The Right to Information System in Brazil: Tensions between Transparency and Control of Information

By *Marcio Camargo Cunha Filho**

Abstract: Right to Information (RTI) laws are commonly seen as key elements of participatory democracies because they allow citizens to hold public officials accountable for their actions. Nevertheless, these laws can be ambiguous since, while creating transparency provisions, they also limit their scope, preventing fundamental change in the power balance between state and civil society. In Brazil, this ambiguity is reinforced by three mechanisms of control created by the RTI normative framework: the structure of the procedure of information access, which attributes decision-making power to high-level political appointees; the procedural requirements for information requests, whose vagueness empowers bureaucrats to define their concrete meaning; and the substantive exceptions to the transparency rule, which create an asymmetry of power between the citizen requesting information and state agencies responding to it. My main goal is to analyze the tensions between control of information and transparency that emerge from the operation of this normative framework by the two administrative appellate agencies of Brazil's executive branch –the Office of the Comptroller General (Ministério da Transparência e Controladoria-Geral da União – CGU) and the Interagency Commission of Information Reassessment (Comissão Mista de Reavaliação de Informações – CMRI). I argue that the CGU has exerted pressure towards transparency in several occasions, tensioning the provisions that allow the withholding of information and thus promoting a gradual, incremental and nonlinear advancement of transparency. I also argue that an additional difficulty for the system to promote transparency is the relative absence of Supreme Court. Had it been more activated, it could theoretically impose more limits to the power to withhold information. I conclude by suggesting that progress towards transparency does not necessarily rest on legal provisions, but perhaps on the existence of an autonomous and qualified bureaucracy that functions as a force that occasionally manages to push the system towards transparency.

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* SJD candidate at University of Brasília School of Law (2015-). Research Fellow at American University (2016-2017). Federal Auditor at the Office of the Comptroller General (Controladoria-Geral da União) (2012-). I am grateful to Débora Diniz, Matthew Taylor, Jonathan Fox, Michael Riegner, Richard Calland, Luciano da Ros, Tiago Peixoto, Fábio Kerche, Rafael Mafei, Gilberto Rodrigues, Temístocles de Oliveira Júnior, Marcos Lindenmayer, Cláudia Chagas, Ana Possamai, Raquel Scalcon and Ramiro Peres, who provided very useful insights for my ongoing research on RTI in Brazil, most of which I incorporated here. Remaining errors are mine alone.

A. Introduction

Many consider Right to Information (RTI) laws as key elements of modern democracies. This rationale assumes that citizens armed with tools to participate in the political process will force officeholders to either answer to the public's needs or to be sanctioned in case they do not. Therefore, RTI laws can supposedly trigger a causal chain of events whose outcome is a political system responsive and accountable to people's needs. This normative approach to RTI laws has been present in the academic literature around the world. Scholars have argued that "the development and deepening of practices of public exposure (…) must be essential to any coherent project of rendering the most democratically generated of rule effectively accountable"[1] and that the right to information represents the fourth great wave of citizens' rights (after civic, political and social rights).[2] This thinking has created a powerful consensus in the international community around the importance of transparency, participation and accountability[3] and has resulted in a "global explosion" in the number of countries that adopted these laws.[4]

Nevertheless, the formula "RTI laws lead to transparency, which leads to participation, that generates accountability" is never as simple and as linear as one would hope.[5] As *Fox* posits, "those who make this assumption are confusing the normative (that which our democratic values lead us to believe in) and the analytical (that which the social sciences allow us to claim)".[6] The studies that adopt this normative approach often rely on "untested normative assumptions and under-specified relationships between mechanisms and outcomes" and "much of the empirical work reviewed is based on poorly articulated, normatively inspired 'mixes' that draw unevenly from the concepts of transparency, accountability, good governance and empowerment."[7] The causal path between the enactment of an

1 *Delmer D. Dunn,* Mixing Elected and Nonelected Officials in Democratic Policy Making: Fundamentals of Accountability and Responsibility, in: Adam Przeworski/Bernard Manin/Susan C. Stokes, Democracy, Accountability and Representation. Cambridge, 1999, p. 340.

2 *Mark Bovens,* Information Rights: Citizenship in the Information Society, Journal of Political Philosophy 10 (2002), p. 317.

3 *Thomas Carothers*/*Saskia Brechenmacher.* Accountability, Transparency, Participation, and Inclusion: A New Development Consensus, Carnegie Endowment for International Peace, Washington 2014.

4 *John Ackerman/Irma Sandoval-Ballesteros,* The Global Explosion of Freedom of Information Laws. Administrative Law Review 58 (2006), p. 85.

5 *Jonathan Fox,* The Uncertain Relationship between Transparency and Accountability, Development in Practice 17 (2007), p. 663; *Jonathan Fox,* Social Accountability: What Does the Evidence Really Say? Global Partnership for Social Accountability Working Paper No. 1, Washington 2014; *Jonathan Fox,* Scaling Accountability through Vertically Integrated Civil Society Policy Monitoring and Advocacy, Working Paper, Brighton 2016; *Rosemary McGee/John Gaventa.* The Impact of Transparency and Accountability Initiatives, Development Policy Review 31 (2013), p. S3.

6 *Fox,* 2007, note 5, pp. 664-665.

7 *McGee/ Gaventa,* 2013, note 6, p. S11.

RTI law and the increase of responsiveness in the political system is filled with obstacles and barriers that are often ignored by the optimistic approach.

In the past years, this awareness has shifted the focus of RTI studies towards a more empirical approach. The metaliterature about RTI's empirical impacts has found that transparency policies can be effective only if certain conditions are met: if (i) they reveal "reliable information about institutional performance, specifying officials' responsibilities as well as where public funds go" instead of "information that does not reveal how institutions actually behave in practice, whether in terms of how they make decisions, or the results of their actions";[8] (ii) they are designed to promote not only citizens' voice in the decision-making process, but also "teeth", that is, "state's institutional capacity to respond to citizen voice";[9] (iii) they are not an isolated tactic, but rather an element of a broader strategy to promote citizen engagement in the political process;[10] (iv) they promote vertical integration, that is, if they allow engagement at the local, state and national levels of government.[11] Just recently scholars have comprehended that characteristics of RTI laws and the context in which they are enforced influence the outcomes they can generate. In this context, the studies of the empirical operation of RTI laws becomes relevant.

In Brazil, most studies have focused on the normative or theoretical importance of the RTI.[12] The emerging field of empirical studies on public transparency has so far produced mixed results. *Michener* posits that Brazil's political dynamics, which combined at the time of the approval of the RTI law a high degree of executive control over congressional agenda and a large coalition cabinet, have created the conditions for the enactment of a strong *de jure* RTI law.[13] He also argues that the *de facto* operability of the law has been "impressive" and that "Brazil's 'transparency infrastructure' has become one of the region's most sophisticated and extensive".[14] *Michener* considers Brazil's law strong because of the presence of provisions that are absent in other countries in the region, for example: the provision that demands public agencies to deliver data-friendly "open-format" information; the provision that creates a unified portal for requests, responses and appeals within the executive branch; the provision that prohibits the classification of information related to fundamental rights;

8 *Fox,* 2007, note 5, p. 667.

9 *Fox,* 2014, note 5, p. 347.

