Received under the FOIA**



Source: DGS.

**Table 6.1. Total Number of Requests Received under the FOIA**

Requests to ministries and subordinated entities	2003	2004	2005	2006	2007	2008	2009
Total	662,447	815,528	710,060	384,642	684,472	681,696	615,783
Positive answers	97%	98.47%	96.20%	89%	79%	45%	n.a.
Rejected	3%	1.52%	2%	2%	17.00%	39.00%	n.a.
Forwarded to other institutions	0	0.01%	1.80%	9%	4%	19%	n.a.

Source: DGS.

n.a. = Not applicable.

**Table 6.2. Total Number of Requests Received under the FOIA, by Channel**

Requests sent	2003 (%)	2004 (%)	2005 (%)	2006 (%)	2007 (%)	2008 (%)	2009 (%)
In writing	21	23.41	35.40	26	32	39	38.70
Verbally	73	71.76	57.50	65	57	54.00	86
By e-mail	6	4.82	7.10	9	10	11.00	9.00

Source: DGS.

**Table 6.3. Total Number of Requests Received under the FOIA, by Type of Applicant**

Applicant	2003 (%)	2004 (%)	2005 (%)	2006 (%)	2007 (%)	2008 (%)	2009 (%)
Individuals	80	69.99	70.40	65	68	71	71
Legal persons	20	30.01	29.40	35	32	29	29

Source: DGS.



The instruments used by applicants for information (according to 2008 data, table 6.2) are (1) verbal requests (55 percent), (2) written requests (33 percent), and (3) e-mail requests (12 percent). Here too a trend is discernible: verbal requests are declining in number; e-mails are increasing. The latter were prevalent in the first few years as citizens and companies tended to employ Law 544 for getting any kind of utilitarian information they needed in their dealings with public authorities. The administration was also likely to report all routine interactions with citizens as requests under Law 544, probably as an old reflex to show a high volume of activity in the periodical reports.

The central administration and its subordinated institutions handle between 66–75 percent of all requests. The deconcentrated, territorial offices of ministries and national public companies are also categorized as central bodies, which explains their high number: it is very likely citizens go to these institutions to solve their individual problems (such a various types of approvals, public services, and so on) and make appeals under Law 544 only in hopes of speeding up the process.

Even in recent years, the public information most frequently demanded had to do with normative acts and regulations, including local ones (approximately 40 percent or more). This reflects the practical limitations (high monetary and information costs) ordinary citizens and companies face when using legal databases online as well as the poor selection of such information posted *ex officio* on the Web sites of the relevant institutions. Information about budget allocations and the use of public funds comes next at 25–30 percent, which, from an accountability standpoint, is encouraging. This category is on the rise overall, but it is also the one in which most administrative rejections have occurred, usually when requests somehow involved personal financial data.

The mass media has attempted to get access to interesting bits of information from various public institutions (such as budgets, projects, tenders, and conflicts of interests). Some journalists have learned how to use the law, and with the occasional assistance from leading NGOs and media associations, have taken the time and trouble to go to court to establish precedents. Public advocacy programs have been carried out by NGOs and think tanks, sometimes with donor support, explicitly aimed at creating a string of strategic precedents, increased awareness of the law's provisions, and—by implication—a deterrence effect against noncompliance.

The need for this kind of intermediary role arose from the fact that the Romanian public had little experience in requesting access to data that were not immediately useful in individual transactions and little expertise in analyzing the more structured type of information that public agencies produce under the FOIA (activity reports, budgets, expenditure reports, and so on). Equally important was the need to monitor the responsiveness and compliance of public agencies to the FOIA in a more systematic way than random requests from citizens could ensure.

Another important function of such an intermediary is to aggregate and streamline citizen requests, thus reducing duplication and the workload of public institutions, including collecting public information released under the FOIA's provisions, processing and presenting it in a user-friendly format, assisting citizens in submitting requests to public agencies, and monitoring the responsiveness of the latter. They also interacted with and advised public agencies (at their request) on how to release public information.

