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MAPPING OF FREEDOM OF INFORMATION REQUESTS (FOIRs) FOR THE PUBLICATION OF COVID-19 VACCINE SUPPLY CONTRACTS¹

CHIAMAKA OJIAKO² and UCHECHUKWU NGWABA³

Abstract

Freedom of Information Requests (FOIRs) provide the window of access to COVID-19 vaccine supply contracts in times of crisis, yet for COVID-19 supply contracts, FOIRs have recorded limited success due to barriers which have either been legal, institutional, political or a combination of all of these. Despite State's commitment to freedom of information and open contracting at both the national and international level, the urgency to procure vaccines led many countries to prioritize public health goals over protecting the public's right of access to information. This empirical study examines freedom of information requests related to COVID-19 vaccine supply contracts to understand the legal, political, and instructional strategies that enabled the regime of vaccine secrecy and assesses the human rights implications using a human rights impact assessment (HRIA) framework.

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I INTRODUCTION

The world has witnessed grand-scale challenges, disruptions and dislocations across industries and sectors due to the SARS-CoV-2 (COVID-19) pandemic. The public health sector has been significantly impacted as its ability to respond effectively to the pandemic has depended largely upon the production, negotiation, and supply of COVID-19 vaccines. While 11 vaccines have been approved by the World Health Organisation (WHO) in its emergency use listing, and 40 vaccines approved for use by at least one national regulatory authority, only about 18% of people in low-income countries have received at least one dose of the vaccine.⁴ Undoubtedly, the inequities in the global vaccines roll-out are traceable to many factors. In this study, we focus on vaccine contract secrecy as one of the perpetuating drivers of inequities in vaccine distribution and uptake.

Section II maps out the scope of the study. Section III outlines the research questions that have been formulated for the study. Section IV describes the method of evidence gathering and evaluation and the theoretical perspective engaged in the study. Section V offers a background discussion of the motivations informing the study. Section VI examines the key actors and the landscape of secrecy. Section VII identifies the key stakeholders in the push for disclosure and impacted by non-disclosure of information about vaccine supply contracts. Section VIII provides an analysis of the data from mapping freedom of information requests for the publication of COVID-19 vaccine supply contracts made to 23 buyers. Section IX undertakes an analysis of the interconnection between the various elements of the study and offers a resolution of the research questions posed for the study. Section X draws conclusions and makes recommendations based on the analysis in the preceding sections.

II SCOPE OF STUDY

The study is focused on two narrow objectives. First, collecting, compiling, and analyzing information on Freedom of Information Requests (FOIRs) related to COVID-19 vaccine supply contracts. The objective is understanding the legal, political, and institutional strategies that have been engaged; the stakeholders who have been impacted by these strategies (i.e., lack of transparency about COVID-19 vaccine supply contracts); and the key actors behind the regime of secrecy (i.e., those who have deployed these strategies). The second objective is to map the human rights and equity impact of the ecosystem of lack of access, or limited access, to information within COVID-19 vaccine supply contracts. We pursue this second objective by using a human rights impact assessment (HRIA) framework. Gostin and Mann explain the basis for HRIA as follows:

All governmental policies in general, and health policies in particular, have the potential to burden human rights to a greater or lesser degree, whether by restricting freedoms, discriminating against individuals or population groups, or other mechanisms. While the protection of public health may in some cases outweigh

⁴ J Holder, J, "Tracking coronavirus vaccinations around the world" (29 January 2021), accessed (20 June 2022) online; <<https://www.nytimes.com/interactive/2021/world/covid-vaccinations-tracker.html>>; COVID-19 Market Dashboard, online: <<https://www.unicef.org/supply/covid-19-market-dashboard>>.

concerns relating to human rights burdens, there are many instances where human rights are needlessly infringed... a Human Rights Impact Assessment... allows policy makers and human rights advocates to identify potential human rights burdens posed by public health policies and suggest strategies for ameliorating those burdens.⁵

By evaluating how the policy of non-disclosure of information about COVID-19 vaccine supply contracts have impacted or burdened two rights – the right of access to information, and the right to health – we have, in so doing, deployed HRIA as an analytical framework of analysis.

III RESEARCH QUESTIONS

In designing the study, we have formulated six questions to be answered. The questions are addressed to specific aspects that shed light on the nature and character of the regime of secrecy around COVID-19 vaccine supply contracts, to wit:

- (1) How many countries with published COVID-19 vaccine supply contracts have freedom of information laws or have signed to open contracting initiatives?⁶
- (2) Which countries amended or changed their laws to protect the confidentiality of pharmaceutical companies that manufactured the COVID-19 vaccines?
- (3) What is the success rate – by country, regionally and globally – of FOIRs regarding COVID-19 vaccine supply contracts?
- (4) What were the justifications for approvals or rejections of FOIRs for vaccine supply contracts?
- (5) What kind of approaches were most successful for carrying out FOIRs for COVID-19 vaccine supply contracts?
- (6) What are the contextual factors that have contributed to the approval(s) or rejection(s) of FOIRs for COVID-19 vaccine supply contracts?

IV. RESEARCH METHOD AND THEORY

A. RESEARCH METHOD

In responding to these questions, we have adopted a mixed-method approach in gathering data for analysis to accommodate a variety of evidence sources we have engaged with in the study. First, we undertake a comprehensive desk review of primary legal sources dealing with the enabling frameworks for freedom of information regimes globally, regionally, and nationally. Second, we examine quantitative data in archival sources detailing freedom of information requests and

⁵ Larry Gostin & Jonathan M. Mann, “Towards the Development of a Human Rights Impact Assessment for the Formulation and Evaluation of Health Policies” (1994) 1:1 Health & Hum Rts 58.

⁶ Open Contracting Initiatives are commitments, principles and contracting data standards that governments, international bodies and institutions have endorsed for government transparency in public procurement to foster participation between public bodies, businesses and civil society. See L Amin, “Making the case for open contracting in Healthcare Procurement” (January 2017) Transparency International Global Health, online: <<https://ti-health.org/content/making-case-open-contracting/>> .

responses to those requests across different countries and regions of the world. In this regard, we map FOIRs made to 23 buyers in different geographic regions to assess their success rates, the strategies deployed and the justifications for denial or partial access.⁷ Third, we engage in doctrinal research examining scholarly sources on freedom of information regimes in different contexts and perspectives. Finally, we engage the qualitative method by interviewing key stakeholders with in-depth knowledge of the legal, political, and institutional processes for securing information about COVID-19 vaccine supply contracts by virtue of the work they have done in advocacy, activism and/or action on the ground to elicit information about their experiences in this regard. Finally, our findings from the interview with key stakeholders have been analyzed against the backdrop of the primary, archival and scholarly literature, and theoretical perspectives on health justice and the imperative to strengthen health capabilities in the formulation of national, regional, and global responses to the COVID-19 pandemic.

B. THEORETICAL APPROACH

The capability theory has informed this study. The formulation of health capability derives from the work of Amartya Sen.⁸ The capability approach, as formulated by Sen, is closely connected to the Aristotelian conception of social and political ethics through his emphasis on capability as the focal variable for social evaluation. Similar to Aristotle, Sen asserts the importance of freedom, attaching value to an individual's choice and opportunities to live the life they choose given their personal and social circumstances.⁹ The capability approach, like the Aristotelian view, focuses on the capability to lead a worthwhile life. It applies this freedom to all members of society, irrespective of race, class, gender, community, sexual orientation, or ethnicity. Capability to function, Sen argues, incorporates both well-being and the freedom to pursue well-being.¹⁰ The capability approach encourages human agency. Promoting health capabilities in low- and middle-income countries will entail promoting the agency of low- and middle-income countries in the choice of the priorities, agendas, and praxis of public health governance as it impacts the population of these countries, in the very same way this capability is available to the populations of high-income countries. To this end, an agenda of secrecy in the conclusion of COVID-19 vaccine supply contracts, when it affects the ability of low- and middle-income countries to craft effective public health responses to the pandemic, will be interpreted as negatively impacting health capabilities.

V. BACKGROUND TO THE STUDY

⁷ Europe Commission, United Kingdom, Albania, Slovakia, Hungary, Brazil, Chile, Mexico, Argentina, Panama, El Salvador, Guatemala, Colombia, Dominican Republic, Peru, China, Israel, Pakistan, Philippines, South Africa, Canada, United States, Australia.

⁸ Amartya Sen, *Inequality Reexamined* (Oxford University Press, 1992).

⁹ *Ibid*; cited in Jennifer Prah Ruger, "Toward a Theory of a Right to Health: Capability and Incompletely Theorized Agreements" (2006) 18(2) YJLH 1 at 13.

¹⁰ *Ibid*.

The distribution of COVID-19 vaccines globally has remained heavily skewed in favour of high-income countries, with estimates indicating that only 18% of the population of low-income countries have been fully vaccinated against COVID-19 compared to 81% in high and upper-middle-income countries.¹¹ Many countries, while scrambling for limited COVID-19 supplies, opted for emergency procurement measures that defied typical transparency and reporting requirements.¹² These measures were equally adopted for COVID-19 vaccine procurement, resulting in a regime of secrecy, as several countries either refused to publish vaccine supply contracts or published redacted versions.¹³ Publishing redacted vaccine contracts that do not disclose crucial information on the price of the vaccine per dose, delivery schedules and concessions resulted in the released documents offering little value for transparency and accountability purposes.

As an example, the European Commission in 2020 issued a guidance informing Member States of the “negotiated procedure without option to publish” that allows for the procurement of supplies within a short timeframe.¹⁴ Countries that adopted this extraordinary measure were required to provide justification in a contract award notice report. Nonetheless, many countries in the European Union (EU) system did not prioritize transparency and accountability measures. For instance, the CureVac and the EU contract, considered one of the most transparent vaccine contracts globally, is a redacted version.¹⁵ Furthermore, pharmaceutical companies have defended vaccine contracts secrecy on the grounds that they contain customary terms and conditions.