10 *Fox,* 2016, note 5.

11 *Fox,* 2016, note 5.

12 For instance, *Fernando Filgueiras,* Transparency and Accountability: Principles and Rules for the Construction of Publicity, Journal of Public Affairs 16 (2015), p. 192.

13 *Robert G. Michener,* How Cabinet Size and Legislative Control Shape the Strength of Transparency Laws. Governance 20 (2014), p. 77.

14 *Robert G. Michener,* Assessing Freedom of Information in Latin America a Decade Later: Illuminating a Transparency Causal Mechanism. Latin American Politics and Society 57 (2015), p. 77.

amongst others. In a more recent occasion *Michener* and *Ritter* identify different types of "resistance" to transparency policies in Brazil's primary and secondary school systems.[15]

On the other hand, Article 19 acknowledges that, although the law has been responsible for substantial progress in the advancement of transparency in Brazil, it has been unevenly applied within Brazil's public agencies, due mostly to the nonexistence of a national and independent agency responsible for overseeing its implementation in the whole country.[16] *Waisbich* et al analyzed responses to information requests by the Ministry of Foreign Relations between May 2012 and May 2015 and concluded that it has construed the exceptions to the transparency rule in a broad and unclear way, overusing the concepts of "national security" and "public interest", virtually exempting foreign relations from the general transparency rule.[17] In a previous paper I argued that despite the fact that the law was thought of as an instrument of transitional justice aimed at recovering information about past violations of human rights, the agencies responsible for its implementation have focused exclusively on its potential role as a tool to promote fiscal transparency, failing to advance other relevant constitutional goals to which RTI is associated, such as the right to historical truth.[18]

Connected to this emerging empirical literature, this paper problematizes the implementation of Brazil's RTI system.[19] I argue that the RTI legal provisions aimed at promoting transparency are counterbalanced by rules that limit its scope by allowing decision makers to be unchecked when deciding to withhold information in certain circumstances. Most of these exceptions to the transparency rule were created or specified by Executive Order 7.724/2012, a unilateral decree enacted by the president that details how the law must be implemented in the executive branch. This means that if the RTI law aims at advancing transparency most of the time, the executive branch created normative exceptions that can be used with few constraints, especially because there is no external oversight to executive decisions. My main goal is to analyze the tensions between transparency and control of information that emerge at the operation level of this normative framework. Although these tensions exist in all RTI systems, the institutional architecture in Brazil contains incentives for the withholding of information when that could harm the power holder's interests. Due to the mechanisms designed to control the flow of information, Brazil's RTI system is

15 *Robert G. Michener/Otávio Ritter.* Comparing resistance to Open Data performance measurement: public education in Brazil and the UK. Public Administration 95 (2017), p. 4.

16 *Article 19.* Os cinco anos da Lei de Acesso à Informação: uma análise de casos de transparência. São Paulo, 2017.

17 *Laura Waisbich/Raísa Cetra/Joara Marchezini,* The Transparency Frontier in Brazilian Foreign Policy, Contexto Internacional 39 (2017), p. 179.

18 *Marcio Cunha Filho,* O Desencontro entre Direito à Informação e Direito à Verdade: Análise das Práticas da Controladoria-Geral da União, Direito, Estado e Sociedade 47 (2015), p. 91.

19 I will use the term "RTI system" when referring to the body of normative acts that regulate access to information in Brazil. Most scholars analyze only the RTI law (Law n. 12.527/2011), but Executive Order n. 7.724/2012 is also relevant since it details how executive agencies must implement the RTI law and have more specific and procedural rules.

meant to promote a weak or controlled kind of transparency, one that from a normative point of view is unlikely to be an effective accountability tool. The absence of the Supreme Court in the definition of legal interpretations regarding the law and how its exceptions should be used is yet another factor that hampers its effectiveness. Nevertheless, despite this institutional design, progress towards transparency has been made. I posit that this progress might not be due to the legal framework, but maybe to the capacity of the civil servants that operate the system.

The analysis of the RTI system will be primarily based on decisions made by the two administrative agencies that head the federal system of access to information in Brazil. The Office of the Comptroller General (*Ministério da Transparência e Controladoria-Geral da União* – CGU) and the Interagency Commission on Information Reassessment (*Comissão Mista de Reavaliação de Informações* – CMRI) have the prerogative to rule on administrative appeals against decisions made by all federal agencies that deny access to information. Along with this authority, they have the responsibility to determine how the RTI law and the Executive Order must be interpreted when faced with concrete information requests. I chose to analyze the appellate agencies of the executive branch mainly because they decide controversies regarding the RTI system on a daily basis and have created, in the first six years of the law, a large and wide enough body of decisions that allows an analysis of their overall position in many issues. If we consider that the exception defines the true content of the rule, the CGU and the CMRI have exercised sovereign power over the implementation of the RTI law since they have had (*de facto,* if not *de jure)* a final say on what is and what is not included in the transparency rule.

B. The RTI law in Brazil

Brazil's 1988 Constitution states that everyone has the right to receive information of private or public interest from state agencies, except when disclosure could harm national or societal security. Despite the constitutional provision, RTI remained a marginal debate in Brazil's political system for many years. In 2003 a congressman from the Workers Party (PT) presented the first bill designed to regulate RTI, but it never made it to the floor of the Chamber of Deputies. In 2006 the executive power (through the CGU) began working on its own version of the bill, which was sent to Congress in 2009. After a relatively quick approval in the Chamber, the bill faced resistance in the Senate. Former Presidents Fernando Collor de Mello and José Sarney (who were senators at the time) exerted great pressure against the approval of the bill, especially because of the provisions that limited secrecy related to national security for up to twenty five years, with the option to restrict access for a further 25.[20] The resistance of some political forces was counterbalanced by direct and indi-

20 According to national newspapers, Sarney argued that the law could not be approved because Brazil had to "heal wounds" from the past instead of trying to solve them (http://g1.globo.com/politica/noticia/2011/06/nao-podemos-fazer-o-wikileaks-da-historia-do-brasil-diz-sarney.html). Collor de Mello exerted a more formal opposition against the law, formalizing a vote against it in the For-

rect pressure from international organizations,[21] and the government managed to approve the bill at the Senate in October 2011. President Dilma Rousseff signed it into law on November 18th, 2011, along with another law that created the truth commission in Brazil. The RTI law went into effect on May 16th 2012. The tensions between promoting transparency and withholding information, which were present throughout the legislative process, would later be reflected in the implementation of the law.