## 7. Analysis

The media and civil society embraced the law and, based on its provisions, created practices and monitoring tools. They did this using a broad array of tools and interventions, sometimes using institutional support for consolidating good practices in institutions, but more often taking a confrontational approach by:

- Quantifying compliance and publishing ranking tables that follow standardized, mock requests. (case 2 in annex 1). Here, compliance with the law's provisions—especially the existence and quality of *ex ante* documents that must exist in the public domain—was considered not only a measure of institutional openness, but also a proxy for administrative capacity in general (examples given in cases 2 and 3).
- Suing state bodies on the FOIA to test the limits of the law's applicability and creating valuable and visible legal precedents (cases 2 and 3).

The creativity of a few civil society actors in exploiting the possibilities offered by the law has been remarkable. The Center for Independent Journalism ran a series of workshops, training many investigative and political reporters on how to use the FOIA and provided readymade forms for information requests to eliminate the risk that an appeal would be rejected in court based on a technicality. The Institute for Public Policy (IPP), a think tank, organized systematic programs for many years to build individual track records of voting (both in the national parliament and local councils), and established rankings of the office expenditures of MPs and councilors. Such databases, when published, carry a lot of political weight and generate media coverage, which is crucial for the intended deterrence effect.

The Romanian Academic Society (SAR), a Bucharest-based think tank,<sup>33</sup> ran a series of projects for about 5 years to measure the transparency and quality of *ex officio* public information on public university Web sites.

League tables were prepared based on these scores and made public in what became a high-profile exercise in “naming and shaming” based on this transparency criteria. Evidence from a second round of evaluations of the same universities showed marked improvement as a result of this monitoring. The project was modeled after a previous one carried out by the same organization that had effectively used the same instrument—the FOIA—to monitor the political integrity of party candidates in the 2004 national elections.<sup>34</sup>

The same exercise was performed in several rounds on a sample of about 300 “core” public authorities (ministries, territorial agencies, and local governments), by either testing them on their compliance with the general FOIA provisions or by explicitly requesting more sensitive information, like the full record of public procurement from the previous budget year (see case 1 in annex 1). In all cases, rankings were prepared and published by sector and institution, and these became widely debated in the national and local media, including on talk shows.

Finally, the SAR, the IPP, and several other civic actors appeared before courts with strategic and visible cases about information of public interest not being willingly disclosed by public institutions. They won almost all of them, whether the issue at stake was the breakdown of office expenses by an individual councilor—decision: this is not personal information; conditions of privatization of a car-making plant with Ford Motors by the State Property Authority—decision: confidentiality clauses requested by the investor and accepted by the state cannot override the law, so the contract and all annexes should be made public; or public relations and service contracts concluded by the state-owned export-promotion Eximbank—decision: these contracts are not covered by the banking secrecy rules because these apply only to clients, not to subcontractors (more details in case 2, annex 1).

The fact that, on average, the central and local public institutions have responded favorably to 95–98 percent of requests received is encouraging and testifies to the strong deterrence effect created by the flagship court cases initiated and popularized by the media and civic activists. In interviews, leaders of journalism associations explicitly mentioned such initiatives triggered good practices in public institutions that have become more forthcoming since these high-profile campaigns. In another widely publicized initiative in 2005 (see note 32), APADOR-CH, a human-rights nonprofit association, sued the General Prosecutor's Office over data on phone tapping by the Romanian Intelligence Service (SRI), the only agency entrusted with phone surveillance in Romania. They sued after they had obtained a mandate from the magistrates asking the SRI to produce the data on the number of surveillance operations and subjects there were in the previous year. By tradition, putting such reports in the public domain would have been unthinkable, as state secret laws automatically covered all such operations. But the courts finally adjudicated in favor of the plaintiffs and forced the SRI to prepare a report summarizing data on the surveillance operations. Tackling head-on one of the most sensitive areas of public policy—state intelligence services and the telephone surveillance system—the activists thus created a landmark precedent that probably influenced not only subsequent court decisions, but also the functioning of the state bureaucracies who learned that there are rules to be complied with even in domains that had seemed closed to public scrutiny.

