

## Transparency International Anti-Corruption Helpdesk Answer

# Transparency of court proceedings

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**Date:** 30 September 2019

Transparency in the judiciary leads to increased efficiency and effectiveness and promotes confidence in the judicial system and in the fair administration of justice. It also encourages judges to act fairly, consistently and impartially. The legal foundations requiring transparency of court procedures are based on the right to information (RTI) and the right to a fair trial. As it relates specifically to judicial proceedings, the right of access to court files may be understood as one of the manifestations of the RTI. It is, though, subject to exceptions, which may justify denying access to courts' proceedings. For example, protecting law enforcement's investigation and prosecution of a corruption case may require authorities to deny access to information. The lack of detailed guidelines in the international normative framework and the juxtaposition of interests and rights which (should) guide governments' efforts lead to uneven but mostly limited progress in the promotion of transparency in court proceedings.

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*This Anti-Corruption Helpdesk is operated by Transparency International and funded by the European Union.*



# Query

Are there any established good practices around the world that make the entirety of court procedures — including non-final decisions — publicly available, from the police investigation to the last ruling given by, for example, the supreme court? Apart from any good practices regarding the transparency of court procedures, is there any relevant research on this topic that supports or denies transparency of the courts' non-final decisions?

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## Transparency and the judiciary

The right of access to information (RTI) is central to the functioning of democratic societies. As British human rights organisation Article 19 (2017) states, “it enables the strengthening of citizen participation and the exercise of socio-economic and political rights, fosters development, economic performance and makes national authorities accountable for their actions and management of public finances and public services”.

As it relates to the judicial branch of government, access to information regulation can refer to: i) the administration and management of the judicial system or to ii) judicial proceedings. This Helpdesk Answer focuses on the latter.

Information on judicial proceedings can refer to a plethora of different types of documents: case files; case law; court rulings; statistics on cases filed, resolved and pending; the court's agenda; among others. The range of information is accompanied by a range of different levels of interest and access

## Main points

- Transparency in the judiciary leads to increased efficiency and effectiveness and promotes confidence in the judicial system and in the fair administration of justice.
- The legal foundations requiring transparency of court procedures are based on the right to information and the right to a fair trial, which can be found in a series of international human rights norms.
- Exceptions may justify denying access to court proceedings, such as the protection of law enforcement's investigation and prosecution of a crime.
- The lack of detailed guidelines in the international normative framework and the juxtaposition of interests and rights which (should) guide governments' efforts lead to uneven but mostly limited progress in the promotion of

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that is usually granted, from parties and its lawyers to the general public.

The European Network of Councils for the Judiciary (ENCJ 2018) has recognised that “an open and transparent system of justice is a further precondition for establishing and maintaining the public trust in justice, which is a cornerstone of legitimacy of judiciary”.

Beyond transparency of court files – ex post access to court proceedings – it should also be noted that supreme courts (and lower courts in fewer instances) in several countries, such as Brazil, Canada and the United Kingdom, as well as some international courts, allow (or even demand) the broadcasting of their hearings on TV, radio and/or the internet (Youn 2012).

There are several reasons for providing the public with access to court files: it promotes confidence in the judicial system and in the fair administration of justice through increasing its efficiency and effectiveness. Evaluations of the judiciary, such as the [EU Justice Scorecard](#), are only possible when data about their performance is publicly available. They are starting points for reforms and policy adjustments which aim to make the courts more efficient and, consequently, to strengthen the rule of law.

People’s perception of the judiciary – and their confidence in it – varies widely. Increased transparency has the potential to improve perceptions of the judiciary since it provides information that is more accurate to the population and allows for comparative analysis between different countries. It also encourages judges and courts to behave better, considering their actions will likely be under public scrutiny.

According to the Global Corruption Barometer, 30 per cent of people believe that all or most judges are corrupt (Transparency International 2017). Perceptions of a corrupt judiciary refer to the direct actions both of judges and court officials (the receiving of bribes, nepotism for judges and its eventual, perceived or real, role in the impunity of corrupt officials and businesspeople).

