

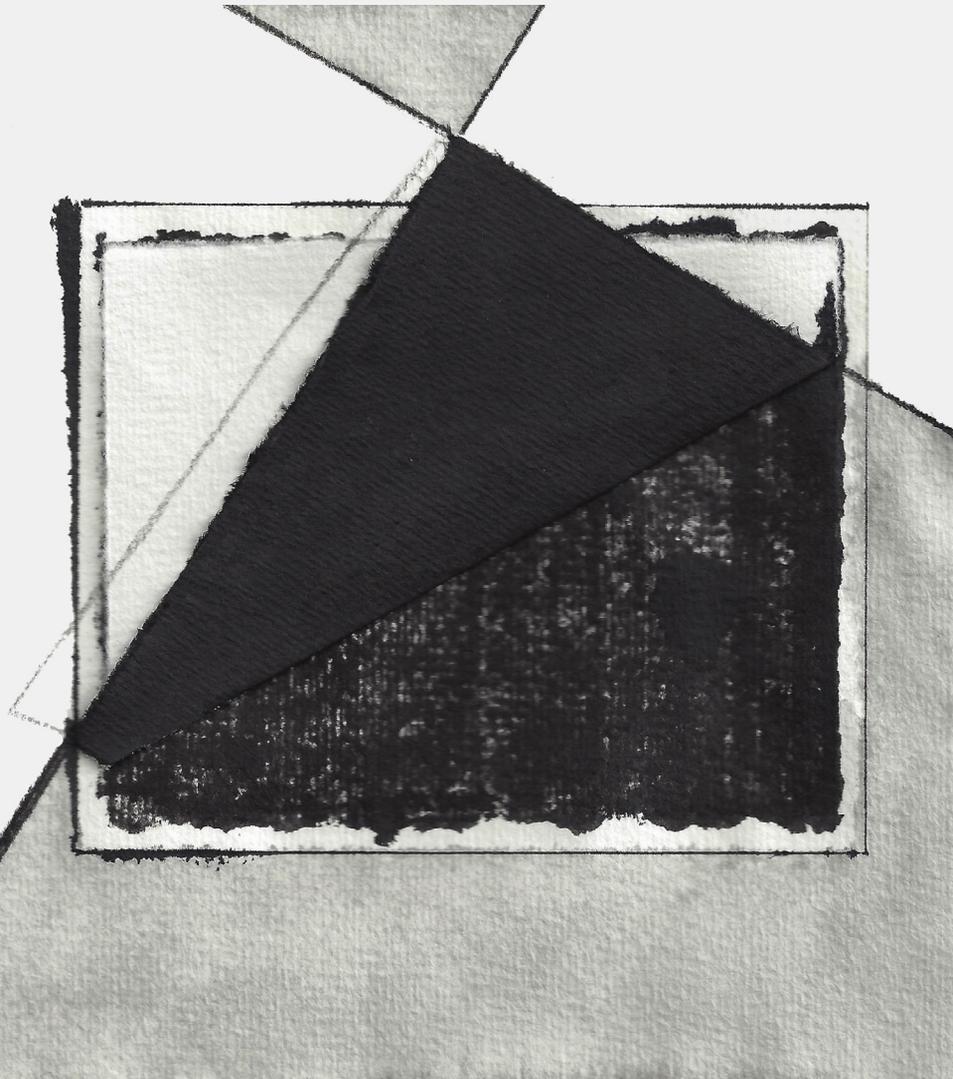
Gregory Michener, Luiz Fernando Marrey Moncau and Rafael Velasco

# The Brazilian State and Transparency

Evaluating Compliance with Freedom of Information



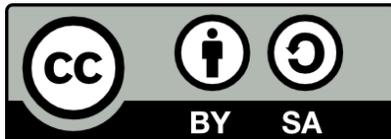
Transparency Audit  
Network



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Graphic Design: **Felipe Labouriau**

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**Gregory Michener**

Associate Professor, EBAPE<sup>1</sup>/FGV<sup>2</sup>

Director, Program for Public Transparency (PTP)<sup>3</sup>, FGV

**Luiz Fernando Marrey Moncau**

Manager

Center for Technology and Society (Centro de Tecnologia e Sociedade)<sup>4</sup>, FGV DIREITO RIO<sup>5</sup>

**Rafael Velasco**

Program Coordinator

Program for Public Transparency, FGV

<sup>1</sup>Brazilian School of Public and Business Administration or Escola Brasileira de Administração Pública e de Empresas.

<sup>2</sup>Getulio Vargas Foundation or Fundação Getulio Vargas.

<sup>3</sup>Public Transparency Program.

<sup>4</sup>Center for Technology and Society.

<sup>5</sup>Getulio Vargas Foundation Law School, Rio de Janeiro.