In many ways, Brazil's RTI law is ambitious in promoting transparency and in trying to limit the discretionary power of public agents to withhold information. First, most of its provisions encompass the three branches of power at all levels of government (federal, state and municipal) (art. 1º). Even private entities, when receiving public funds, have certain transparency obligations under the law (art. 1º, section 1º). The law subordinates to its regime all public agencies, even those that are often excluded in other countries, such as the office of the president, intelligence community agencies and even state-owned companies, which must obey the law's general commands. Second, the RTI law imposes the proactive disclosure of certain types of information, such as orientation about procedures to access information, including the whereabouts of the information; information about the activities and organization of public agencies, including the public services that they provide; among others (art. 7º), and determines that information must be provided in the most complete and updated form (art. 7º, section IV). Third, the law demands each public agency to create a specialized unit named Citizen Information Service (*Serviço de Informação ao Cidadão – SIC),* whose goals are to respond to information requests within thirty calendar days and to provide guidance for citizens regarding public information (art. 9º). This provision allowed the creation, within the federal executive branch, of a unified electronic procedure to receive and respond to information requests, which has facilitated the utilization of the law.[22] For these reasons and others, Brazil rates well in the Global Right to Information Rating – it has the 22nd best law out of 111.[23]

Because of these provisions, the law has accomplished most of its goals since it went into force, according to the executive power's reports on the implementation of the law. The 4th Report on the implementation of the law elaborated by the CGU stated that federal agencies received 334,463 requests from May 2012 until December 2015 and granted ac-

eign Relations Committee and proposing a new version of the bill, which included no temporal limit for withholding information related to national security (http://www.adur-rj.org.br/5com/pop/ignorando_collor.htm).

21 According to Martin Tisné, Brazil would not have approved its RTI law without the OGP. Another piece of evidence of international pressure towards the approval of the law was the decision by the Interamerican Court of Human Rights in November 2010 of the Gomes v. Lund case, in which it required Brazil to adopt an RTI law. *Martin Tisné,* What can the OGP do for me? Available in https://www.opengovpartnership.org/stories/what-can-ogp-do-me.

22 The unified electronic entry portal was imposed by Executive Order 7.724/2012/12.

23 http://www.rti-rating.org/country-data/.

cess to the information requested in 76.50% of them.[24] The rate of requests that did not receive any answer was at only 0.2% throughout this period. Based on these numbers, the executive branch concludes that "transparency is considered an indispensable tool to strengthen modern democracies since it enables the exercise of political power by all people"[25] and that "focusing on transparency is, doubtlessly, the best pathway to enforce human rights and to improve public management".[26] And the government is not alone: Article 19 also argues that the law caused "considerable progress in the total volume of information accessible by public."[27]

Although Brazil's RTI law certainly has provisions aimed at promoting transparency, Executive Order 7.724/12, the complementary executive branch regulations and the law itself constrained these provisions by creating mechanisms that stretch the discretionary power of non-elected officials to use the exceptions to these rules, creating tensions between transparency and control of information. These tensions are materialized in three main levels. First, the procedure of information request allows government to control the disclosure of information via the power to freely appoint and remove decision-makers from office. Second, procedural safeguards allow public agencies not to analyze information requests if they are underspecified, unreasonable or disproportionate. Third, the substantive exceptions to the transparency rule are numerous and their complexity often creates an asymmetry of power between public officials and information requesters, limiting the power of the latter to influence the outcome of the litigation for information. Therefore, positive outcomes that may have resulted from the law do not rest necessarily or exclusively on legal provisions since the ambiguity of the RTI system makes it relatively easy for officials to withhold information.

C. Tensions between transparency and control of information

I The procedural design to access information: exercising a controlled right

Brazil's RTI law was enacted rather late in terms of the larger global expansion of RTI laws. This allowed the country to compile the best normative provisions created by other countries. One of the most important of these transplanted provisions was the creation of a procedure for requesting information, which aims at strengthening the position of the requester *vis-à-vis* the state in several aspects. This procedure eliminated most bureaucratic

24 The fourth report on the implementation of the law is dated as of May 2016 and encompasses data from May 2012 until December 2015. On CGU's website (http://www.acessoainformacao.gov.br/central-de-conteudo/publicacoes) there is no reference for the more updated reports (last access December 2017).

25 *Controladoria-Geral da União,* Acesso à Informação Pública, uma introdução à Lei 12.527/11. Brasília, 2012, p. 7, available at http://www.acessoainformacao.gov.br/central-de-conteudo/publicacoes/arquivos/cartilhaacessoainformacao-1.pdf.

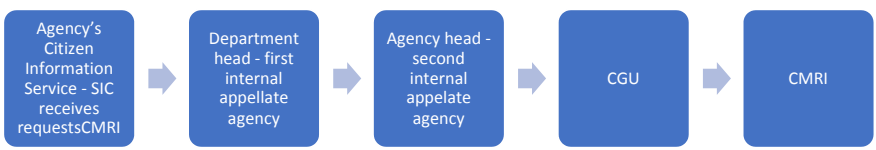
26 *Controladoria-Geral da União,* note 24, p. 47.

27 *Article 19,* note 176, p. 8.

barriers for requesting public information. It abstained from imposing prerequisites of citizenship, age or legal capacity to file information requests, which means that virtually any person (including legal persons, or persons not entitled to exercise political rights) can request information from Brazilian authorities. The law also requires public agencies to disclose information in plain and easily comprehensible language (art. 5º) and prohibits public agencies from requiring justification for information requests (art. 10) because this could create difficulties for filing requests.[28]

Besides that, the RTI system formalizes a grievance redress procedure with four different appellate levels, two internal to the agency where the request was originally presented and two external.[29] If the request received at the unified entry portal, the Electronic Citizen Information Service (*e*-SIC), is denied, the requester can appeal to the department head and then to the highest authority within that agency. If these appeals are denied, the claimant can appeal to the CGU, an agency with ministerial status that, according to the RTI law, has the authority to rule on appeals against decisions by all federal agencies that deny access to information. If the CGU does not grant it, the requester can file a final appeal to the CMRI, an interagency commission created by the RTI law primarily to rule on information appeals and, together with the CGU, to summarize and to specify how RTI legal provisions must be construed.

Figure 1. Appellate levels in Brazil's Executive Branch.



Grievance redress mechanisms "have the potential to improve accountability relationships in the social sectors both by empowering users and by providing information to policymakers."[30] Nevertheless, under Brazil's RTI law, the redressal instances lack political autonomy to adjudicate information appeals. Although numerous, the appellate levels are all part of the executive branch, and the main decision makers are high-level political appointees who can be freely appointed and removed from office by their superiors. Because of this, their decisions regarding public disclosure of information tend to be aligned with the govern-

28 One possible bureaucratic barrier imposed by the RTI law is the identity requirement, which is often seen as attempts to expose information requests and therefore keep them from requesting information.

29 The CGU and the CMRI are external *vis-à-vis* the agency requested, but they are still internal to the executive branch, as I explain in detail later in this section.

30 *Varun Gauri,* Redressing Grievances and Complaints Regarding Basic Service Delivery. World Development 41 (2013), p. 110.

ment's agenda, making them unlikely to disclose information that could harm the incumbent's image.