The judiciary does not act only as a third-party arbiter of individual disputes, it intervenes constantly in the political system, participating in

the process of public policy development, recognising and protecting fundamental rights and limiting other state powers. When deciding on the constitutionality of a law, for example, it affects the whole legal system. It may also choose to impart *erga omnes* effects on a decision, meaning its results will affect people beyond the parties of that legal proceeding.

Thus, it is even more imperative for the judiciary to undertake transparency reforms to increase its legitimacy (Herrero & López 2010). In such instances, the courts should not only open themselves, through transparency measures, but also seek to ensure greater participation by society in its decision-making process. The acceptance of civil society organisations, for instance, as *amici curiae* is an example of such a measure.

Transparency in the courts also “encourages judges to act fairly, consistently and impartially, allowing the public to ‘judge the judge’” (European Parliament 2013). Accountability, which is key for the public’s confidence in the judiciary, depends on transparency of both individual decisions and statistics on the court’s performance (ENCJ 2017).

Greater accountability leads to increased public acceptance of the process and outcome. In criminal cases and, in particular, corruption cases of significant public interest, greater transparency leads to “public investment” in the process of justice – people are able to express their personal discontent and disapproval towards the criminal acts and important issues are publicly discussed (Burkell & Bailey 2017).

The transparency of court proceedings also allows the public to access the reasoning behind judicial decisions and settles expectations for future cases. The justification of a judicial decision has become more and more the source for its authority and the right to a reasoned judgement has been considered part of the right to a fair trial. It is essential, for example, for a person to make use of available remedies and for the right to appeal (OSCE 2012).

[Fair Trials](#) (2019), a London-based NGO, includes open justice as one of the components of the right to a fair trial, because it “enables the public to see how justice is administered and by subjecting it to

the public and press scrutiny, safeguards the fairness of the trial”.

The European Court of Human Rights (ECHR) has stated that “public character of proceedings before judicial bodies protects litigants against the administration of justice in secret with no public scrutiny” and that it also strengthens the public’s confidence in the courts (ECHR 2019a).

Transparency of court proceedings is key to the public perception of the judiciary since that is affected not only by scandals of corruption but also if and how it performs its constitutional role when countering corruption.

## Legal foundations for transparency of courts’ proceedings

The legal foundations requiring transparency of court procedures can be found in a series of international human rights norms. More specifically, there are two related rights which have an impact – and generate obligations – on the transparency of the judiciary: the right to information and the right to a fair trial.

### Right to information

The right to information (RTI) can be found, as well as in other international treaties, in the United Nations’ International Covenant on Civil and Political Rights (ICCPR). Article 19 states that “Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice”.

RTI is intrinsically connected to the freedom of opinion and expression, as the [Universal Declaration of Human Rights](#) (1948) demonstrates: “Everyone has the right to freedom of opinion and

expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers” (article 19).

Similarly, the Council of Europe Convention on Access to Official Documents seeks to ensure “the right of everyone, without discrimination on any ground, to have access, on request, to official documents held by public authorities” (article 2).

In its efforts to promote the right to access of information, both the Organization of American States and the African Union have “model laws”, which serve as parameters for international best practices on the topic.

As it relates specifically to judicial proceedings, the right of access to court files may be understood as one of the manifestations of RTI (European Parliament 2013). This specific right should not be mistaken with the right to access information on the management of the judiciary. There are international norms – such as the Council of Europe Convention on Access to Official Documents<sup>1</sup> – which restrict transparency obligations to this type of information.

National legislation dedicated to the right of access to court files is scarce. The main example is Finland where the courts have played a major role in promoting the transparency of the judiciary. Examples of this are found in Canada and several countries in Latin America too.

Countries regulate RTI in different ways and, since few countries have specific legislation concerning access to judicial proceedings, most evaluations of a country’s judicial transparency are based on two initial questions: whether there is RTI legislation and whether it explicitly applies to the judiciary<sup>2</sup> (Due Process of Law Foundation 2012).

There is, thus, a range of possible scenarios for the regulation of the right of access to court documents. At one end is specific legislation concerning these rights and the related obligations of the judiciary. Then, there are countries with an

<sup>1</sup> It defines “public authorities” rather restrictively as “legislative bodies and judicial authorities in so far as they perform administrative functions according to national law” (article 1, 2, a, 2).