The implications of lack of full disclosure of COVID-19 vaccine supply contracts have been consequential for the struggle to improve access to affordable medicines and vaccines, particularly with the disproportionately low vaccination rates in low- and middle-income countries compared to high-income countries.¹⁶

¹¹ Holder *supra* note 4.

¹² I Lozovsky, “In Europe's scramble to buy COVID-19 supplies, anti-corruption measures fall away” (21 April, 2020) OCCRP, online: <<https://www.occrp.org/en/coronavirus/in-europes-scramble-to-buy-COVID-19-supplies-anti-corruption-measures-fall-away>>.

¹³ Centre for Global Development, *The Principles on Commercial Transparency in Public Contracts: Working Group on Commercial Transparency in Public Contracts*. (2019), online: <<https://www.cgdev.org/sites/default/files/principles-commercial-transparency-public-contracts.pdf>>.

¹⁴ UNODC, *Covid-19 Vaccines and Corruption Risks: Preventing Corruption in the Manufacture, Allocation and Distribution of Vaccines* (Policy Paper, December 2020), online: <https://www.unodc.org/documents/corruption/COVID-19/Policy_paper_on_COVID-19_vaccines_and_corruption_risks.pdf>; Communication from the European Commission, *Guidance from the European Commission on using the public procurement framework in the emergency related to the COVID-19 crisis* 63 (1 April 2020), OJEU (2020/C 108 I/01) 1 at 1–5.

¹⁵ M Apuzzo, & S Gebrekidan “Governments sign secret vaccine deals. Here's what they hide” (28 January 2021) The New York Times, online: <<https://www.nytimes.com/2021/01/28/world/europe/vaccine-secret-contracts-prices.html>>.

¹⁶ Karen Hussmann, “Global access to Covid-19 vaccines: Lifting the veil of opacity” 2021:12 U4 Anti-Corruption Resource Centre, online: <<https://reliefweb.int/sites/reliefweb.int/files/resources/lifting-the-veil-of-opacity-in-covid-19-vaccines-to-combat-the-pandemic.pdf>>.

Open procurement and disclosure of vaccine supply contracts can serve many important functions. First, it can build public trust in the decision-making around the purchase of vaccines; second, it can reduce corruption risks that arise when public procurement contracts are hidden from public scrutiny; and third, it can improve the prospects of achieving equity in the availability and accessibility of vaccines.¹⁷ Indisputably, open procurement and disclosure, when properly channeled, can motivate policy makers and global health actors to act with responsibility in their conclusion of vaccine supply contracts. Responsibility, in this context, is owed not just to the interests of concerned state and non-state actors, but also to the global community.¹⁸ This is because of how the decisions of state actors, such as the advanced purchasing and stock-piling of large quantities of the vaccine to the detriment of other states, as well as decisions of non-state actors (like pharmaceutical companies) around vaccine contracts negotiation that is disproportionately skewed to advance profit motives can impact health equity and outcomes globally.¹⁹ Consequently, the global distribution of COVID-19 vaccines has been suggested to have resulted in a form of “vaccine apartheid” between high and low- and middle-income countries.²⁰

FOIRs provide a window of access to COVID-19 vaccine supply contracts. As an essential work tool in the repertoire of activists seeking to entrench transparency and accountability in the public domain, FOIRs can help peel back the layers of government secrecy and create the opportunities for public scrutiny of states’ decision-making processes.²¹ Yet FOIRs for COVID-19 supply contracts have recorded limited success due to barriers which have either been legal, institutional, political or a combination of all of these.²² Given the far-reaching impact of the pandemic on almost all facets of society, as well as the significant investment of public funds in the procurement of vaccines by many countries, the arguments that have been proffered against publicising COVID-19 vaccines contract have failed to gain traction. The pushback against government secrecy in managing information about COVID-19 contracts has brought renewed

¹⁷ “For whose benefit? transparency in the development and procurement of COVID-19 vaccines” (Policy Brief, May 2021), online: <<https://ti-health.org/wp-content/uploads/2021/05/For-Whose-Benefit-summary-Transparency-International-Global-Health.pdf>>.

¹⁸ EJ Emanuel et al., “What are the obligations of pharmaceutical companies in a global health emergency?” (2021) 398:10304 *Lancet* 1015-20, online: <[https://doi.org/10.1016/S0140-6736\(21\)01378-7](https://doi.org/10.1016/S0140-6736(21)01378-7)>.

¹⁹ B Telford, L Hoemeke & J Barnes-Weise, “The global covid-19 contract conundrum: Think global health” (8 December 2021), online: <<https://www.thinkglobalhealth.org/article/global-covid-19-contract-conundrum>>; CE Wagner et al., “Vaccine nationalism and the dynamics and control of SARS-CoV-2” (2021) 373:6562 *Science*.

²⁰ SS Bajaj, L Maki and FC Stanford, “Vaccine apartheid: global cooperation and equity” (2022) 399:10334 *Lancet*. 1452.

²¹ L Stein & L Camai “Freedom of Information” (2018) *Oxford Research Encyclopedia of Communication*, online: <<https://oxfordre.com/communication/view/10.1093/acrefore/9780190228613.001.0001/acrefore-9780190228613-e-97>>.

²² *Maximum Disclosure: Secrecy in COVID-19 Vaccine Contracts and Other Shortcomings of Colombia’s Vaccine Rollout* (Briefing Paper, 2021), online: <<https://opiniojuris.org/2021/08/02/covid-19-and-courts-symposium-maximum-disclosure-colombian-tribunal-leads-way-in-ensuring-transparency-over-covid-19-vaccine-contracts/>>.

focus to the utility of administrative law tools like FOIRs for unmasking what has been kept hidden by government bureaucrats in many countries.

VI. KEY ACTORS AND THE LANDSCAPE OF SECRECY

Who are the key actors behind the regime of secrecy in the conclusion of COVID-19 vaccine supply contracts? By what means have these key actors sustained non-disclosure of information about contractual terms contained in COVID-19 vaccine supply contracts? These questions relate to Research Questions (RQ) 2 and 4, respectively, of the formulated research questions of this study.

RQ 2 raises an enquiry as to the countries that amended or changed their laws to protect the confidentiality of pharmaceutical companies that manufactured the COVID-19 vaccines.

On examination of primary and secondary sources, we primarily found evidence of the widespread enactment and uptake of national laws guaranteeing access to information in public records as a human right to foster accountability, transparency, and more effective use of limited resources in more than 100 countries.²³ However, we also found that at the height of the pandemic, the scramble for limited COVID-19 vaccines resulted in a collision between the public right of access to information and the protection of public health goals by securing doses required for immunization of the populace.²⁴ The immediate response of many countries focused on prioritizing public health goals over protecting the public's right of access to information contained in COVID-19 vaccine contract agreements because they found themselves in a predicament where non-disclosure agreements became a precondition for securing COVID-19 vaccines.²⁵ As such, even when the terms of vaccine contracts deviated from national law provisions on the right of access to information, countries had to either introduce new legislation or amend existing freedom of information (FOI) laws to suspend or completely prohibit access to information about vaccine contracts. These ordinances and legislation either prohibited, suspended, or extended processing time; or permitted only partial disclosure of vaccine contract details. This fostered a global climate of secrecy around the negotiation and execution of COVID-19 vaccine contracts.²⁶

²³ According to a UNESCO report, about 125 countries have adopted Freedom of Information (FOI) or similar laws which establish rights and procedures for accessing information. See UNESCO "Powering Sustainable Development with Access to Information: Highlights From the 2019 UNESCO Monitoring and Reporting of SDG Indicator 16.10.2", online: <https://unesdoc.unesco.org/ark:/48223/pf0000369160>.

²⁴ UNESCO, Toby Mendel and Laura Notess "The Right to Information in Times of Crisis: Access to Information – Saving Lives, Building Trust, Bringing Hope!" (2020), online: <https://unesdoc.unesco.org/ark:/48223/pf0000374369>.

²⁵ M Davies et al, "'Held to ransom': Pfizer demands governments gamble with state assets to secure vaccine deal" (23 February 2021) online: <https://www.thebureauinvestigates.com/stories/2021-02-23/held-to-ransom-pfizer-demands-governments-gamble-with-state-assets-to-secure-vaccine-deal>.

²⁶ R Radu, "Fighting the 'Infodemic': Legal Responses to COVID-19 Disinformation" (2020) Soc. Media Soc., online: <https://doi.org/10.1177/2056305120948190>.

When these findings were put before the interviewed stakeholders, they provided further insights on how the regime of secrecy of COVID-19 vaccine contracts became the norm across different regions of the world, albeit, with varying degrees of rigidity informed by the peculiarities of individual countries.

For instance, Respondent 1 ('R1')²⁷ identified systemic and historical reasons as the main drivers of the regime of secrecy in the negotiation of vaccine contracts by pharmaceutical companies. According to R1, pharmaceutical companies found themselves in a unique position of limitless power "...because they had access to the means to get countries out of this pandemic." With this kind of power, R1 believes pharmaceutical companies exploited the situation to make unreasonable demands in the vaccine supply contracts they negotiated with countries all over the world.²⁸ According to R1, countries on their part could not push back because they urgently required the vaccines to bolster their public health response to the pandemic. The concessions that arose from these negotiations, in the view of R1, were very problematic as they were made under desperation by many governments around the world who were trying to respond to wave after wave of the pandemic.

However, R1 did not absolve governments of these countries from responsibility in the negotiation process. While acknowledging the heavy-handedness of the pharmaceutical companies in the negotiation of these contracts, R1 also drew attention to the fact there were no instances where a government of a country indicated a predisposition to disclose the terms of the COVID-19 vaccine contracts but could not do so due to non-disclosure terms negotiated with pharmaceutical companies: "*I have not come across a government that has been willing to be proactive in trying to fight for the disclosure or to insist on the need for the public to know what the terms of these contracts were.*"

Other respondents confirmed this when asked the same questions, with some respondents even suggesting it was a seller's market, not a buyer's market, with pharmaceutical companies calling all the shots.²⁹ However, the European Commission was completely open to the full publication of its COVID-19 vaccine contract agreement with AstraZeneca when they delayed

²⁷ To preserve the anonymity of our interview subjects, we refer to them in numeric terms, maintaining a specific number for each interview subject. We have also offered only a general description of the background of respondents to give a good sense of their subject matter expertise without disclosing their identity; Respondent One (R1) works in a civil society organisation in South Africa dedicated to seeking mandatory disclosure of information, and whose work has specifically dealt with seeking disclosure of COVID-19 vaccine contracts.