According to Executive Order 7.724/2012, the second appeal must be ruled on by the head of the agency requested, which is either a minister (the highest position in Brazil's bureaucracy) or a holder of *DAS 101.6* (the second highest position in Brazil's federal bureaucracy, only below the ministers to whom they are subordinated). The *DAS* position is not tenured, which makes their holders unlikely to disclose information that could be embarrassing for their agency or superiors (the minister or the president). When the appeal reaches the next level, the *Ouvidor-Geral da União*[31] is the decision-maker at the CGU.[32] He also holds a *DAS 101.6*, facing therefore the same issue of lack of autonomy, since he can be removed from office with no justification or prior notice. But at the CGU level, there is an additional problem. If the original information request was addressed to a ministry, then the appeal to the highest authority was adjudicated by its respective minister. How can CGU's *Ouvidor-Geral,* whose position in the bureaucracy is one step below the minister's, overrule a decision made by a minister? Although theoretically he has that prerogative, the *Ouvidor-Geral* might not have political power to overrule decisions made by ministers or even by more politically salient holders of *DAS 101.6.*[33]

In this case, the structure of the appeals system can lead to the withholding of information. These incentives continue at the final level of the appeals process, the CMRI. In the version of the RTI law approved by congress, the CMRI was a plural commission composed of members of the executive, the judiciary and the legislative. Nevertheless, this provision was vetoed by President Rousseff, who later enacted Executive Order 7.724/2012, according to which all of the commission's members would be executive branch officials. Therefore, today the CMRI is composed exclusively of high-level representatives of ten ministries or agencies with ministerial status. As such, they are collectively likely to be concerned with the impact that a disclosure might have on the government and on their own agencies. Besides that, many appeals addressed to the CMRI were originally presented to one of the ten agencies that compose it (for example, the Ministry of Foreign Relations or the Ministry of Treasury). In these cases, the agency that denied the information request on three different occasions (the original request, the appeal to the head of the department and

31 The *Ouvidor-Geral da União* is a unique public position. It was inspired in the European ombudsman, but it has important differences with it. The *Ouvidor-Geral* is also meant to represent public's interest, but he does not have the prerogative of initiating lawsuits and he is an executive branch official.

32 According to executive branch regulation (*Portaria n. 1,567/2013*), http://www.cgu.gov.br/sobre/legislacao/arquivos/portarias/portaria_cgu_1567_2013.pdf

33 There are decisions that contradict this assumption. The CGU has ruled against the ministry of agriculture in 20 occasions during the first four years of the law. It has also rule against the ministry of treasury and others. Other ministries, such as the ministry of foreign affairs and the chief of staff's office (which also has ministerial status) have had its decisions overruled by the CGU only in rare occasions.

the appeal to the highest authority) will vote on whether the information should be disclosed in the appellate level, creating a situation of conflict of interests.

Whereas this first kind of double-judgement happens occasionally, only when the agency originally requested has a representative at the commission level, there is a second kind of double adjudication that happens in all appeals ruled on by the CMRI. All appeals that reach the commission were denied at the lower level by the CGU – and the CGU's representative at the commission not only votes, but is also responsible for briefing the case to the other members of the commission before it is adjudicated. To sum up, the appellant at the CMRI always starts off with at least one vote against him – the CGU denied the appeal at the immediate lower level and is likely to vote again in the same way. When the information request was originally directed to one of the other nine agencies that have a seat at the CMRI, the appellant starts off with two votes against him. For his appeal to be granted, he will need to convince six out of the eight remaining members of the commission if they are all present.[34]

The power to appoint high-level public officials gives the incumbent government great influence in the decision to disclose or not disclose information. But which justifications can they use for denying information requests? Executive Order 7.724/2012 imposes procedural prerequisites for information requests to be analyzed, whereas the RTI law itself creates substantive exceptions to the transparency rule without creating independent oversight institutions that could limit their overuse.

II Procedural safeguards

1. Underspecified, unreasonable and disproportionate requests

Executive order 7.724/2012 licenses public agencies not to analyze underspecified, unreasonable or disproportionate information requests. The CGU and the CMRI have created a fourth procedural exception that allows agencies not to analyze requests: the allegation of nonexistence of the information requested. In these cases, the vagueness of the legal provisions stretches discretionary power of public officials responsible for responding to information requests and hampers assessment of compliance, because "the more clearly an opinion states the policy implications of the decision, the easier it is to verify whether policy makers have faithfully complied, making it more likely that external actors can monitor and impose costs for non-compliance."[35] Said another way, vagueness empowers agencies to define the concrete meaning of the vague terms, allowing officeholders that could be removed from office at any time to draw the boundary lines between what is included and what is not in the transparency rule. The CGU and the CMRI have not uniformized or stan-

34 Appeals against decisions by the CGU that deny access to information requests are decided on by simple majority, according to art. 7º of the commission's internal rules.

35 *Jeffrey Staton/Georg Vanberg*. The Value of Vagueness: delegation, defiance and judicial opinions. American Journal of Political Science 52 (2008), p. 507.

dardized the use of concepts, making their usage unclear and therefore difficult to hold accountable.[36]

In an appeal that demanded access to documents sent by a certain congressman to *Banco do Brasil* (one of Brazil's state-owned bank), the CGU ruled that, to be specific, an information request has to indicate its subject "with sufficient detail about time, space and event, in a way that allows the civil servant responsible for that subject to identify the information in a quick and precise way".[37] Based on this concept of "underspecified" and the necessity of outlining a subject, several information requests have been denied, such as requests for all documents signed by the ministry of treasury in a given year,[38] all documents signed by the president of the *BNDES* in a given period of time,[39] or even all documents that made reference to the requester.[40]

Nevertheless, at a later point the CGU overturned this decision. Acknowledging its own previous efforts to concretize the meaning of "specificity", it implied that connecting it to outlining a subject was unconstitutional because this could ultimately lead to a situation in which the only person who could elaborate a specific request would be someone who previously knew quite precisely what the content of the information was.[41] Although the decision did not specify exactly which constitutional provisions had been violated, it is a clear example of CGU's civil servants applying pressure towards transparency, and even trying to make use of constitutional interpretations to do so, despite the fact that it is not the agency's role to decide matters of constitutionality. Said differently, although this request could easily be considered underspecified, because of the legal provisions that impose the fulfillment of procedural requirements and because of the previous decisions, CGU's bureaucracy managed to use its margin of liberty to advance an important change towards transparency. After this decision, detailing the subject of the information requested was no longer seen as a mandatory requirement for the request to be considered specific. For instance, the CGU ruled that "even though depicting the subject can help in the identification of information, its requirement as a procedural request must be construed cautiously, especially when declassified information is requested.[42] This uptake was reiterated in other decisions.[43] Never-

36 All decisions by the CGU and the CMRI cited in this article can be found in Portuguese at http://buscaprecedentes.cgu.gov.br/busca/Pages/advanced.aspx.The English version of this paper was translated by me.

37 Decision 4196, 05/24/2013, appeal 99901.000164/2013-73.

38 Decision 4747, 06/19/2013, appeal 16853.007617/2012-05.

39 Decision 4748, 06/19/2013, appeals 99903.000478/2012-75, 99903.000476/2012-86 and 99903.000480/2012- 44.

40 Decision 566 09/03/2015, appeal 00077.000821/2014-66.

41 Decision 2198, 09/06/2013, appeal 60502.002445/2013-28.

42 Decision 932, 04/13/2015, appeals 00077.000797/2014-65, 00077.000821/2014-66 and 00077.000822/2014-19.

43 Decision 1816 de 19/06/2015, appeals 60502.002680/2014-81, 60502.002795/2014- 75, 60502.002877/2014-10, 60502.003002/2014-35 e 60502.003039/2014-63).

theless, it is still unclear whether or not depicting a subject is a mandatory requirement for information requests. In a more recent appeal, the CGU considered a request underspecified because it did not properly indicate a subject.[44]

On the other hand, the CGU has also made decisions clearly aimed at restricting the use of the "underspecified" category, thus advancing transparency. In an appeal that claimed access to reports produced by the subcommittee of cyber defense of the Ministry of Defense, the CGU ruled that "the underspecified request is comparable to an incomprehensible one (…) State officials are obliged to search for the information if there is an indexer that allows its recovery."[45] Although it is unclear at this point whether indicating a subject is a necessary requirement for filing information requests, the uncertainty regarding this issue could prevent actors from requesting information in the first place. Actors whose requests have been previously denied under this argument may feel they cannot make further requests without specifying the subject, regardless of the CGU's most updated assessment on that specific case.

