ACCESS TO PUBLIC INFORMATION BY THE MEDIA:

LEGISLATION V. REALITY

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CONTENT

MAIN FINDINGS

STATISTICAL FINDINGS OF OBTAINING INFORMATION FROM PUBLIC INSTITUTIONS.

01 Only around 12% of journalists were able to obtain public information in full within the time limit stipulated by the law.

02 In 50% of cases, the request for public information was not satisfied or remained unanswered. In the rest of the cases, public information was issued in full or in part.

03 Excluding the cases where the request was left unanswered (about 25% of the applications), it took an average of 16 calendar days for a public institution to issue a response letter to the request.

04 Administrative complaints are usually not satisfied, but in about 40% of cases it became possible to obtain the information in full, even as the complaint remained unresolved.

05 In the case of the use of administrative complaints, it took an average of 35 calendar days to receive information.

06 The courts have not made any decisions on the lawsuits filed within the framework of the project. It takes an average of 2.5 years to conclude a public information dispute in the general court system.

07 The courts extended the standard term of court review by 5 months for 100% of the complaints received in the proceedings, citing the special complexity of the disputes (including cases in which the administrative body did not respond to the public information request or the administrative complaint at all).

08 During the project, the number of lawsuits filed by IDFI with the court of first instance on issues related to requests for public information over the course of 7 months was almost twice as high as the total number of similar lawsuits filed throughout Georgia during the first 9 months of 2021.

SUBSTANTIVE SINDINGS: SYSTEMIC PROBLEMS OF OBTAINING PUBLIC INFORMATION BY THE MEDIA

09 Public institutions, in most cases, either violated the time limits for providing public information stipulated by the legislation of Georgia or left public information requests unanswered.

10 Oftentimes, public institutions provide the requested information in an incomplete form and do not justify why the requested information is not provided, which hinders the proper use of the right to appeal.

11 There is a different approach in considering administrative complaints across public institutions. Some public institutions do not consider administrative complaints and believe that they should be appealed only in court.

12 Practice indicates that, in order to effectively obtain public information, knowledge of the relevant field/business process and/or legal assistance is required. This is mainly due to the strictly formal assessment of the content of the request by public institutions.

13 The project identified cases where public institutions indicate that they do not process information in the requested form and do not provide information in the forms as it is stored in the public institution.

14 In some cases, public institutions do not provide information based on legal arguments that are not derived from the law.

15 The practice of "redacting information" is necessary to ensure the proportionality of restrictions on the right to receive public information, although this practice is only applicable to public information containing personal data.

16 There are problematic public institutions that do not respond at all to public information requests or to corresponding complaints (for example, the Government of Georgia).

SUBSTANTIVE FINDINGS: NORMATIVE/SYSTEMIC PROBLEMS OF OBTAINING PUBLIC INFORMATION

17 The established practice in the Supreme Court creates significant problems in terms of obtaining public information from state companies.

18 Public institutions interpret certain norms of the legislation of Georgia broadly and do not extend the legislation regulating freedom of information to public information containing specific content from documents processed on certain issues.

MAIN FINDINGS WITH REGARD TO THE OVERSIGHT OF BREACHES OF THE RIGHT TO PUBLIC INFORMATION

19 In Georgia, there is no institution (e.g. a Freedom of Information Commissioner) that would provide effective administrative supervision over the implementation of the freedom of information legislation by public institutions.

20 Court control over disputes related to freedom of information is ineffective due to terms of case review stipulated by the legislation, the violation of these terms, and the lack of effective procedural mechanisms.

21 Reports submitted by public institutions to the Parliament of Georgia on issues related to freedom of information do not provide a complete picture of the systemic problems identified in terms of access to public information.

SYSTEMIC PROBLEMS AND THEIR POSSIBLE SOLUTIONS

Within the framework of the project, it became clear that violations of clear requirements of the legislation by public institutions, as well as the indifferent attitude towards public information requirements, are the main obstacles to access to information with the state. The lack of effective control mechanisms is the main reason for the indifference, and in some cases, the lack of accountability of public institutions. The above runs in tandem with the challenges identified in terms of access to public information.

1. An effective external control mechanism (Commissioner of Freedom of Information) should be created in Georgia.
2. The terms of consideration of lawsuits filed in court on issues of freedom of information should be reduced and the procedural mechanisms for consideration of such lawsuits should be improved.
3. The Parliament of Georgia should use the oversight mechanisms provided for in the Rules of Procedure of the Parliament against the institutions that blatantly and likely intentionally violate the requirements of the legislation regulating freedom of information.

INTRODUCTION

From January 1, 2022, the Institute for Development of Freedom of Information (IDFI), with the financial support of the Open Society Georgia Foundation (OSGF), started the project "**IMPROVING ACCESS TO PUBLIC INFORMATION BY THE MEDIA".** The goal of the project is to provide legal support to the media in matters related to public information. Specifically, IDFI's lawyers provide legal assistance to journalists (media representatives) on issues related to freedom of information. IDFI's legal assistance was comprehensive and included:

- Legal consultation;
- Preparation of public information requests;
- Preparation of administrative complaints;
- Preparation of administrative complaints, appeals, and cassation appeals;
- Legal representation.

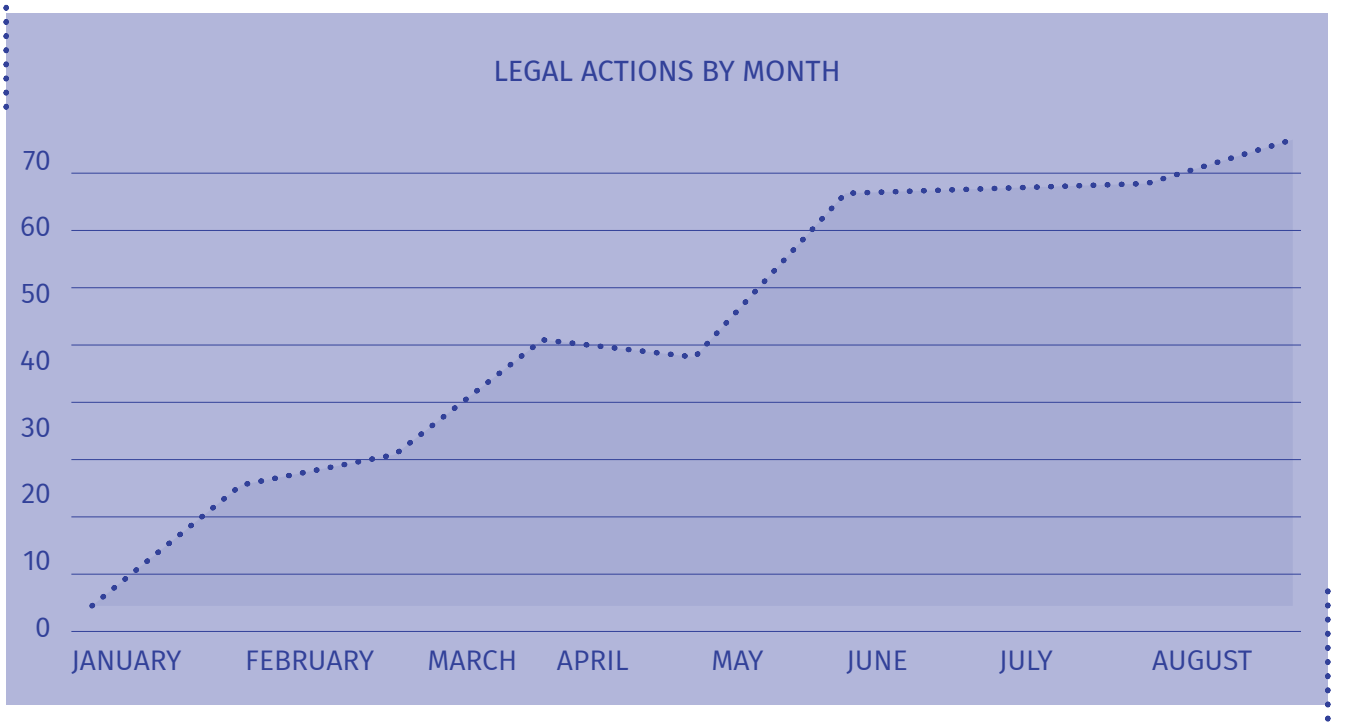
REPORTING PERIOD AND SUMMARY DATA: during the project, approximately 255 legal documents were prepared. Of these, 172 applications, 37 administrative complaints, 18 administrative lawsuits. In addition, within the framework of the project, about 45 oral legal consultations were given, which were related to the interpretation of received public information and/or assistance to the journalist in the formulation of public information.

REPORT METHODOLOGY: The current report is divided into four main sections. The first part presents the quantitative and qualitative statistical data of the legal assistance provided by the project team. The second and third parts are devoted, respectively, to the practical and normative problems identified during the project that hinder effective access to public information by journalists. The final, fourth part, concerns the effectiveness of the mechanisms for protecting the right to access to public information. Namely, in the 4th part, we review to what extent the media representatives have procedural mechanisms to properly protect the rights related to freedom of information.

CHAPTER I: ANALYSIS OF PUBLIC INFORMATION REQUESTS, RESPONSES FROM PUBLIC INSTITUTIONS, AND ADMINISTRATIVE COMPLAINTS

IDFI started the project of providing legal support for journalists on issues of access to public information from January 1, 2022. However, it took time to disseminate information about the project and reach the interested parties.

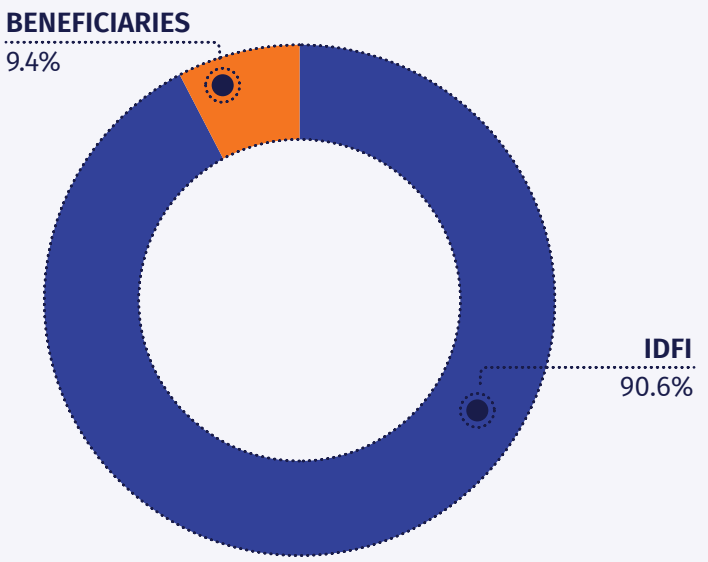
Graphic N1: The graphic shows the dynamics of the work performed within the framework of legal aid by month.



