

Evaluating readiness for the implementation of open government systems: The Brazilian case in comparative perspective

Fabrizio Rigout and Camila Cirillo¹

Abstract

This paper explores the ongoing Brazilian experience with the regulation of citizens' constitutional rights to access government files, and the development of technical means for universalizing such access. It describes the results of a research to assess the readiness of government institutions to deliver public information, discusses the main findings and concludes with the placement of this experience into international perspective.

Keywords

Freedom of information legislation, Open government, Civil servant attitudes

Glossary

FOI – Freedom of Information

FOIA – Freedom of Information Act

CGU – Office of the Comptroller-General

DTS – Document-tracking System

¹ Plan, São Paulo, Brazil. Contact: info@planpp.com | +55 11 3020 5800

Introduction

The Open Government Partnership, a multilateral initiative founded in September of 2011 by Brazil, Indonesia, Mexico, Norway, Philippines, South Africa, United Kingdom and the United States has now expanded to include 53 countries that have agreed to make their administrations more transparent by guaranteeing free public access to state-held information.

In this paper we explore the ongoing Brazilian experience with the regulation of citizens' constitutional rights to access government files, and the development of technical means for universalizing such access. We describe the results of a research to assess the readiness of government institutions to deliver public information, discuss the main findings and conclude with the placement of this experience into international perspective.

Its empirical section will summarize the findings of two studies:

1. An attitude assessment based on interviews with civil servants regarding the merits of disclosing state-held information to the public, carried out in 2011. This qualitative study discusses institutional and cultural rewards to secrecy in government bureaucracies.
2. Results from a survey of the entire federal executive branch regarding their achievements and challenges in the implementation of public access to information tools, under UNESCO sponsorship.

Much evidence is needed for developing performance evaluation instruments designed to identify best practices and make compliance possible in large bureaucratic systems when it comes to freedom of information (FOI) regulation. With the presentation and discussion of these results we hope to contribute findings, but more importantly provide evaluation tools and indicators to be applied in other nations facing similar challenges.

Method

The research had a qualitative approach, with the application of 60 in-depth interviews to Federal Executive branch civil servants belonging to the areas of 1) control, regulation and supervision, 2) planning and economics, 3) defense, intelligence and foreign relations and 4) social services. As a complement, we used data from a representative survey of 15,000 civil servants in the federal government².

² See: Sumario Executivo Pesquisa Diagnóstico sobre Valores, Conhecimento e Cultura de Acesso à Informação Pública no Poder Executivo Federal Brasileiro. Available at: http://www.cgu.gov.br/Publicacoes/SumarioPesquisaAcessoInformacao/SUMARIO_FINAL.pdf

Freedom of Information Acts

Freedom of Information Acts (FOIA) emerged as a way to ensure the realization of the right to information, regulating the form of delivery, and establishing deadlines and sanctions in case of non-compliance. The right to access state-held information is recognized by the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, and is one of three instruments that constitute the International Bill of Human Rights, ratified by Brazil in 1992.

Its full implementation is essential to promote democratic participation, as it facilitates governmental accountability and increases the flow of information between the state and citizens, bolstering social control of government.

Thus, these laws are also crucial public policy instruments to promote good governance, combating corruption and other forms of illicit public (Article XIX, 2009). Latin America began adopting these laws in late 1990, but the issue gained more attention starting in the year 2000 when a series of countries began to consolidate and expand their FOI legislation into regulatory bills. Currently, with the recent enactment of the Brazilian FOI law, over 15 countries in the Caribbean and Latin America have already enacted their laws (Cainfo, 2011).