The concept of "reasonableness" plays a similar role. In its RTI guidebook, the CGU states that a request is unreasonable if based neither on the RTI law goals, nor on its legal provisions nor on the fundamental guarantees of the Constitution.[46] In concrete cases, it ruled that an unreasonable request is characterized "by its non-conformity with the public interest of the state (...), such as public security, celerity and economic viability of the public administration" or by the "inherent incompatibility between the information requested and the public reason aimed at the common good",[47] or even by the fact that "they go against the spirit of the law or the public interest".[48] These definitions are as vague as the concept, and they do not limit agencies' authority to use it. The lack of a clear-cut definition has permitted public officials to deny information requests in a wide range of situations, such as access to timesheets of *Universidade Federal da Bahia's* civil servants;[49] access to robbery reports at *Banco do Brasil's* agencies;[50] access to the names of the civil servants that had had access to the claimant's tax declaration;[51] amongst others. The CGU argues that the concept of unreasonableness should be used only in "extremely exceptional circumstances",[52] but in practice it has not narrowed down its usage.

44 Decision 2509, 07/06//2016, appeal 00077.000393/2016-33.

45 Decision 817, 03/04/2016, appeal 53850.000097/2016-81.

46 Office of the Comptroller General, guideline to the implementation of the RTI Act in Brazil, p. 36, available at http://www.ouvidorias.gov.br/central-de-conteudos/biblioteca/arquivos/aplicacao-da-lai-em-recursos-a-cgu.pdf.

47 Legal opinion no. 3102, 08/19/2016. This legal opinion does not refer to a concrete case, but rather it represented an attempt to standardize the usage of these concepts.

48 Decision 4747, 07/17/2013, appeal 16853.007617/2012-05.

49 Decision 4146,04/05/2017, appeal 23480.020787/2016-41.

50 Decision 1634, 06/08/2015, appeal 99901.000150/2015-11.

51 Decision 3541, 09/08/2014, appeal 16853.000212/2014-08.

52 Decision 817, 03/04/2016, appeal 53850.000097/2016-81.

Proportionality, according to the CGU, is related to the total amount of work hours necessary for agencies to respond properly to a request. In this sense, the CGU has ruled that "the operational difficulty in producing the information (...) makes it impossible to grant the disproportionate request". A request to access all the telegrams written or received by the Ministry of Foreign Affairs during the months of May and June 2015 was considered disproportionate under these grounds, as the Ministry alleged that responding to the request would demand an analysis of 20 thousand documents.[53] Additionally, the CGU ruled that "the [appealed] agency is responsible for demonstrating the causal chain between the request and its operational unviability" because "information requested in disproportionate requests (…) could be disclosed if requested in a proper way."[54] The meaning of "disproportionate" is therefore clearer than the meaning of "unreasonable" or "underspecified". Moreover, by imposing agencies to specifically prove how responding to a certain request would implicate too much work, the CGU limits agencies' discretion to use this concept to deny information requests. Despite that, a few ambiguities remain. How much work could be "too much" and thus justify the denial of a request? The CGU avoids bounding agencies to one sole standard, recognizing that "public agencies have different operational structures to respond to requests."[55] Therefore, although the definition is clearer in this case, the criteria for its usage is not.

2. Nonexistent information

The RTI system does not regulate how public agencies should respond to requests that demand nonexistent information. The issue is more complex than it seems. Affirming that a document does not exist ends the interaction between state and society, eliminating the possibility of counter argumentation because nothing can be argued against this claim. Because of the powerfulness of the nonexistence answer, the Inter American Court of Human Rights (IACHR) ruled, on several occasions, that the declaration of nonexistence is not sufficient to deny an information request. To legitimize this response, a public agency must prove that it has previously conducted all possible diligence procedures to produce the information requested and that it was not obtained despite that.

The Court has made this decision on several occasions, including in a case that discussed the responsibility of the Brazilian State for promoting the forced disappearance of anti-dictatorship activists in the *Araguaia* region in the 1970s.[56] After acknowledging that

53 Decision 2336, 07/31/2015, appeal 09200.000284/2015-47.

54 This definition appears for the first time in the Guideline "Enforcement of Right to Information at the CGU", published in August 2015 (available at http://www.acessoainformacao.gov.br/central-de-conteudo/publicacoes/arquivos/aplicacao-da-lai-em-recursos-a-cgu.pdf), and was thereafter used in several decisions, such as Decision no. 4220, 04/13/2017, appeal no. 00077.001165/2016-81.

55 Decision 2302, 07/29/2015, appeal 99908.000226/2015-49.

56 *Inter American Court of Human Rights* (IACHR), Gomes-Lund et al. (Guerrilha do Araguaia) v. Brazil, November 2010.

these crimes did indeed occur, the Court affirmed that access to information could be one of the few possible ways to repair them. During the trial, Brazil alleged that it had taken all possible steps to enforce the victims' RTI, especially the creation of a task force to coordinate the search for the remains of those killed in the *Araguaia* region and the publication of a report entitled "Right to Memory and Right to Truth". The Court, however, found that these actions were not sufficient to authorize the denial of information. It ruled that Brazil had a duty to do everything within its power to produce the information, and convicted the country for failing to do so, urging it to "adopt legislative and administrative measures, and any other measures necessary to strengthen the normative framework of access to information, pursuant to the Inter-American standards for the protection of human rights."[57]

By requiring public agencies to prove that they have done everything within their power to produce the information requested, the Court aimed at limiting the overuse of the "nonexistence" response. Nevertheless, the CGU and the CMRI have not strictly complied with this ruling. The CGU has accepted allegations of nonexistence as sufficient to deny information requests.[58] After several similar decisions, the CMRI, which has the authority to edit binding normative statements on how to interpret RTI provisions, stated in normative statement no. 6 that the declaration of nonexistence of a piece of information is sufficient for denying a request for information. The normative statement goes on to determine that the nonexistence response can trigger a search request by the CGU or the CMRI, if they decide to do so, as well as to establish penalties on civil servants who untruthfully claim that a piece of information does not exist.