<sup>2</sup> This is still a source of contention, for example: <https://www.virginiamercury.com/2018/10/31/your-right-to-know-foia-and-virginias-judiciary/>

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RTI law that explicitly applies to the justice system, followed by the ones where there is an RTI law but not specifically applicable to the judiciary. At the other end are countries with no RTI law, where, eventually, the right to access information must be found in pieces of legislation spread across the legal system.

The [Global Right to Information Rating](#) (2019) has introduced to its evaluations of RTI laws a question on the application of freedom of information (FOI) laws to the judiciary, including whether their scope encompasses both administrative and other types of information (indicator 9).

Beyond the international human rights framework, transparency requirements are also set out in the United Nations Convention against Corruption (UNCAC). Article 10 states that “Taking into account the need to combat corruption, each state party shall, in accordance with the fundamental principles of its domestic law, take such measures as may be necessary to enhance transparency in its public administration, including with regard to its organization, functioning and decision-making processes, where appropriate”. There are, however, no specific references to transparency of the judiciary or judicial decisions.

Beyond the importance of access to judicial proceedings in attempts to counter corruption, it has also been recognised as central to sustainable development (Article 19, 2017). The [Rio +20 Declaration on the Sustainable Development Goals](#) recognises that “broad public participation and access to information and judicial and administrative proceedings are essential to the promotion of sustainable development”.

On a related note, the development of effective, accountable and transparent institutions at all levels is one of the Sustainable Development Goals of the United Nations (Target 16.6).

## Right to a fair trial

There is no dissociating the right to a fair trial and a transparent judiciary. As the European Network of Councils for the Judiciary (2018) states, “a

transparent and accountable judiciary of integrity is one of prerequisites for a proper functioning of the rule of law and the right to a fair, timely, and efficient trial by an independent and impartial court established by law”.

The International Covenant on Civil and Political Rights, which aims to ensure the right to a fair trial, details the obligation of the courts to publicise its rulings. It explicitly states that “any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires, or the proceedings concern matrimonial disputes or the guardianship of children” (article 14). Similarly, the American Convention on Human Rights states that “criminal proceedings shall be public, except insofar as may be necessary to protect the interests of justice” (article 8.5).

The European Convention on Human Rights maintains that “In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly<sup>3</sup> but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice” (Article 6).

The convention goes well beyond the EU Charter of Fundamental Rights, which states only that “Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented”.

The European Court on Human Rights (2019a; 2019b) has published guidelines on the interpretation of Article 6 – on civil and criminal aspects – based on its own jurisprudence. It states that “complete concealment from the public of the entirety of a judicial decision cannot be justified.

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<sup>3</sup> Reading out the court’s judgement is not the only way through which scrutiny of the judiciary may be ensured, providing the judgement in the court’s registry and

publishing in official collections may satisfy that requirement (ECHR 2019b).

Legitimate security concerns can be accommodated through certain techniques, such as classification of only those parts of the judicial decisions whose disclosure would compromise national security or the safety of others" (ECHR 2019b). In any case, the court should provide specific and sufficient reasoning for limiting publicity – of a hearing and/or of the judgement.

It should be noted that the defendant's right to access information on the judicial proceedings to which they are a party is an essential component of the right to due process.

## Exceptions to transparency

Both the right to a fair trial and, especially, the right to information are not without bounds. Exceptions are recognised by international norms and it is standard for domestic RTI laws to allow for a range of situations in which access to information may be restricted. Some of these situations are directly applicable to the right of access to court documents.

For example, the Council of Europe Convention on Access to Official Documents allows for limitations aimed at protecting: national security, defence and international relations; public safety; the prevention, investigation and prosecution of criminal activities; disciplinary investigations; inspection, control and supervision by public authorities; privacy and other legitimate private interests; commercial and other economic interests; the economic, monetary and exchange rate policies of the state; the equality of parties in court proceedings and the effective administration of justice; environment; the deliberations within or between public authorities concerning the examination of a matter (article 3).