More than 40 journalists/media representatives benefited from legal aid during the project. Journalists had the opportunity to use the text of public information requests prepared by the project team or to have the organization (IDFI) itself request information and then hand it to journalists. Among the offered forms of communication with public institutions, the absolute majority of the beneficiaries opted to request information through IDFI. This was due to two main reasons: to reduce the legal and logistical burden of communication with public institutions, and the high risk of refusal to provide information by public institution.

1. ANALYSIS OF PUBLIC INFORMATION REQUESTS, RESPONSES FROM PUBLIC INSTITUTIONS, AND ADMINISTRATIVE COMPLAINTS

SELECTED FORM OF COMMUNICATION WITH PUBLIC INSTITUTIONS

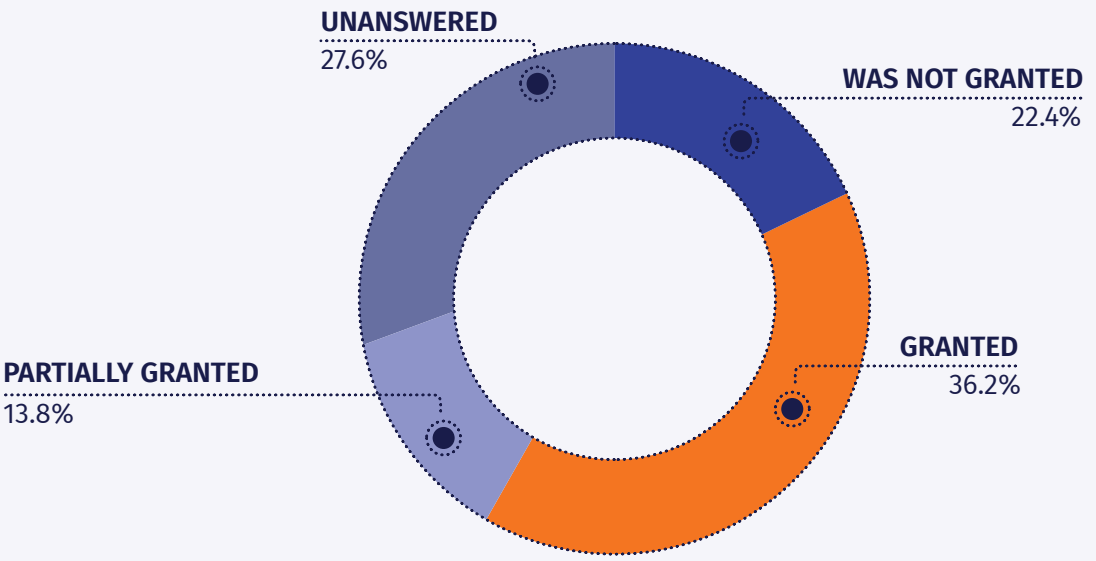


AN IMPORTANT NOTE REGARDING THE STATISTICAL DATA PRESENTED BELOW: within the framework of the project, 172 requests related to freedom of information were prepared, addressed to 125 different public institutions. It should be mentioned that in some cases, the requests referred to similar information already requested from different institutions. For example, considering the needs of one of the beneficiaries, IDFI requested public information from all state museums in Georgia regarding the donations received and their budget contributions (hereinafter referred to as "concentrated requests"). In order for the statistical data presented below on the problems associated with receiving public information to be as accurate as possible, we do not take into account the so-called concentrated requests while processing the statistics. At the same time, although requests for public information within the framework of the project were sent throughout Georgia, the majority of the requests were addressed to central government bodies and their local representatives.

In approximately 36% of the cases, media representatives were able to obtain public information without filing an administrative complaint/lawsuit. It should be emphasized that even when the request was granted, the information was issued in violation of the terms stipulated by the law. In particular, even if a public information request is granted, there is only about a 31% probability that the media will receive public information within the timeframe set by the law. If we take into account the mentioned data in the general indicator of the satisfaction of statements, we will get a critically negative result.

Specifically, the probability that a journalist will be able to fully obtain public information in the manner established by law and within the time limit set by law is approximately 12%.

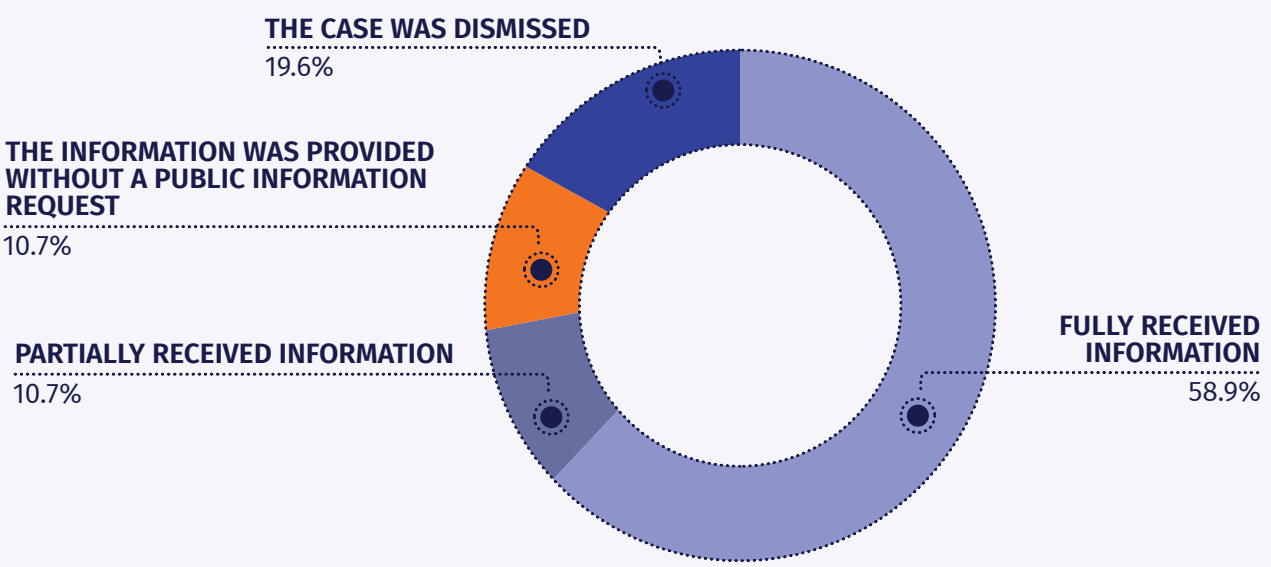
THE RATE OF GRANTING THE REQUESTS OF PUBLIC INFORMATION



It is important to note that the priority of the project lawyers was to deliver information to the media. Thus, IDFI spared no effort in formulating the requests in such a way as to avoid any legal and/or practice-based grounds for refusing the release of information.

Considering this background, it is possible to conclude based on the indicated figures that, **ON A PRACTICAL LEVEL, THE MEDIA HAS NO EXPECTATION OF RECEIVING PUBLIC INFORMATION IN ACCORDANCE WITH THE LAW.**

OUTCOMES OF COMPLETED CASES



During the project, in 63 cases, journalists were able to fully or partially obtain public information from various public institutions.

The distribution by percentage of completed cases according to the results is as follows.

2. RESPONSES APPEALED VIA ADMINISTRATIVE PROCEDURE AND OUTCOMES OF ADMINISTRATIVE APPEALS

The strategic vision of the project was to appeal every illegal refusal to address requests of public information in administrative body. Exceptions were the cases where project team considered that a written refusal of a public institution to address a request was lawful or presented a normative/strategic problem which could not be resolved via the appeal mechanism.

01 In the framework of the project, 37 administrative complaints were prepared (4 are being in the process of preparation) and 68% of the problematic responses of public institutions have been appealed.

02 The project team have not appeald problematic responses in the cases where a journalist was able to fulfil their interest via another way, or a normative problem was identified, or time limits for issuance of public information have not expired yet (approximately 32%).

It is notable, that non of our administrative complaints were formally satisfied, but this does not mean that beneficiaries were not able to obtain information after filing an administrative complaint. Namely, By the end of September, 2022 consideration of IDFI's 32 administrative complaints have ended in public institutions.

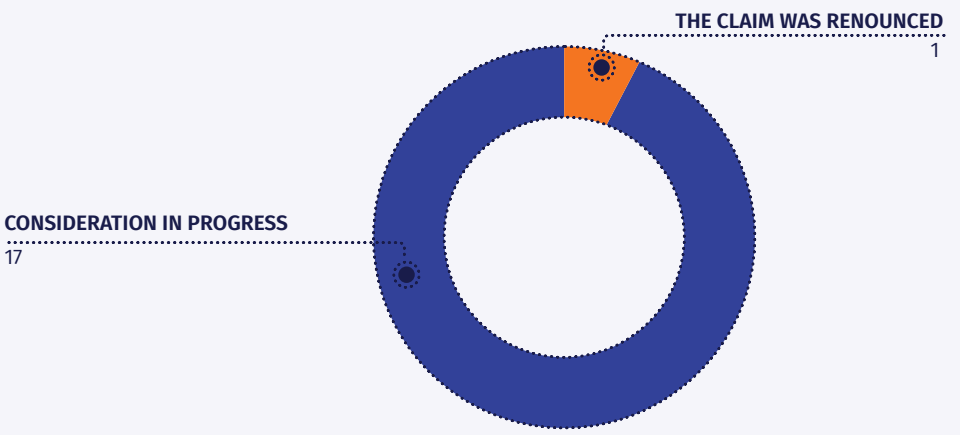
N	OUTCOMES OF ADMINISTRATIVE APPEALS	AMOUNT	%
1	Did not consider (referring to the competence of the court)	2	6,25%
2	The information was issued partially (complaint was not considered	3	9,38%
3	Information was provided (complaint was not considered)	6	18,75%
4	Information was provided (complaint was withdrawn)	6	18,75%
5	No response was received	7	21,88%
6	Complaint was not granted	8	25,00%

The analysis of the completed administrative complaint show that, in the case of an administrative appeal against the refusal to provide requested information, the probability of receiving the information is about 40%. Namely, a complaint is not being reviewed, but an interested party obtains information requested via an application. In the vast majority of such cases public institutions have not responded to applications of public information at all. It should be mentioned that in 5 cases where requests were appealed in the court public institutions have not responded to neither an application nor an administrative complaint at all (in October, 2022 2 possible cases of such kind were identified).