Despite these mitigations, the CMRI has inverted the logic of the IACHR's decision: according to the latter, public agencies must firstly do all they can to find the information requested, and only after that, can they claim its nonexistence. According to the former, public agencies can first affirm that the information does not exist and then wait for a search request, if and when the CGU or the CMRI decide to request it. The adoption of a repressive approach instead of a preventive one could be interpreted as an institutional incentive for agencies not to search for information since it is easier to wait for the CGU or the CMRI to demand a search (which might not occur) than to do it proactively. This case shows some of the problems related to the combination of a high degree of discretionary power and lack of mechanisms that could mitigate the overuse of such power. The RTI law itself in no way goes against the ruling of the IACHR, but in practice the CGU and the CMRI argue that a claim of nonexistence is sufficient to deny a request. Executive agencies tend to follow the CGU and the CMRI's lead and therefore ignore the Court's ruling, which is more distant and less accessible for public agencies to grasp. Said differently, the CMRI's normative statement has had a more widespread impact than the Court's ruling, in the sense that it has been reproduced and quoted by lower agencies more often. The Court's decision lacks enforcement within Brazil's administrative structure. Since public agencies have a di-

57 IACHR, 2010, note 57, paragraph 293.

58 Decision 2618, 07/14/2016, appeal 00077.000318/2016-72.

rect hierarchical relation to the CGU and the CMRI in terms of information access, they tend to rely on them for instructions on how to interpret laws, and not on the IACHR.

When the procedural safeguards are overcome, the requester still must convince public agencies that the information requested does not fall under any of the secrecy categories that are expressly allowed by the RTI law. This can be a difficult task, especially because the RTI system design creates an asymmetry of power between the citizen requesting information and the agencies that respond to it.

III. Exclusions at the substantive level

According to the RTI law, there are only three categories of exclusion from the transparency rule. Only personal information, information that could harm state or societal security and "legal secrets" (information protected by another law) can be withheld. Narrowing the possibilities of secrecy to only three categories was an attempt to limit the sovereign power of state agencies to exclude situations from the transparency rule. Nevertheless, these three categories of exclusion hinder citizens' participation in the process of requesting and having public information released to them, hampering its potential to become an effective accountability tool.

1. Classified information

According to the law, information "indispensable to the state or societal security" can be classified as reserved, secret or top secret – in these situations its access can be restricted for up to five, fifteen or 25 years, respectively. Top secret information can have its deadline extended for a further 25. When a document is classified, citizens have only one tool for holding public officials accountable at the administrative level: the declassification request, which can be presented to the authority that classified it.[59] This request is nonetheless a fragile tool, especially because the act of classifying information encompasses the reasons for classifying it.[60] Therefore, someone interested in obtaining access to classified information must file a declassification request without knowing what the information is and why it was classified. Under these circumstances, it becomes excessively difficult to build an argument against the declassification. Therefore, Brazil's RTI law did not eliminate the common problem of the deep secrets, which has already been vastly addressed by RTI literature.[61]

59 Formally, RTI law distinguishes an information request from a declassification request. In practice, they operate similarly, through the same online portal. The main difference between the two is that the declassification request has fewer appellate levels: if the classifying authority denies it, the requester can file an appeal to the CGU and then to the CMRI.

60 Art. 19, 1st section, Executive Order 7.724/2012.

61 *Steven Aftergood,* Reducing Government Secrecy: Finding What Works, Yale Law & Policy Review 27 (2009), p. 399; *Steven Aftergood,* National Security Secrecy: How the Limits Change, Social Research 77 (2010), p. 839; *David Pozen,* Deep Secrecy, Stanford Law Review 62 (2010), p. 257.

The point is that the RTI law created a system in which executive officials can classify information without being effectively checked because the classification decision cannot be concretely or directly monitored by the public, which might be interpreted as a contradiction in terms of democratic theory. The people, as the original holders of sovereignty, have no direct say in the decision-making process of classified information. Deep secrets cannot coexist in a democratic system because "a popular decision authorizing the president to keep deep secrets would not suffice to legitimate the practice, as it would license him to violate norms that are themselves constitutive of democratic rule."[62] This argument is related to the distinction between popular sovereignty and democracy noted by Waldron.[63] According to him, the existence of a sovereign decision made by the people does not make its outcome democratic. The fact that the public sovereignly authorized public officials to create deep secrets does not make it a democratic one: on the contrary, this decision is based on the idea that a small elite group of state officials is better suited to make decisions than the public.

2. Legal secrets

Besides allowing the classification of information, Brazil's RTI law licenses the creation of abstract categories of secrets, so long as they are stipulated by law. This authorization poses two problems. First, legal secrets are numerous, especially because the RTI law not only authorized the creation of future secrets, but also validated the ones that were priorly in force. Some of the most used legal secrets in force today are bank secrecy, fiscal secrecy, communications secrecy, intelligence activity secrecy, industrial secrecy, professional secrecy, judicial secrecy, plea-bargaining secrecy, among others.[64] There are also situations of questionable legality, such as the secrecy of the disciplinary administrative proceeding against legal, which was not created by a law but rather by an Executive Order.

The second problem concerning legal secrets is the technical complexity related to many of them. Take, for instance, bank secrecy, which according to Complementary Law 105/2001, means that "financial institutions shall hold in secret its active and passive operations, as well as the services that they have executed". This legal provision has a clear application when it refers to strictly private relations. But there are in Brazil at least three large state-owned banks. One of them, the *BNDES* (the National Development Bank) is amongst the biggest investment banks in the world. It often subsidies national companies by making loans with interest rates below the official inflation rate. When these financial operations take place, public resources are being used as investments in given sectors of the

62 *Pozen*, 2010, note 62, p. 291.

63 *Jeremy Waldron,* Precommitment and Disagreement, in: Larry Alexander (ed.), Constitutionalism: Philosophical Foundations, Cambridge 1998, p. 271.

64 For a more detailed discussion about the exceptions on the RTI law and how they work in practice, see *Marcio Cunha Filho/Vitor César Xavier,* Lei de Acesso à Informação: teoria e prática, Rio de Janeiro 2014.

national economy. To what extent should the concept of bank secrecy be applied to these situations? After all, the spending of public resources should be fully disclosed according to the RTI regime. Does the legal concept of bank secrecy encompass only private financial operations, or can it be extended to public ones?

This is an example of a complex technical discussion in which the state has a clear advantage *vis-à-vis* ordinary citizens requesting information: many federal agencies in Brazil have not only highly qualified civil servants, but also a team of public attorneys highly specialized in administrative and judicial adjudication. The complexity of these issues puts on opposite sides a citizen interested in obtaining public information and a group of highly specialized public officials who have greater resources and technical knowledge to argue the need for withholding information, if they chose to do so. This is a case where the very architecture of the procedure favors one of the parties, which tends to create results that will strengthen this party even further in the long run, in a situation equivalent to that described by *Galanter* when he analyzes the asymmetry between repeat players and single shooters in judicial litigations.[65] State actors have more resources, personnel, time and expertise to advance their interpretations of the law, which only curtails the ability of citizens to force government officials to disclose information. Even if the requester is an NGO, this asymmetry still stands since an NGO hardly has the same resources as state agencies.[66]

Despite this asymmetry, the CGU has created a pro-transparency interpretation in important cases. When discussing the ambiguity of the law that regulates the secrecy of the use of government corporate credit cards, the CGU concluded that it does not automatically establish a legal secret, but only allows classification of the information if government officials conclude that it is sensitive. In other words, the CGU stated that government spending via corporate credit cards is not automatically secret.[67] This case is a relevant example of the CGU checking the use of legal secrets. Nevertheless, the decision was not the result of bottom-up pressure from civil society, but rather the result of the action by CGU's personnel; it did not happen because of the normative framework regarding legal secrets but despite it.