However, the mere enactment of the law does not ensure that the right to access public information is fulfilled since, in many cases, the adoption of a legal framework was not accompanied by the dissemination of the culture of transparency and Open Government (Cainfo, 2011). In fact, both the literature and the previous experience of other countries indicate elements that can be considered obstacles to the full consolidation of this right. Among them are the difficulties in the adoption of extensive bureaucratic routes for processing requests for information (Cainfo, 2011) and in the implementation of universal electronic management (CGU, 2011); the creation of sovereign law-enforcement bodies; the maintenance of communication channels among agencies and between the state and citizens, among others. Also noteworthy are the barriers of cultural character due to the existence of a tradition of secrecy, rooted in most if not all Latin American government bureaucracies, where public information seem to belong to the state or even to the department/server that holds the data.

It is this cultural dimension that underpins the assumptions of the first part of this study. It takes as a point of departure traits of Brazilian civil servant attitudes that have historically leaned towards the requirements of a patrimonial bureaucracy, and had little incentive until recent decades, with redemocratization, to pay tribute to a republican conception of autonomous citizen participation and their impersonal relationship with the state. Complementing this legacy, it is assumed that there is also an exaggerated personalism and a relational view of the world where rules and procedures are both too strict and outlined with consent of the parties. As a consequence of this legacy, the state agents would tend to treat public information on a discretionary basis. Thus, the hypotheses worked in this study are:

- The conception that the public servant has of the role of the state interferes with their ability to operationalize public access to information. A more Republican

conception will lead to better policy implementation, a more patrimonialist one, to a worse implementation;

- The more state-held information is conceived as a public good, the more likely implementation of FOI legislation would be successful, as less effort would be required to break resistances on the part of bureaucrats towards publicity.

Thus, this study is an ex-ante evaluation carried out with servers and authorities of the Federal Government. Its purpose was to verify the existence of a culture of secrecy in the Brazilian state, by identifying their opinions, visions and values within the context of current Brazilian enactment of the Access to Information Bill (Act 12.527/2011). This bill requires civil servants to be primed for a new level of transparency, and the evaluation will be used to prepare educational material with that intent.

The Brazilian Freedom of Information Act

The Brazilian Freedom of Information Act was passed on November 18, 2011 after two and a half years of parliamentary debates and intense media attention regarding its consequences for the disclosure of military intelligence concerning human rights violations during authoritarian periods. The law, however, has a much broader aim. It mandates that public data under the custody of all branches and levels of government be available instantly; declassifies all but select military and Foreign Office documents; bans justification requests; and imposes severe penalties on gatekeeping.

Specifically, the law reduces the terms of confidentiality of top secret, secret and undisclosed (excluding confidential) information for 25, 15 and five years, respectively, and ends the possibility of renewal of these quarantine periods. It also specifies the circumstances that constitute "state and society security" in cases involving defense, scientific, intelligence, surveillance and investigation of crimes and threats to economic stability, health and safety of citizens. The confidentiality of information regarding data that may affect an individual's "privacy, honor, and image" remains a hundred years as per constitutional mandate.

Extremely impactful to the administrative work are the articles which govern the mandatory provision of information to citizens, the means to do so, their periodicity and penalties in case of non-compliance. It is established in Article 30 that public bodies must publish every year the declassified documents in that year, a list of those disqualified and a statistical summary of information requests received and answered. For information systems and document management, the challenge to organize and publish this demand grows in the face of obligations imposed by Article 11, which defines that citizen requests must be immediately answered, and if the information is in another repository, to report its location to the requester within 20 days.

The Act also mandates that Citizen Information Portals be deployed in every government agency within 180 days of the law's enactment. This period is considered as one of the shortest, if not the most meager among all countries that have adopted similar legislation. There is still a need for definition and

division of responsibilities regarding the implementation of such systems. In the sphere of the federal public service, the Office of the Comptroller-General (CGU) will be responsible for the management of such open government initiatives, and will be the highest instance of appellation in cases of noncompliance of the FOIA by federal government agencies (Article 16).

Results

In this section, we deal with the way civil servants see the relationship between state and society in Brazil, explore what they understand by transparency, their impressions on Bill 219-C (2003) regarding the Access to Public Information (later sanctioned by Law 12.527) and on the current status of production, storage, classification and disclosure of data to society.