²⁸ Z Rizvi, "Pfizer's power" (19 October 2021), online: <<https://mkus3lurbh3lbztg254fzode-wpengine.netdna-ssl.com/wp-content/uploads/Pfizer-power-Oct-19-final-1.pdf>>.

²⁹ All respondents who were asked this question shared similar views.

supply. This example suggests that countries were more interested in vaccine contract transparency when their interests are jeopardized.³⁰

Yet from these responses, we also observed how structural inequities between countries of the world played a role in determining the degree of favourability (or unfavourability) of negotiated contractual terms. Firstly, countries which were home-states of pharmaceutical companies were able to corner a substantial portion of the vaccine market for their populace at likely more favourable terms than what was available to other countries.³¹ This occurred at the expense of low- and middle-income countries who depended on good-will donations from high-income countries.³² On this point, R2³³ identified the reliance of many African countries on donations made to COVAX by high-income countries as problematic because high-income countries prioritized deliveries to their countries at the expense of vaccines owed under the COVAX initiative. R2 pointed to the conflict that arose when high income countries did not fund COVAX on time and instead pre-ordered to vaccinate their won population.

Secondly, some countries that took loans to fund vaccine purchases found themselves paying for vaccines supplies that were priced differently.³⁴ On this point, R1 pointed to multiple media reports indicating some low- and middle-income countries paid higher prices for vaccines. R1 also noted that a country like South Africa took out a World Bank loan to fund its acquisition of COVID-19 vaccines.

Thirdly, R1 flagged the restrictions placed by pharmaceutical companies on donations or onward selling of vaccines as problematic:³⁵ “...*there were bilateral agreements for supplies coming through the AU vaccine delivery mechanism, AVAX, or through COVAX, that prohibited donations or onward selling.*” R1 points out that even at this point, pharmaceutical companies were determining markets and geographies in terms of who could benefit from a particular product, and whether countries could donate or sell it. This became an issue where countries had a change of mind about the efficacy of a particular vaccine and opted for other authorized options. As an example, in the United States, a Defense Department spokesperson alluded to contract restrictions

³⁰ J Deutsch “Commission: AstraZeneca's plan to publish vaccine contract coming Friday” (28 January 2021) POLITICO, online: <<https://www.politico.eu/article/commission-astrazeneca-to-make-proposal-to-publish-vaccine-contract-friday/>>.

³¹ Because of the secrecy surrounding the terms of these contracts, our respondents could only speculate on what must have happened behind the scenes or what has been hidden in the redacted contracts that were released to the public in some countries.

³² A. D So, & J Woo, “Reserving coronavirus disease 2019 vaccines for Global Access: Cross Sectional Analysis” (15 December 2020) BMJ, online: <<https://www.bmj.com/content/371/bmj.m4750>>.

³³ Respondent Two (R2) leads a Global Health Policy Program in the United States of America.

³⁴ Person “South Africa to pay \$5.25 a dose for AstraZeneca vaccine from India's SII” (21 January 2021), online: <<https://www.reuters.com/business/healthcare-pharmaceuticals/south-africa-pay-525-dose-astrazeneca-vaccine-indias-sii-2021-01-21/>>.

³⁵ A.de Bengy Puyvallée and K.T. Storeng, “COVAX, vaccine donations and the politics of global vaccine inequity” (2022) *Global Health* 18 at 26.

by some vaccine manufacturers that prohibited the use of vaccine doses outside the U.S, which prevented the donation of surplus vaccine doses to other countries.³⁶

Fourthly, lack of transparency and visibility around the delivery schedules of COVID-19 vaccines, according to R1, may have compromised the ability of already weak health systems on the African continent to craft coherent public health responses to the pandemic: *“What we saw in Africa is that with the absence of supply scheduling or visibility, there was a lot of pressure on already weak health systems to quickly use vaccines that were about to expire or to use small batches of deliveries.”*

In summing up on RQ2 responses, while both pharmaceutical companies and countries may have cooperatively enabled a regime of secrecy to thrive in the context of COVID-19 vaccine supply contracts, pharmaceutical companies were at the driving seat of the secrecy agenda. We can also conclude that the degree of autonomy and agency of each country played a significant role in their ability to corner market resources for their populace; and to a limited extent, determine how the terms of the vaccine supply contracts applied to them.

RQ 4, enquires about how the key actors sustained the regime of secrecy around COVID-19 vaccine supply contracts. Essentially, what were the justifications for approvals or rejections of the FOIRs for vaccine supply contracts?

Countries observed the confidentiality demands of vaccine contracts resulted in non-disclosure or partial disclosure of these contracts.³⁷ In response to these restrictive clauses, several governments relied on the exceptions in freedom of information laws as the basis for refusing to fully disclose information in vaccine contracts. For example, Peru’s government justified the rejections of FOIRs for vaccine supply contracts on the ground that the confidentiality agreements entered with vaccine suppliers fell under the lawful exceptions excluding the publication of public information that contains confidential information protected by industrial, commercial, and technological secrets amongst others.³⁸

A similar approach was adopted by the National Unit for Disaster Risk Management (UNGRD), a Colombian government agency that characterized confidentiality agreements and commitments the government entered with vaccine manufacturers as reserved information precluded from the publication requirement. UNGRD claimed the restrictions passed the test of proportionality and reasonableness because it served a legitimate purpose of protecting the general

³⁶ K Eban, *“We are hoarding”: Why the U.S. still can't donate covid-19 vaccines to countries in need*” (6 April 2021) Vanity Fair, online: <https://www.vanityfair.com/news/2021/04/why-the-us-still-cant-donate-covid-19-vaccines-to-countries-in-need>.

³⁷ *Ibid* 28.

³⁸ R Gestión, *“Covid-19 Vaccine: Minsa will only publish information that does not affect confidentiality with Laboratories”* (16 January 2021) Emergency Decree 003-2021.

interest and needs of Colombians under unique circumstances. Colombia's law mandates designated entities that deny published information based on legal exceptions such as classified or reserved information to provide detailed justifications for denials.³⁹

Other justifications for nondisclosure or partial disclosure of COVID-19 vaccine contracts in response to FOIRs include national security interest, classification of the information as immaterial or compromising the health of the population by undermining the government's ability to negotiate contracts with pharmaceutical companies, and limiting the ability of the government to effectively compete with other countries seeking to procure COVID-19 vaccines.

In a Colombian legal action challenging the denial of FOIRs on the grounds of confidentiality and harm to public safety or health, the Tribunal's analysis and conclusion are worth highlighting:⁴⁰

- a. On the issue of refusing disclosure of information on the ground of confidentiality the Tribunal distinguished between negotiations before a contract is signed and the contract itself. While negotiation details may lawfully be subjected to confidentiality, the negotiation outcomes such as the contract must be publicly available for public oversight.
- b. On the issue of justifying the denial of access to information in the contracts on the ground of protecting public safety or health, the Tribunal found that the terms referred to as confidential, such as price or compensation structure, were not justifiably confidential or harmful to pharmaceutical companies' intellectual property.
- c. Furthermore, the Tribunal held that keeping vaccine contracts secret because of the fear of losing access to vaccines were unsubstantiated. Rather than jeopardizing countries public safety or health, the Tribunal stated that disclosing contracts enhanced States negotiating positions and the general public's trust.

When RQ4 was put to our respondents, they identified common underlying reasons against disclosure of the terms of these contracts.⁴¹ In particular, pharmaceutical companies desired to maintain price secrecy and non-disclosure of key terms of the vaccine supply contract that will harm trade interests or future negotiations. Whereas the key motivation for countries to uphold secrecy were founded upon national security concerns. For instance, R3⁴² identified the reluctance by parties to reveal concessions made in the negotiation process which did not reflect their best

³⁹ Article 74 of the Political Constitution of Colombia.

⁴⁰ *International Institute of Anticorruption Studies (Instituto Internacional de Estudios Anticorrupción) v The National Unit for Disaster Risk Management (Unidad Nacional de Gestión del Riesgo de Desastres, 2021-05-081 R1 (Recurso de insistencia)*, online: <<https://www.covid19litigation.org/case-index/colombia-council-state-no-11001-03-15-000-2021-03032-00-2021-07-19>>.

⁴¹ All respondents who were asked this question reached largely similar conclusions on this point.

⁴² Respondent Three (R3) works in a senior capacity at a global organisation dedicated to research, education, and advocacy in global health.

bargain: *“If the company is giving concessions to one country, they don't want every other country asking for the same concessions and the leverage may not be the same for each country.”*

R4⁴³ re-echoed the views of R3, observing that given the amount of information exchanged between countries and pharmaceutical companies, the need to preserve the confidentiality of the exchange was a key motivation for non-disclosure. It was also a safeguard for future bargains.

R5⁴⁴ identified national security concerns as the most common reason given for the refusal of FOIRs in some Latin American countries. R5 pointed out that in Mexico, even though there were institutional and legal frameworks supporting the release of information about vaccine supply contracts, national security concerns were allowed as a basis for refusal to disclose by the Supreme Court of Mexico.

According to R6⁴⁵ commercial confidentiality has been used as a blanket excuse to not publish information about contracts in general, and COVID-19 contracts specifically. Additionally, R6 pointed out that Research & Development information and intellectual property (IP) was another common argument made by pharmaceutical companies against contract transparency. R6 was however of the view that IP information should be contained in patents, not contracts. Noting concerns that commercially sensitive information such as manufacturing volumes and prices can give clues to important IP, R6 maintained that the public interest in these pieces of information to end the pandemic trumps those concerns. R6 suggested that if vaccine contracts were negotiated under the premise the information would be released in the public interest for transparency and accountability, it would strengthen governments' hand to better serve the public interest in their negotiations with pharmaceutical companies.