3. ADMINISTRATIVE LAWSUITS: STATISTICS OF COURT APPEALS

A total of 18 administrative lawsuits were filed in court. IDFI withdrew 1 administrative lawsuit, since it received the requested information from the defendant ministry, one of legal entities under public law. In one lawsuit, the defendant (Ministry of Culture, Sport and Youth) provided us with almost 100 percent of requested information.[1]

STATUS OF LAWSUITS FILED IN COURT



THE COURTS EXTENDED THE STANDARD TERM OF COURT REVIEW BY 5 MONTHS FOR 100% OF THE COMPLAINTS RECEIVED IN THE PROCEEDINGS, CITING THE SPECIAL COMPLEXITY OF THE DISPUTE. AMONG THEM ARE CASES IN WHICH THE ADMINISTRATIVE BODY DID NOT PROVIDE AN ANSWER TO EITHER THE PUBLIC INFORMATION REQUEST OR THE ADMINISTRATIVE COMPLAINT.

The court has not rendered any decision on the lawsuits filed within the project yet. In general, it takes an average of 2.5 years to conclude a public information dispute in the common court system.

It's important to note that during the project, the number of lawsuits filed by IDFI with the court of first instance on issues related to requests for public information over the course of 7 months was almost twice as high as the total number of similar lawsuits filed throughout Georgia during the first 9 months of 2021.[2]

[1] In the mentioned case, we are communicating with the defendant regarding one point of the application, and we will most likely renounce this lawsuit as well.

[2] The conclusion of the thematic research group of the Human Rights and Civil Integration Committee of the Parliament of Georgia, "Effectiveness of parliamentary control over the submission of reports showing access to public information by public institutions", p.37. On the problems of effective judicial control over the right of access to public information, please, see Chapter IV.

4. THE MAIN PROBLEMS THAT WERE THE CAUSES FOR FILING THE COMPLAINT/LAWSUIT.

Within the framework of the project, the absolute majority of acts of the administrative body were appealed, where the beneficiary could not receive the requested public information in full. The data table presented below shows the main problems that were the causes for filing the complaint/lawsuit.

N	LEGAL PROBLEM	%
1	Request remained unanswered	39,73%
2	A public institution does not process the requested information	10,96%
3	A public institution does not process the information in the requested form	8,22%
4	It is not clear why the information was not given	10,96%
5	Information is “confidential”	4,11%
6	State company does not consider itself as a public institution	4,11%
7	Protection of personal data	2,74%
8	Contains state secret	2,74%
9	Is related to foreign policy, General Administrative Code does not apply	1,37%
10	Is related to an arbitral dispute, General Administrative Code does not apply	1,37%
11	Processing of information is a service (fee is being charged)	1,37%
12	A public institution does not have resources to process data	1,37%
13	Other	10,96%

As it was mentioned above, the project team tried as much as possible to avoid every potential legal risk that could justifiably or unjustifiably become the reason for denial to issue public information. Therefore, the generalization of the results given in the table to the general problems of public information in the country would be inappropriate.

CHAPTER II. PRACTICAL PROBLEMS IN ACCESS TO PUBLIC INFORMATION

1. ADHERENCE TO TIME LIMITS SET BY PUBLIC INFORMATION LEGISLATION AND UNANSWERED REQUESTS

The General Administrative Code of Georgia sets special time limits for the disclosure of public information. Since a request for public information by its content requires consideration within a short period of time, the Code took into account the specifics of said right, including the presence of immediate interest in public information (as a rule), and defined a timeframe for it that is different from simple administrative proceedings. In particular, according to the first part of Article 40 of the General Administrative Code: "The public institution is obligated to provide public information, ... **immediately, or no later than 10 days** if responding to the request for public information requires:

a. Obtaining and processing information from a structural subdivision or other public institutions situated in another settlement;

b. Finding and processing unrelated documents of significant volume;

c. Consultation with a structural subdivision or other public institution situated in another settlement.

When using the mentioned terms, there are cases of wrong interpretation of the law and violation of the legislation. Cases of wrong interpretation of the law and violation of the legislation have become visible in the use of the aforementioned terms.

1.1. Incorrect Interpretation of the time limits Established by the Law

The law establishes a general rule for the disclosure of public information, which is to be provided immediately, and the 10-day period should be used only in exceptional cases, when the circumstances identified in the Code are present. In case of using the 10-day period, the public institution must immediately inform the applicant about it.

Despite the clear wording in the law, in practice the administrative bodies use the 10-day period for providing information as a general rule, which is how they interpret the disposition of the Code. Some agencies automatically send a reference as a response to requests for public information, stating that the information will be provided to the applicant "within the 10-day period established by law." As such, a practice has formed in public institutions in such a way that the legal term for the release of public information is directly associated with the 10-day period, while the reference of the Code to the immediate disclosure of information is practically not implemented. It is clear that public institutions that try to provide the requested information immediately are an exception.

1.2. Violations of the Time Limits Established by the Georgian Law

In parallel with the incorrect interpretation of the time limits defined by the law, there are quite frequent cases of violations by public agencies when the response is provided right on the deadline, in violation of the 10-day limit, or when response to the request is delayed. For example, in the case of 75% of the requests sent by us, the administrative bodies provided a reply in violation of the legal time frame or left the requests unanswered. On average, it takes 16 days to get a response to the requested information. The mentioned practice significantly complicates the practical realization of the right of access to public information and effective public control over the government. A public information request, by its very nature, requires an immediate reaction due to the high risk of the requested information losing its relevance/urgency.

1.3 Unanswered Requests: A Gross Violation Of The Time Limits Stipulated By The General Administrative Code Of Georgia

IDFI's practice shows that requests left unanswered are a significant problem. It is not uncommon for public institutions to leave public information requests unanswered. Specifically, in about 50% of the cases, the administrative bodies did not respond to a request. This approach clearly contradicts the requirements of the existing legislation. Namely, according to the General Administrative Code of Georgia, violation of the term established by the law is considered a refusal to issue the act[3] and is appealed according to the procedure established for the appeal of an individual administrative-legal act. In addition, according to the law, "the applicant must be notified of the refusal of a public institution to provide public information immediately. In case of refusal to provide public information, the public institution is obligated to explain to the person in writing his rights and the procedure for appeal within 3 days following the decision.[4]

As such, in case of violation of the time limits established by the law, or in case of refusal to provide information, the law obligates the public institution to inform the applicant about this and explain the legal basis for not providing the information and the procedure for appeal. These are the minimum requirements of the law, which public institutions usually do not take into account.

The importance of the definition of the right to appeal should be highlighted here. IDFI observes that, in some cases, the legal possibility of appealing an unanswered request is not fully clear to journalists or other persons without legal education. In particular, in many cases, the applicants are not aware of the legal nature of the administrative body's violation of the time limits or leaving the request without a response, and the legal levers for appealing it and restore the violated right. In such circumstances, the public institution leaving a request unanswered not only illegally restricts the person's right of access to public information, but also restricts the procedural rights to restore violated rights in administrative proceedings.

[3] Part 2 of Article 177 of the General Administrative Code of Georgia.

[4] Parts 1 and 2 of Article 41 of the General Administrative Code of Georgia.

1.4 Cases of Satisfying Requests Following a Complaint

IDFI has observed that it is quite common for unanswered requests to be satisfied only after the submission of an administrative complaint (sometimes, a lawsuit). In particular, IDFI appealed virtually all cases of public information requests that were left unanswered. Of these, in approximately 40% of the cases, the requested public information was provided only after the administrative complaint was submitted. Thus, in some cases, the application is satisfied only as a result of appealing the decision in an administrative (sometimes judicial) manner.

It should be noted that in such cases, according to IDFI's practice, as a rule, the administrative complaint is not formally satisfied. Specifically, as a result of the appeal, the administrative body does not issue information as a result of processing the appeal, making a decision on it, and satisfying it, but instead satisfies the initial request while not considering the appeal due to the absence of a subject for the dispute.

In some cases, the administrative body will issue the requested information not only after the administrative complaint, but after a lawsuit has been filed. For example, IDFI requested information from the Ministry of Culture, Sports and Youth of Georgia regarding the complete list of state museums and theaters and the funds allocated to them from the state budget and their own revenue. The Ministry left the request unanswered, and IDFI appealed with an administrative complaint. After the complaint was also left unanswered, IDFI filed a lawsuit against the Ministry. Only after filing the lawsuit did the Ministry respond to the initial request.

This problematic practice shows the low consideration for accountability at public institutions. The practice of providing the requested information only after the appeal suggests that public institutions, in the absence of proper oversight from a superior body/court, are more inclined to leave requests without a response.

2. INCOMPLETE RESPONSES TO PUBLIC INFORMATION REQUESTS

"Everyone has the right to request public information, regardless of its physical form and state of storage, and to choose the form of receiving public information, if it exists in different forms, as well as to get acquainted with the information in the original form."[5] Based on the spirit of the mentioned norm and Article 18, Part 2 of the Constitution of Georgia, the administrative body must ensure the provision of public information in an adequate manner (content and volume) in response to the submitted request. The General Administrative Code of Georgia defines the mechanism of exercising the constitutional right - submission of a request. The mentioned right will be fully realized only when the administrative body provides information on all points and content components specified in the request.