# Table of Contents

## **14 EXECUTIVE SUMMARY**

## **21 INTRODUCTION**

## **26 Chapter 1 – METHODOLOGY**

### 26 1. General Audit

29 1.1 Setting up the field experiment; user identities to test for bias

### 30 2. The Judicial Branch Audit

### 31 3. Preparations; procedural rules to ensure realistic responses

### 32 4. Metrics

32 4.1 Defining what constitutes a response

33 4.2 Evaluating response accuracy rates

33 4.2.1 Accuracy evaluation criteria

33 4.2.2 Double coding of responses

34 4.2.3 Testing the reliability of double coding

36 4.3 Timeliness of responses

## **37 Part 1 – GENERAL AUDIT**

## **37 Chapter 2 – RESULTS**

### 37 1. Introduction

### 37 2. Aggregate analysis

38 2.1 Jurisdictional level analysis

44 2.2 Analysis by branch of government

### 50 3. The field experiment; user identities and question groups

51 3.1 Results; descriptive statistics

53 3.2 Statistical tests

### 55 4. Conclusions

### 56 5. Appeals; their place in the study



Click on the number to go to the specific page

56 5.1 Introduction; background and procedure

57 5.2. Successful appeals; overturning unsatisfactory responses

### **59 Chapter 3 – BEST PRACTICES AND BARRIERS TO TRANSPARENCY**

59 1. Introduction

59 2. Best practices

60 3. Barriers to Public Transparency

61 3.1 Requirements that the request be submitted or retrieved in person

63 3.2 Rejection of the request based on a broad interpretation of the “undue additional work” clause

65 3.3 Transmitting information in formats not processable by computers

67 3.4 Aggregation of information in a pattern different from the original request

67 3.5 Implementation of potentially intimidating procedures

### **69 Chapter 4 – AUDIT OF THE PLATFORMS USED TO MANAGE FOI REQUESTS**

69 1. Introduction

69 2. Information access barriers: a lack of compliant digital platforms

70 2.1 Impossibility of filing an appeal

70 2.2 Character limits

70 3. Evaluation of digital platforms

71 3.1 Methodology of evaluation; what constitutes a good FOI digital platform?

71 3.2 Submission of a confirmation email

- 72 3.3 Submission of a notification of response
- 72 3.4 Availability of a specific section for filing appeals
- 72 3.5 Use of log-in procedure instead of confirmation/protocol numbers
- 72 3.6 Summary
- 73 4. Comparative analysis of digital platforms
- 75 5. Conclusions

## **76 Part 2 – JUDICIAL BRANCH AUDIT**

### **78 Chapter 5 – RESULTS**

- 78 1. Methodology
  - 78 1.1 Audit coverage
  - 79 1.2 Development and submission of requests
  - 79 1.3 Topics of requests
  - 87 1.4 User identities: simulating the request process
  - 88 1.5 Submission of requests
  - 88 1.6 Appeals
  - 89 1.7 Field experiment; testing responses to justified vs. non-justified requests
- 90 2. Results
  - 91 2.1 Results by request category
    - 91 Request Category 1
    - 94 Request Category 2
    - 96 Request Category 3
    - 98 Request Category 4
    - 99 Request Category 5
    - 101 Request Category 6
    - 103 Request Category 7
  - 105 2.2 Detailed results
  - 107 2.3 Analysis of the courts

**110 Chapter 6 – BARRIERS TO TRANSPARENCY AND ACCESS**

111 1. Bureaucratic barriers

113 2. Legal and regulatory barriers, and misuse of exemptions

113 2.1 Excessively broad interpretation of exemptions

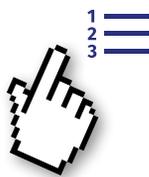
114 2.1.1 Disproportionate or unreasonable requests

115 2.1.2 Generic requests or requests requiring additional work

116 2.2 Misinterpretation of exceptions; – active transparency and the format of documents

117 2.2.1 Requests for information already available in active transparency platforms

119 2.2.2 Questions regarding data format

**123 Chapter 7 – EVALUATING THE PLATFORMS USED****125 CONCLUSION****133 REFERENCES**

Click on this link at  
the top of any page  
to go back to the  
Table of Contents

# Index of figures

- 38 **Figure 1** – Results of aggregate analysis
- 38 **Figure 2** – Aggregate analysis of average response time
- 39 **Figure 3** – Federal level results
- 39 **Figure 4** – Average response time at the federal level
- 40 **Figure 5** – State level results
- 41 **Figure 6** – Average response time at the state level
- 42 **Figure 7** – Municipal level results
- 43 **Figure 8** – Average response time at the municipal level
- 44 **Figure 9** – Results by government branch
- 45 **Figure 10** – Average response time by government branch
- 46 **Figure 11** – Analysis of Executive branches by jurisdictional level: States and Federal Government
- 47 **Figure 12** – Average response time of executive branches by jurisdictional level: States and Federal Government
- 48 **Figure 13** – Analysis of Executive branches by jurisdictional level: municipalities and federal Government
- 49 **Figure 14** – Average response time of Executive branches by jurisdictional level: Municipalities and Federal Government
- 51 **Figure 15** – Field experiment results
- 52 **Figure 16** – Average response time for field experiment
- 91 **Figure 17** – Aggregate analysis results of Judicial Branch Audit
- 92 **Figure 18** – Results of request category one
- 93 **Figure 19** – Average response time for request category one
- 94 **Figure 20** – Results of request category two
- 95 **Figure 21** – Average response time for request category two
- 96 **Figure 22** – Results of request category three
- 97 **Figure 23** – Average response time for request category three
- 98 **Figure 24** – Results of request category four