In principle, the media was supportive of such initiatives. But the situation was complicated by the fact that in a small media market,<sup>35</sup> the higher journalistic agenda is often superseded by the narrow interests of the owners, which are often more political than economic. As a result, while praising transparency and anticorruption measures in principle, some media channels hosted public campaigns against the very champions of such moves: civic activists and public officials who were promoters of the reform.

In theory, businesses would be one of the beneficiaries from a more open and accountable administration, but to date, no critical mass has appeared among entrepreneurs in favor of this position. This is probably due to a difficult operating environment that creates a free-riding dilemma: whoever makes the first move will incur the full cost, while the benefits, if any, would accrue to all.

# Annex 1

## Case 1. How FOIA-Related Tasks are Performed in a Large Sectoral Ministry: Education

Like most large central institutions that have extensive interaction with the public, the Ministry of Education has a Press and Public Relations (PR) Service which is officially in charge of processing the Freedom of Information Act (FOIA) requests received by the headquarters. Similarly, the 41 county-level branches of the ministry (education inspectorates) have smaller communication units—usually consisting of one person—to fulfill the same function. The Press and PR Service in the ministry centralizes the standard fiches from the region and sends the aggregate data to the DGS once a year. The regular petitions to the ministry follow a separate path for processing and reporting and are not mixed up with the FOIA requests.

Although the Ministry of Education is a big structure, the Press and PR Service is a rather small unit made up of three civil servants. Their duties are largely threefold: (1) to monitor the media and organize the ministry's official communications, such as press releases and press conferences; (2) to receive, register, and process FOIA solicitations; and (3) to organize the proactive disclosure of public information, according to the law. This unit does not have its own budget as such, nor is the ministry's annual budget programming process organized to take into account the actual volume of the FOIA activity and budget. The only concrete element of resource programming for the FOIA tasks are the salaries of the three civil servants.

Another issue is that of the administrative fees, which by law public institutions can charge to applicants whose FOIA requests involve a substantial amount of work and use of public resources. In practice, though, this provision is difficult to apply, especially in large institutions like ministries: the Press and PR unit has no procedure for charging and collecting money from applicants and the ministry's accounting

department is in a different location and too overworked to find time to create procedures for collecting what they perceive as trivial sums.

The final result is that, because the Press and PR unit prefers not to charge for the copies or other expenses, and in order to avoid cumbersome procedures that might end up being more annoying for the applicant in terms of time rather than money, a modest source of extra revenue is lost that could have supplemented the usually tight budget for materials and consumables. Not surprisingly, the territorial branches (inspectorates), being smaller institutions, find it easier to organize the charging of service fees. According to existing data, in 2009, they incurred a net benefit from this activity: they collected about \$10,000 in revenues from charges against costs of about \$7,000. However, these numbers, especially regarding costs, should be regarded with caution.

In terms of content, the vast majority of FOIA requests are somewhat utilitarian in nature (see table A1.1): teachers inquiring about various pieces of legislation on regulations, mostly related to salary arrangements or promotion exams; students with individual problems or grievances; or retired teachers asked by the pension fund to produce documents from their active period. After 2005, there were a few rounds of pension recalculations done by the government to rectify some imbalances, but due to the poor organization of the national pensions archives, the process ended with many people having to individually document their salary regime during the various stages of their active life. As a result, the ministry's FOIA unit was burdened with a lot of archival work, frustratingly done on a case-by-case basis.

Apart from these run-of-the-mill tasks, the units also receive occasional requests for information of authentic public interest from NGOs or investigative journalists, such as those related to the use of public resources, tenders and public contracts, and performance indicators of the education system. Each request is registered at

the Press and PR unit and directed to the relevant ministerial department, the majority going to the legal service; others to the economic directorate, the curriculum unit, and so on. The draft responses from the department come back to the unit, are rechecked by the head of the service, and are sent to the solicitor and to the head of the sectoral department who prepare the draft to be signed. According to the head of one FOIA unit who would occasionally meet and have discussions with his counterparts in other ministries and central institutions, there were some problems in the first two or three years after the law was passed with the interpretation of some of its provisions and in the organization of the flow of documents, but that in the last few years, “the practice has stricken roots and became reasonably well institutionalized.”<sup>36</sup>

Though not explicitly requested by law, in some cases of “sensitive requests”—such as, minister’s actions, important policy changes, or significant contracts and tenders—the head of the Press and PR unit also consults the minister’s advisors before sending the reply to the applicant. Also, according to the head of the unit, solicitations coming from the mass media are given preferential treatment in this ministry and others in the sense that they are processed faster and not delayed until the legal deadline.