2.1 The Problem of Receiving Requested Information in Full

In IDFI's practice, incomplete responses to public information requests are not uncommon. In many cases, requests consist of multiple points and include various content requirements, including sorting of requested data according to different criteria (years, legal bases, etc.). IDFI has observed that, during the reporting period, 14% of the answered requests were satisfied only partially.

2.2 Absence of Justifications for Unanswered Points

According to IDFI's observation, when an administrative body does not provide information on a given point mentioned in the request, it in fact never makes an explanation regarding the legal basis on which access to the information requested in this or that point was restricted. About 70% of incomplete responses include just such cases.

This practice complicates the effective realization of the right of access to public information in many cases. In particular, it is not clear to the applicant what legal argument the public institution relied on in its refusal so that the applicant may formulate their legal position during the administrative and/or judicial appeal. IDFI's practice shows that in such cases, it is often, on a practical level, difficult to communicate with the public institution and find out why information was not provided on this or that point, when other points were met.[6]

2.3. The Problem of Wording Public Information Requests

In many cases, the problem at the practical level is the wording of public information requests and the high risk of incorrect/limited reading of this wording by administrative bodies. IDFI's practice shows that, in order for an applicant to receive public information of interest to them and to avoid the risks of misinterpretation, it is better for the wording used to be very precise, otherwise there is a high probability of interpretation in favor of not giving public information (giving as little information as possible).

[5] The first part of Article 37 of the General Administrative Code of Georgia

[6] For example, a public information request consisting of 9 items was sent to the Ministry of Culture, Sports and Youth of Georgia. The answer received from the Ministry contained 8 out of the 9 mentioned, and no information was provided about one of them. At the time of preparation of the report, it has still not been possible to contact the authorized person of the Ministry and clarify why one point of the request remained unanswered.

The mentioned practice may in many cases present a problem for journalists or other persons without legal education in the way of realizing their right to public information. Taking into account the systematic definition of the General Administrative Code of Georgia and its spirit,[7] the preparation of a public information request and the processing thereof should be easily accessible to any person. To illustrate the problem in practice, we can cite a case when a journalist requested statistics on violations of pet ownership and maintenance rules. The Ministry of Internal Affairs refused to provide information, justifying the decision by stating that the Ministry's Information and Analytical Department records statistics only in accordance with the articles of the Criminal Code of Georgia and the Code of Administrative Offenses. Thus, the applicant had to first address the Ministry and specify the exact article of administrative offenses[8], in relation to which they were interested in statistical data.

7 According to the General Administrative Code of Georgia, the request for public information does not need to be substantiated and, moreover, indicate the motive and purpose.

8 Article 103 of the Code of Administrative Offenses of Georgia (violation of the rules of having a dog and a cat).

3. PROBLEMATIC PUBLIC INSTITUTIONS: AGENCIES THAT COMPLETELY IGNORE PUBLIC INFORMATION REQUESTS

3.1 Administration of the Government of Georgia and the Ministry of Culture, Sports and Youth Affairs of Georgia

The deterioration of the quality of information transparency was observed in the Ministry of Culture, Sports and Youth Affairs of Georgia and the Administration of the Government of Georgia. Within the framework of the project, 14 requests were sent to these institutions. They have not responded to any.

In the case of all unanswered requests, IDFI filed administrative complaints, which both agencies also left without consideration and still did not provide us the information. It should be noted that the the Ministry of Culture, Sports and Youth Affairs of Georgia provided the information stipulated in one of the requests for public information only after a lawsuit was filed in the court.

It is obvious that the Administration of the Government of Georgia, as well as the the Ministry of Culture, Sports and Youth Affairs, deliberately violate both the formal and material requirements of the Georgian legislation. This creates a dangerous precedent and encourages lack of integrity in public institutions.

3.2 Government's Decrees: Blatant Disregard for Legislative Requirements and Discrimination against the Media

In this context, it is important to address the problem of access to the Government's decrees, which, although it has existed for several years, it manifested itself differently during the course of the project. Specifically, the mentioned problem became the likely basis for discriminatory treatment towards a journalist.

Official documents kept in a public institution are subject to release as public information. In relation to government decrees, however, the legislation sets a higher standard of transparency and directly indicates the obligation to publish them proactively. According to Article 22, Clause 3 of the Regulations of the Government of Georgia, the decrees adopted by the Government are to be uploaded to the Government's website no later than 3 working days after their adoption, except for some cases stipulated by the legislation. Despite the above, since 2020, the Administration of the Government has not published legal acts on the website nor issued them as public information to interested persons.

In September 2020, IDFI addressed the Administration of the Government with a request for the decrees, but the application, as well as the subsequent administrative appeal, went unanswered by the Administration. In December 2020, IDFI appealed to the court with the same request, although a substantive consideration of the the case in the court of first instance has not yet been scheduled.

On 9 September 2022, BMG aired a **REPORT** prepared by Telara Gelantia regarding the restriction of access to governmental decrees, which included an overview of IDFI's lawsuit against the Administration of the Government. It is to this story that the journalist **CONNECTS** the refusal to admit her to a government session on September 12, 2022. According to Telara Gelantia, the representative of the Government cited the fact that the journalist was asking a lot of questions and violating the rules, thus preventing their colleagues from working.

Telara Gelantia has been covering government sessions for 10 years and has not received any warnings, notifications and/or other type of communication from the government about "violation of rules" during all this time. This may confirm the discriminatory treatment by the Administration of the Government related to the report prepared by the journalist on the availability of decrees.

It should be noted that the journalist was also not given an opportunity to attend the government **SESSIONS** on September 26 and 30, 2022. Telara Gelantia, with the help of IDFI, **APPEALED** to the Public Defender of Georgia in order to establish the fact of discrimination against the journalist by the Administration of the Government of Georgia. The mentioned case once again emphasizes the "closed" nature of the Georgian government and the alarming trend of negative attitude towards the media.

4. THE PROBLEM OF ADMINISTRATIVE COMPLAINTS

4.1 LACK OF AN UNIFORM APPROACH TO ADMINISTRATIVE COMPLAINTS

The practice of IDFI shows a lack of a uniform approach to the consideration of complaints by administrative bodies. Generally, administrative bodies consider a complaint without an oral hearing. Sometimes it is not known to the applicant at all whether an administrative complaint has been considered. In the reporting period, only 1 case was observed when the administrative body considered an administrative complaint by oral hearing.

Often, the administrative body refuses to consider an administrative complaint based on Article 36 of the General Administrative Code, according to which a public institution is obligated to assign a public servant responsible for ensuring access to public information and proactive publication of information. "The assignment of a special authorized person means that they cannot have a functionally superior official or a superior administrative body, and their decisions can be appealed only in court." [9]

It should be noted here that the administrative bodies did not formally respond to the administrative complaints sent by IDFI, but instead did not consider the complaint after providing the information on the grounds that the reason for the dispute was gone. Specifically, in the reporting period, approximately 40% of complaints by IDFI remained without consideration due to the fact that the information requested in the initial statement was fully provided after the complaint was filed.

4.2 ADMINISTRATIVE COMPLAINT AS A MECHANISM FOR PROTECTING RIGHTS AND ITS INTERPRETATION

Filing an administrative complaint is the primary legal basis for a response to a possible violation of rights by a public institution. Moreover, as a rule, the law requires the use of the right of administrative complaint before filing a complaint with a court.[10] According to the established practice, administrative bodies usually consider administrative complaints related to the release of public information. Nevertheless, during the course of the project, other approaches were observed as well.

Namely, with reference to Articles 36 and 47 of the General Administrative Code of Georgia, a public institution pointed out to us that, in general, an administrative complaint regarding public information will not be allowed, and such type of cases should be litigated directly in court. In another case, one of the public institutions ruled out the possibility of using the right to use an administrative complaint on disputes related to public information.

[9] From one of the responses from the public institution.

[10] Article 2.5 of the Administrative Procedure Code of Georgia.

5. "INFORMATION IS NOT PROCESSED IN THE REQUESTED FORM": A PRACTICAL PROBLEM WHEN REQUESTING STATISTICAL INFORMATION

As a basis for refusing to provide information, public institutions not infrequently state that they do not record/process statistics and/or information in the form stipulated in the request. In the reporting period, we encountered 5 such cases, and in each of these, although the public institution possessed the requested information, it was neither given in the form specified in the request, nor was it provided with documents that would be able to fully or partially clarify the desired data. In addition, as a rule, IDFI makes a note in the request that, should the information not be processed in the requested form in the agency, the public institution should provide us with all the appropriate documents (if necessary, with some data redacted), with which it would be possible to obtain the desired statistics/information. Nevertheless, in many cases, the answer is that that the body does not process statistics/information in the form requested by the applicant. The mentioned approach hinders the realization of the right of access to the information of the interested person.

These kind of responses from administrative bodies are mainly seen in the case of requests regarding statistical information. The mentioned approach is even more problematic when taking into account the fact that the majority of agencies with the obligation to provide information do not have a normatively regulated procedure for recording information and producing statistical data. Even if there are documents defining the rules for information processing and statistics production, access to them is not ensured, including proactively. In general, the interested person does not have information about the kind of data and its forms in the public agency, and this is a serious obstacle in terms of accessing public information.

"Everyone has the right to request public information regardless of its physical form and storage condition and to choose the form of receiving public information if it exists in different forms."[11] Based on the spirit of the mentioned norm and the right of access to public information, if the requested information falls within the sphere protected by the right, if the public institution processes it in one way or another (although it does not process it in the specific form named in the application), and the request does not necessitate the creation of new information (which would go beyond the scope of the right of access to public information), the information must be provided to them in any form that is available and that is fully or partially consistent with the requirement indicated in the request.

In several cases, requests for public information were sent with insurance against the risk that the public institution did not have the requested statistical information. Namely, in the statement, it was directly specified that if the institution did not have statistical data, it should provide primary documents, with personal data redacted, and we would process the information ourselves. Despite this fact, it was not possible to receive primary documents for any such request, and since the legal disputes have not been concluded for any of these cases, there is no established judicial practice on the legal problem discussed so far.