The [Model Inter-American Law on Access to Public Information](#) (OAS 2010) also established limitations when access to information would create a risk to public interests, such as public safety, national security, effective formulation or development of policy, international relations and legitimate financial interests of a public authority (Article 41).

Exceptions to the right to information should be clearly and narrowly defined. They should also be subject to the strict or consequential "harm" test

and the "public interest" test. According to the former, relating to one of the interests laid out as possible exception justifications is not enough – the disclosure of the information must produce real harm to said interest to justify withholding its publication (Article 19, 2012)

According to the "public interest" test, authorities should weigh the potential harm from disclosure and the public interest in said disclosure. As the Centre for Law and Democracy (2012) notes, there is a particular high public interest in information concerning issues of corruption, which raises the threshold of harm the disclosure would cause to justify its classification.

Provisions allowing for certain categories of exceptions may be used to deny access to court proceedings. As stated, exceptions are a legitimate tool to protect other interests and rights; however, denial of access must be justified since "the presumption in favour of disclosure means that the onus should be on the public body seeking to deny access to certain information to show that it may legitimately be withheld" (Article 19 2002).

## Corruption investigations

While there is no specific exception to the right to access information in corruption cases, a series of generic exceptions may be applicable to such instances.

An exception to the transparency rule is commonly allowed whenever providing access to information "would create a clear, probable and specific risk of substantial harm to the law enforcement, prevention, investigation and prosecution of crime" (Model Inter-American Law on Access to Public Information, article 41).

This exception aims to protect "judicial proceeding and strategy in criminal cases where disclosure of the information before a final decision is returned could affect the course of the investigation and procedure for dispensation of justice".

The [Model Law on Access to Information for Africa](#) provides that "an information officer may refuse to grant access to information, where to do so would cause prejudice to (a) the prevention or detection

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of crime; (b) the apprehension or prosecution of offenders; (c) the administration of justice; or (d) the assessment or collection of any tax or duty" (African Commission on Human and Peoples' Rights 2013).

Similarly, the ECRH (2019b) has recognised the possibility of limiting the public nature of criminal proceedings to protect the safety (or privacy) of witnesses or to promote the free exchange of information and opinion in the pursuit of justice.

The integrity of testing and auditing procedures may also justify denial of access to information during their progress. Disclosure, in these cases, "might undermine a public examination process and its final outcome" (OAS 2010). Once concluded, however, accessing its results should not be an issue (Model Inter-American Law on Access to Public Information, article 41, b, 9).

These exceptions are generally applicable to police investigations. As the Centre for Law and Democracy (2012) recognises "it is important to prevent the disclosure of information whose confidentiality is vital to law enforcement, particularly where this is necessary to protect the rights of parties involved in cases". Information held by investigative authorities should, therefore, remain secret. In particular, information on witnesses and whistleblowers may be withheld to protect them (UNODC 2008).

The United Nations Office on Drugs and Crimes (2002) highlights the importance of secrecy in investigations into corruption schemes, especially considering the risks of publicity in cases involving civil servants. It notes, for example, that "the suspect corrupt civil servant might have connections to other civil servants who might alert them to investigations or they might even be members of the criminal justice system and thus have access to restricted information". That is why, according to the UNODC, it is "essential at the outset to evaluate methods to ensure the confidentiality of the investigation".

Noting the different standards that may be applicable to different phases of investigations into corruption schemes, the UNODC (2002) notes that "there should be no obligation to inform the suspect about the investigation during its early stage. When a suspect has knowledge of an

investigation prior to the time the police can secure sufficient evidence, the suspect might destroy evidence and warn other targeted persons to do the same".

Important tools for the investigation of corruption cases are the deferred prosecution agreements, non-prosecution agreements or leniency agreements. Such agreements, between companies under investigation and prosecutors, are usually sealed or given limited publicity – and different countries regulate this aspect of corporate liability differently.

There are some reasons why there is often little or no transparency given to such agreements: companies prefer agreements to prosecution, partially because it reduces the amount of bad publicity it will receive; publicising detailed accounts of wrongdoings may jeopardise investigations, especially in multi-jurisdictional enforcement where different countries are in different stages of investigations (for example, in the Odebrecht case in the Car Wash investigations).