65 *Marc Galanter,* Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change, Law & Society Review 9 (1974), p. 95.

66 One of the most active NGOs in terms of making information requests in Brazil has been Conectas. On its website (http://www.conectas.org/pt/acoes/justica/lei-de-acesso-a-informacao), it lists the main information request it has presented to the federal government, as well as to the state government of São Paulo, such as the request for information regarding public funding by the BNDES (appeal no. 99903.000361/2015-34), the request for information regarding details about the decision-making process regarding Brazil's votes at the Council of Human Rights (appeal 09200.000103/2015-82), and the information request related to audit reports elaborated by the International IBAS Fund (09200000196201383).

67 Decision 2408, 09/23/2013, appeal 00077.000026/2013-97.

3. Personal Information

Public agencies can deny information requests when disclosure could affect "intimacy, personal life, honor and image, as well as individual liberties and guarantees" (RTI law, art. 31). Information that could damage the privacy of a third party can be withheld with no prior legal or administrative procedure: in these cases, the sole allegation of the public agency suffices as a response. Some authors, nevertheless, have challenged the assumption that withholding personal information will necessarily protect intimacy and privacy. *Diniz* reverses this mainstream argument to uphold that, in some situations, protecting someone requires the exact opposite, that is, disclosing personal information.[68] Studying the case of a woman who had been incarcerated at a mental institution for over 40 years (beyond, therefore, the maximum time allowed by Brazilian legislation), she argues that disclosing her personal information would be the only possible way to protect her – to keep her name in the shadows would only warrant the continuity of the abusive incarceration imposed upon her. According to her, "transparency of the state punitive laws must prevail over secrecy measures regarding access to personal information."[69]

The point is that protecting personal information could be a double-edged sword: it can be used not only to protect citizens' privacy, but also to protect state officials from disclosing information related to wrongdoings or misdemeanors. For instance, when denying access to the names of the civil servants that had had access to the claimant's tax declaration, the CGU responded that the public interest in knowing their names did not overcome the civil servant's private interest in keeping their names secret. This could be an example of state officials trying to protect themselves rather than the privacy of third parties. Nevertheless, the CGU has refrained from using the "personal information" argument to protect state officials on several occasions. It has granted access to information about compensatory fees of *Caixa Economica Federal's* employees, denying the use of personal privacy as an argument for withholding the information.[70] It has also granted access about the average salary of civil servants in a state-owned company,[71] amongst others. Analyzing a case that requested the disclosure of personal letters by Mario de Andrade, an important writer and activist in the 1920's, *Chagas* argues that the CGU correctly ordered the disclosure of the letters because there was a "public interest override" in the case: the public interest in knowing their content was greater than the personal interest of Andrade's relatives in keeping them secret. [72]

68 *Débora Diniz,* Ela, Zefinha: o nome do abandono, Ciência & Saúde Coletiva 20 (2015), p. 2667.

69 *Diniz,* 2015, note 68, p. 2670.

70 Decision 4401, 12/21/2015, appeal 99902.003841/2015-67.

71 Decision 4296, 04/18/2017, appeal 99908.000013/2017-89. Here the CGU did not grant access to the individual salaries of the employees of the state-owned company, but only demanded it to inform the average salary, as well as the highest and the lowest.

72 *Cláudia Chagas,* O dilema entre o acesso à informação e intimidade, Rio de Janeiro 2017.

D. The role of the Supreme Court

In many countries, difficult controversies regarding RTI are eventually ruled on by the Supreme Court. The vagueness of RTI law's provisions and the sensibility of many transparency issues provide courts with an opportunity to play a relevant role in defining the extent of the transparency rule, and to curb abuses by the executive branch. One could imagine that this would be the case in Brazil, where the *Supremo Tribunal Federal* (STF) has been a relevant actor in the country's political system.[73] In terms of RTI, nevertheless, few controversies have so far reached the Court. Research on STF's website[74] with the keywords "*Lei de Acesso à Informação"* (RTI law) and "12,527" (the law's number) reveals only 32 cases in which the law was the center of a ruling by the Court between May 2012 (when the law when into force) and May 2017. This number is small compared to the thousands of cases ruled yearly by the Court. In addition, these cases discussed a limited range of issues. Twenty-two out of the 32 cases debated the disclosure of individual salaries of civil servants. Most of these cases were initiated by civil servants' unions who aimed at striking down administrative decisions that ordered the personalized disclosure of their salaries. The limited number of cases and their limited scope is impressive considering the many ways demands could reach the Court: CGU's and CMRI's administrative decisions are not final and could be challenged in courts and eventually in the STF; in fact, in Brazil judicial lawsuits can be presented directly to the judiciary with no prior need of filing administrative requests.[75]

The cases ruled by the STF regarding disclosure of individualized salaries had different plaintiffs, such as the Union of Civil Servants of the Federal Judiciary,[76] the Union of the Penitentiary Officers of the Federal District,[77] the Union of the Civil Servants of the Federal Judiciary in the state of Rio de Janeiro,[78] the National Association of Notaries,[79] the

73 Literature on judicial politics in Brazil is extensive and will not be reviewed here. I shall only state that most scholars affirm that the Supreme Court has become a relevant political actor, especially since the enactment of the 1988 Constitution. One of the reasons is that the Constitution permitted several actors to initiate unconstitutionality actions, allowing them direct access to the Court. Therefore, the court has become a relevant political actor not only in terms of number of cases ruled, but also because of the salience of issues that it rules. For an overview discussion on the literature regarding the STF, see *Luciano da Ros,* Em que ponto estamos? Agendas de Pesquisa sobre o Supremo Tribunal Federal no Brasil e nos Estados Unidos, in: Fabiano Engelmann (Org.). Sociologia Política das Instituições Judiciais, Porto Alegre 2017, p. 57.

74 http://portal.stf.jus.br/ (last accessed 21.12.2017).

75 There are a few exceptions to this rule. To file an *Habeas Data,* a lawsuit that aims at obtaining personal information in possession of state agencies, one must first file an administrative request. The *Habeas Data,* however, is not the only judicial instrument through which it is possible to request information from state agencies.

76 Rcl 14733 RS, ruled on Nov 20th, 2012.

77 SS 4661 DF, ruled on September 20th, 2012.

78 Rcl 14530 RJ, ruled on Nov 14th, 2012.

79 AI 1874, ruled on November 17th, 2014, and MC AO 1874 DF, ruled on June 30th, 2014.

National Association of state Magistrates.[80] In all of them, the petitioner argued that disclosing personalized salary information would harm their intimacy and privacy, and in all of them the STF rejected this claim and ruled that civil servants' salaries is information of public interest, and therefore can be lawfully disclosed. In other cases, the STF has often (albeit not always) ruled in favor of transparency. For instance, in a Direct Unconstitutionality Action,[81] the Governor of the State of Paraíba requested the Court to strike down a federal law that authorized the Federal Account Court to create a website to disclose fiscal information about Brazil's states. The STF denied the request, arguing that the law did not represent a breach in the federative principle, and that it was grounded in the principle of full disclosure, and therefore was constitutional. In the situations in which the transparency rule was not favored, most times that happened due to the non-fulfillment of procedural requirements.[82] [83]