Also, we address the issue of absolute secrecy (data restricted to the state apparatus) and permanent secrecy (*ad aeternum* renewed secrecy) and the issue of accountability, in particular punishment of staff members who refuse to disclose public information.

State-society relationship

Here, we seek to understand how public officials see the distance (or proximity) between state and society in Brazil and where they fit in this relationship.

Qualitative data reveal that there is a general idea of a gap in the relationship between state and society. In the opinion of most servants interviewed, however, this distance has been gradually waning since the democratization process in the 1980s.

Despite this general perception of distance, public servants have no doubts regarding their role being to serve the citizen. In the quantitative part of the study, 88,5% of those surveyed claimed that they owe more obligation to society than to the state. Still, they believe there is a long way to go to broaden citizen participation and to make the state better able to respond to the concerns of society.

Access to public information

A second group of questions aims to probe public servants' take on the legitimacy of citizen requests for access to information. Both in interviews and quantitative data we have found that there is a dominant vision of the state as the keeper of public information, although it belongs to society. Quantitative data show that 91.5% of civil servants believe that every citizen has the right of access to any public information (provided it is not labeled confidential) without any need for justification, and public administration should have the duty to answer such requests within a previously established deadline.

Nevertheless, in the interviews we noticed that in spite of the legitimacy of such requests, a majority of respondents do not see government apparatus as being ready to answer them properly. Inadequacies of infrastructure and human resources are said to be causes of delays or difficulties in meeting demands. What stands out, however, is a concern with the way the information will be used when it becomes available to the citizen. The judgment implied in the statements varies in a continuum between the need of organize the information so it is intelligible to the user (minimum degree of control) to a view that whoever uses the information must identify himself, justify the demand and, depending on the justification presented, may not receive the information or, at most, obtain only selected data (maximum degree of control or supervision). “Political” use of information is considered by some key servants as the justification for such “editing” of the information provided, many having journalists in mind. Some object to the disclosure of full databases on the grounds that the certain “wrong associations” may be made.

Management and classification of public information

Unlike the other groups of questions, which explore actors’ perspectives, in this block we present objective data about the processing of public information within the public institutions studied.

The answers to in-depth interviews revealed the coexistence of quite different situations in the Federal Public Administration. Some agencies have systems for the control of service statistics, electronic management of documents, computerized management of processes, performance indicators and several channels for public access. Others are still struggling to keep up with the flow between the request and the response, without dedicated system to register information requests and monitor the delivery of that information.

As a complement, quantitative research brought information about other aspects directly related to how public information is treated in the various organs of Federal Public Administration, in particular, whether there is an electronic document-tracking system (DTS); who answers the requests for access to public information; and the frequency of training courses for the management of documents in the organs where they operate. Here, the lack of a systematic approach is clear: 66% of the servers indicated the existence of DTS and electronic processing of documents, but a large chunk of respondents (47,1%) stated that in their office either there is no agency responsible for answering requests for information, or are they are unaware of its existence.

Legitimacy of absolute and permanent secrecy

This section deals with respondents’ opinions about the legitimacy of keeping certain information under absolute and permanent secrecy, what circumstances warrant such secrecy, and who should be responsible for determining classified status.

The majority of respondents from all areas do not consider legitimate that information should be kept under absolute and permanent secrecy. However, there was variability in the justifications presented, in particular in their trying to distinguish absolute and permanent. Some respondents argue the need for protecting absolutely some data from society, but for a limited period of time, highlighting information affecting national security and strategic information about the government.

Regulation of the right to access

The perception that actors have about the need for public administration to adapt to the new law, as well as the need for such regulation, varies according to prior knowledge of the FOI bill.

It is noted that because of lack of knowledge there is some confusion regarding the protection of privacy, in particular about whistleblowers, which supposedly would not be covered. Another concern of respondents refers to the adaptation of management systems for monitoring the actions of state by the citizens. Many believe that the federal government is not prepared to comply with the legislation. Considering that the universalization of centralized management systems is still ongoing, they say, the need to create a layer of transparency above them would bring complications of practical nature.