[11] The first part of Article 37 of the General Administrative Code of Georgia

As an example, we can cite the case of requesting information/statistical data from the Ministry of Internal Affairs of Georgia on the refusal of crossing the border of Georgia to citizens of foreign countries. Regarding the request, the Ministry stated that it unable to provide the information, since it did not record the data in the requested form and according to the specified criteria (according to the legal grounds for refusal). With regard to this, as an alternative, IDFI requested information in the following form: all documents were requested individually (with personal data redacted) that had been prepared in writing by an authorized person of the Ministry at the border of Georgia. This case is being litigated in the court of first instance.

6. REFUSAL TO PROVIDE INFORMATION ON NON-STATUTORY GROUNDS: CONFIDENTIALITY AGREEMENT BETWEEN PARTIES

During the reporting period, we encountered grounds for refusal to provide information by public institutions that are not provided for in the legislation. For example, there was a case when a public institution refused the request to provide public information based on the confidentiality agreement between the parties.

More specifically, agreements and acceptance acts signed within the framework of the international tourist exhibition-fair and the documentation about the country's marketing campaign were requested from the National Tourism Administration of Georgia. In response, the National Tourism Administration informed us that the contract signed with the exhibition organizer company entailed an obligation of the parties to protect confidentiality, and since the other party refused to disclose the confidential information contained in the contract, the Tourism Administration was deprived of the opportunity to disclose the requested information.

Georgian legislation does not recognize the concept of confidential information at all. In addition, the parties' agreement to deviate from public legal rules only indicates the lack of validity of such an agreement, with such a use of this private legal agreement to evade the requirements of regulatory norms regarding public information. Specifically, a private legal agreement cannot turn information into either commercial, professional, or state secrets. The lawsuit on this particular case continues in the Common Court.

7. SPECIFIC PRACTICAL PROBLEMS RELATED TO PERSONAL DATA

The legal issue under consideration was not identified within the scope of the legal assistance of the media. Nevertheless, this problem is also relevant to the media, and there is a high probability that these legal problems will arise during the review of the lawsuits filed in the court within the framework of the project.

As mentioned above, within the framework of the project, the lawyers acted with the best interests of the beneficiaries in mind. Thus, since it was known to us in advance how many serious practical and normative problems personal data creates in terms of access to public information, we have generally avoided requests for public information containing personal data, even if disclosure of relevant personal data may have been permitted by law. However, this does not mean that personal data does not create problems for media access to public information and/or that it is always possible to avoid public information containing personal data. Thus, we would like to draw attention to one interesting case from the current practice of IDFI.

One of the interesting problematic cases in relation to personal data was administrative bodies' refusal to provide personal data of individual entrepreneurs.[12] Specifically, in one of the cases, a public institution considered the existence of personal data (not of a special category) as a basis for refusing to disclose public information. This practice contradicts the decision of the Constitutional Court of Georgia on October 14, 2018, "Green Alternative Party v. The Parliament of Georgia",[13] through which the Constitutional Court overruled the decision of October 30, 2008, on the case "The Public Defender of Georgia and the Association of Young Lawyers of Georgia v. The Parliament of Georgia", according to which the information contained in official records concerning the health, finances, and other private matters of individuals is itself excluded from the sphere protected by the first paragraph of Article 41 of the Constitution of Georgia (paragraph 2 of Article 18 of the current edition), and access to it is not protected. The Court dismissed this definition and recognized the possibility of limiting the right to personal data in the presence of appropriate, legitimate interest.

During the case, the public institution requested a recommendation from the Personal Data Protection Service in accordance with the Law of Georgia "On Personal Data Protection".[14] The Service issued a recommendation, and since the legislation did not in itself prohibit the disclosure of personal data, the Service indicated that the matter should be decided on the basis of balancing the interests in accordance with the legislation. IDFI's practice shows that the Personal Data Protection Service usually does not participate in the assessment of the circumstances of a particular case and refrains from making a recommendation to an administrative body on whether to disclose personal data in a particular case. Otherwise, the Personal Data Protection Service entrusts the evaluation of the legality of personal data processing to the public institution in specific cases, although, in case of discovery of a violation, it retrospectively evaluates the action of the public institution and, if necessary, fines it in accordance with the law.[15]

[12] Said legal dispute was not initiated based on the journalist's request.

[13] Decision No. 3/1/752 of the Constitutional Court of Georgia dated October 14, 2018, on the case "Green Alternative Party v. The Parliament of Georgia".

[14] Article 4014 of the Law of Georgia "On Personal Data Protection".

[15] Chapter VII of the Law of Georgia "On Personal Data Protection" defines the administrative responsibility for violation of this law. For example, according to the data of the Personal Data Protection Service for the first 6 months of 2022, the service conducted 76 checks (inspections) of the legality of data processing and identified 70 facts of illegal processing of personal data, of which a fine was used as a penalty in 41 cases.

The perspective that the use of a fine as an administrative penalty by the Personal Data Protection Service may be, among others, one of the reasons why public institutions usually avoid disclosing personal data even when there is a legal basis for it.[16] This kind of practice creates a significant obstacle in the context of realizing the right of access to public information.

[16] Meaning ordinary and not special category personal data

8. DETERMINING THE FEE FOR PROVIDING PUBLIC INFORMATION: PUBLIC INFORMATION AS A "SERVICE"

One of the interesting cases revealed was that of the Public Registry instituting a certain fee for providing public information. A journalist requested statistics on the exclusion of lands from the forest fund since 2016, with the indication of cadastral codes. In connection with the mentioned request, only general statistical data was provided by the Public Registry, and in connection with the provision of cadastral codes, the Registry pointed to subsection "e" of Article 3 of the Resolution N509 of the Government of Georgia of December 29, 2011 (hereinafter - the Resolution) "On the approval of service fee rates, fee payment rules, and service terms provided by the National Agency of Public Registry", citing the non-payment of relevant fees as the reason for the refusal to issue the information.

The resolution determines the amount of the fee for the services provided by the National Agency of Public Registry, the terms of service, and the procedures for the payment of the fees and refunds. More specifically, subsection "e" of the first paragraph of Article 3 stipulates the payment of a fee for the preparation of information on the data stored in the Public Registry about the right to an item and non-material property, the obligation related to the right to ownership of the immovable object, public legal restriction and/or tax lien/mortgage at the time of request. The provision of cadastral codes of the cases of exclusion of lands from the forest fund, by its content, cannot be considered within the framework of the cases provided for by the named norm. It is impossible for a request for data in the form of public information to be considered a service provided by the National Public Registry Agency with its content.

According to the General Administrative Code of Georgia, "a public institution is obligated to ensure the availability of copies of public information. It is not allowed to set any kind of fee for the release of public information, except for the reimbursement of the amount necessary for making a copy".[17] As such, the present norm prohibits making the release of public information protected by a public institution into a "service".

According to paragraph one of Article 37 of the General Administrative Code of Georgia, "anyone has the right to request public information regardless of its physical form and state of storage and to choose the form of receiving public information, if it exists in different forms, as well as to get acquainted with the information in the original form." The Coded defines any public information (official document, including drawing, model, plan, scheme, photograph, electronic information, video and audio recordings) that a public institution has access to and/or processes in one form or another at some stage as the object of the right of access to public information.

In turn, public information should be distinguished from the provision of services by public institutions. Specifically, when providing the data processed/created as a result of service provision and kept in a public institution as public information, payment of a fee for said service should not be required for each piece of information. For example, if the issuance of a conviction notice by LEPL Service Agency of the Ministry of Internal Affairs of Georgia constitutes a service, and therefore a certain fee is established for it by the law of Georgia "On fees and deadlines for services provided by LEPL Service Agency of the Ministry of Internal Affairs of Georgia", said fee should not be required to be paid for issuing public information processed in the agency regarding such services. A lawsuit on the abovementioned case is currently underway in the court of first instance.

[17] Article 38 of the General Administrative Code of Georgia

9. THE PROBLEM OF NOT RELEASING INFORMATION PUBLISHED PROACTIVELY

Part 3 of Article 40 of the General Administrative Code indicates that the proactive publication of public information does not exempt a public institution from the obligation to provide the same or other public information in the prescribed manner in case of a request. Despite this entry in the code, in the reporting period there was one case when an administrative body, instead of providing public information, indicated to the interested person that the requested information had been published on the statistics website, which is a violation of the abovementioned norm.

10. DEMANDING REQUISITES FOR A PUBLIC INFORMATION APPLICATION THAT DO NOT DERIVE FROM THE LAW

The legal problem to be discussed in the current part was not revealed directly to the media. IDFI was contacted for consultation. However, journalists may face the mentioned problems when they personally, on their own behalf, request information from some public institutions.

10.1 Demanding a Copy of an Identity Card for a Public Information Application

In one of the cases, the National Center for Educational Quality Enhancement denied a public information application, despite it meeting the requirements of the General Administrative Code of Georgia, and additionally demanded a copy of the identity card to be attached to the request. The General Administrative Code of Georgia establishes a written application as a form of public information request. Article 78 of the mentioned Code defines the requisites of the application.

According to Article 78(I)(B), an application must include “the identity and address of the applicant.”

Public law is characterized by a strictly established principle of legality, according to which the administrative body cannot establish additional requirements or impose restrictions different from the law, if the law does not explicitly stipulate it. The mentioned principle is enshrined in Article 5(1), according to which “an administrative body may not carry out an activity that contradicts the requirements of the law.” Hence, when the law directly and clearly defines the list of specific requisites for the application, the discretion of the administrative body is limited to zero, which does not give it the possibility to establish additional criteria.

Sub-paragraph "b" of Article 78 of the Code requires an applicant to indicate only his/her name and address, and not the submission of a copy of the official document, in this case, copy of an identity document. In contrast, when the law requires the submission of an identity document or its copy, this is directly and explicitly stated in various legislative acts (for instance, pursuant to Article 11(1) of the Law of Georgia on Entrepreneurs, “in order to register as an individual entrepreneur or to register changes in the registered data, a natural person shall submit to the registration authority a written application requesting registration as an individual entrepreneur or the registration of changes in the registered data, and the identity document of a citizen of Georgia or, if an applicant is not a citizen of Georgia or is an alien, an identity document which is used for the identification of the person in the process of carrying out notarial actions”).

Thus, the indication of the identity and address in the application by the applicant is fully sufficient for the acceptance of the application and its registration, while the request for additional details from the administrative body contradicts the requirements of the legislation.