In terms of numbers and categories of requests received by this ministry, the last year for which information was officially reported (2009) shows the following numbers (categories follow the format of the standardized fiche provided by the law):

**Table A1.1. FOIA Requests and How They Were Solved, Ministry of Education, 2009.**

	Central level	County-level inspectorates	Total
Requests solved	2,790	7,192	9,982
Requests forwarded to other institutions	103	87	190
Requests rejected:			
Information excepted	2	13	15
Nonexistent information	30	32	62
No/other reason	5	117	122
Total	2,930	7,441	10,371

Source: Ministry of Education, the Press and FOIA unit.

**Table A1.2. FOIA Requests by Subject, Ministry of Education, 2009**

Requests received, by subject	Central level	County level	Total
Public funds (spending, public contracts)	224	770	994
Ministerial activity	70	956	1,026
Sectoral laws and regulations	1,558	1,784	3,342
Actions of political leaders	35	90	125
Information related to the FOIA procedures	15	54	69
Exams, curricula, transfers, other HR policy	890	2,910	3,800

Source: Ministry of Education, the Press and FOIA unit.

**Table A1.3. FOIA Requests by Channel, Ministry of Education, 2009**

Request channels	Central level	County level
On paper	2,981	2,366
E-mail	2,600	448
Verbal	1,000	16,000

Source: Ministry of Education, the Press and FOIA unit.

**Table A1.4. Appeals Following FOIA Requests and How They Were Solved, Ministry of Education, 2009**

		Central level	County level
Administrative complaints	In favor of applicant	—	—
	Rejected	2	10
	Pending	1	15
Actions in court	Decided for applicant	2	3
	Decided for institution	1	8
	Pending	5	17

Source: Ministry of Education, the Press and FOIA unit.

## Case 2. Monitoring of Transparency by Sampling Institutions: The Case of Procurement

In 2009, a sample of 281 public institutions from all sectors and tiers of government was developed by the Romanian Academic Society (SAR), a Bucharest-based think tank, to test them on the actual implementation of the legal provisions on transparency in public procurement.

The requests for data using the standard forms under Law 544/2001 were sent to each of the institutions by fax or/and e-mail, with follow-up requests to those who did not respond on time. The quality and completeness of the answers were quantified as well as the timeliness according to the law, the aim being to monitor the whole procurement process in the respective institution. A public procurement list of contracts above €5,000 was requested for the previous year, which included details such as: (1) the type of procurement procedure, (2) the justification of the type of procurement procedure chosen, (3) the types and quantities of products/services purchased, (4) the suppliers who won the

contracts, and (5) the total value of the procurement. The scoring system is explained below and the following table summarizes the results.

- Speed of response (code): (1) within 10 days; (2) within 30 days; (3) after 30 days; (4) none.
- Completeness of response (code): (1) everything requested in the reasonable form (directly, functional Web site), friendly style; (2) reasonable but telegraphic; (3) partial; (4) unsatisfactory.
- Quality of the existing documentation (dispatched, accessible online, and so on), understanding of the procurement process (code): (1) the procurement process compliant with type of procurement versus contract value and with explicit justifications for exceptions; (2) the procurement process seems to be compliant, but justifications are not complete; (3) the procurement process is not justified from the viewpoint of the contract value; or (4) this point has been ignored.

**Table A1.5. The Sample of Public Institutions Surveyed**

95	Local governments
41	County councils
92	Deconcentrated (county level: police, school inspectorate, and so on)
4	“Direct” central institution (ministry, subordinated agency)
6	“Indirect” central institution (autonomous administration, public company)
18	Courts
10	School, secondary school
15	Hospital

Source: SAR 2009.

