

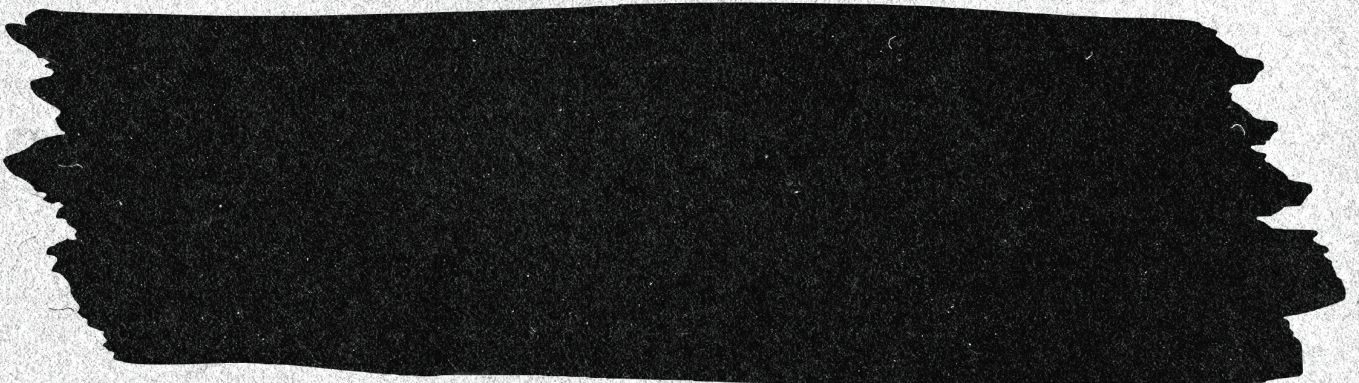
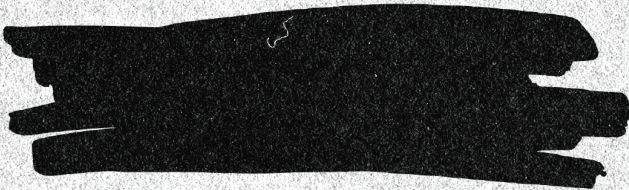
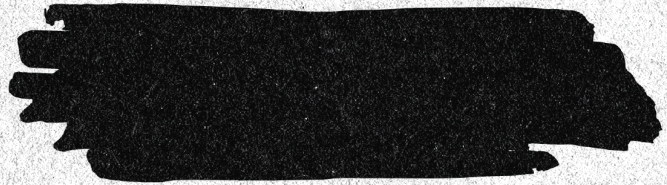


Funded by
the European Union



(NON)PUBLIC INFORMATION

Deteriorated Accountability of State Agencies



(NON)PUBLIC INFORMATION

Deteriorated Accountability of State Agencies



Funded by
the European Union



SOCIAL
JUSTICE
CENTER



CAUCASUS
RESEARCH
RESOURCE
CENTER



GEORGIAN
YOUNG
LAWYERS'
ASSOCIATION

This publication has been produced with the assistance of the European Union, within the project “Supporting Accountable and Human Rights-oriented Security Sector through Research, Advocacy and Inclusive Dialogue”. Its contents are the sole responsibility of Social Justice Center and they do not necessarily reflect the views of the European Union.

Supervisor: Guram Imnadze, Tamta Tsveraidze

Researcher: Tamar Pachulia

Translator: Mariam Begadze

Cover: Salome Latsabidze

Reprinting, reproduction, or distribution for commercial purposes without the organization's written permission is prohibited.

Citation: *Social Justice Center, “(NON)PUBLIC INFORMATION -Deteriorated Accountability of State Agencies”, Tamar Pachulia, 2023*

© Social Justice Center

Address: Abashidze 12 b, Tbilisi, Georgia

Phone.: +995 032 2 23 37 06

www.socialjustice.org.ge

info@socialjustice.org.ge

<https://www.facebook.com/socialjustice.org.ge>

Table of Contents

- Introduction..... 4**
- What Kind of Information is Withheld by State Agencies? 5**
 - 1. Secrecy of Statistical Data..... 5**
 - 2. Denial of Access to Information due to Absence of Relevant Statistical data and/or Resource Constraints..... 7**
 - 3. Reference to Sources Published Proactively Instead of Providing Requested Information..... 8**
 - 4. Leaving Requests without a Response 8**
- Deadline for Providing Public Information..... 9**
- Electronic Public Information Request Forms 9**
- Effectiveness of Administrative Complaint/Appeal Mechanism 10**
- Conclusion 11**

Introduction

The Constitution of Georgia provides for and recognizes the freedom of information,¹ given concrete content and implemented by the General Administrative Code of Georgia.² Access to public information, as one of the components of freedom of information, plays an important role in the process of state transparency, implementation of open governance, and building trust in public agencies. Therefore, the publicity of information is one of the most important benchmarks for the quality of democracy in the country.