As regards the argument made by pharmaceutical companies, that keeping prices secret allows them to provide better prices, R6 pointed out the evidence of pharmaceutical companies offering cheaper rates to low-income countries is very thin, and difficult to verify without more transparency. According to R6, award-winning investigations by data journalists and civic organisations like Civio have revealed that prices for medicines vary widely between countries, and can cost even more in low- and middle-income countries due to a lack of transparency and a lack of negotiating expertise. What is more, many low- and middle-income countries rarely buy medicine directly from the pharmaceutical companies, but instead purchase them from intermediaries which increases the risk of opaque package deals for vaccines and distribution

⁴³ Respondent Four (R4) works in the same organisation as Respondent 3 and they were interviewed together.

⁴⁴ Respondent Five (R5) works for a global organisation dedicated to promoting transparency and accountability in the public sector and has worked extensively in coordinating a global action plan for securing FOIRs on COVID-19 vaccine supply contracts.

⁴⁵ Respondent Six (R6) works in a global organisation dedicated to promoting values around transparency and openness in contract negotiations.

where there may be conflicts of interest, especially if the ultimate owners of those companies are kept hidden.

In total, there is good reason to assume from the above RQ4 responses that pharmaceutical companies have insisted on the inclusion of confidentiality clauses in COVID-19 vaccine supply contracts as a way of safeguarding their commercial interests. National governments, on the other hand, have used national security justifications to enforce these disclosure restrictions motivated primarily by concerns about breaching commercial agreements with pharmaceutical companies and being denied future supplies of COVID-19 vaccines when they are desperately needed to meet public health emergencies.⁴⁶ What is salient from the combined reading of the responses to RQ2 and RQ4, respectively, is that pharmaceutical companies are likely to have maintained the upper hand in these negotiations.

VII. KEY STAKEHOLDERS IN THE PUSH FOR DISCLOSURE

In a HRIA framework, it is important to identify the key stakeholders who are burdened by breaches of human rights regime. This allows us to put a human face to the suffering caused by the violation of human rights. In this section, we aim to identify; firstly, the stakeholders behind the push for disclosure; and secondly, the stakeholders impacted by non-disclosure of information about COVID-19 vaccine supply contracts.

A. THE STAKEHOLDERS PUSHING FOR DISCLOSURE:

We identified civil society groups (with experience and resources devoted to open government initiatives), investigative journalists, and lawyers working in organisations dedicated to access to information as the key stakeholders behind the push for disclosure of information about COVID-19 vaccine supply contracts. We also identified three key strategies that were deployed by these stakeholders, either individually or in combination, to elicit information about COVID-19 vaccine supply contracts (with varying degrees of success), namely: legal strategy, political strategy, and media and institutional strategy. The examination of these strategies responds to RQ5: *What kind of approaches were most successful for carrying out FOIRs for COVID-19 vaccine supply contracts?*

(i) **Legal Strategy** – This strategy involves the engagement of the legal system to secure access to information about COVID-19 vaccine supply contracts. We observed this strategy being utilised to good effect in countries, such as the United States, which have freedom of information laws, effective and independent judicial institutions, and a history of judicial involvement in protecting rights and freedoms.⁴⁷ Transparency and accountability stakeholders like Knowledge

⁴⁶ Although this concern is mostly limited to low- and middle-income countries and not high-income countries who are host-countries of the leading pharmaceutical companies in the world.

⁴⁷ The United State and South Africa are two jurisdictions where we observed the ready engagement of a legal strategy in circumventing restrictions to information about COVID-19 vaccine supply contracts. There are also some Latin American countries where this strategy has been engaged.

Ecology International (KEI) and Transparency International have filed numerous lawsuits challenging denial of FOIRs and some of the cases are ongoing.

However, when we engaged with our interview partners about the effectiveness of the legal strategy, the responses indicated it was a strategy of last resort. This strategy does not enable quick results. According to R1, who has been directly involved in utilising the legal strategy in South Africa: “*Litigation was a last resort after every other strategy we adopted failed to yield any result. We needed a strategy to compel the government to respond to our request and settled for litigation.*” R5 also offered a view in alignment with R1. However, R5 drew attention to the limits of litigation as a legal strategy in a climate where decisions of courts are not followed:

For example, the refusal to follow court decisions was evident in Colombia. In *International Institute of Anticorruption Studies (Instituto Internacional de Estudios Anticorrupción) v The National Unit for Disaster Risk Management*, a non-profit organisation filed a petition against the Colombian government unit responsible for vaccine procurement for refusing to disclose information on the COVID-19 contracts and details on the acquisition process.⁴⁸ The Government Unit responded to the petition by releasing some information, but refused to disclose information in the contracts on the ground that it was subject to confidentiality. The nonprofit organization requested for a judicial review of the decision at the Tribunal. Although the Tribunal held that the Unit should provide copies of the contract requested within 3 days of the decision, the Unit did not comply. Instead, the Unit extended the administrative procedure by asking for clarification of the Tribunal’s decision.

A final point about this legal strategy is that the released information is redacted amounting to a pyrrhic victory of sorts, even where the strategy has been used successfully. For instance, the Corporate Europe Observatory (a nonprofit organisation), filed a complaint with the Ombudsman challenging the European Commission's refusal to respond to their freedom of information requests within the stipulated time. The Ombudsman asked the Commission to respond to the requests. The Ombudsman then closed the inquiry after the Commission indicated they had published redacted versions of the contended agreement.

(ii) Political strategy – This strategy involves the engagement of political structures and those decision-makers which initiate disclosures of information about COVID-19 vaccine supply contracts. Political pressure from the legislature and the executive’s commitment to transparency are crucial for the efficacy of FOIRs in fostering access to information in vaccine contracts. For instance, the EU parliament adopted a resolution to enact a legislation for COVID-19 vaccine contract transparency in addition to a lawsuit filed by 5 Members of European Parliament

⁴⁸ *Ibid* 40.

challenging the denial of FOIRs.⁴⁹ This pressure led to partial disclosure of vaccine contracts by the EU Commission.

In Brazil, political parties and the Brazilian Bar Association filed a direct action of unconstitutionality challenging a measure by the Presidency that suspended the prescribed procedural deadlines and administrative sanctions meted on public institutions for non-compliance with administrative process for freedom of information requests.⁵⁰ The Supreme Federal Tribunal suspended the Measure by interim injunctions and in a later suit the Plenary of the Supreme Court endorsed this initial decision by a unanimous vote.⁵¹

R3 identified the political strategy as in evident use in the EU which published some of its contracts – although the published EU contracts were heavily redacted. Equally so, R5 confirmed the political strategy as being in use in the EU and some Latin American countries. For example, in Mexico, where the Supreme Court refused the disclosure of information on national security grounds, R5 notes that the President still expressed a willingness to release the information if requested to do so. The Mexican government, according to R5, through its Ministry of Foreign Affairs and the Transparency Institute, made a fanfare of releasing details of Mexico’s COVID-19 contracts and created a website page in May 2021 to release the contracts. Yet, the released contracts remain heavily redacted. In contrast, in the Dominican Republic, the government published its COVID-19 vaccine contracts without any redaction and stands as an isolated example where transparency has been taken as a default position by the government. In commenting about the political strategy, R1 observed that: “...if you don't have the support of politicians at the highest level and government officials elected to insist on the disclosure then you are not going to get it.”

(iii) Media and institutional strategy – By far the most effective strategy that has been deployed to date by stakeholders in eliciting information about COVID-19 vaccine supply contracts is what we refer to in this study as media and institutional strategy. This strategy describes the work of media organisations that have worked through investigative journalists and whistleblowers in government institutions to uncover otherwise hidden information about COVID-19 vaccine contracts.⁵² Those engaging the media and institutional strategy have adopted

⁴⁹ European Parliament, “Covid-19: Parliament wants more transparent EU vaccine policies: News: European parliament” (21 October 2021), online: <<https://www.europarl.europa.eu/news/en/press-room/20211014IPR14927/covid-19-parliament-wants-more-transparent-eu-vaccine-policies>>.

⁵⁰ The Freedom of Information Law mandates response to FOIRs within 20 days and an additional extension not exceeding 10 days, online: <http://www.planalto.gov.br/ccivil_03/_ato2019-2022/2020/Mpv/mpv928.htm>.

⁵¹ OLM Ferraz et al, ‘Brazil: Legal Response to Covid-19’, in Jeff King and Octávio LM Ferraz et al (eds), *The Oxford Compendium of National Legal Responses to Covid-19* (OUP 2021).

⁵² The media has engaged in investigative journalism to reveal some of the behind-the-scenes events that exposed the regime of secrecy. A Taylor, “In secret vaccine contracts with governments, pfizer took hard line in push for profit, report says” (20 October 2021) *The Washington Post*

extraordinary measures (like whistle-blowing) to secure access to information about these contracts.⁵³ Many of our interview subjects identified the media and institutional strategy (out of the three strategies we have flagged here) as the most effectively deployed in circumventing the regime of secrecy around COVID-19 vaccine supply contracts. In this connection, R1 observed that what has worked so far has been leaks: *“I think, it is one of the surest, quickest ways to be able to access the contract. Also investigative journalism that relies on whistle-blowers and that is how the Financial Times was able to break that story, or the New York Times on the Johnson & Johnson contract for South Africa.”*

Other respondents who were asked this question readily identified the media and institutional strategy, more so than the legal or political strategy, as the most effective strategy that has been utilised against the regime of secrecy of COVID-19 vaccine supply contracts. R5 noted, for instance, that in Columbia there was a leak.

While the media and institutional strategy has been singled out as the most effective strategy to have been deployed in the current climate of secrecy, it is worth observing that this strategy can only be successfully deployed in a climate that supports and sustains freedom of the press and is not punitive towards whistleblowing. In other words, it can only thrive in an environment that offers some form of protection to stakeholders championing transparency and accountability in public administration. Even then, it is not sustainable for the long term. There needs to be more long-term commitment to transparency and accountability by governments.