**Table A1.6. Survey Results for 281 Institutions: Average Scores**

	Speed of response	Completeness of response	Quality (documents, procedures)
Court	3.78	3.50	3.44
County council	3.54	3.05	2.76
Urban town hall	3.05	2.61	2.33
Deconcentrated office	2.71	2.60	2.33
University	2.30	2.90	2.70
Central institution/administration/company	2.71	2.14	2.14
Rural town hall	1.97	1.81	1.68
Hospital	1.20	1.13	1.20

Source: SAR, 2009.

### Case 3. Strategic Litigation on Law 544/2001

To supplement the data collection (case 1), gain a better insight into the practice at the subnational level, and investigate particular cases closer, the monitoring system also included a more intensive component based on the direct request of access to the whole procurement dossier to evaluate its accuracy and completeness. Local investigative journalists with an interest and some experience in public procurement were selected. They were further trained by the SAR and assisted in the submission of applications for access to all procurement dossiers in a list of 29 cases considered “sensitive” (having high visibility, dealing with suspicions of fraud aired in the media, and so on).

The 29 procurement/concession contracts surveyed were:

- AVAS (state privatization agency): selling of an automaker to Ford Motors.
- The National Authority for Mineral Resources (ANRM): offshore oil exploitation, Petrom-OMV.
- Bucharest metro company (Metrorex): contract for advertising spaces.
- Eximbank (state bank): contract for the acquisition of publicity and promotion services.
- Local government of District 1, Bucharest: large garbage collection contract.
- Cluj County Council: concession contracts for shopping mall, Nokia factory, and traffic monitoring cameras.
- Agro University of Cluj: real estate concession.
- Town Hall of Constanța: eight contracts with press and publicity agencies, security firms, and park maintenance companies.

- Braşov County Council: work contracts for offices, social housing, and sports grounds.
- Town Hall of Braşov: road and school rehabilitation contracts.
- Municipal Transport Company, Oradea: purchase of streetcars.
- Oradea University: The construction of the University Library.
- Rural municipality of Sânmartin: sale of forested land.
- Bihor County Council: rehabilitation of roads.
- Town Hall of Iaşi: services contract for towing vehicles.
- Iaşi, two hospitals: contracts for rehabilitation of premises and purchasing medical equipment.

The main results from this evaluation showed a high variability of local practices, from full disclosure to complete opacity. In general, off-budget institutions such as hospitals and schools were surprised to learn they were covered by the FOIA and must, as a result, make all their proceedings public. A similar thing occurred with the state export-promotion bank, which actually pretended that their purchase of PR and legal services was covered by the bank's secrecy laws and with the state privatization agency, which blamed its private partners for pressuring it into including confidentiality clauses in the contract. The court found these clauses groundless so the privatization file was made public.

To build a visible portfolio of best-practice cases, to clarify who has the obligation to provide public information and who doesn't, and to establish the extent to which a public authority may accept the idea of some contractors/associates introducing confidentiality clauses in their contracts, the SAR initiated legal action in the public interest based on Law 544/2001 against the above-mentioned institutions. Based on resources available, six institutions were selected for the strategic importance of the judicial precedent to be created: AVAS, ANRM, Metrorex, Eximbank, the local government of District 1-Bucharest, and the Town Hall of Constanţa. The actions were introduced in 2009, and the think tank won all six cases, including the three for which the institutions appealed the first-order court decision.

These decisions are important because they reinforce the doctrine that even "special" public institutions that are market-based and have commercial revenues, such as the state-owned Eximbank, are subject to Law 544/2001 with regard to their procurement process (but not their banking operations), and that even "strategic" privatizations or offshore oil exploration contracts must meet the requirements of transparency applicable to normal procurement operations. The law has been an effective tool for achieving such results.



## Annex 2. List of Persons Interviewed

Vasile Dâncu, ex–Minister of Public Information, one of the law initiators in 2001.