Freedom of information occupies a special place in the Constitution of Georgia, as vital discussions and debates characteristic of free societies are impossible without it.³ According to the interpretation of the European Court of Human Rights, the barriers to access to information imposed by the government turn into a form of indirect censorship.⁴

Despite the legal regulation and the standards supported by international practice, access to public information in Georgia is associated with a number of challenges. As the second priority set for the EU membership candidate status requires increasing the accountability and transparency of public agencies, improvement of freedom information standards is now particularly pertinent and important for Georgia.⁵ Accordingly, existing barriers in this direction can prove to be substantively damaging to the European integration process of Georgia.

In June 2023, the Institute for Development of Freedom of Information (IDFI) published an assessment report on access to public information.⁶ The document emphasizes that the quality of access to information has sharply declined. The response rate to public information requests in 2022 was the worst (58%) since 2010.

The IDFI report examines trends in access to information quantitatively/statistically. Accordingly, it emphasizes the scale of the problem. The purpose of the present document is not so much to emphasize the quantitative but the substantive aspects: what kind of information is withheld by public agencies, on what basis public information is refused or incomplete information is provided, and how effective the use of the administrative complaint/court appeal mechanism is in case of the refusal to provide public information.

¹The Constitution of Georgia, Article 18.

² Chapter III of General Administrative Code of Georgia - „Freedom of Information“

³ Decision of the Constitutional Court of Georgia #2/3/406,408, October 30, 2008, para 2 (10).

⁴Társaság A Szabadságjogokért v. Hungary, 23.

⁵EUROPEAN COMMISSION - Commission Opinion on Georgia's application for membership of the European Union, available at: <https://shorturl.at/ahGHR> (accessed on: 10.08.2023)

⁶IDFI – “Sharp Decline in Access to Public Information”, available at: <https://shorturl.at/esvNY> (accessed on: 10.08.2023).

The document was prepared by the Social Justice Center based on the information requested from individual agencies. Accordingly, we cannot generalize the assessments presented in it to all public agencies and categories of information.

What Kind of Information is Withheld by State Agencies?

The Social Justice Center did not send requests to public agencies purposefully - to check the standards of information publicity. However, in the process of preparing documents on various topics (including drug policy, the activities of the High Council of Justice, the use of policing powers, the activities of the security sector, etc.), the categories of information, with respect to which public accessibility is particularly low, as well as those public agencies that systematically fail to fulfill their obligations set by law were clearly identified.

The Social Justice Center was denied public information from public agencies for various reasons. In the document, the most common/problematic cases of limiting access to public information will be discussed:

1. Secrecy of Statistical Data

The State Security Service (hereinafter: SSS) and the legal entity under public law - the Operational-Technical Agency of Georgia (hereinafter: the Agency) do not even provide generalized and content-free statistical data in full. SSS is a closed agency and a significant part of its activities is kept secret. Therefore, for exercising public control, it is key to ensure access to information in relation to the data that fall under the category of public information - i.e. that do not contain state, professional, and/or commercial secrets, although practice has shown that the level of access to information is low even in relation to this category of data.

The Social Justice Center sent the correspondence to the SSS and the agency several times, however, a full response has not been obtained from either of them.

The first request⁷ concerned such generalized, quantitative data on the human resources (organizational-structural issues) of the SSS and the agency as names of structural units in agencies, the number of employees and dismissals in specific years, etc. The response letters of the SSS and the agency did not contain complete information on any of the issues inquired about in the said request. In particular, part of the provided information was inaccurate,⁸ and the normative acts indicated in

⁷ Correspondence of the Social Justice Center N301-317 submitted to the State Security Service (11.10.2022).