Grand juries – "citizen-comprised body that obtains evidence and considers whether it is sufficient to justify criminal charges in a particular case" – are a common feature in the legal system in some countries, such as the US. They are commonly used to investigate and prosecute corruption cases, and their proceedings are mostly secret to prevent those under scrutiny from fleeing or importuning the grand jurors, to encourage full disclosure by witnesses and to protect the innocent from unwarranted prosecution (Foster 2009).

## Privacy and reputation

The International Covenant on Civil and Political Rights also details some possible exceptions to the right to information. It recognises limitations to the exercise of such rights "for respect of the rights or reputations of others" (article 19, 3, a).

Among these rights, the right to privacy may justify denying access to a particular piece of information. This right – as well as the right to data protection – has been elevated to the level of a fundamental right, and they both can be found in several international human rights conventions.

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As for corruption cases, it should be noted that the Model Inter-American Law on Access to Public Information does not consider that exception to be applicable to “matter[s] related to functions of public officials”.

Similarly, the privacy exemption does not apply, according to the Model Law on Access to Information for Africa, if “the information relates to the position or functions of an individual who is or was an official of the information holder or any other public body or relevant private body” (African Commission on Human and Peoples' Rights 2013).

## National security

Limitations to the right to information – which may limit the obligation of the courts to give publicity to judicial processes – can be found, for example, in the ICCPR. It states that the protection of national security may justify restrictions to the right to information (article 19, 3, b).

There are, however, limitations to how those restrictions should be applied and the Global Principles on National Security and the Right to Information lay out some of these limitations. Also known as the Tshwane Principles, they were developed “to provide guidance to those engaged in drafting, revising, or implementing laws or provisions related to the state’s authority to withhold information on national security grounds or to punish the disclosure of such information”<sup>4</sup>. It can also serve as reference – for the purposes of this answer – to justify exceptions to the right to information in corruption cases.

As it relates to public access to judicial proceedings, the principles state that the “invocation of national security may not be relied upon to undermine the fundamental right of the public to access judicial processes” (Principle 28). The Tshwane Principles lay out the components of judicial processes which should be made available: i) judicial reasoning; ii) information about the existence and progress of cases; iii) written arguments submitted to the court; iv) court hearings and trials; and v) evidence in court proceedings that forms the basis of a conviction.

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<sup>4</sup> The Tshwane Principles were drafted by 22 organisations and academic centres in consultation with more than 500

Beyond that, the public should have the opportunity to contest the claim that a restriction is necessary on national security grounds and the very decision of restricting access to judicial processes should provide “fact-specific reasons and its legal analysis in writing” (Open Society Justice Initiative, 2012).

The ECHR (2019b) has stated that “the mere presence of classified information in the case file does not automatically imply a need to close a trial to the public, without balancing openness with national-security concerns”. Secrecy should, therefore, be limited to the extent necessary to preserve a compelling governmental interest.

## Other exceptions

Lastly, there are other exceptions to the right to information which may justify limitations to the publicity of court proceedings. One of them is the protection of public order, public health or morals (Article 19, 3, b International Covenant for Political and Civil Rights).

The ECRH has found that limits to publicity may also be justified to protect professional confidentiality (European Union Agency for Fundamental Rights. 2016).

There are also exceptions directed at protecting the rights of children and adolescents. Both the International Covenant on Civil and Political Rights and the European Convention on Human Rights state as much.

More specifically, the United Nations Standard Minimum Rules for the Administration of Juvenile Justice – known as the [Beijing Rules](#) – determine that “the juvenile’s right to privacy shall be respected at all stages in order to avoid harm caused to her or him by undue publicity or by the process of labelling” and that “no information that may lead to the identification of a juvenile offender shall be published”.

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experts from more than 70 countries as part of the Open Society Justice Initiative.

# Case studies on judicial transparency

## Country examples

There are different ways through which countries regulate the transparency of judicial proceedings. The lack of detailed guidelines in the international normative framework and the juxtaposition of interests and rights which (should) guide efforts to increased transparency lead to uneven, but mostly limited progress in the promotion of transparency for courts proceedings.