Click on number  
to go to the  
specific figure

- 99 **Figure 25** – Average response time for request category four
- 100 **Figure 26** – Results of request category five
- 100 **Figure 27** – Average response time for request category five
- 101 **Figure 28** – Results of request category six
- 102 **Figure 29** – Average response time for request category six
- 103 **Figure 30** – Results of request category seven
- 104 **Figure 31** – Average response time for request category seven
- 105 **Figure 32** – Field experiment results: response and accuracy rates
- 106 **Figure 33** – Field experiment results: average response time

## Index of tables

- 27 **Table 1** – Subjects of requests and number of submissions for each request
- 35 **Table 2** – *Kappa* scores scale
- 35 **Table 3** – *Kappa* score of the General Audit
- 36 **Table 4** – *Kappa* score of the Judicial Branch Audit
- 50 **Table 5** – Distribution of requests user identities
- 51 **Table 6** – Distribution of requests between institutional and non-institutional identity users
- 53 **Table 7** – Chi-square test for differences in response rate
- 54 **Table 8** – Chi-square test of differences in accuracy rate
- 54 **Table 9** – T-test of differences in average response time
- 55 **Table 10** – Results of hypothesis testing
- 73 **Table 11** – Platform avaluation
- 79 **Table 12** – Number of Audited Courts
- 80 **Table 13** – Requests of the Judicial Branch Audit
- 88 **Table 14** – Requests by identity
- 90 **Table 15** – Courts by group
- 108 **Table 16** – Court ranking



Click on number  
to go to the  
specific table

## Executive Summary

In 2011, Brazil became the 13th country in Latin America and 91st in the world to grant its citizens specific mechanisms to guarantee the right to public information. Law 12.527, Brazil's new Freedom of Information (FOI) law went into effect in May 2012<sup>6</sup>. It regulates several provisions in the Federal Constitution, including section XXXIII of article 5 and article 37 section II §3. The FOI law applies to all branches and levels of government, including state owned companies and banks, among other entities.

### Research Questions

Are Brazilian public institutions complying with the Freedom of Information Law?

What does the level of Compliance tell us about the need for greater commitments, reforms and better practices?

Freedom of information is a fundamental right and recognized as 'the oxygen of democracy'<sup>7</sup>. Likewise, government transparency helps professionalize the public administration and consolidate a rule of law based on accountability and democratic openness.

Despite the importance of transparency, compliance with transparency statutes is extremely onerous in political terms. Within this context, this study assesses the degree of compliance with freedom of information in Brazil, examining commitments to passive transparency – responses to requests for information. Additionally, the research evaluates the procedures that citizens must follow in requesting information.

For an entire year, the Public Transparency Program (PTP) at the Getulio Vargas Foundation's Brazilian School of Public and Business Administration (EBAPE)<sup>8</sup> as well as the Center for Technology and Society (CTS)<sup>9</sup> at the Law School of Rio de Janeiro (FGV DIREITO RIO)<sup>10</sup>, conducted two transparency audits using a simulated user methodology. More than 700 FOI requests were sent to almost 170 public enti-

ties from all three government branches and all levels of government; federal, state, and municipal.

The first objective of the audit was to verify whether public entities are responding to FOI requests, and whether responses (i) comply with stipulated timeframes and (ii) accurately respond to requests. The study also sought to understand whether public entities are complying with general norms of non-discrimination when providing access to information. In other words, whether public entities' responses to information requests varied based on who submitted, and how the request was placed. Finally, the audit aimed to assess the existence and quality of digital platforms provided so that citizens might access public information in a simple manner, using a single platform to make requests and appeals, as well as to receive responses.

## Report Outline

This report is divided into two parts. The first presents what is referred to as 'the General Audit', in which more than 450 FOI requests were submitted to the three branches of government in eight jurisdictions at the federal, state, and municipal levels, as well as state enterprises and constitutionally autonomous institutions. The second part of the report is referred to as 'the Judicial Branch Audit', which consists of a specific analysis of the Brazilian Judicial Branch. This audit involved over 260 FOI requests sent out to more than 40 tribunals.

## Methodology

The General Audit as well as the Judicial Branch Audit used the same methodology, which was developed with the goal of being easily understood and replicated by other institutions or persons interested in analyzing the level of government compliance with FOI laws.

<sup>6</sup>Portuguese the law is known as 'Lei de Acesso à Informação' or LAI.

<sup>7</sup>Phrase from the non-governmental organization Article 19.

<sup>8</sup>Programa de Transparência Pública, Escola Brasileira de Administração Pública e de Empresas.

<sup>9</sup>Centro de Tecnologia e Sociedade.

<sup>10</sup>FGV - Fundação Getulio Vargas.