B. THE STAKEHOLDERS IMPACTED BY NON-DISCLOSURE:

Our formulation of the impacted stakeholders contemplates those who have been most burdened by the current climate of secrecy surrounding COVID-19 vaccine supply contracts. In this study, we have engaged the theoretical perspective of the capability theory to ground the objectives of public health policy. Sen’s capability theory attaches importance to freedom, choice, and opportunities for individuals to live the life they choose given their personal and social circumstances.⁵⁴ Our research indicates that health capabilities are compromised, particularly in low- and middle-income countries, in an environment of secrecy surrounding the negotiation and conclusion of COVID-19 vaccine supply contracts. Secrecy promotes inequities in the ecosystem

<<https://www.washingtonpost.com/world/2021/10/19/secret-vaccine-contracts-with-governments-pfizer-took-hard-line-push-profit-report-says/>>; Adriaan Alsema, “Emergency talks in Colombia after Covid vaccine deals leaked” (12 August 2021) Colombia Reports, online: <<https://colombiareports.com/emergency-talks-in-colombias-after-covid-vaccine-deals-leaked/>>; Reuters “Leaked EU-Pfizer contract shows price for Covid vaccines set at 15.5 euros per dose” (21 April 2021), online: <<https://www.reuters.com/article/health-coronavirus-eu-pfizer/leaked-eu-pfizer-contract-shows-price-for-covid-vaccines-set-at-15-5-euros-per-dose-idUSL1N2ME0Z5>>.

⁵³ T McIntosh “How to investigate COVID-19 vaccine contracts” (13 July 2021) Global Investigative Journalism Network, online; <<https://gijn.org/2021/02/04/how-to-investigate-covid-19-vaccine-contracts/>>.

⁵⁴ Amartya Sen, *Inequality Reexamined* (Oxford University Press, 1992).

of access to medicines and vaccines. A common refrain on this subject matter from our interview with key informants is that the regime of secrecy surrounding COVID-19 vaccine supply contracts exacerbated existing inequities in health opportunities and outcomes in disadvantaged communities of the world.

For instance, R7⁵⁵ who has done much activism around promoting transparency of COVID-19 vaccine contracts, observed that non-disclosure created power imbalance in favour of pharmaceutical companies who were able to exercise so much power over countries in a life-or-death pandemic situation; and smaller countries were the more marginalized.

On this subject, R2 noted that the main problem was that Africa had to rely on aid from high-income countries for the most part. This was problematic since many high-income countries were more inclined to outbid other countries to gain earlier access to limited COVID-19 vaccine doses that exceeded their populations needs. In response to whether transparency of the process would have made any difference, R2 was of the view that it would not have made much difference as those making the decisions about vaccine supplies to low- and middle-income countries were situated in high-income countries. Equally so, R6 noted that based on investigations undertaken by data journalists and civic organisations, prices for medicines and vaccines varied widely between low- and middle-income countries and high-income countries due to lack of transparency.⁵⁶ This resulted from the actions of intermediaries that often stand between pharmaceutical companies and low- and middle-income countries in the value chain of vaccine supplies.

In sum, the key stakeholders who have driven the agenda for more transparency of COVID-19 vaccine supply contracts have adopted legal, political, and institutional strategies (involving the media) to varying degrees of success. What is clear from our study is that the media and institutional strategy appears to have offered the quickest avenue for circumventing the regime of secrecy around COVID-19 vaccine supply contracts. However, the success of this strategy has depended on the actions of ethically driven whistle-blowers and investigative journalists who have exposed what has been kept hidden in these contracts. Nonetheless, as we have pointed out, the efficacy of this strategy depends on strong institutions operating in an eco-system that is not too hostile to activism aimed at improving transparency and accountability in public administration. Other strategies, such as the legal and political strategy which have recorded only modest success,

⁵⁵ Respondent Seven (R7) is the Head of Advocacy in a global organisation dedicated to promoting values around transparency and openness in contract negotiations.

⁵⁶ Erin Webb et al, "What are the implications of policies increasing transparency of prices paid for pharmaceuticals? A primer for understanding the policy perspective in light of the empirical evidence" (2022) European Observatory on Health Systems and Policies, World Health Organization. Regional Office for Europe, online; <<https://apps.who.int/iris/handle/10665/354271>>.

may hold the key for more lasting reform and political action around accountability and transparency in public procurement of health goods like vaccines.

Our study supports the conclusion that there is a human cost to non-disclosure of COVID-19 vaccine supply contracts. This takes the form of the compromised capability of disadvantaged communities located in low- and middle-income countries to effectively respond to the COVID-19 pandemic due to opacity in the negotiation and conclusion of COVID-19 vaccine supply contracts which affects pricing and distribution of vaccines. By treating desperately needed vaccines during a pandemic as a commercial product to be distributed by the instrumentality of market forces, global health action towards curtailing the pandemic has been skewed in favour of high-income countries to the detriment of low- and middle-income countries.

VIII. FINDINGS FROM MAPPING OF FOIRs

RQ 3 which considers the success rate of FOIRs for the disclosure of information in COVID-19 vaccine supply contracts by country, regionally and globally is answered by our assessment of FOIRs made to 39 COVID-19 vaccine buyers. Less than 6% of FOIRs were successful, and even when the designated agencies published COVID-19 contracts it was heavily redacted. Some of the requests were delivered and awaiting a response from the designated authority, and in some instances the requests were ignored or partially denied. Only about 18% of the contracts were proactively published by the designated authorities, albeit heavily redacted.

Status	Freedom of information Requests
Unsuccessful	52.94%
Not applicable	17.65%
Delivered	11.76%
Finished	5.88%
Successful	5.88%
Info not accessible	2.94%
Partially denied	2.94%
Grand Total	100.00%

The data shows that the buyers default response to FOIRs were denials and partial disclosure of vaccine contract information. The right to information became a casualty of government measures adopted in response to the COVID-19 pandemic. **Image 1** in the Appendix of this report shows a map of buyer countries that rejected FOIRs notwithstanding enabling frameworks and subscription to open contracting agreements. Governments introduced restrictive measures in the form of circulars, executive orders, and legislations that disrupted administrative processes including FOIRs and became the premise for justifying denials. In Bangladesh, with the

closure of government offices, following lockdown staff were not informed on whether people could submit FOIRs and whether the institutions should respond.

Governments of some countries also suspended legal provisions that stipulated time frames for processing FOIRs and sanctions for non-compliance. The President of Brazil signed the Provisional Measure No. 928, which amended the Right to Information Law by suspending the prescribed procedural deadlines, administrative sanctions meted on public institutions for non-compliance with administrative process for FOIRs and prohibited the appeal of denied FOIRs. The Presidency defended the suspension of information requests on the grounds of averting the collapse of the information service and ensuring that the activities of institutions combating the pandemic were uncompromised.⁵⁷

New Brunswick and Alberta Canadian provinces amended the right to information obligations by either suspending FOIRs processing or extending the timeline for processing requests. Philippine's Presidential Communications Operations office suspended the period for resolving FOIRs for some Agencies, Departments, Bureaus, Offices, and Instrumentalities of the Executive branch.⁵⁸ The Commission for Exceptional Situations granted Moldovan public officials' wide discretion to decide on whether to respond to FOIRs in addition to the extension of the response time.⁵⁹

In some countries, the Ministry of Health and other designated public institutions were prohibited from publishing information in COVID-19 vaccines or agreements because of resolutions reserving COVID-19 contracts for a stipulated timeframe. Mexico's Transparency Committee issued a resolution that reserved the information relating to the COVID-19 vaccines and the agreements signed between the Mexican government and Pfizer for a period of 5 years. Peru equally adopted a similar measure through an executive order.⁶⁰ **Table 1** in the Appendix of this report shows the measures adopted by select buyers from the Mapping dataset.

Our findings in this section are limited because our dataset represents the FOIRs that were readily accessible. Not all countries have accessible repositories or portals for accessing freedom of information requests.

⁵⁷ The Freedom of Information Law mandates response to FOIRs within 20 days and an additional extension not exceeding 10 days, online: <http://www.planalto.gov.br/ccivil_03/ato2019-2022/2020/Mpv/mpv928.htm>.

⁵⁸ R Gestión, Covid-19 Vaccine: Minsa will only publish information that does not affect confidentiality with Laboratories, Emergency Decree 003-2021 (January 16 2021).

⁵⁹ I, Nikolic et al, "Central and eastern europe freedom of information rights 'postponed'" (4 June 2020) Balkan Insight, online: <<https://balkaninsight.com/2020/04/06/central-and-eastern-europe-freedom-of-information-rights-postponed/>>.

⁶⁰ By virtue of criteria CT -957-20 and CT-952-20.

IX. ANALYSIS OF THE INTERCONNECTION BETWEEN THE VARIOUS ELEMENTS OF THE STUDY

The specific nature of the rights burdened by the policy of non-disclosure of COVID-19 vaccine supply contracts include the right of access to information and the right to health (expressed in this study in terms of the capability of national health systems to respond effectively to the pandemic). In the analysis on the way the policy and actions of key actors behind this regime of secrecy of COVID-19 vaccine supply contracts have impacted and burdened the human rights of stakeholders, four thematic areas have been identified, these include: the normative basis for access to information; exceptions to disclosure as burdening human rights; inequitable outcomes arising from non-disclosure; and contextual factors accounting for success or failure of FOIRs. The discussion that follows will address each of these thematic issues.