Below are some examples of how differently countries attempt to regulate this matter.

### Finland

Finland adopted the [Act on the Publicity of Court Proceedings in General Courts](#) in 2007. It enshrines the principle of publicity which states that “Court proceedings and trial documents are public unless provided otherwise in this or another Act”.

Besides defining the circumstances in which court proceedings may be exempted from the transparency requirements and the period of secrecy, the act also details the process and time through which a document becomes public.

Among the exceptions provided are information which, if made public, could endanger the security of the state and sensitive information regarding matters relating to the private life, health, disability or the social welfare of a person.

### Canada

The Canadian experience deserves a special mention because it was built, mainly through jurisprudence, on the “principle of open court”. Motivating a presumptive openness means that “unless restricted by explicit court order or in specific and identified type or proceedings, the public has access to any and all information revealed by or about parties and witnesses in court proceedings” (Burkell & Bailey 2017). The principle serves an educational purpose as it educates the public about the court system and facilitates public participation in the “ritual of the trial”.

The right to open courts generally outweighs the right of an individual to privacy in Canada. All court files are accessible to the public and new technologies have contributed to making this fundamental goal realistic. They have also, on the other hand, facilitated some uses of information that are not connected to the open court rationale and may lead to negative impacts upon public and private security and the protection of confidential business information (European Parliament’s Directorate-General for Internal Policies 2013).

### Slovenia

In Slovenia, access to information on court proceedings is regulated by the [Act on Access to Information of Public Character](#).

The Slovenian judiciary has its own centralised website, which provides electronic access to all courts and tribunals. Access to court documents for third parties is, however, limited. In criminal proceedings, applicants must demonstrate a legitimate interest to obtain a copy of the court files. The definition of “legitimate interest” is contested, and its interpretation may lead to a restriction in the public’s access to courts’ proceedings (European Parliament’s Directorate-General for Internal Policies 2013).

There are also exceptions, such as when the release of information on a criminal prosecution procedure could be detrimental (the “harm test”) to its completion.

### Indonesia

In Indonesia, transparency of judicial proceedings is regulated by the [2008 Law on Public Information Disclosure](#).

Interestingly, that legislation details the circumstances in which information on law enforcement may be withheld from the public: “i) obstruct the observation and investigation process of a criminal act; ii) reveal the identity of informants, reporters, witnesses and/or victims having knowledge of a criminal act; iii) reveal criminal intelligence data and plans related to prevention and treatment of any forms of transnational crime; iv) endanger the safety and lives of law enforcement personnel and/or their

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families; v) endanger the security equipment, facilities and/or infrastructure of law enforcement personnel”.

Not included in the exception, according to Indonesian law, are the following information: i) verdicts of a court of law; ii) affirmation, decision, regulation, circular letter or other types of policies, either binding or nonbinding; internally or externally, and any consideration of law enforcement institutions; iii) warrant to discontinue investigation or prosecution (Centre for Law and Democracy 2012).

## Multi-country evaluations

Below are a series of multi-country evaluations which provide a comparative understanding of the issue of transparency in judicial processes:

- European Parliament’s Directorate-General for Internal Policies – [National Practices with Regard to the Accessibility of Court Documents](#): Finland, Slovenia and Canada, as well as the European Union.
- The World Bank – [Access to Information and Transparency in the Judiciary](#): A Guide to Good Practices from Latin America.
- Due Process of Law Foundation – [Disclosing Justice: a study on access to judicial information in Latin America](#): Argentina, Chile, Colombia, Dominican Republic, Ecuador, Honduras, Mexico, Panama, Peru and Uruguay.
- Open Society Justice Initiative – [Report on Access to Judicial Information](#): Australia, Belgium, Bosnia and Herzegovina, Canada, Croatia, Ireland, Israel, Japan, New Zealand, South Africa, Spain, Sweden, Turkey, United Kingdom and the United States as well as the European Union.
- Council of Europe – [Report on the Accessibility of Judicial Decisions through Publication Standards](#): Czech Republic, England and Wales, Estonia, Italy and Moldova.
- Justice Studies Centre of the Americas – [Judicial Information Accessibility Index](#): OAS member countries.

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