The methodology was developed in collaboration with numerous professors and researchers from FGV's EBAPE and FGV DIREITO RIO, and was based on an extensive review and analysis of audits in other countries. As will be shown in Chapter 1, our methodology used three straightforward metrics: response rate, accuracy rate, and average response time. The response rate consisted of the proportion of requests responded to, by a particular entity. The accuracy rate measured the proportion of requests that were answered with relevant responses. The average response rate calculated the number of days between the date the request was submitted and the date of response by the various entities. All these metrics are indicators of the institutional commitment to compliance with freedom of information norms.

## **Part I – General Audit**

A total of 453 FOI requests were submitted based on 55 different questions, targeted at 133 public entities across the three branches of government in eight jurisdictions. The jurisdictions included the Federal Government, the Federal District, and the states of Minas Gerais, Rio de Janeiro and São Paulo, as well as their respective capitals: Belo Horizonte, Rio de Janeiro and São Paulo.

The overall objective of the audit was to provide an overview of the practical workings of Law 12.527/11. Three main thematic topic areas, all relevant to Brazil's current public policy challenges, were selected as the basis for requests: (i) governance and watchdog institutions; (ii) public participation and human rights; and (iii) socioeconomic rights. The General Audit was exploratory in character, employing a wide diversity of requests as a means of gauging the general responsiveness of governmental entities, the application of the law and, consequently, governmental commitments to transparency.

Of 453 requests, some 322 were submitted by four volunteers, who formed two groups or user identities, each one comprised of a male and a female. Requests were divided into two groups, one of institutional user identities; and the other of non-institutional user identities. The former was composed of researchers from the FGV – a fact that could be easily verified through a search of the person's name on the Internet. The volunteers with non-institutional identities had no trace

of their names on the Internet, and could therefore not be associated with any institution. Based on discussions with public administrators responsible for FOI requests, FGV researchers inferred that governmental authorities often use Internet searches of requesters to identify details about the person making the request. This practice creates an opportunity to consciously or unconsciously discriminate in the provision of a public service. It was our objective to assess the extent of discrimination through a field experiment.

As will be explained in Chapter 2, the findings of the General Audit show a moderate to low rate of compliance with Law 12.527/11, however the results vary widely across the various jurisdictions analyzed. The overall response rate was 69%, the overall accuracy rate, 57%, and the average response time was 21 days. Despite being slightly higher than the response period of 20 days established by the FOI law, the average response rate is within the statutory maximum limit of 30 days applicable to cases with justifiable time extensions.

In summary, the data suggests that the audited jurisdictions do not respond to one out of three FOI requests received, and slightly more than half of the requests receive responses that meet the minimum accuracy threshold.

It is important to note that we find wide variations in the degree of compliance with the law across eight jurisdictions in the study. The state of Rio de Janeiro and the municipality of Rio de Janeiro exhibit an alarmingly low rate of compliance, with response rates of 27% and 38% respectively. The situation is worse when we take into account the accuracy rates of 17% for the state and 18% for the municipality. These results, well below the study average, are partly due to decrees which illegally regulate Federal Law 12.527/11. For example, Decree 43.597 of 2012 in the state of Rio de Janeiro requires that citizens fill out requests in person at the relevant agency, and sign a liability statement. These requirements egregiously deviate from international norms as well as Article 11 of the federal law; law 12.527/11 stipulates that citizens can request information “by any legitimate means”.

On the other hand, the response rates of the federal branches of government, the Federal District, and the state and municipality of São Paulo, were quite high, at approximately 80%. Accuracy rates in these

jurisdictions ranged between 62%, in the case of the municipality of São Paulo, to 76% for the Federal Government. These findings show significant variation in commitment to the FOI law.

The results of the user identity experiment point to practices of discrimination in responding to FOI requests. Specifically, the non-institutional users obtained a response rate 10% below the response rate for the users with institutional identities (64% vs. 74%), a remarkable difference that is statistically significant at the 10% level. The non-institutional users also experienced much longer response times, an average of eight days longer than institutional users (25.5 days vs. 17.5 days). Particularly alarming, the female non-institutional identity had a very low response rate, (57%), and an accuracy rate of only 45%. Taking these figures into account, we believe the requirement in Law 12.527/11, that citizens provide their real names and an identity number, (RG or CPF) should be immediately amended<sup>11</sup>. The use of real identities can result not only in discrimination, but also intimidation. In short, only contact details should be required to request information.

The range of topics addressed in the FOI requests submitted in the General Audit, as well as the number of entities analyzed, was considerably broad. Nevertheless, the results allow us to make important inferences about compliance with the FOI law in jurisdictions known to set examples across Brazil.

## Part II – Judicial Branch Audit

The objectives of the Judicial Branch Audit were: (i) to evaluate compliance with the FOI law by the Brazilian courts, (ii) to add new dimensions to the recent discussion of this topic<sup>12</sup>, and (iii) to identify opportunities and challenges for more efficient public management. In contrast to the General Audit, the Judicial Branch Audit analyzed a limited number of topics in greater detail. These topics reflected some of the current challenges faced by the Judicial Branch in Brazil, such as salaries, the promotion of judges, the prevention of nepotism, and

<sup>11</sup>The General Registry or Registro Geral (RG) is the official identity document in Brazil. The Natural Persons Register or Cadastro de Pessoas Físicas (CPF) is a number attributed by the Brazilian Federal Revenue Service to both Brazilians and resident aliens and is equivalent to a social security number.

the administrative management of the courts.