⁸ For example: according to the provided information, from January 1, 2022 to October 12, 2022 - 221 employees were dismissed (including 5 due to disciplinary misconduct, 103 due to transfer to another public agency), accordingly, the reason for the dismissal of the remaining 113 employees could not be determined. The data on the number of employees dismissed in other years is also inaccurate.

response to the rest of the questions did not reflect the factual situation in the agencies, nor did it provide the opportunity to compare the situation according to years.⁹

The Social Justice Center also requested information from the SSS and the Supreme Court¹⁰ on how many motions the SSS filed with the Supreme Court in 2021 for permission to carry out covert surveillance for counterintelligence purposes, how many of those petitions were granted, and in total, how many citizens and for how long were subjected to covert wiretapping/surveillance. The requested information was not provided by any of the agencies. The ground for the refusal was Article 6 of the Law of Georgia On Counter-intelligence Activities, according to which counter-intelligence activities are classified and documents, materials, and other data describing such activities are state secrets.

We believe that the refusal to provide the requested information was unlawful since the request did not concern the contents of the counter-intelligence activity or a document describing the essence of such activity (as indicated by the Supreme Court¹¹), but rather only generalized statistical information. The quantitative indicators by their nature cannot be information containing state secrets, since it does not pose the risks of disclosing state secrets, harming security and counter-intelligence interests, or publishing any information that would create a barrier to the effective performance of the SSS functions in the future.

The third request concerned the exchange of information with the SSS by the agencies of special importance to state security, and like the previous requests was limited to quantitative aspects only.¹² This time, the SSS justified its refusal to provide information on the basis that the *general administrative code does not apply to the activities of the executive authorities, which are related to the operative search activities*.¹³ In this case, as well, the State Security Service did not take into account that the requested information was completely non-substantive, therefore, it could not be considered as information related to operational search activity in such a way that legitimate purposes would justify limiting the applicant's right of access to information.

⁹The SSS correspondence explained that the number of staff units in the service is determined by the law "on the 2022 State Budget of Georgia". The Chapter 6 of the Law (Georgia's State Budget Appropriations) contains information about the number of employees working in the SSS, however, the determined numbers are fixed and do not change from year to year. Accordingly, the information describing the actual situation (number of employees, excluding vacant positions) cannot be determined. This normative act also does not provide the data broken down by structural units, as requested in the correspondence.

¹⁰Correspondence of the Social Justice Center N301-02 submitted to the Supreme Court of Georgia, January 13, 2022.

¹¹ Correspondence N3-22-22 of the head of Secretariat of the Plenary and Grand Chamber of the Supreme Court of Georgia, January 20, 2022.

¹² With this correspondence, the Social Justice Center requested statistics on how frequently and in relation to which category of information agencies of special importance to state security exchanged information with the State Security Service of Georgia during 2019-2022.

¹³ General Administrative Code of Georgia, para 3, subparagraph 4 (b).

2. Denial of Access to Information due to Absence of Relevant Statistical data and/or Resource Constraints

The Social Justice Center requested statistical information from the Supreme Court and the National Agency for Crime Prevention, Execution of Non-Custodial Sentences and Probation on the rate of deprivation of rights for offenses under Article 45¹ of the Code of Administrative Offenses.¹⁴ The requested information was not provided by the public agencies on the basis that the deprivation of civil rights provided for by the law on Combating Drug-related Crime is not recorded in the forms of valid statistical reports.¹⁵

Similarly, the Tbilisi Court of Appeal denied the information on the number of retrial petitions due to newly discovered circumstances based on the absence of statistical data.¹⁶ The practice of denying information by public agencies on the basis that the information requested is not found in the statistics already produced by them has become an undesirable trend. Refusal to provide public information for this reason is against the requirements of the law. The General Administrative Code does not exempt public agencies from the obligation to respond to requests for a large volume of information and/or that which necessitates the searching and connecting of different data.¹⁷ In the absence of statistics, the public agencies may need relatively more time to process the information, however, the absolute restriction of the right of access to information is a clearly disproportionate interference with the freedom of information.

The Kutaisi City Court did not provide the rulings (with the protection of personal data) on cases of offenses provided for by Articles 166 (petty hooliganism) and 173 (disobedience to legal requirements) of the Administrative Offenses Code from January 1 to June 30, 2023, on the grounds that *the satisfaction of the request would require the mobilization of court time and resources specifically for this purpose*.¹⁸

We believe that the refusal to provide information in this case was also unlawful. In the absence of the necessary resources to process resolutions, the City Court must have provided at least a certain part of the decisions made in the reporting period.

A relatively small amount of information was requested from the Gori District Court - 10 rulings issued in a specific reporting period under the same articles of the Administrative Offenses Code. In response,

¹⁴Article 3 of the Law of Georgia “on Combating Drug-related Crime”, besides the administrative fine, provides for the possibility of depriving civil rights from the persons who have committed administrative offenses related to the purchase and possession of small amounts of cannabis/marijuana (Article 45¹ of Administrative Offense Code). Civil rights include: the right to drive a vehicle, the right to stand for elections, the right to act as counsel and other rights.