In areas that currently receive high demand for information, some officials expect that the law will serve to limit requests for information, rather than broaden it. In their responses, they reveal the desire that the law should discipline requests from citizens, defining the types of information that may be requested based on criteria of cost, time of production, allocation of personnel and utility.

The proposal to establish clear rules to broaden citizen's access to information found positive reception among respondents. It was argued that the legislation would help strengthen the bonds of trust between state and society and overcome the pattern of personalized relationship typical of a "paternalist State". Nevertheless, some cultural aspects must be worked out, such as the existing concern regarding the misuse of information, the perceived difficulty in the relationship with the press and the vision that serving the public is a waste of time.

Accountability

The topic of accountability tried to capture the reaction of those interviewed about the possibility of being held responsible for refusal in granting access to public information.

In the quantitative study, 80.7% of respondents agree with the fact that the civil servant should be held responsible if she refuses to provide public information to the citizen. However, in analyzing qualitative data at greater depth, we see that this topic is controversial.

The question raised some interesting doubts regarding two aspects: the perception that not all information held by state is automatically public, and that it would be justifiable to deny the provision of information when the functionary was not authorized to do so. Other opinions have referred to the problem of determining who is the official in charge of granting access. In other words, respondents believe that the public servant should be held responsible according to what is required by law, but offered some conditions for the individualization of sanctions. In summary, according to them, civil servants should be held accountable if 1) she possessed the requested information; 2) had the means to prepare it; 3) the information was public according to legal criteria; 4) the task of providing the information was among her assignments; and 5) the denial of access did not carry acceptable justification.

Comparative analysis and indicators proposal

In this study we aimed to capture the perceptions that federal employees have of state accountability before society, particularly their perception of how the state should grant access to public information. The results provide valuable information for designing actions that may reduce resistance during the implementation of an FOIA. Additionally, if we make a comparative analysis with other countries, we will see in Brazil some peculiarities and similarities in terms of values, opinions, preferences, and ideologies of their public servants.

Comparatively, the first point concerns the lack of a clear definition of the Brazilian FOI law about what is and is not public information. This issue was pointed out previously by the organization Article XIX, which examined the Bill C-219, and mentioned by some of the participants in this study. This is a fundamental aspect that may affect the perception of public servants and determine the impact of the law. A more accurate definition of public information would help in facing head-on the conception that the employee owns the information, and also reduce the discretionary leeway in invoking secrecy with the purpose of protecting authorities. The literature shows, however, that many Latin American countries still have a long way to overcome the culture of secrecy (Cainfo, 2011), even in those laws which have more precise information regarding the definition of public information.

Central concerns about the Bill identified by Article XIX include the fact that it does not prevail over secrecy laws in case of conflict between legislations; the fact that decisions about access are made using the classification of confidentiality as a reference, instead of relying on the damage that disclosure of information would cause; the lack of provision for the ultimate prevalence of the public interest; and the need for more robust publicity measures regarding the law itself. They also recommended the removal of the requirement for identification of the applicant. This is a controversial issue for public employees, who value such identification, due to the existence of fears about its “misuse”, as we have seen.

With regard to organizational issues, there is a need for restructuring areas in charge of receiving requests for information in each office, in accordance with the law. However, the law could be improved, because it did not establish one

independent oversight institution, crucial to promoting a proper implementation of the right to information (Article XIX). This problem is also faced by many Latin American countries, which do not have a body with clear powers and financial independence to enforce the law. Nevertheless, in Latin America some alternatives have been found, for example, with the creation of the "Consejo para la Transparencia" (Council for Transparency - Chile) and the IFAI (Mexico), both autonomous institutions whose decisions have final and binding character (Cainfo, 2011).