Seven separate FOI requests concerning these topics were submitted to 40 different courts, comprising 264 requests in total. We assessed three Superior Courts (Tribunais Superiores), including the Supreme Federal Court, (Supremo Tribunal Federal, or STF)<sup>13</sup>, the Superior Court of Justice, (Superior Tribunal da Justica, or STJ)<sup>14</sup>, and the Superior Labor Court, (Tribunal Superior do Trabalho, or TST)<sup>15</sup>, as well as five Federal Regional Courts (Tribunais Regionais Federais, or TRF), five Regional Labor Courts (Tribunais Regionais do Trabalho), 26 State Courts (Tribunais de Justica dos Estados), in addition to the Court of Justice of the Federal District and Territories (Tribunal de Justica do Distrito Federal e Territorios).

The aggregate results show that out of a total of 264 FOI requests, 160 (61%) received a response, of which only 69 (26%) were deemed accurate according to the definition established in the methodology.

The response rate did not show significant variability across the seven requests submitted, hovering around 65%. The accuracy rate of the responses was low relative to the rate observed in the General Audit. However, the accuracy rate varied significantly across the courts analyzed, between 5% and 62%, depending on the question submitted.

When ranked based on their performance in supplying the specific information requested, the thirteen courts which obtained best accuracy rates were: the TST, SFT, TRF 4TH Region, TRT 15th Region, TRT 1st Region, TJ-RR, TRT 10th Region, TRF 2nd Region, TRF 3rd Region, TRT 3rd Region, STJ, TJ-RJ and TJ-DFT. It is worth highlighting that only three state judicial courts rank among the courts with the best

<sup>12</sup>See: ARTIGO 19, Balanço de 1 Ano da Lei de Acesso à Informação Pública Acesso à informação e os órgãos de justiça brasileiros – 2012-2013. São Paulo: Artigo 19, 2013. Available at: [http://artigo19.org/wp-content/uploads/2014/01/balanco\\_1\\_ano\\_lei\\_acesso.pdf](http://artigo19.org/wp-content/uploads/2014/01/balanco_1_ano_lei_acesso.pdf) [Accessed on: 03.11.2014], as well as, BEGHIN, N. & ZIGONI, C. (orgs), *Avaliando os websites de transparência orçamentária nacionais e sub-nacionais e medindo impactos de dados abertos sobre direitos humanos no Brasil*. Brasília: Instituto de Estudos Socioeconômicos, 2014. Available at: <http://www.inesc.org.br/biblioteca/publicacoes/textos/pesquisa-transparencia-orcamentaria-nos-websites-nacionais-e-sub-nacionais> [Accessed on: 29.10.2014]

<sup>13</sup>Supreme Federal Court or “Supremo Tribunal Federal”.

<sup>14</sup>Superior Court of Justice or “Superior Tribunal de Justica”.

<sup>15</sup>Superior Labor Court or “Tribunal Superior Do Trabalho”.

accuracy rates. Regarding the timeliness of their response, only four of the 40 courts did not comply with the 20-day deadline stipulated by the law. The average response time was 14 days; below the average response time observed for those entities assessed in the General Audit.

The Freedom of Information Law establishes that a denial must occur only under extraordinary conditions defined by law. The findings of the qualitative assessment, however, indicate that FOI requests were repeatedly rejected, based on excessively broad, and at times illegitimate interpretations of the permitted legal exceptions. In other situations, the courts hampered access by creating bureaucratic obstacles, which is forbidden by Law 12.527/11.

Furthermore, the vast majority of the courts analyzed did not have specific platforms for the submission of FOI requests. Instead, they were found to employ the websites of their ombudsmen.

Considering all of the above, we recommend that the efforts of the courts and the National Judicial Council (CNJ) focus on a few key implementation objectives, detailed at the end of the next section.

# Introduction

## Context

In recent years a wave of Freedom of Information (FOI) laws has swept across the world, with more than two thirds of the approximately one hundred FOI laws having been adopted in the last decade. In Latin America, only Venezuela and Costa Rica do not have some type of FOI legislation: Brazil was one of the last to join this move towards greater transparency, approving its Freedom of Information Law 12.527/11 in 2011<sup>16</sup>. This law delineates and makes effective the right guaranteed by Article 5º, XXXIII and section II of § 3rd of Article 37, of the Federal Constitution, which grants any citizen the right to obtain government information.

The FOI law complies with the decisions of the Inter-American Court of Human Rights, which affirm the right of access to public information (Chile v Claude Reyes *et al*<sup>17</sup> and Gomes-Lund v Brasil)<sup>18</sup>. It also represents compliance with other treaties and conventions, such as Article 19 of the Universal Declaration of Human Rights of the United Nations; that the right to public information is a fundamental human right<sup>19</sup>.