¹⁵ Correspondence of the Supreme Court of Georgia №3-53-23, January 30, 2023; Correspondence of the National Agency for Crime Prevention, Execution of Non-Custodial Sentences and Probation № 2/18391, March 2, 2023.

¹⁶ Correspondence of Kutaisi Appellate Court N 54-2/10, February 2, 2023.

¹⁷ General Administrative Code of Georgia, Article 40.

¹⁸ Correspondence of Kutaisi City Court N 6593-2, July 10, 2023.

the Gori District Court explained to us that the court staff is busy fulfilling the obligations under the law and considered it impossible to allocate the resources of the administrative staff to providing public information.¹⁹

3. Reference to Sources Published Proactively Instead of Providing Requested Information

In response to the applicants' requests, part of the public agencies refer to laws/subordinate legislation and/or information published on the website, which do not answer the issues raised in the requests. Presumably, such responses to public information requests only serve to artificially increase the number of satisfied requests in the statistics of public information.

The Social Justice Center requested information from the Tbilisi City Hall regarding the specific issues provided for by the Georgian Law on Assemblies and Demonstrations. Among others, the request posed a question of whether there was a by-law/other regulation on the management of assemblies and demonstrations. Tbilisi City Hall responded to the request in the following way:²⁰ "Tbilisi City Hall acts in compliance with the requirements of the Law on Assemblies and Demonstrations."

The Ministry of Internal Affairs referred us to its website²¹ in response to the request on the registration and prosecution rate of crimes under paragraphs 4 and 5 of Article 260 of the Criminal Code during 2018-2022. It is true that the Ministry of Internal Affairs proactively publishes the statistics of registered crimes, however, until 2021, the Ministry had been producing statistics only according to articles. Therefore, the statistics published on the website do not fully reflect the requested information.

4. Leaving Requests without a Response

The practice of leaving requests without a response is more common than the refusal to provide information on a specific basis.

Despite the submission of repeated requests and numerous telephone communications, no public information was provided to us by:

- The High Council of Justice²² - the information requested concerned the percentage of workload (distributed cases) of the common court judges who simultaneously hold the position of a member of the High Council of Justice.

¹⁹ Correspondence of Gori District Court N898, July 28, 2023.

²⁰ Electronic Correspondence of Tbilisi City Hall, December 21, 2022.

²¹ Correspondence of the Ministry of Internal Affairs N MIA 6 23 00157012, January 20, 2023.

²² Correspondence of the Social Justice Center N801-70 sent to the High Council of Justice, February 13, 2023.

- The Ministry of Internally Displaced Persons from the Occupied Territories, Health, Labour and Social Affairs of Georgia²³ - the information requested concerned the treatment, rehabilitation and harm reduction services for drug users;
- The Ministry of Defense of Georgia²⁴ and the Ministry of Internal Affairs²⁵ - the information requested concerned the persons employed, dismissed, and seconded in the agency during 2018-2022.
- The Center for Mental Health and Prevention of Addiction²⁶ - the information requested concerned the fulfillment of duties under the 2021-2022 Anti-Drug Action Plan, etc.

Deadline for Providing Public Information

According to the legislation, the public agency is obliged to provide public information immediately, and in exceptional cases – no later than in 10 days.²⁷ Despite the legislative regulation, only a small part of public agencies (Ministry of Education and Science of Georgia, LEPL Office of Resource Officers of Educational Institutions, Constitutional Court, Supreme Court of Georgia, Office of the General Prosecutor of Georgia, National Security Council, etc.)²⁸ provide information in observance of the deadline set by law. In most cases, public agencies do not explain the reasons for exceeding the deadline.

The legislation imposes specific obligations on public agencies even in case of the refusal to provide information. In particular, on the one hand, the law establishes the obligation of immediate notification of the refusal, and on the other hand, of a written explanation to be provided within 3 days of the decision.²⁹ Despite this, most public agencies leave the requests without a response and appropriate legal justification.

Electronic Public Information Request Forms

Some public agencies have an electronic mechanism for requesting information on their official website, however, in most cases, this function either has a technical fault³⁰ or is not systematically monitored by the person responsible for providing public information in the relevant agency. Therefore, a large part of the requests submitted in this form are often left unanswered.³¹ The Social Justice Center considers that technical improvement of the system is appropriate, as fewer resources

²³ Correspondence of the Social Justice Center N 01/22 sent to the Ministry of Internally Displaced Persons from the Occupied Territories, Health, Labour and Social Affairs of Georgia, January 17, 2023.