10.2 Request for a Qualified Electronic Signature on Public Information Application

In one of the cases, an administrative body did not accept the public information application because it did not have a qualified electronic signature/stamp, even though a scanned signature of the applicant was present.

The General Administrative Code specifies the applicant's signature as one of the mandatory requisites of the request.[18] The law of Georgia "On Electronic Documents and Electronic Trust Services " sets forth the legal grounds for using electronic documents, electronic signatures, and electronic trust services (Article 1(1) of the law). According to Article 3(3) of the mentioned law, "if a natural person or a legal entity under private law chooses an electronic form to communicate with administrative bodies, and the submitted document requires a signature and/or a seal, it shall be mandatory to put a qualified electronic signature and/or a qualified electronic seal on the document." Thus, according to the general rule established by the law, for a request submitted electronically, a qualified electronic signature and/or a qualified electronic stamp is determined. However, until January 1, 2023, Article 453 of the Law of Georgia "On Public Health" is valid in Georgia, according to the first paragraph of which „the rule for isolation and/or quarantine shall be established by the Government of Georgia or the Ministry defined by the Government of Georgia. The relevant quarantine measures that, in this case, are part of the rule, may be determined in accordance with the rule." On the basis of this provision, the Government of Georgia adopted the "Isolation and Quarantine Rules" by decree No. 322 of May 23, 2020, according to Article 7(3) of which public institutions, natural persons, and legal persons were granted powers to use electronic documents and/or electronic signatures made in accordance with conditions different from those provided for by the Law of Georgia "On Electronic Documents and Electronic Trust Services". In this case, the signature was done in a manner different from the law of Georgia "On Electronic Documents and Electronic Trust Services". Specifically, in a scanned form, which is authorized by paragraph 3 of Article 7 of the "Isolation and Quarantine Rules". Therefore, the administrative body's refusal to accept the application in the proceedings contradicted the current legislation.

[18] Article 78(I)(D) of the General Administrative Code of Georgia.

11. LACK OF REMEDIES IN CASES OF INCORRECT PUBLIC INFORMATION

The problem of incorrect public information has not taken place in a case involving requests from the media. Instead, an individual addressed IDFI. Based on case materials, it was clear that the person obtained incorrect public information from two public institutions. This problem is included in the present report because of the special legal importance of the issue.

The protected area of the right to access public information includes in itself not only obtainment of requested information, but the fact that an applicant has a legitimate expectation that the information is going to be accurate.

The lack of remedies for incorrect public information is related to the provisions of the General Administrative Code. Namely, according to the normative provisions, if a refusal to issue public information is qualified as an administrative act, issuing incorrect public information is a kind of administrative action that is not considered as an administrative act ("real act"), which significantly reduces legal possibilities to remedy violated rights. In particular, it is legally impossible to request for incorrect information to be nulled,[19] as well as to declare that information is incorrect based on a claim of acknowledgment.[20]

According to Article 47 of the General Administrative Code of Georgia, a person has the right to appeal to a court to cancel or reverse a decision of a public institution, state employee, or public servant, when: ... b) incorrect public information is created and processed. This provision can be used in the context of declaration and/or reversion of incorrect public information. The problem in this regard is the term "decision" used in the Code. It should be mentioned that there is still no case law of the Supreme Court of Georgia on "cancellation or reversion" of incorrect information. For the case mentioned above where an applicant, with high probability, received incorrect information, IDFI has filed a lawsuit in the Supreme Court of Georgia.

[19] Based on the provisions of the Code, this possibility only applies to administrative acts.

[20] According to article 25 of the Administrative Procedure Code of Georgia, claim of acknowledgment can only be filed in order to declare an administrative act as invalid or to determine the existence or absence of a right or legal relationship.

12. CONCEALMENT OF INFORMATION IN THE DOCUMENTS ISSUED AS PUBLIC INFORMATION

Access to public information is not an absolute right and, according to the Constitution, can be restricted in compliance with the principle of proportionality when there are relevant legitimate aims. Information that is requested from an administrative body can be related to an applicant, general information stored in a public institution, and/or the kind of information that contains state, personal, commercial, and/or professional secret. But the same document may contain open information as well, which must be accessible to the public. This creates the need to conceal some data/information when disclosing public information.

Specifically, the need for data concealment in general derives from the principle of proportionality, which means that the right must not be restricted to a greater degree than is necessary to achieve a legitimate aim. In this case, if a document can be issued with the concealment of information that is protected from disclosure, the public institution must redact restricted information and issue the remaining part. In public institutions, the practice of concealment of personal data is actively implemented, but this practice does not apply to other types of information.

One public institution declined to issue public information, referring to the fact that the requested information (minutes of a session) may include information that is protected from disclosure. But this institution has not even considered the possibility to conceal the relevant parts. Namely, according to Article 33 of the General Administrative Code of Georgia, information that is/was being reviewed on a closed session of a collegial public institution must be separable from the minutes of a session and published in this form. In this case, the aim of the law is to make available information, the obtainment of „any reasonably separable part“ (unconcealed part) of which will not harm the legitimate interests protected by state, commercial, personal and/or professional secrecy. Data concealment on its own means to cover data containing some kind of secret information in such a way that these parts are impossible to read.

Overall, we can say that the practice of personal data concealment is in place in public institutions. However, there is no such practice regarding other types of information protected from disclosure. This has a negative impact on the proportionality of restriction of the right to request/obtain public information, because an applicant may not be able to obtain parts of the public documents which do not contain classified information.

CHAPTER III. NORMATIVE PROBLEMS: SYSTEMATIC GAPS IN THE LEGISLATION REGULATING FREEDOM OF INFORMATION

1. PUBLIC INFORMATION REGARDING ARBITRATION DISPUTES

According to article 3, paragraph 5 of the General Administrative Code of Georgia, the scope of Chapter III of this code shall not apply to the activities of the executive bodies related to participation of the State of Georgia in the proceedings and review of cases in progress in international arbitration, foreign or international courts, until a final decision is made.

According to information released in December 2021, CSS (The Arbitration Institute of the Stockholm Chamber of Commerce) has obligated the Georgian government to pay approximately 80 million USD to the energy company Inter RAO. IDFI requested this decision from Ministry of Justice of Georgia. The Ministry rejected the request based on article 3, paragraph 5 of the General Administrative Code and mentioned that, at the time, arbitration had only issued some interim awards and this kind of information was not subject to disclosure.

The Ministry of Justice broadly interpreted this norm and included an award under the definition "information related to participation of the State of Georgia in the proceedings and review of cases in progress at international arbitration", whereas the purpose of this norm is to prevent information regarding state's procedural participation in proceeding and hearing of arbitration cases from disclosure. In particular, following the norm, procedural steps that the state takes during an arbitration or other foreign or international court proceeding are not public (for example, with whom it concludes contracts of agency, expertise, and other kinds of service, what pieces of evidence it collects, etc.). "Information related to the state's participation in arbitration" cannot include in itself arbitration awards, not only final, but interim and partial awards[21] as well.

[21] It is a partial decision that was requested in this case.

2. ACCESS TO PUBLIC INFORMATION REGARDING INTERNATIONAL TREATIES AND FOREIGN POLICY

According to article 3, paragraph 4, sub-paragraph “f” of the General Administrative Code, the scope of this code shall not apply to the activities of executive bodies related to executing international treaties and agreements and implementing foreign policy.

There have been cases of misinterpretation of this provision in the framework of the project. IDFI requested information from the Ministry of Foreign Affairs of Georgia regarding minutes of the hearing of 61st session of the governmental commission on EU integration and any official document adopted/prepared by it. According to the Ministry, provisions of public information do not apply to international treaties and implementation of foreign policy.

Such an interpretation of this norm excludes publicity of any official document that has any kind of connection with the implementation of foreign policy. Such a broad interpretation unreasonably denies the constitutional right of access to public information and contradicts the essential purpose of the norm. The purpose of article 3, paragraph 4, sub-paragraph “f” of the code is to implement foreign policy in accordance with internationally accepted rules and, to do so, exempt it from legal procedures established by the General Administrative Code. In the context of public information, it can imply, for example, preventing sensitive diplomatic correspondence from being disclosed.

Furthermore, even though the operation of the commission relates to Georgia’s integration in the EU, it cannot be qualified as an implementation of foreign policy. According to this interpretation, any activity of the state that has any kind of link with Georgia’s harmonization and approximation with EU would have been classified. Such an interpretation of this norm has a negative effect on the realization of the constitutional right on public information.

IDFI currently pursuits a lawsuit on this case in a general court.

3. REQUESTING PUBLIC INFORMATION FROM STATE COMPANIES

According to the current normative framework, it is virtually impossible to obtain public information from state companies.[22] For example, in responses to IDFI's requests for information about "LLC Gardabani TPP" and "Georgian Oil and Gas Corporation", the companies in question interpreted that, following Georgian legislation, they are not administrative bodies and thus provisions regarding public information do not apply to them. Such an interpretation is backed by the decision of 12 th of September, 2019, of the Supreme Court of Georgia,[23] where the Court did not apply the definition of "a public institution" and, therefore, norms of public information to commercial legal entities, 100% of the shares of which are owned by the state/municipality.

Specifically, the plaintiff had requested public information from an LLC,[24] the founder and owner of 100% of shares of which is the self-governing city–Municipality of Batumi. There was an agreement on public procurement between the Municipality of Batumi and this LLC. Namely, a contract on ongoing maintenance and operation of drainage channels in the amount of 1 634 077 GEL.

Article 27 of the General Administrative Code of Georgia defines bodies responsible for issuing public information. Sub-paragraph "a" of this article provides the legal definition of a public institution: "an administrative body, as well as a legal person under private law with funding received from the state or local budget". The Supreme Court of Georgia based its assessments on this norm and stated that "a legal entity of private law can only be considered a public institution in the scope of state or municipal funding. In any other cases, even with such kind of funding, beyond the scope of mentioned funding, a private institution maintains its own status and the provisions provided by Georgian legislation for public institutions do not apply to it."

The Court also clarified what is meant by funding from the state or municipality and included subsidies, grants, procurement of services, and voucher mechanisms in it. According to the Court's interpretation, "State bodies' or municipalities' 100% or any other kind of participation in founding legal entities of private law on its own shall not have any implication on their private-legal status and shall not make them public institutions". In the end, the Court applied the definition of a public institution and, therefore, the norms of public information not to the entire activity of an LLC, but only within the scope of the state procurement in the amount of 1 634 077 GEL.