The FOI law is of central importance as a tool for exercising democracy in Brazil. It not only gives access to information previously unavailable but also requires governments to make available a number of categories of online information and access to open data. In fact, Law 12.527/11 is one of only a few in the world to incorporate several open data principles<sup>20</sup>.

<sup>16</sup>Law 12.527 became effective only the following year in 2012. The law is known in Portuguese as “Lei de Acesso à Informação” or LAI.

<sup>17</sup>Series C, Number 151.

<sup>18</sup>Series C, Number 27.

<sup>19</sup>Article 19 states: “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive, and impart information and ideas through any media and regardless of frontiers.”

Open data is an international concept developed in recent years, which refers to “data that can be freely used, reused and redistributed by anyone”<sup>21</sup>. When applied to government information the concept favors transparency by allowing citizens to access, reuse and freely share public information<sup>22</sup>. It also maximizes potential participation and public oversight of government actions.

While the law is a boon to citizens the requirements from public servants are undeniably onerous. It establishes a new administrative paradigm, requiring public servants to act with conscientious professionalism, competence, efficiency and probity. Compliance with the FOI law depends on an effective commitment to public transparency. The leaders of Brazil’s public entities have a professional obligation to comply with the FOI law, ensuring that the resultant benefits, such as more efficient public management and greater control of the population on public spending and policies, are spread through all spheres of government.

This study, which was presented at the seminar ‘National Evaluation on Governmental Transparency’, represents our first effort to assess the workings of the FOI law in practice<sup>23</sup>. The study is part of the institutional mission of the Transparency Audit Network, an international initiative still in its developmental phase, coordinated by the Public Transparency Program at EBAPE and CTS/FGV DIREITO RIO. The goal of the Transparency Audit Network is to develop and apply transparency assessments in order to help civil society, governments, and aca-

<sup>20</sup>Art. 8º, § 3º, sections II and III of Law 12.527/11 recommend that public bodies use open formats processable by computer to provide information as part of their active transparency initiatives.

<sup>21</sup>Open Knowledge Foundation, “Manual dos dados abertos: governo”. Laboratório Brasileiro de Cultura Digital & NICBr, 2011. Available at [http://www.w3c.br/pub/Materiais/PublicacoesW3C/Manual\\_Dados\\_Abertos\\_WEB.pdf](http://www.w3c.br/pub/Materiais/PublicacoesW3C/Manual_Dados_Abertos_WEB.pdf) [Accessed on: 02.11.2014].

<sup>22</sup>For further details regarding the principles of open data see BEGHIN, N. & ZIGONI, C. (orgs.), “Avaliando os websites de transparência orçamentária nacionais e sub-nacionais e medindo impactos de dados abertos sobre direitos humanos no Brasil”. Brasília: Instituto de Estudos Socioeconômicos, 2014. Available at: <http://www.inesc.org.br/biblioteca/publicacoes/textos/pesquisa-transparencia-orcamentaria-nos-websites-nacionais-e-sub-nacionais> [Accessed on: 29.10.2014]

<sup>23</sup>In Portuguese: “Avaliação Nacional de Transparência Governamental”. November 10-11, 2014, FGV, Rio de Janeiro.

demics, to better understand and compare compliance with transparency laws across countries and jurisdictions.

It is important to note that Brazil is recognized as a world leader in the area of transparency, and is a founding member of the Open Government Partnership (OGP). In this context, the country has made a commitment to promote open data, creating a National Open Data Infrastructure (Infraestrutura Nacional de Dados Abertos or INDA) under the Ministry of Planning which is responsible for developing mechanisms and standards in order to provide public information in open formats<sup>24 25</sup>.

### **What is the degree of compliance with the FOI law by the Brazilian Government?**

In de jure terms, Brazil has one of the strongest FOI laws according to the Right-to-Information (RTI) Rating, an international measure of the legal strength of FOI laws<sup>26</sup>. Law 12.527/11 establishes fundamental rules to ensure citizens find information on government websites (active transparency), and can request information not previously made available by the government (passive transparency). The Brazilian FOI law applies to all public entities that are members of the direct administration of the Executive, Legislative, Judiciary and Autonomous Bodies<sup>27</sup>, as well as public companies, joint stock companies and other entities of indirect public administration.

This study presents the findings of an assessment of the level of compliance with the FOI law by public entities. The assessment is comprised of two related audits: the General Audit (Part I) and the Judicial Branch Audit (Part 2). The General Audit consisted of 453 FOI requests based on 55 individual questions. The requests were submitted to 133 public entities across all branches of governments in the states of São Paulo, Minas Gerais, and Rio de Janeiro, as well as their

<sup>24</sup><http://governoaberto.cgu.gov.br/index.asp>

<sup>25</sup><http://www.governoeletronico.gov.br/acoes-e-projetos/Dados-Abertos/inda-infraestrutura-nacional-de-dados-abertos>

<sup>26</sup>For more information visit: <http://www.rti-rating.org/> [Accessed on: 05.11.2014]

<sup>27</sup>For purposes of this study, Autonomous Bodies include Public Prosecutors (Ministérios Públicos), Public Defenders (Defensorias Públicas) and State Audit Institutions (Tribunais de Contas).

respective capitals, in addition to the Federal District and other federal branches of government.