A. NORMATIVE BASIS FOR ACCESS TO INFORMATION:

At the commencement of our study, a preliminary question concerned the potential of any normative grounding for open contracting under international law, or whether this was a matter that was solely left to the freedom of information laws of each country. If so, how many countries had such laws in place. This was the premise for RQ1: *“How many countries with published COVID-19 vaccine supply contracts have Freedom of Information Laws or have signed to open contracting initiatives?”* In framing this research question, the objective was to establish whether there was any correlation between the publication of COVID-19 vaccine contracts and commitments to transparency and accountability as evidenced by the promulgations of national laws on freedom of information, or ratification of an international instrument on open contracting. As the discussion in Section VI of this study demonstrates, there appears to be no correlative relationship between the presence (or absence) of access to information laws at the national level, or commitment to open contracting initiatives at the international level, and the willingness to disclose (or not disclose) the details of COVID-19 vaccine supply contracts.

Although we were unable to identify a hard law instrument on open contracting under international law which countries have ratified, R2 confirmed what we found in our research; there is a plethora of soft law instruments (involving initiatives, agreements, proposals, and recommendations) supporting a regime of open contracting. Much of the action in this area however has occurred at the country level, as many countries have promulgated legislation committing to transparency principles in public administration. **Table 2** in the Appendix of this report shows several high-level non-binding norms on open contracting. While **Table 3** sets out

the list of countries that have promulgated freedom of information legislation – a UNESCO reports puts the number of countries that have adopted FOI or similar laws at 125 countries.⁶¹

The presence of these laws did not result in more transparency in the negotiation and conclusion of COVID-19 vaccine supply contracts by countries. Nor did it lead to a predisposition to respond positively to freedom of information requests that were submitted by stakeholders seeking disclosure of COVID-19 vaccine supply contracts. As the discussion in Section VI of this study reflects, almost without exception, many countries amended their FOI laws or promulgated ordinances that placed restrictions on the application of FOI laws to COVID-19 vaccine supply contracts. This sustains a regime of secrecy.

Furthermore, we were able to identify normative support for transparency and accountability in public administration in pre-existing hard law instruments dealing with other subject matters under international law: **Table 4** highlights key provisions under international law that support the obligation of transparency and accountability by States.

In sum, despite the presence of a normative basis for transparency and accountability supporting a right of access to information in many countries, this did not offer a sufficient buffer against the emergence of a regime of secrecy in the treatment of COVID-19 vaccine supply contracts by many countries. There was a grand scale pushback against obligations of transparency and accountability in many countries. Of the nature and character of this pushback, we are invited to consider the second thematic analysis identified above.

B. EXCEPTIONS TO DISCLOSURE AS BURDENING HUMAN RIGHTS:

The analysis on this point responds to *RQ2: Which countries amended or changed their laws to protect the confidentiality or pharmaceutical companies that manufactured the COVID-19 vaccines?* The willingness of many countries to amend their FOI laws or pass ordinances limiting the application of these laws to COVID-19 vaccine supply contracts worked to burden human rights in two specific ways. First, it infringed on the right of access to information that had been previously guaranteed under these laws. Second, it compromised health capabilities by creating an opportunity for pharmaceutical companies to promote “hostage-taking COVID-19 vaccine supply contracts”.⁶² Each of these conclusions deserve further scrutiny.

(i) Infringement of the right of access to information? – There was consensus amongst our interview subjects that the infringement of the right of access to information was problematic. However, two of our interview subjects sounded a note of caution on the need to consider the

⁶¹ “Monitoring and Reporting of SDG Indicator 16.10.2”, online: <https://unesdoc.unesco.org/ark:/48223/pf0000369160>.

⁶² In our interview, R1 repeatedly characterised the contract which pharmaceutical companies negotiated with countries for the supply of COVID-19 contract as giving rise to a hostage situation.

uncertainties that prevailed at the height of the pandemic during which pharmaceutical companies had to produce the COVID-19 vaccines. According to R8,⁶³ there was much uncertainty about which vaccine products will eventually make it through the development stage, pass clinical trials, and be approved by the relevant authorities for deployment to the market. In the view of R8, the combination of these uncertainties may have necessitated the regime of secrecy in the conclusion of COVID-19 vaccine supply contract.

Yet another perspective on this point was offered by R7, who draws attention to how market distortions in a heavily regulated and capital-intensive sector like the pharmaceutical industry do not allow easy entrance for new players, and thus health competition in the pharmaceutical marketplace. According to R7, the huge barriers to entry, regulatory hurdles, expensive research, and development investments create a unique matrix of factors propelling pharmaceutical companies to want to recoup their investments. For example, this has been used by governments to justify the patent protection for the vaccines. If a patent waiver was granted straight away, the argument goes that pharmaceutical companies would have been dis-incentivised to invest large resources in the research and development of medical solutions during the next pandemic. The lack of patent waivers was based on the commercial interests of the pharmaceutical companies. Where this becomes problematic, according to R7, is when pharmaceutical companies want to benefit from the guarantees of huge public health budgets to purchase their products without corresponding public accountability. The manufacturers whose products first entered the market had all received large volumes of public funding to expedite the research and development of the vaccines, which in itself invalidates the argument of commercial interests as the money that was to be earned back in large parts did not come out of their own budgets in the first place. Secondly, and most importantly, it ignores the requirements for transparency and accountability in the utilisation of public funds.

When we place the perspectives of R7 and R8 side-by-side, we get a better sense of the circumstances that led to the unique situation that played out at the height of the COVID-19 pandemic where pharmaceutical companies were able to negotiate terms that were very favourable to them and detrimental to countries, and at the same time insist on secrecy through non-disclosure clauses that countries would be hard put to ignore given the continuing need for the vaccine products which the pharmaceutical companies were selling.

The right of access to information, a fundamental pillar of citizen-informed public administration was put aside at the height of the COVID-19 pandemic at the behest of commercial interests of pharmaceutical companies. Rightly, or wrongly, this action may have compromised citizens' faith in their government and may have contributed to loss of the narrative surrounding the utility of the COVID-19 vaccine as an effective therapy against the pandemic.

⁶³ Respondent 8 (R8) is a global institution that was involved in COVID-19 vaccine procurement and distribution.

(ii) The compromise of health capabilities? – Building on the previous point, the regime of secrecy in the conclusion of COVID-19 vaccine supply contracts compromised the ability of national health systems, particularly in low- and middle-income countries, to effectively respond to the pandemic. The lack of visibility of supply schedule of the vaccines did not allow proper coordination for effective use of the vaccine therapies when they arrived, and this served as an additional pressure point for already weak health systems in low- and middle-income countries.

R1 makes the point that given the distortions in the power dynamics between governments and the pharmaceutical companies – as these companies were able to determine who gets the vaccine, at what price, and when – this had an impact on vaccine selection: *“if you have a situation where the terms and conditions of the contract are designed to take advantage of your vulnerabilities, it has a ripple effect on your public health measures, your vaccine confidence and uptake, and more importantly, vaccine selection.”*

What this meant was that many countries did not have choice of vaccine therapies to adopt while some others were spoilt for choice. Those in the former category were in a critically compromised position which impacted their pandemic response. The basis of health capabilities, as previously explained, is the promotion of human agency. Promoting health capabilities in low- and middle-income countries entails promoting the agency of low- and middle-income countries in the choice of the priorities, agendas, and praxis of public health governance as it impacts the population of these countries, in the very same way this capability is available to the populations of high-income countries. The fact that the vaccine supply contracts many low- and middle-income countries negotiated with pharmaceutical industries compromised their agency informs the argument that health capabilities was compromised in these countries.

In total, the infringement of transparency and accountability principles in public procurement on the one hand, and the compromise of health capabilities on the other hand, created a burden on two consequential human rights, namely: the right of access to information; and the right to health. These may have worked together to produce disparities between high-income countries, and low- and middle-income countries, respectively, which could have been avoided.

C. INEQUITABLE OUTCOMES ARISING FROM NON-DISCLOSURE:

Inequitable outcomes produced by the global response to the COVID-19 pandemic is not a debatable point. The sheer preponderance of research and studies being churned out in recent times on better preparedness for the next pandemic sustains the view we got things wrong this time around.⁶⁴ We found consensus among our interview subjects on the view that existing inequities in the architecture of global health have been exacerbated by the regime of secrecy in the way

⁶⁴ C Caduff “What Went Wrong: Corona and the World after the Full Stop” (2020) 34:4 *Med Anthropol Q.* 467; LO Gostin “The Coronavirus Pandemic 1 Year On—What Went Wrong?” (2021) 325:12 *JAMA* 1132; Rohit C Khanna et al, “COVID-19 pandemic: Lessons learned and future directions” (2020) 68:5 *Indian Journal of Ophthalmology.*

information about COVID-19 vaccine supply contracts was managed. The analysis in this section, although not specifically tied to any research question framed for this study, responds to the assessment of the equity impact of non-disclosure of COVID-19 vaccine supply contracts.

In this connection, the observation made by R6 is revealing. According to R6, the argument that has been frequently used by pharmaceutical companies to support price secrecy is it will allow them to provide cheaper prices for vaccines. However, the evidence of pharmaceutical companies providing cheaper prices to low- and middle-income countries is thin. Investigations reveal the prices for medicine and vaccines vary widely between high-income countries and low- and middle-income countries because of a lack of transparency and lack of negotiating expertise in the latter.⁶⁵ R1 goes on to suggest that there may have in fact been disparities in the price South Africa secured the COVID-19 vaccine for vis-à-vis what many high-income countries secured for themselves. So, what does this mean for health equity? For countries that cannot rely on donations or procuring the vaccines through pooled mechanisms, this means that despite having lower economic power and subsequently, smaller health expenditure, they are forced to pay more for the same product, and are less likely to achieve full vaccine coverage (or at a much slower pace).

Additionally, lack of transparency of COVID-19 vaccine supply contracts sustains corruption risks through the actions of intermediaries who stand between pharmaceutical companies and low- and middle-income countries in the supply chain of medicines and vaccines. As noted by R7, the big pharmaceutical companies do not see the need to directly deal with many low- and middle-income countries because they are considered less commercially viable compared to markets in richer countries. Secrecy in the negotiation of contracts with these intermediaries increases the risk of opaque package deals for vaccines where there may be conflict of interests.