With this interpretation, the Court virtually prohibited the application of the norms of public information to the companies founded with 100% participation of the state. In IDFI's opinion, this practice significantly hinders an effective supervision on government in the context of so-called "state companies" and virtually denies the monitoring of activities of such companies beyond the scope of "state/municipal" funding.

[22] Companies more than 50% shares/stocks of which are owned by the state.

[23] Decision ბს-1020(კ-18) of 12th of September, 2019 of the Supreme Court of Georgia.

[24] Namely: staff list, salaries, and information regarding audit inspection of the LLC.

4. THE PROBLEM OF "SPECIAL CATEGORY" PERSONAL DATA

The Law of Georgia on "Personal Data Protection" restricts processing of special category personal data.[25] The law explicitly states that processing special category data is prohibited, and it can only be processed in exceptional cases.[26] Even in exceptional cases, it is prohibited to make the data publicly available and to disclose the data to a third party without the consent of the data subject. The legislation does not recognize a legal possibility to obtain this kind of data as public information, even if there is legitimate interest towards an official – article 44 of the General Administrative Code, which ensures the openness of personal data of an official only applies to so-called "ordinary" personal data and not special category personal data.

During the project, considering the best interests of the journalists, IDFI have not requested special category personal data, as it is clear that the legal framework does not allow this. However, in many cases, in our assessment, there has been instances with high public interest where the disclosure of special category personal data would have been proportionate.

[25] According to article 2, sub-paragraph "b" of the Law of Georgia on "Personal Data Protection", special categories of data are-"data connected to a person's racial or ethnic origin, political views, religious or philosophical beliefs, membership of professional organizations, state of health, sexual life, criminal history, administrative detention, putting a person under restraint, plea bargains, abatement, recognition as a victim of crime or as a person affected, as well as biometric and genetic data that allow the identification of a natural person by the above features".

[26] Article 6 of the Law of Georgia on "Personal Data Protection".

5. „AUDIO RECORDINGS OF A SESSION OF A PUBLIC INSTITUTION". THE PRACTICE ESTABLISHED BY THE SUPREME COURT

The Supreme Court of Georgia made another problematic interpretation regarding public information in its ruling of November 25, 2021.[27] Specifically, in this case, the plaintiffs had requested an audio recording of the session of the Georgian National Communications Commission on imposing administrative responsibility.

This legal problem was not identified upon a request from the media, but the interpretation below sets a dangerous precedent that can be actively used as a basis for restricting the media's access to information.

The Supreme Court of Georgia based its conclusions on article 16, paragraph 2 of the Law of Georgia on "National Regulatory Bodies", according to which "National Regulatory Bodies shall keep a record of the proceedings of their sessions and other relevant documents for at least 7 years." And the resolution №1 of June 27, 2003 of the Georgian National Communications Commission – "Rules regulating the operation of Georgian National Communications Commission", which defines the rules for drawing up the minutes of a session.

Following the interpretation of this norms, the Court came to a decision that storing and issuing a minutes of a session of a commission as public information is prescribed by the law, but audio-recordings as intra-agency documentation do not fall under the definition of public information and, therefore, according to article 99 of the General Administrative Code of Georgia, their disclosure is restricted.[28]

This argumentation from the Court is problematic from two points of view. First, it excludes recordings of a session from the definition of public information and does not take into account provisions of article 16, paragraph 3 of the Law of Georgia on "National Regulatory Bodies" and article 7, paragraph 1, according to which sessions of the Commission are open to the public. "All resolutions, decisions, orders, records, and other documents of the Commission shall be available for public discussion". IN addition, by this decision of the Court, records of the session were defined as "intra-agency documentation", the sole purpose of which is to assist with drawing up minutes of a session.

It should be mentioned that an obligation of the coverage of the commission's sessions via livestream was defined by the resolution N433 of September 27, 2017, of the Government of Georgia "On adoption of the national anti-corruption strategy and action plan on implementation of the national anti-corruption strategy for 2017-2018". Specifically, the commission provides live coverage of the sessions on its YouTube page. According to the action plan on the implementation of the strategy, this was aimed at "increasing the transparency of independent regulatory bodies". Therefore, the recordings of a publically streamed live session by its essence cannot be considered as intra-agency documentation, and the sole purpose for them cannot be to assist with drawing up minutes of a session when the main purpose is defined to be increasing transparency and ensuring publicity.

[27] Ruling ბს-589(კ-19) of November 25, 2021 of the Supreme Court of Georgia.

[28] An interested party to an administrative proceeding may access the materials of the proceedings, except for the documents of intra-agency character directly related to the preparation of an individual administrative act.

IT SHOULD BE MENTIONED THAT THE PRACTICE ESTABLISHED BY THIS DECISION OF THE SUPREME COURT IS STILL IN PLACE. THE COMMISSION REFERS TO THIS DECISION WHEN IT DENIES REQUESTS FOR RECORDINGS OF ITS SESSIONS AS PUBLIC INFORMATION. However, we should mentions that this decision handed down by the Supreme Court was regarding the session of 2016 and its audio-recording, which at that time was not subject to the obligation to livestream. Therefore, taking into consideration the regulation of that time, the decision of the Supreme Court could have some legitimacy/relevance, but exercising this practice today contradicts current legislation. The established practice significantly hinders public supervision of the commission.

CHAPTER IV. EFFICIENCY OF THE MECHANISMS FOR THE PROTECTION OF THE RIGHT AND CONTROL OF PUBLIC AUTHORITIES OVER PUBLIC INFORMATION

1. LACK OF EXTERNAL ADMINISTRATIVE SUPERVISION ON PUBLIC INSTITUTIONS

The current legislation of Georgia does not recognize a specialized body supervising the disclosure of public information that would be control timely and comprehensive disclosure of information.

According to the current regulation, administrative supervision is limited to the possibility of filing an administrative complaint. In most cases, an information seeker is forced to go to the court and conduct a dispute for years to obtain public information.

The Public Defender of Georgia also exercises control over the accessibility of public information under its general mandate. In order to protect the human rights defined by Chapter 2 of the Constitution of Georgia, the Public Defender is equipped with the authority to address the corresponding body with relevant proposals and recommendations in case of finding a violation of human rights on the basis of individual applications and complaints. This also applies to the right to access public information guaranteed by article 18, paragraph 2 of the Constitution of Georgia. However, proposals and recommendations of a Public Defender are non-binding, and an institution violating the right does not have an obligation to take them into account. Assessments made by the Public Defender can only be used as evidence in a dispute over the disclosure of public information in a common court.

2. PROBLEMS OF JUDICIAL CONTROL OVER PUBLIC INFORMATION

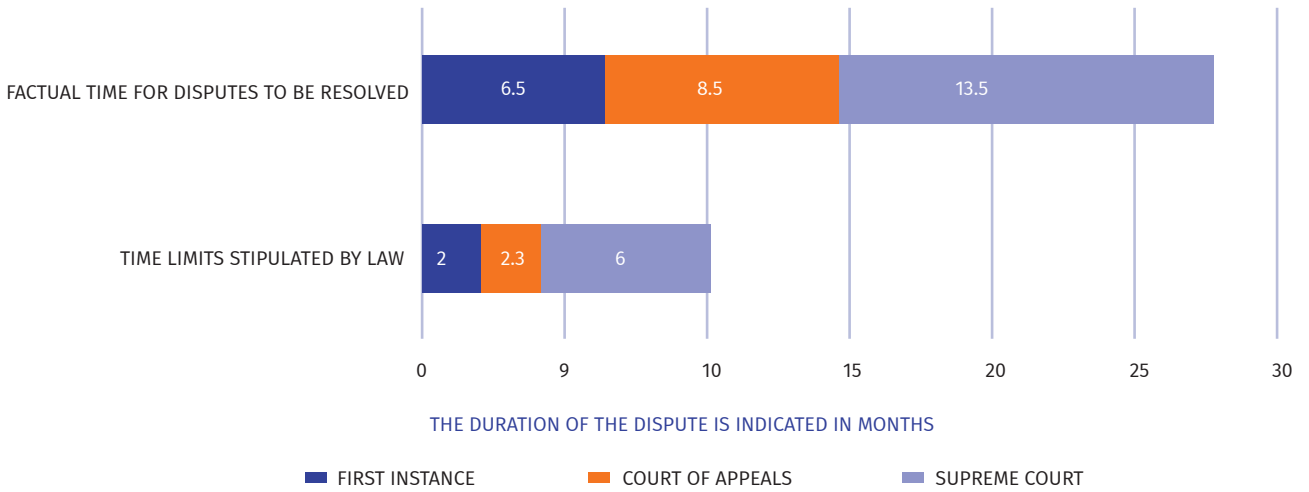
As it was mentioned above, there is no effective external administrative mechanism of control.[29] Therefore, control exercised by the judiciary, by common courts, is of utmost importance. Of course, the contents of the decisions are important, but no less important is the timeframes of such decisions. Specifically, a dispute must be resolved in such a way that the requested information does not lose its relevance/value.

[29] For example, Information Freedom Commissioner or other body equipped with the same authority. The Public Defender of Georgia, under its general mandate of human rights protection, is empowered to examine cases of public information, but this mechanism does not meet a high standard of efficiency, because results of such inspection are non-binding.

2.1 Procedural Time Limits for Common Courts

To assess the efficiency of judicial control in terms of procedural time limits, IDFI has studied statistics of court cases in the period between 2010 and 2020 regarding public information and the most recent cases decided by the Supreme Court of Georgia. Specifically, IDFI studied 25 recently completed cases of the Supreme Court.[30]

TIME LIMITS FOR PUBLIC INFORMATION CASES TO BE RESOLVED



As the research shows, courts of first instance solve disputes in about six and a half months, whereas, according to law, a court should resolve a case no later than two months after receiving the application. This time limit may be extended by no more than five months in particularly complex cases. [31]

Regarding the Courts of Appeal, it reviews the admissibility of a claim within 10 days[32] and, after finding the case admissible, has two months to litigate the case. An analysis of the cases revealed that the Court of Appeals takes an average of eight and a half months to reach a decision.