²⁴ Correspondence of the Social Justice Center 01/301 to the Ministry of Defense, October 3, 2022.

²⁵ Correspondence of the Social Justice Center 01/300 to the Ministry of Internal Affairs, October 3, 2022.

²⁶ Correspondence of the Social Justice Center N 01/155 to the Center for Mental Health and Prevention of Addiction, May 2, 2023.

²⁷ General Administrative Code of Georgia, Article 40.

²⁸ Agencies are selected based on comparative statistics. The said list does not necessarily indicate that the agencies provide all information in full and in accordance with the deadline set by law.

²⁹ General Administrative Code of Georgia, Article 41, para 2.

³⁰ For instance: Public information request mechanism on the website of the Constitutional Court.

³¹ For instance: Response was not received to electronic public information requests from Kutaisi and Batumi City Courts within the deadline set by law.

are required for requesting/providing information electronically and the requests can be satisfied in a relatively shorter time period.

Effectiveness of Administrative Complaint/Appeal Mechanism

According to the legislation, the refusal to provide public information can be appealed to a higher administrative body³² and then to a court.³³

The Social Justice Center has appealed several decisions on the refusal to provide information to a higher administrative body. It followed that in most cases the administrative complaint mechanism has a formal character. Superior administrative bodies either agree to the refusal of the administrative body without any justification or leave the complaint entirely without a response.

- Following the refusal to provide statistical information on the human resources of the SSS, the Social Justice Center filed an administrative complaint with the head of the State Security Service and requested that the public information be provided in full. The superior administrative body did not respond to the complaint within the time limit set by the law. In response to the administrative complaint requesting generalized quantitative data on the measures of state secret protection, the head of the SSS explained to us that "operational-search activity is not a function of our agency."³⁴
- Following the refusal to provide statistical information on the human resources of the operational-technical agency, the Social Justice Center filed an administrative complaint with the head of the agency. In response to the complaint, we were formally referred to the same correspondence subject to the complaint. In particular, the letter indicated: "substantiated response was provided by the first deputy head of the agency within the framework of the legislation". The said letter confirms that the head of the operational-technical agency did not review the circumstances presented in the complaint and did not explain why he considered the information provided to be complete and justified.

The practice of the Social Justice Center has shown that in case of the refusal to provide public information, even the judicial appeal mechanism is ineffective. The case consideration in the first instance courts may even take several years. Accordingly, at the point of delivering the final decision, there is no longer an interest in receiving the information. For example, the Social Justice Center filed an administrative lawsuit against the Supreme Court on March 29, 2022,³⁵ however, up until now the Tbilisi City Court has not even started the substantive review of the case. Therefore, even assuming the

³² General Administrative Code of Georgia, Article 180.

³³ Administrative Procedure Code of Georgia, Article 2.

³⁴ Correspondence of the Head of State Security Service SSC 3 23 00075829, March 31, 2023.

³⁵ With the administrative lawsuit, the Social Justice Center requested the provision of statistical data in full on electronic surveillance.

claim is fully satisfied, the information received loses its original value for the applicant, as it can no longer guarantee the control of the public agencies' activities.

Conclusion

Against the backdrop of certain public agencies' low accountability, full access to public information remains a significant challenge in Georgia. The main barriers in the process of obtaining public information are:

- Extension of the grounds for restricting access to information by public agencies, including placing purely statistical data in the category of information containing state secrets;
- Substantial violation of the deadline established by law for providing information;
- Absence of mechanisms for requesting and issuing public information in an electronic form;
- Practice of leaving requests without a response in the absence of any explanation;
- In case of the refusal to provide information, absence of an effective remedy for a rights violation.

To improve standards of access to information, the Social Justice Center calls on public agencies to:

- explain objectively and in good faith the grounds for restricting the freedom of information (including classification of information) to avoid unjustified restriction of the right;
- respond appropriately to any public information request; provide the requested information in full or, in case appropriate legal grounds exist, explain to the applicant the reasons for denial/partial satisfaction of the request.
- consider the complaints submitted with the public information requests within the optimal period and in compliance with the relevant standards;
- The Human Rights Protection and Civil Integration Committee of the Parliament should effectively monitor the provision of information by public agencies, by reviewing relevant reports³⁶ and issuing specific recommendations.

³⁶ Rules of Procedure of the Parliament, Article 177; General Administrative Code of Georgia, Article 49.