The regime of secrecy in the negotiation of COVID-19 vaccine supply contracts impacts on health equity by promoting disparities in the market price of vaccines between high-income countries, on the one hand, and low- and middle-income countries on the other. In addition, the regime exacerbates corruption risks through the actions of intermediaries who distort the value chain of medicines and vaccines.

D. CONTEXTUAL FACTORS ACCOUNTING FOR SUCCESS OR FAILURE OF FOIRS:

While there is no groundswell evidence of successful outcomes in FOIRs (see Image 2 in the Appendix), there are some factors identified in this study as supporting a more successful outcome

⁶⁵ OJ Wouters et al, “Challenges in ensuring global access to COVID-19 vaccines: production, affordability, allocation, and deployment” (2021) 13:397(10278) *Lancet* 1023; S Sciacchitano and A Bartolazzi “Transparency in Negotiation of European Union with Big Pharma on COVID-19 Vaccines” (18 February 2021) 9:647955 *Front Public Health*.

for FOIRs. The analysis of these factors responds to *RQ 6: what are the contextual factors that have contributed to the approvals or rejections of FOIRs for vaccine supply contracts?*

Two factors contribute to the approval or rejection of FOIRs for COVID-19 vaccine supply contracts. The first is the presence of strong and effective institutions for government accountability which sustains the successful deployment of legal and/or political strategies in securing transparency and accountability.⁶⁶ The second is a climate of activism around openness and transparency in public procurement practice which provides the bedrock of support for media and institutional actors who have made the most significant contribution in pushing back against the regime of secrecy pervading the conclusion of COVID-19 vaccine supply contracts. As the discussion in Section VII of this study indicates, the work of media and institutional actors paved the way for the modest progress following the disclosures of some COVID-19 vaccine supply contracts. Strengthening the two factors identified here by enhancing the legal regime supporting transparency and accountability is therefore vital for improving the chances of success of FOIRs of COVID-19 vaccine contracts in the future.

X. CONCLUSION AND RECOMMENDATION

This study was informed by six research questions: (1) how many countries with published COVID-19 vaccine supply contracts have freedom of information laws or have signed to open contracting initiatives; (2) which countries amended or changed their laws to protect the confidentiality of pharmaceutical companies that manufactured the COVID-19 vaccines; (3) what is the success rate – by country, regionally and globally – of FOIRs regarding COVID-19 vaccine supply contracts; (4) what were the justifications for approvals or rejections of the FOIRs for vaccine supply contracts; (5) what kind of approaches were most successful for carrying out FOIRs for COVID-19 vaccine supply contracts; and (6) what are the contextual factors that have contributed to the approval(s) or rejection(s) of FOIRs for COVID-19 vaccine supply contracts.

A. CONCLUSION:

Our study has been able to provide answers to all RQs.

With respect to RQ 1, there appears to be no correlative relationship between the presence (or absence) of access to information laws at the national level, or commitment to open contracting initiatives at the international level, and the willingness to disclose (or not disclose) the details of COVID-19 vaccine supply contracts.

For RQ 2, we found several countries amended their laws or passed ordinances that limited the application of FOI laws to COVID-19 vaccine supply contracts. This was done at the behest

⁶⁶ See the discussion in Section IV of this study.

of pharmaceutical companies who were in the driving seat in the negotiation of these contracts and insisted on non-disclosure terms as a key strategy for protecting their commercial interests.

With respect to RQ 3, we found that less than 6% of FOIRs have so far been successful. Buyers justified COVID-19 vaccine contracts opacity on the grounds of confidentiality and used the exceptions to the general principle of maximum disclosure as a sword instead of a shield. However, we acknowledge our findings are limited since our dataset represents the FOIRs which were readily accessible. Not all countries have accessible repositories or portals for accessing freedom of information requests.

For RQ 4, pharmaceutical companies likely insisted on the inclusion of confidentiality clauses in COVID-19 vaccine supply contracts as a way of safeguarding their commercial interests. In contrast, governments used national security justifications to enforce these disclosure restrictions motivated primarily by concerns about breaching commercial agreements with pharmaceutical companies and being denied future supplies of COVID-19 vaccines when they desperately need it to meet public health emergencies.

For RQ 5, we found three strategies have been utilised for carrying out FOIRs for COVID-19 vaccine contracts, namely, legal, political, and media and institutional strategies. While the media and institutional strategy has been identified as the most effective strategy to have been deployed in the current climate of secrecy, this strategy has not operated in isolation from the other strategies. Evidence from our research points to all three strategies being used concurrently in some cases to achieve the objectives of access to information about COVID-19 vaccine supply contracts. Each strategy offers unique strengths and limitations.

For RQ 6 we found the presence of strong and effective institutions for government accountability, which sustains the successful deployment of legal and/or political strategies in securing transparency and accountability. We also discovered a climate of activism around openness and transparency in public procurement practice, providing the bedrock of support for media and institutional actors. These are contextual factors which contribute to the success or failure of FOIRs for COVID-19 vaccine supply contracts.

B. RECOMMENDATION:

In response to the research and policy gaps revealed in our study, recommendations are presented below for the relevant actors and stakeholders.

First, a framework needs to be developed for mapping and tracking the success or failure rate of FOIRs in respect of contracts for medicines and vaccines nationally, regionally, and globally. In any future pandemic, this will remain a flashpoint in the exacerbation of structural and systemic barriers to access to medicines and vaccine therapies.

Second, there is need for the conclusion of a globally binding framework for vaccines and medicines contract transparency that factors the unique context of pandemics where lack of transparency is costly due to its equity impact. This is something that can be taken into account by the pandemic preparedness treaty being developed by global health actors.

Third, the important and consequential role played by the media and organised civil society as institutional stakeholders in pushing for transparency and accountability in the negotiation of COVID-19 vaccine supply contracts demonstrates the continuing value they bring to global and national health governance. Thus, the need to equip and empower them in low- and middle-income countries where their contributions are most desperately needed.

Fourth, there is need to diversify the research and development as well as the manufacturing base of medicines and vaccines to address current distortions in the global market for medicines and vaccines.

Fifth, make vaccine contract transparency a prerequisite possibly at the negotiation stage. Governments should insist on greater transparency when negotiating contracts in the public interest and funding bodies could make vaccine contract transparency a condition for accessing funds for research and development.

Sixth, further study is required on how to go about incentivising transparency and disincentivising secrecy in the negotiation and conclusion of contracts for the supply of medicines and vaccines.

APPENDIX

Table 1: Measures adopted by select buyers from the Mapping dataset.

Buyers	Measures
European Commission	Guidance informing Member States of the “negotiated procedure without option to publish” procedure that allows for the procurement of supplies within a short timeframe
United Kingdom	Scotland passed a new law that allowed for an extension of response to FOIRs and non-liability of public authorities for failure to comply with their obligations due to the COVID-19 impact
Mexico	<p>a. Initial resolution suspended information requests deadlines that were eventually lifted.</p> <p>b. Resolution reserving the information relating to the COVID-19 vaccines and the agreements signed between the Mexican government and Pfizer for a period of 5 years.</p>
El Salvador	Emergency decree suspending administrative procedures and deadlines for processing requests
Guatemala	Administrative procedures were suspended, however deadlines relating to accessing public information were exempted
Colombia	Decree that extended the deadline for administrative requests, inclusive of right to information proceedings
Peru	The Executive Branch introduced a decree that limited the vaccine contract information the Ministry of Health could publish.
Philippines	The Presidential Communications Operations office suspended the period for resolving FOIRs for some Agencies, Departments, Bureaus, Offices and Instrumentalities of the Executive branch
Canada	In Canada, some provinces like New Brunswick and Alberta made amendments to right to information obligations that either suspended FOIRs processing or extended the timeline for processing requests at the beginning of the pandemic.
United States	Some states like Michigan, Delaware and Hawaii issued executive orders that either suspended or extended the timeline for processing and responding to FOIR Responses leading to delayed response to freedom of information requests
Australia	Directed agencies to request time extension for FOIRs on a case by case basis

Table 2: High-level non-binding norms on open contractingSource: [Open Contracting Partnership](#)

S/N	Global Commitments
1	Conference of Information Commissioners statement on open contracting
2	EITI Contract Disclosure Requirement
3	G7 Statement Against Corruption and Kleptocracies 2021
4	G7 Biarritz declaration Transparency in Public Procurement and the Common Fight Against Corruption
5	G20 Anti-Corruption Minister Declaration on COVID-19 response
6	G20 Open Data Principles
7	G20 Principles of Public Procurement
8	Organization for Economic Cooperation and Development (OECD) MAPS
9	OECD Guidance on Infrastructure Governance
10	OGP 2016 Paris Declaration
11	Open Data Charter Anti-Corruption Toolkit
12	UK Anti-Corruption Summit Communique
13	United Nations General Assembly (UNGA) Special Session on Corruption political declaration

Table 3: List of countries that promulgated freedom of information legislation

Source: [Powering sustainable development with access to information: highlights from the 2019 UNESCO monitoring and reporting of SDG indicator 16.10.2](#)

Countries with FOI/ATI/RTI guaranteed						
Afghanistan	Chile	Greece	Liberia	New Zealand	Sierra Leone	Thailand
Albania	China	Guatemala	Liechtenstein	Nicaragua	Slovakia	Timor-Leste
Angola	Colombia	Guyana	Lithuania	Niger	Slovenia	Togo
Antigua and Barbuda	Cook Islands	Honduras	Macedonia	Nigeria	Saint Kitts and Nevis	Trinidad and Tobago
Argentina	Cote d'Ivoire	Hungary	Malawi	Norway	Saint Vincent and the Grenadines	Tunisia
Armenia	Croatia	Iceland	Maldives	Pakistan	Seychelles	Turkey
Australia	Cyprus	India	Malta	Palau	Serbia	United States
Austria	Czechia	Indonesia	Mexico	Panama	South Africa	Uganda
Azerbaijan	Denmark	Iran	Moldova	Paraguay	South Korea	Ukraine
Bahamas	Dominican Republic	Ireland	Monaco	Peru	South Sudan	United Kingdom of Great Britain and Northern Ireland
Bangladesh	Ecuador	Israel	Mongolia	Philippines	Spain	United Republic of Tanzania
Belgium	El Salvador	Italy	Montenegro	Poland	Sri Lanka	Uruguay
Belize	Estonia	Jamaica	Mozambique	Portugal	Sudan	Uzbekistan
Benin	Ethiopia	Japan	Morocco	Republic of Korea	Sweden	Vanuatu
Bolivia	Fiji	Jordan	Nepal	Romania	Switzerland	Vietnam
Bosnia and Herzegovina	Finland	Kazakhstan	Netherlands	Russian Federation	Tajikistan	Yemen
Brazil	France	Kenya	Kyrgyzstan	Rwanda	Tanzania	Zimbabwe
Bulgaria	Georgia	Burkina Faso	Germany	Latvia	Canada	Ghana
Lebanon						