The Supreme Court takes the most time to reach a decision on cases regarding public information. As the analysis of the recent 25 decisions of the Supreme Court shows, it takes on average more than 1 year and 1 month to resolve public information disputes. According to the law, the total time limit for reviewing the admissibility of a claim and making a decision on administrative cases should not exceed 6 months. [33]

[30] As of July 11, 2022.

[31] Civil Procedure Code of Georgia, article 59, paragraph 3

[32] Civil Procedure Code of Georgia, article 174, paragraph 1

[33] Administrative Procedure Code of Georgia, article 34, paragraph 4.

It should be mentioned that this statistical data differs from IDFI's practice as well as from our expectations regarding the lawsuits filed within the framework of the project. Specifically, as mentioned above, in 100% of the cases where claims where admitted, the Court extended the time limit of reviewing it by up to 5 months, and it is expected that these cases will not be decided in this timeframe. Additionally, beyond this project, IDFI conducts litigations on several cases, one of which has been in the process of being review by the court of first instance since December 2020.

2.2 Extension of Time Limits by up to 5 Months.

Along with the general problem of prolongation of review time in the courts, the problem related to the use of the opportunity to extend the time limit for reviewing a case is evident as well. As mentioned above, following article 59, paragraph 3 of the Civil Procedure Code of Georgia, according to the general rule, a court shall resolve a case not later than two months after receiving the application. This time limit may be extended by no more than five months in particularly complex cases.

Therefore, the mechanism of extending the time limit for reviewing a case only applies to exceptional cases, where the court shall deliver a reasoned ruling explaining the complexity of the case. In the reporting period, with every claim filed by IDFI that has been admitted by the court of first instance, the reviewing time limits were extended by 5 months based on article 59, paragraph 3 of the Civil Procedure Code of Georgia.

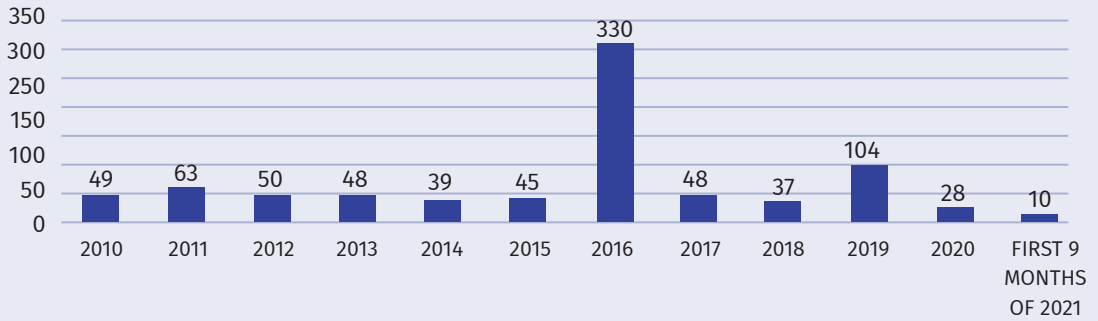
To be clear, in a ruling regarding the admissibility of a claim, the court, without any legal or factual justification, automatically extends the time limits for reviewing the case, regardless of the complexity of the legal problem identified in a claim.[34] In general, public information disputes are less likely to fall into the complex category of cases. In a majority of cases regarding public information, we are not dealing with particularly complex legal aspects or a large amount of evidence to be investigated. Despite this, the court uses the mechanism of extension of time limits without appropriate justification.

2.3 Statistics of Cases Filed in Common Courts regarding Public Information

The statistics of applying to a court with cases concerning public information is declining. Specifically, we do not take into consideration the year 2016, when there was an outstandingly high number of cases (330 cases) compared to other years (the reasons for which are unknown to us). On average, there are 51 new cases referring to public information each year. According to the statistics of recent years, this number is decreasing even more, with 2020 having 28, and in the first 9 months of 2021 - 10 cases.

[34] For example, the court automatically extends the time limit to 5 months even in cases where there is no problem with the interpretation of legal norms and a plaintiff is pursuing a response to an unanswered request.

STATISTICC OF THE NUMBER OF CASES REGARDING PUBLIC INFORMATION IN COMMON COURTS (2010-2020 YEARS)



2.4 Prolonged Court Time Limits as an Ineffective Remedy

The analysis of recent practice shows that pursuing public information through the courts is ineffective, and the violation of procedural time limits actually obscures the essence of this right and makes it impossible to exercise it effectively. Finally, the average time from submitting a complaint and initiating a lawsuit by the interested party to the final settlement of the dispute is 2.5 years, whereas, according to the law, the maximum time limit for public information cases to be resolved (taking into consideration maximum time limits of filing appeals) must not exceed 11.5 months. Receiving the requested information after 29 months deprives this information of its value/relevance.[35]

Such delays in reviewing and resolving public information cases virtually preclude the effectiveness of judicial control over administrative bodies as well. Moreover, a dispute related to public information, due to its specificity, should be resolved in even less time than the maximum time limit established by law. Particular legal complexity, complex factual prerequisites, and large amounts of evidence to be examined is not typical for the vast majority of such cases, and the interest of restoring the violated right and receiving the requested information is instantaneous. The review of disputes over a period 2.5 times longer than stipulated by law, on the one hand, makes it impossible to properly restore the violated legal status of a person, and on the other hand, fails to exercise proper control over public bodies.

In the context of accessibility of public information, it is essentially important for judicial control to be effective and for information seekers to have an expectation that, after an illegal act, the court will restore their violated right by obligating institutions to hand over public information. As it is clear from above, at this moment, the only actual, but at the same time, ineffective remedy for this violated right is the court.

[35] It should be noted that the problem of violation of legal time limits and delays in litigation in common courts does not only apply to cases related to public information. This problem applies to virtually all types of disputes in the common courts, and it does not imply that the courts specifically delay justice in cases only concerning public information.

The lack of timely justice over the legal obligation of public bodies to provide public information, on the one hand, hinders citizens' right from being effectively exercised, and on the other hand, encourages the arbitrary and non-transparent activities of public bodies. In the current situation, an administrative body will easily be able to violate the right to access public information. All of this significantly undermines the possibility to create qualified and evidence-based media products, the implementation of effective public control over public institutions, and the accountability of public authorities.

Due to the nature of public information disputes, it is highly important to reduce the timeframes for hearing/resolving such cases, or at least have this process fall within the time limits prescribed by law. In addition, due to the nature of judicial control and the administration of justice, reducing timeframes for resolving cases has its own limitations.

In response to this problem, IDFI has been advocating for the establishment of the institute of Freedom of Information Commissioner for many years. We should mention that the relevant draft law has been under consideration of the executive power since 2014, but has not been registered in the Parliament of Georgia so far.

3. SUPERVISORY POWER OF THE PARLIAMENT OF GEORGIA REGARDING PUBLIC INFORMATION

Another supervisory mechanism in relation to the disclosure of public information appertains to the Parliament of Georgia. Specifically, Article 49 of the General Administrative Code of Georgia stipulates the obligation of public institutions to submit a report on access to public information to the Parliament of Georgia, the President of Georgia, and the Prime Minister of Georgia on December 10 of each year and to publish it in the Legislative Herald of Georgia.

The regulation of parliamentary supervision related to the fulfillment of this obligation is enshrined in the Rules of Procedure of the Parliament of Georgia. According to Article 177 of the Rules of Procedure of the Parliament, "before the end of the spring session, the Human Rights and Civil Integration Committee of the Parliament shall prepare and submit to the Bureau of the Parliament a unified opinion on the reports submitted to the Parliament by public institutions in accordance with Article 49 of the General Administrative Code of Georgia."

In 2021, public institutions submitted reports to the Parliament of Georgia. Only 60 institutions were selected by IDFI according to a specific principle, and the reports submitted by them were checked/assessed.[36] The research report highlights the shortcomings related to the accuracy of the reports submitted by public institutions to the Parliament.

On July 26, 2021, a thematic research group was established on the basis of the Human Rights and Civil Integration Committee of the Parliament of Georgia in order to study the effectiveness of parliamentary control over the submission of reports reflecting the availability of public information by public institutions.[37]

On April 19, 2022, the thematic research group issued 13 main recommendations, most of which are addressed to the Parliament of Georgia.[38] According to the recommendations, in order to increase the effectiveness of monitoring of the accessibility of information, it is essential to refine the reports to be submitted by public institutions and write down their contents in detail, to create a list of accountable institutions, and to determine administrative responsibility for non-submission of the report.

The fulfilment and proper implementation of the recommendations issued by the thematic research group are important prerequisites for identifying and responding to existing systemic challenges in terms of freedom of information. The recommendations of the thematic research group have not been implemented so far.

[36] IDFI's Research "The results of monitoring the accuracy of the so-called December 10 reports of public institutions", see the link at: https://bit.ly/3Ddo8Jr

[37] The conclusion of the thematic research group of the Human Rights and Civil Integration Committee of the Parliament of Georgia, "Effectiveness of parliamentary control over the submission of reports showing access to public information by public institutions", see the link at: https://bit.ly/3CREl5o

[38] Id., p.53.

CONCLUSION

It was revealed during the course of the project that there are practical-normative problems of a systemic nature in terms of obtaining information on issues of interest to the media. Ignoring both formal and material requirements of the legislation regulating freedom of information is a regular occurrence.

The number of public institutions that attempt to comply with the requirements of the legislation as much as possible is exceptionally low. There is about a 12% probability that information on issues of interest to the media will be provided fully and within the timeframe stipulated in the law.

The degree of arbitrariness in public institutions is high. This may be due to the lack of effective judicial or external administrative control. In some cases, it appears that complete ignorance of public information requests is a proven practice of a public institution. The effectiveness of judicial oversight is significantly reduced by the length of timeframes stipulated by law for the consideration of a case, as well as by the courts' disregard of these terms.

The systemic problems discussed above essentially worsen the quality of access to public information on matters of media interest. On a practical level, there is no expectation that the media will be able to obtain information on an issue of its interest within the timeframe stipulated by the law. The cases of compliance with the requirements of the legislation regulating freedom of information by a public institution are exceptional.