Mona Muscă, ex-MP of the National Liberal Party (PNL), in opposition in 2001, another initiator of the law.

Florian Jurcan, ex–Secretary of State, Ministry of Public Information (MPI) in 2001, then with the Secretariat General of the Government.

Gabriel Bădescu, ex-president of the Agency for Government Strategies (ASG).

Lelia Oanta, head of the Department for Government Strategies (DGS), the body consolidating data on ATI.

Valeriu Guguianu, expert, DGS.

Călin Hințea, adviser to the Prime Minister on the Public Administration Reform.

Horia Georgescu, secretary-general, National Agency for Integrity (ANI).

Monica Macovei, ex–Minister of Justice, currently member of the European Parliament.

Dana Titian, counsellor to the General Prosecutor of Romania dealing with ATI.

Constantin Tomoni, head of the Media/FOIA office of the Ministry of Education.

Septimiu Buzasu, ex–Secretary of State, Ministry of Transportation.

Oana Branzan, head of the Media, PR, and FOIA service of the National Railways Company (SNCFR, under the Ministry of Transportation).

Monica Niculescu, judge, dealing with ATI complaints.

Codru Vrabie, formerly with Transparency International, Romania.

Dan Tapalaga, journalist, Hotnews (online news portal).

Dan Mihai, human rights practising lawyer, APADOR-Helsinki Committee (human rights NGO).

Cristian Ghinea, director, Romanian Center for European Policies (think tank).

A group discussion based on a guideline was also held with the FOIA officers from the following local institutions during a training session on integrity held in April–May 2011: prefecture offices of Brăila county, Buzău county, Suceava county, and Bucharest; Suceava County Council; Buzău County Pension Fund; Brăila County Employment Agency; and Vrancea County Employment Agency.

### Other Sources

Freedom House. Nations in Transit annual reports. <http://www.freedomhouse.org/report-types/nations-transit>.

Mungiu-Pippidi, Alina. “The Story of the Romanian Coalition for a Clean Parliament,” *Journal of Democracy* 16 (April 2005): 154-55. <http://www.sar.org.ro/a-quest-for-political-integrity>.

[www.sar.org.ro](http://www.sar.org.ro)

[www.cdep.ro/pls/proiecte/upl\\_pck.proiect?idp=2517](http://www.cdep.ro/pls/proiecte/upl_pck.proiect?idp=2517)

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# Notes

<sup>1</sup> The first round of European ex-Communist countries (eight) were accepted into the EU in 2004, together with Cyprus and Malta. Romania and Bulgaria were still unprepared at that time and only managed to join, after substantial efforts, at the beginning of 2007.

<sup>2</sup> The body of laws and regulations governing the EU.

<sup>3</sup> The executive of the Union.

<sup>4</sup> Support for EU membership in public opinion polls differed from one country to another, but the general majority was in favor everywhere.

<sup>5</sup> Among which were the Helsinki Committee; the Freedom House, Romania; the Romanian Academic Society (SAR); and various journalists associations (see list of interviews in annex 2).

<sup>6</sup> Interview with Vasile Dâncu, former Minister of Public Information, Cluj, May 2011.

<sup>7</sup> Telephonic interview with Mona Musca, ex-MP from the National Liberal Party (opposition) and the main promoter of the opposition FOIA version in Parliament, May 2011.

<sup>8</sup> Interview with Dan Mihai, human rights practicing lawyer, APADOR-Helsinki Committee (NGO), August 2011.

<sup>9</sup> [www.cdep.ro/pls/proiecte/upl\\_pck.proiect?idp=2517](http://www.cdep.ro/pls/proiecte/upl_pck.proiect?idp=2517).

<sup>10</sup> Valeriu Guguianu, expert, Department for Government Strategies (DGS).

<sup>11</sup> [www.cdep.ro/pls/legis/legis\\_pck.frame](http://www.cdep.ro/pls/legis/legis_pck.frame).

<sup>12</sup> See note 8.