For the Judicial Branch Audit, 264 FOI requests were issued based on seven specific requests. These were submitted to 40 courts: the 26 State Courts (Tribunais de Justicia dos Estados), the Court of Justice of the Federal District and Territories (Tribunal de Justicia do Distrito Federal e Territorios), the five Federal Regional Courts (Tribunais Regionais Federais), five Regional Labor Courts (Tribunais Regionais do Trabalho), the Federal Supreme Court (Supremo Tribunal Federal), the Superior Court of Justice (Superior Tribunal de Justiça), and the Superior Court of Labor (Tribunal Superior do Trabalho).

### **About the results**

The results of the two audits demonstrate substantial differences in compliance with FOI law 12.527/11. Some public entities, such as the Federal Government, the Executive Government of the Federal District, and the Executive Power of the state and municipality of São Paulo, have adopted guidelines aimed at codifying the rules established by the FOI law. Others however, such as the executive branches of the state of Minas Gerais and the municipality of Belo Horizonte still have a long way to go towards fully implementing and complying with the requirements of the LAI, while the state and municipality of Rio de Janeiro are significantly behind national and international standards.

The findings suggest important progress has been made by specific federal bodies, government branches and entities. However, other entities have introduced barriers to transparency. We observed, for example, instances where some jurisdictions issued decrees making the process of obtaining information more complex than necessary; contrary to both the spirit and objectives of the FOI law.

### **Methodology**

As previously discussed, this study consists of two audits: the General Audit and the Judicial Branch Audit. Both are based on a simulated user methodology which has been widely used in other transparency audits and is considered one of the most effective methods of assess-

ing a public entity's compliance with FOI laws. This methodology allows for the replication of a citizen's experience, from the bureaucratic process of requesting public information to obtaining a response and even appealing. The methodology was developed to be easily understood and replicable by other institutions or persons.

The method of analysis involves the submission of information requests and the assessment of responses, based on use three metrics: 1) response rates (number of responses received/number of requests submitted); 2) accuracy rates (number of requests to receive directly relevant responses/ number of requests submitted); and 3) average response times (number of days between the date the request was submitted and the date of response). A full description of the methodology is presented in Chapter 1 of the report.

## **Organization of the Report**

This report is presented in two parts; Part I is the General Audit and Part 2 is the Judicial Branch Audit.

Part I is set out as follows: Chapter 1 provides details about the methodology used in both audits; Chapter 2 presents the findings of the General Audit, Chapter 3 provides examples of some of the best answers received and presents a comparative analysis of various public entities, as well as discussing barriers to transparency; and Chapter 4 presents the findings of the assessment of digital platforms used to manage FOI requests.

In Part 2: Chapter 5 discusses the differences in methodology between the General Audit and the Judicial Branch Audit, and presents the findings of the Judicial Branch Audit; Chapter 6 discusses the barriers to transparency identified in the Brazilian courts; and Chapter 7 is an assessment of the digital platforms used to manage FOI requests.

Finally, we present the overarching conclusions and recommendations of the analysis.

## Chapter 1

# Methodology

## 1. General Audit

As described in the introduction, the Public Transparency Program, (PTP), coordinated by FGV, EBAPE and CTS FGV DIREITO RIO, conducted a General Audit to assess compliance with Brazil's new Freedom of Information Law 12.527/11. The audit consisted of 453 FOI requests, submitted in the states of São Paulo, Minas Gerais, and Rio de Janeiro, as well as their respective capitals, in addition to the Federal District and the federal branches of government<sup>28</sup>.

The four states and three capitals included in this study account for nearly half of the Brazilian population and more than half of the Gross Domestic Product (GDP). We selected these jurisdictions due to their size and bureaucratic capacity to comply with FOI requests. The sample is also representative of the three levels of the Brazilian federal system - federal, state and municipal – as well as a variety of institutional legacies. Finally, the sample included the federal branches of central government, wielding the country's largest budget, and whose policies affect all Brazilian citizens.

The selection of jurisdictions and government bodies was therefore based on relevance within the national context. Our hypothesis was that if Law 12.527/11 is not being properly enforced by the selected jurisdictions, its enforcement is likely to be even more precarious in those parts of the country with more limited bureaucratic capacity, public resources, and institutional legacies. Moreover, it is essential the law be properly enforced within these critical jurisdictions in order to promote emulation and diffuse best practice to other states and municipalities<sup>29</sup>.

<sup>28</sup>For a discussion on the diffusion and adoption of public policies see: WEYLAND, K. G. Learning from Foreign Models of Policy Reform. Baltimore: John Hopkins University.

<sup>29</sup>ibid.

The FOI requests submitted as part of the General Audit were based on three principal themes: (i) governance and watchdogs; (ii) public participation and human rights; and (iii) socioeconomic rights. These themes were selected for their importance in the current public debate and represent some of the specific interests of professors and researchers at EBAPE FGV and CTS FGV DIREITO RIO. These subjects also respond to the requests of various NGOs contacted by the Public Transparency Program (PTP).