Table 4: Key provisions under international law supporting the obligation of transparency and accountability by States

International Instrument	Relevant Section	Excerpt of Provision
International Covenant on Civil and Political Rights (ICCPR)	Article 19(2) of the ICCPR	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.
African Commission on Human and Peoples' Rights (ACHPR)	Article 13(1) of the ACHPR	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.
UN Convention Against Corruption (UNCAC)	Article 10 UNCAC	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. Such measures may include, inter alia... Publishing information, which may include periodic reports on the risks of corruption in its public administration.
Declaration of Principles on Freedom of Expression in Africa	Article IV (2)	The right to information shall be guaranteed by law in accordance with the following principles ... public bodies shall be required, even in the absence of a request, actively to publish important information of significant public interest; no one shall be subject to any sanction for releasing in good faith information on wrongdoing, or that which would disclose a serious threat to health, safety or the environment save where the imposition of sanctions serves a legitimate interest and is necessary in a democratic society; and secrecy laws shall be amended as necessary to comply with freedom of information principles.

Image 1: Buyer countries that rejected FOIRs notwithstanding enabling frameworks and subscription to open contracting agreements.

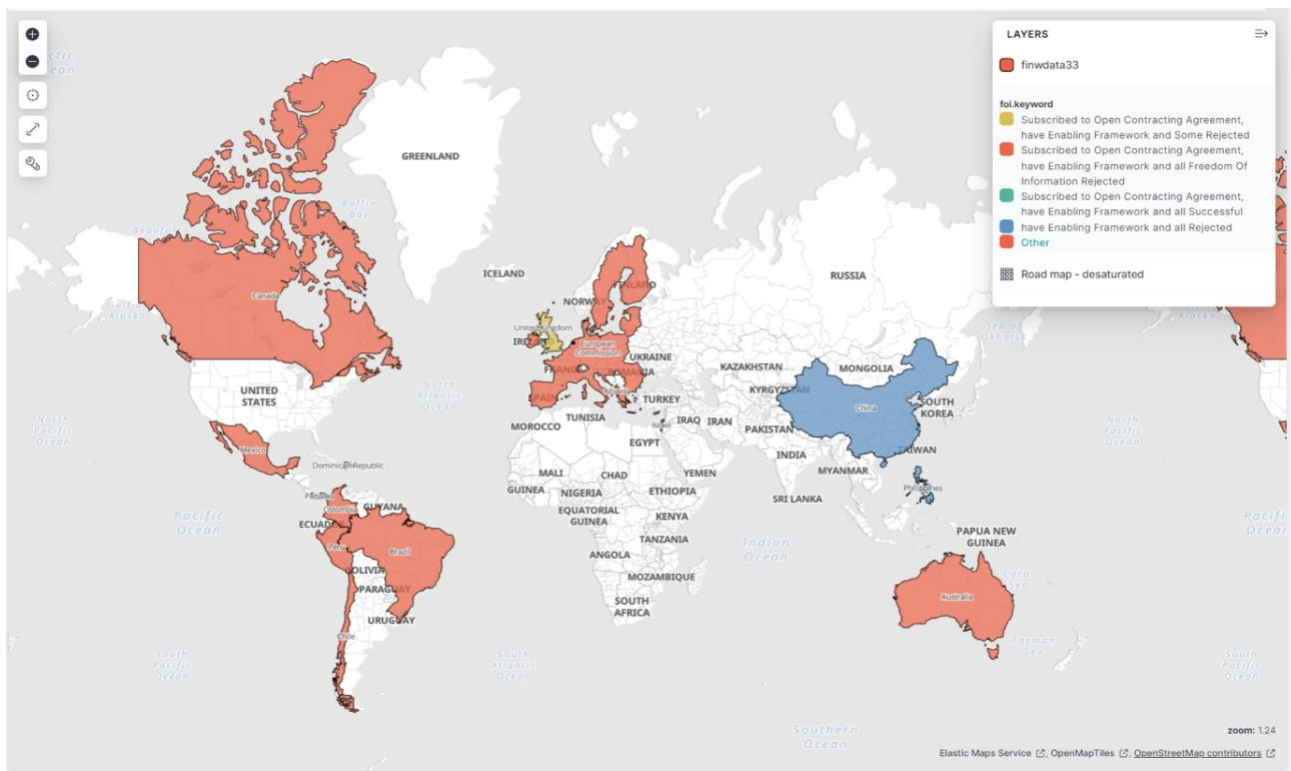


Image 2: Representation of FOIRs outcomes

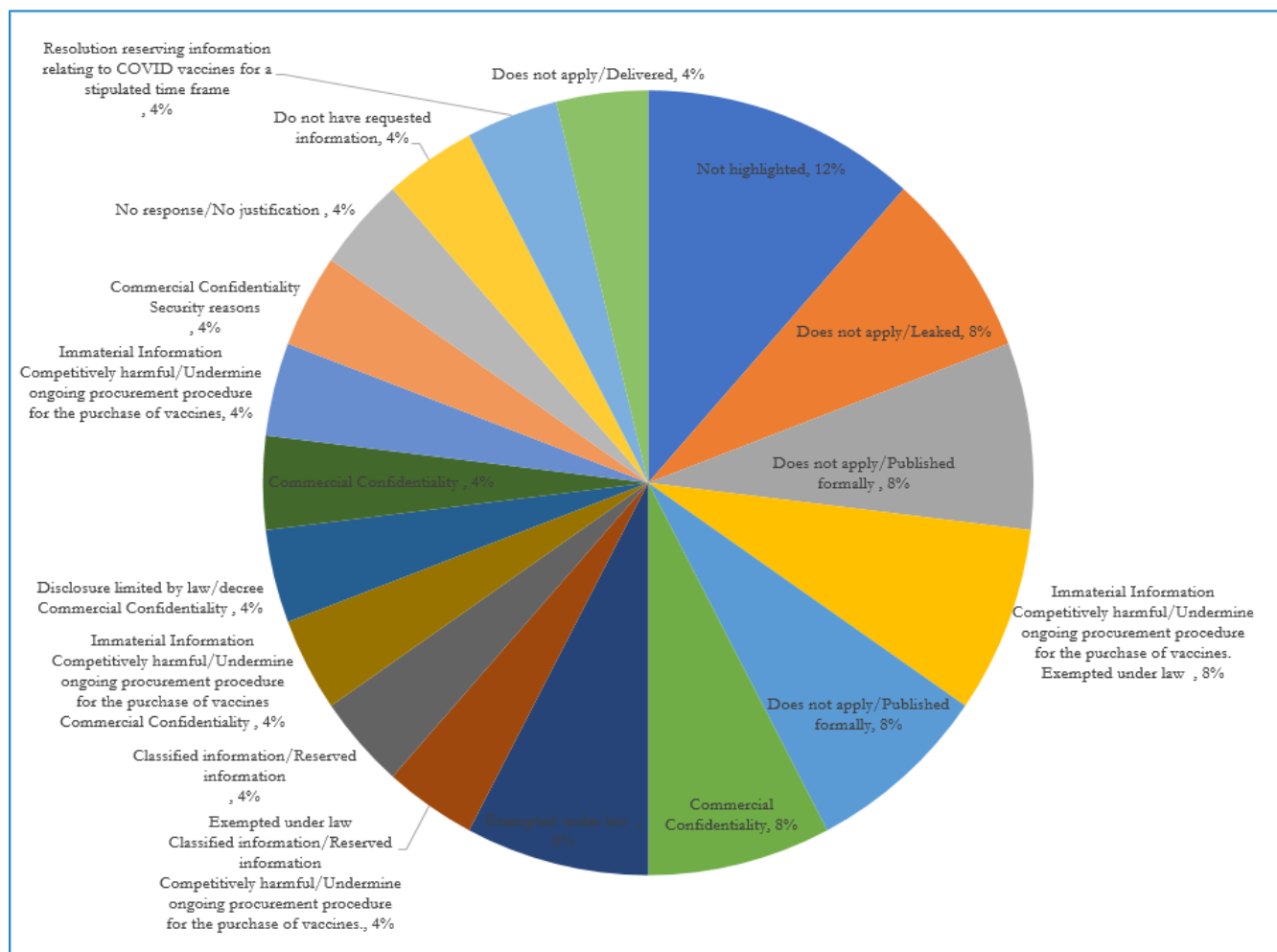


Table 5: List of persons interviewed for the study

Anonymised Name	Institutional affiliation
Respondent One (R1)	R1 works in a civil society organisation in South Africa dedicated to seeking mandatory disclosure of information (including information about COVID-19 vaccine contracts).
Respondent Two (R2)	R2 leads a Global Health Policy Program in the United States of America.
Respondent Three (R3)	R3 works in a senior capacity at a global organization dedicated to research, education, and advocacy in global health.
Respondent Four (R4)	R4 works in the same organization as R3.
Respondent Four (R5)	R5 works for a global organization dedicated to promoting transparency and accountability in the public sector.
Respondent Four (R6)	R6 works for a global organization dedicated to promoting values around openness in contract negotiations.
Respondent Four (R7)	R7 is the head of advocacy for the global organisation of R6.
Respondent Four (R8)	R8 works for a global health organisation involved with the COVID-19 vaccines procurement.

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