<sup>13</sup> Among the promoters of such ideas in subsequent years were the ex-senator Gheorghe Funar (extreme right) as well as ex-senator Ioan Ghise and deputy Silviu Prigoana, both individual mavericks from otherwise centrist parties.

<sup>14</sup> Article 2(a) of Law 544/2001.

<sup>15</sup> With reasonable exemptions granted for documents pertaining to investigations or pending court cases (see next section).

<sup>16</sup> Article 12 provides for the following exceptions: (1) information regarding national defense, safety, and public order, if it is classified information; (2) information regarding the deliberations and that regarding the economic and political interests of Romania if it is classified information; (3) information regarding the commercial or financial activities if its publicity breaches the intellectual property rights or the principle of fair competition; (4) personal data; (5) information regarding criminal or disciplinary investigations if, through its publicity, the investigation is endangered or confidential sources are disclosed, or if the life, personal integrity, or the health of a person related to the investigation is endangered; (6) information regarding judicial proceedings if the right to a fair trial or a legitimate interest of one of the parties is breached; and (7) information that would endanger the measures for the protection of the youth if made public. It is article 12 of the law, as indicated, transposed into shorter language.

<sup>17</sup> For example, when a local NGO appealed in court against the secrecy of the file on the Craiova car factory privatization by Ford Motors, the judge's access to the full tender dossier was crucial. Finally, the decision went in favor of the NGO, and the government had to disclose the tender documentation.

<sup>18</sup> The implementing norms specify that the deadlines shall be calculated taking into account the number of working—not calendar—days.

<sup>19</sup> Telephone interview with Valeriu Guguianu, expert, DGS, Bucharest, August 2011.

<sup>20</sup> The last two issues, 2008 and 2009, are two of the sources of hard data included in this report.

<sup>21</sup> See annex 2 with the names of interviewed local-level FOIA officers.

<sup>22</sup> This was true in some cases: obstructive local governments imposed unreasonable high fees that were subsequently challenged in court, creating a lot of negative publicity for the political leaders of the institution. Interviews with Dan Tapalagă (journalist), Codru Vrabie (activist), and local FOIA officers (see list in annex 2) in Bucharest (August 2011) and Sinaia (April–May 2011).

<sup>23</sup> Interviews with Tomoni and Buzasu, from education and transportation, respectively (list in annex 2), Bucharest, August 2011.

<sup>24</sup> For example, the budgets in spreadsheet format or some legal databases.

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<sup>25</sup> This was mentioned in relation with tenure competitions in the school system, for example. Interviews with local FOIA officers (see list in annex 2).

<sup>26</sup> Interview with ex-secretary of state Buzasu, note 26.

<sup>27</sup> Apparently the reason is that the exact form provided as an annex to the law must be used, which is, of course, in text format.

<sup>28</sup> For example, the General Prosecutor's Office was ordered by a court decision in 2005 to provide information to APADOR-CH (the local affiliate of the Helsinki Committee, a human rights watch organization) on the number of phone tapings performed during the previous year with its approval by the Romanian Intelligence Service (SRI).

<sup>29</sup> This requirement was introduced in 2007—article 2 (5).

<sup>30</sup> This requirement was introduced in 2006—article 111.

<sup>31</sup> See for example Freedom House's *Nations in Transit* annual reports, at <http://www.freedomhouse.org/report-types/nations-transit>

<sup>32</sup> [www.sar.org.ro](http://www.sar.org.ro).

<sup>33</sup> [www.sar.org.ro](http://www.sar.org.ro).

<sup>34</sup> See Alina Mungiu-Pippidi, "The Story of the Romanian Coalition for a Clean Parliament," *Journal of Democracy* 16 (April 2005): 154-55. <http://www.sar.org.ro/a-quest-for-political-integrity>

<sup>35</sup> Meaning highly fragmented, politicized, and manipulative especially in the electronic segment, where most media channels are attached to political and business groups that pursue interests other than the profits from media operations as such, with the assumption that peddling influence is more important than profits (interviews with journalists and media analysts, Dan Tapalaga and Ioana Avadani, Bucharest, August 2011).

<sup>36</sup> Interview with Constantin Tomoni.