Also with regard to organizational issues, the respondents reveal the inexistence of standardized procedures establishing the flow of requests and responses, with an interface with the internet for direct access by the public, which will surely hinder the implementation of the law. They also reveal the lack of routine disclosure procedures and timelines for the creation of websites, to fulfill the obligations of proactive publication and the information update. These points seem to be bottlenecks in other countries with FOIA implemented. In Latin America, for example, there are no countries with uniform internal routes for processing and monitoring of applications in all organs of government. This is probably due to the difficulties in structuring and matching existing systems, as well as creating, expanding or consolidating of databases, and scanning actual documents.

Indicators

Considering the organizational difficulties regarding information management, we present some monitoring indicators we developed for the National Archives, the agency responsible for public document management and storage in Brazil. For each group of indicators we've considered their relevance in measuring compliance with the provisions of the FOI law, focusing on capacity to produce results³.

Document preservation, restoration and record keeping: Indicators relating to the integrity of archives, involving the maintenance and improvement of storage conditions.

Existence of a timeline for preserving and restoring files with physical targets by document type

Prioritization of collections to be retrieved and preserved is based on criteria known by everyone in the institution

The technical resources for conservation and recovery are adequate

There are no archives lost resulting from inadequate physical conditions

The technical staff are regularly trained and are aware of the international state of the art of document preservation and restoration

³ Beyond criteria to measure the ability to accomplish with the provisions of law, we used additional criteria as: four-year plan; best practices; ISSO 15489; digital migration.

Public administration disclose technical notes, studies, documents and other parameters that may serve to inform preservation activities.
Digital migration: Refers to the establishment of procedures for processing files from physical to digital media, as well as for its preservation and future regulation, with implications for the management of born-digital documents.
There is a plan for digital migration with deadlines, resources and partnerships defined
There are goals and set dates for digitizing the entire collection
Open-source formats are used
The migrated information retained its integrity
The migrated information is more affordable than before
There are metadata about the origin of digital documents, dates and conversion processes and description of its contents
Safety data backups are done and storage media are not obsolete
The knowledge produced on digitization and digital preservation of records contributed / contributes to the regulation of this activity in the country
Access: Indicators related to citizen access to information
The handling of documents in all formats is done by the public in a proper condition to avoid any damage to the material
The media used by the public to query images remotely are certified, their content checked and integrity tested before sending
Planning is integrated, by using quantitative data from each query to prioritize activities to preserve and restore frequently used archives
The citizen has access via the Internet to the metadata of federal administration files
The document management systems deployed in federal agencies allow citizens to have access to information in person, immediately
There is a unified document tracking system and/or a standardized procedure to enable the public to see and request documents held by the state
The deadlines for answering each type of user demand are publicly disclosed

Deadlines for attendance are fulfilled
Responses to in-situ requests for documents are made within the time limits established by law
People with special needs have access to the archives with the help of technological tools or of an official
The entire collection is available for remote viewing, either through digital or physical copies
Responses to remote consultations are made within the time limits established by law
The monitoring of user satisfaction is carried out systematically
All consultations are recorded and typed
There is an indexed content of document descriptions (metadata) replacing consultation guides to archives and other instruments on paper
It is possible to query, via the Internet, the description of all documents available to the public
At any level of information access system there is no justification asked of the use to be made of the information, except in cases that require specific preparation of the document for a particular purpose
Employees who deal directly with the public receive specific training
The criticisms and suggestions from users demonstrably result in periodic enhancement of internal processes of the institution
Management: Indicators of document-managed capacity in government organizations
There are classification codes and disposal schedules for the administration's means-based activities
There are classification codes and disposal schedules for administration's end-based activities
There is a computerized system for document management with unified procedures for all federal public administration.
The formal processes to allocate federal administration files are known and used by public institutions