Considering these decisions, one could hardly argue that the Court is unwilling to advance transparency or to enforce the RTI law. A broader study by Article 19 about how Brazilian high courts have interpreted the RTI law confirms this hypothesis. Analyzing 250 cases tried by two high courts (including the STF) and three regional courts, the study concludes that approximately 80% of the cases were ruled in favor of transparency.[84] Nevertheless, it seems that so far the only plaintiffs that have brought RTI cases to the STF are not human rights activists or people interested in limiting state secrecy: rather, they are for the most part civil servants or unions of civil servants preoccupied with the protection of their own privacy and with the continuity of a certain secrecy standard. Rather than using judicial litigation to expand the content of the RTI, they have engaged in a kind of reverse activism, aiming at curbing its scope of application. The absence of inputs by civil society actors has restrained the Court from being more active in this particular subject, putting it in a position in which maintaining the *status quo* is the most it can do. In this sense, *Calland* and *Neuman* posit that private citizens, media outlets and community organizations must be co-responsible in the process of implementing RTI laws – when these actors pressure political institutions, they can promote changes and challenge long-standing assumptions about government secrecy, allowing new interpretations to gain strength. But when they are absent, it is less likely that these changes will occur. This might indicate that the full imple-

80 AO 1823 MG, ruled on October 14th, 2013.

81 ADI 2198 PB, ruled on August 18th, 2013.

82 Rcl 11949, ruled on March 14th, 2014.

83 Other cases in which the STF ruled in favor of disclosing documents: MS MC 34568 (2017), in which it ordered the disclosure of technical studies maybe by *Caixa Econômica Federal;* and Rcl 22555 (2016), in which it ordered the disclosure of an investigative procedure.

84 Article 19. A Lei de Acesso à Informação nos Tribunais Brasileiros. 2017.

mentation of RTI laws depends not exclusively on state agencies, but also on the pressure by civil society, which place relevant issues onto the judicial agenda. [85]

E. Conclusions

I have argued that Brazil's RTI law's provisions aimed at promoting transparency are limited by three mechanisms of control of information: the structure of the procedure to access information, the procedural safeguards for requesting information, and the substantive exceptions. Together, they create institutional incentives for withholding salient information: high-level political appointees are unlikely to release information that could harm the government since they have normative justifications to do so and their decisions are unchecked by external agencies. The Supreme Court, which could play an important role in defining legal concepts related to the RTI law and in limiting the overuse of power by public officials, has remained relatively absent from these disputes.

Despite these factors, in several important cases the CGU managed to advance transparency in situations in which secrecy would be defensible from a legal point of view. When the CGU decided to disclose salary information of state-owned companies' employees, or when it limited the usage of vague legal provisions such as "underspecified" or decided that a law does not automatically allow information to be withheld, it tensioned the controlled transparency designed by the normative framework. Said differently, the CGU is promoting a kind of change that, according to *Taylor* and *Praça*, is common in Brazilian bureaucracy: a gradual and incremental change, one that is often kept "under the radar" of politicians and lawmakers.[86] Therefore, by no means is the role of the CGU in the process of information disclosure insignificant. On the contrary, the agency has managed to be active in its role of overruling nondisclosure decisions made by lower agencies. But what are the contexts and the conditions that allow the CGU to overrule decisions made by other agencies? Does the information revealed by the CGU at the appeal level advances a clear or opaque kind of transparency according to *Fox's* definition?[87] Are these overruling decisions evenly distributed across the executive branch agencies, or are there agencies that have not been subjected to reversal decisions? Has the RTI law produced tangible impacts and effects in public policy? The variations in the enforcement of the law are some of the questions that future research could address.

If they confirm that the CGU has played a significant role in the RTI system, further studies could also investigate which factors have contributed to this. One possible factor to be investigated is the role played by the agency's highly professionalized and qualified bu-

85 *Richard Calland /Laura Neuman,* Making the Access to Information Law Work: The Challenges of Implementation, in: Ann Florini (Ed.), The Right to Know: Transparency for an Open World, New York 2007, p. 179.

86 *Matthew Taylor/Sérgio Praça.* Inching Toward Accountability: The Evolution of Brazil's Anticorruption Institutions, 1985–2010, Latin American Politics and Society 56 (2014), p. 27.

87 *Fox,* 2007, note 5.

reaucracy in the process of granting access to information: even though CGU's federal auditors do not have decision-making power, they possess technical skills that could convince or pressure decision-makers to grant access to information in the appeals process. This hypothesis should be considered, especially because previous studies have argued that the CGU's bureaucracy, when compared to other agencies in Brazil's executive branch, has had a high degree of autonomy and capacity and a lower level of partisan dominance.[88]After all, although rules and institutions are important and do influence people's course of action, "human conduct may in no way be assimilated to mechanical obedience or to the pressure of structural givens."[89] My analysis therefore does not intend to suggest a deterministic approach: the fact that institutions are operated by individuals means that they can and often are used for purposes different than those they were designed to achieve. Said differently, although the RTI normative framework creates institutional incentives for withholding information, individuals are never fully constrained by institutions and rules and can promote transparency despite that.

At the CMRI level, the empirical data seems less promising. Between the years 2012 and 2017, it granted access to information in zero, one, six, fourteen, five and zero cases, respectively. That is equivalent to 0%, 0.5%, 2%, 3.4%, 2%, 0,7% and 0% of the cases ruled in each of those years.[90] As a commission, the CMRI does not have a professionalized bureaucracy working full time on its behalf, which may be a factor that contributes to the lower amount of pro-transparency interventions *vis-à-vis* the CGU. But it remains to be examined whether the existence of an independent oversight agency is the solution for issues related to information access. Mexico, which counts on a strong and independent (at least *de jure)* access to information oversight agency,[91] has faced threats of political interference in the implementation of its RTI law.[92] On the other hand, in the United States the Interagency Security Classification Appeals Panel (ISCAP), which as Brazil's CMRI is composed exclusively of executive branch officials, has declassified over half of the information presented to it since 1996: according to *Aftergood*, "the ISCAP has proved to be an exceptionally independent and effective check on individual executive branch agency clas-

88 *Matthew Taylor/Sérgio Praça/Katherine Bersch*, State Capacity, Bureaucratic Politicization, and Corruption, Governance 30 (2017), p. 105.

89 *Michael Crozier/Erhard Friedberg,* Actors and System, The Politics of Collective Action, Chicago/London 1977, p. 19.

90 The CMRI was installed in November 2012, so few cases were ruled that year. Besides that, at the time this paper was finished, there was data available only until September 2017.

91 The Federal Institute for Access to Public Information and Data Protection (in Spanish, INAI) is an autonomous body whose *Pleno* is composed of 7 officials named by the Senate. Once named, these officials cannot be removed from office before the expiration of their terms, which theoretically increases their autonomy.

92 *Irma Eréndira Sandoval,* Transparency under dispute: public relations, bureaucracy and democracy in Mexico, in: Padideh Ala'I/Robert Vaughn*,* Research Handbook on Transparency, Cheltenham and Northhampton, 2014, p. 157.

sification practices."[93] So other factors, besides the hierarchical structure and formal rules, matter and should be investigated.

93 Aftergood, note 61, p. 407.