There is a single document tracking system linked to the national system of archive management
The rules of organization and presentation of documents to be gathered by the national archives are known by the all other government organs
There is a plan with annual targets for collection of public files for the national archives, and the attainment of these goals is monitored
There are procedures for the storage of digital documents
Standardization and Inspection: this group of indicator includes the existence of a description of standards and also deals with the law enforcing power of the archives
There are document management standards applicable to the whole country
Random audits are made in the archives of the administration bodies
There is a policy for classification of official electronic communication as official documents
Education: this group of indicators deals with the diffusion of archival knowledge within the administration in order to bring these organs closer to the central archives
The administration organs are able to autonomously fulfill their roles of production, description, custody and allocation of documents
The classification codes for end-activities were developed in partnership between the central and the local archives
The importance of archive management within public administration is publicized for a wider audience than just those who are responsible for document tracking and archive
There are published standards and procedures for organization and certification of document authenticity, and these procedures are enforced
Disclosure: indicators of ability to disseminate information to the general public. Included here are the goals to popularize knowledge about archival activity and services to society
The web portal of the archive is regularly updated with a news section and/or events integrated into engines for quick retrieval, such as social networks and RSS
The institution has its own publications, digital or in paper, published on a

regular basis and with a clear editorial purpose

The archive has a technical library open to public consultation and updated by constant acquisitions

Conclusions

Overall, the results showed public servants' conceptions about the role of the state that were, in its large majority, republican, that is, aware of its impersonal public function. The minority that hold non-republican conceptions tend toward partisanship or bureaucratic *esprit de corps*, worried about the consequences that transparency may have for the destabilization of government or, at a more immediate level, in jeopardizing the careers of servants themselves.

The impersonality of the state is not formally questioned, but it is implied that the "caution" in the use of information would be essential. So it seems that the opposite of republicanism in their minds is not necessarily patrimonialism, understood as the use of the state for private interests, but corporatism. Resistance towards treating information as unequivocally public property may reflect more complex organizational problems. Those who understand the sundry opportunities for instrumentalizing information may reveal such uses in more private conversations – had we undertaken participant observation rather than in-depth interviews, these may have surfaced.

On the other hand, we note that there is a desire to "contextualize" the information disclosed in a matter akin to tutelage of society by the state. There are some actors who have the desire to control the presentation of information, and a way to do so is hindering citizens' access to databases.

The greater or lesser tendency to grant access to information or to consider it a topic that should be kept as a secret varies greatly depending on the area. In defense, intelligence and foreign affairs, there is a strong sense of need for control, which translates into excessive concern to know who and why is requesting certain information. It was found, moreover, that these departments provide even higher degree of discretion on the servants regarding the decision to provide or not information to citizens, hence the need for regulation to prevent the "personalization" of the decision and achieve its impersonality. However, even in these areas all respondents were in favor of disclosure of public information, in order to ensure the transparency of its acts, except in cases involving strategic information that can undermine national sovereignty.

In this context, FOI law implementation strategies should focus on strengthening democratic values and on the consolidation of a culture of openness and trust. Certainly, the replication of best practices, as well as the carrying out of systematic monitoring of actions will also contribute to the successful implementation and consolidation of the right of access to public information.

Published sources

- 1) Artigo IXI: Análise do Projeto de Lei de Acesso à Informação Pública. Jun 2009.
- 2) Centro de Archivo y Acceso a la Información Pública (Cainfo): Venciendo la Cultura del Secreto, Obstáculos a la implementación de políticas y normas de acceso a la información pública en siete países de America Latina. May 2011. Available at: <http://www.cainfo.org.uy/images/LIBRO%20-%20Venciendo%20la%20Cultura%20del%20Secreto.pdf>
- 3) Controladoria Geral da União (CGU): Acesso à Informação Pública: Uma Introdução à Lei nº 12.527. Nov 2011. Available at: <http://www.acs.ufpr.br/cgu.pdf>
- 4) Controladoria Geral da União (CGU): Sumário Executivo: Pesquisa Diagnóstico sobre Valores, Conhecimento e Cultura de Acesso à Informação Pública no Poder Executivo Federal Brasileiro. Dic 2011. Available at: http://www.cgu.gov.br/Publicacoes/SumarioPesquisaAcessoInformacao/SUMARIO_FINAL.pdf