The table below shows the subject of each of the 55 FOI requests, as well as the total number of requests submitted for each.

**Table 1** Subjects of requests and number of submissions for each request

Subject of the FOIA request	N° of requests sent
Exemption from public procurement bidding procedures	42
Contracting of consultancy services	40
Outlay of government advertising expenses	40
Quantitative data on freedom of information (FOI) requests and appeals	39
Budget and personnel allocated for complying with transparency policies	38
Remuneration and gratifications for public servants	37
Copyright management policy	16
Participation of public prosecutors or judges in events and seminars sponsored by companies	10
Remuneration of members of the Legislature	10
Complaints against members of the Police in 2013	10
Attendance lists of legislators	9
Subscription of newspapers and magazines	8
Discretionary appointments (to agencies)	8
Hiring of security companies for the 2014 World Cup	8
Programs against piracy	8
Rules regulating the use of police video images from public protests	8
Programs to promote FOI	7
Assessment of public universities' regional impact	7
Outsourcing in the Public Health System	7

Subject of the FOIA request	N° of requests sent
Activities against child prostitution	7
Investment in student retention programs	7
Teachers under probation for underperformance	5
Criteria for the allocation of state funds among police Forces in different municipalities	4
Performance evaluations of public prosecutors	4
Regulation concerning the use of identity badges by uniformed policemen	4
Rules and procedures applicable in cases of public transport emergencies	4
List of activities - Municipal Council of Public Transport	4
Basic Education Census	4
Utilization of funds by the Ministry of Education for building nurseries	4
Outlay of expenses on public attorneys	4
Average time for judges to turn around law suits	3
Regulatory penalties imposed on electric energy concessionaries	3
Regulatory penalties imposed on concessionaries performing public services	3
Regulatory penalties imposed on concessionaries performing municipal transport duties	3
Criteria for the recalculation of public transportation fees	3
Oversight of Government agencies by Legislative Committees	3
Quantitative information on prisons due to copyright violations	3
Courts Databases	3
Calculation of the total amount of taxes levied upon online radio services	3
Calculation of the total amount of taxes levied upon online video services	3
Calculation of the total amount of taxes levied upon online sale of music and e-books	3
Quantitative and qualitative information about complaints regarding municipal public transportation	2
Suits brought against Brazil within the Inter-American Court for Human Rights still in course	2
Police strategy for drugs	2
Minutes of meetings in which the renewal of broadcasting licenses were awarded	1
Environmental licenses awarded within the scope of the Programa de Aceleração do Crescimento – The Economic Growth Acceleration Program	1
Penalties imposed by TCU on public servants who work for regulatory agencies	1
Transfer of elector data to private third parties	1
Governmental Programs of Internal Monitoring	1
Amount of money invested by BNDES in a specific seminar	1

Amount of money invested by BNDES in a specific seminar	1
Costs and reports of Plano Nacional do Livro e Leitura – National Plan for Books & Reading	1
Cost for contracting the use of academic databases	1
Programa Sala de Leitura – Reading Room Program	1
Reports of the National Plan for Eradication of Slave Labor – Plano Nacional para Erradicação do Trabalho Escravo	1
Concession and revocation of licenses for caring firearms	1

It should be noted that the General Audit included six requests that had to be submitted more than 37 times each. The other 51 requests were submitted between one and 16 times, to different entities from the three branches of government and autonomous institutions<sup>30</sup>.

The General Audit was developed with the objective of being comprehensive in terms of entities and subjects analyzed, rather than an in-depth analysis of a more limited group.

### 1.1 Setting up the field experiment; user identities to test for bias

The provision of a public service and the fulfillment of rights such as access to public information are incompatible with any kind of discrimination; the provision of information should be impartial and never discriminate among applicants. We sought to test this principle and identify whether there is a bias in providing access to information in Brazil. We used institutional affiliation as a proxy indicator for class, socioeconomic status, and educational level, among other variables.

Four volunteers, who granted access and use of their personal data and were aware of the nature and content of the requests, submitted a total of 322 requests. Two of these identities (a man and a woman) were researchers from FGV EBAPE and CTS FGV DIREITO RIO. The two other identities (also one male, one female) had no institutional affiliation or any other identification based on Internet searches.

The configuration of two pairs of requesters, male and female, institutional and non-institutional, makes it possible to observe whether government representatives respond differently to requests from different types of citizens.

The practice of searching for a FOI applicant's identity on the Internet

creates opportunities for violations of the principle of equality in the provision of a public service. As this report will show, there was evidence to suggest that the identity of applicants was being screened<sup>31</sup>.

The findings of the General Audit are presented in Chapter 2.

## 2. The Judicial Branch Audit

In the General Audit, the Judiciary was the government branch to receive the least freedom of information (FOI) requests. In compensation, and to provide an in-depth analysis of one branch of government, the Judicial Branch Audit included 264 requests to courts across the country. While this audit focused on a smaller set of topics, it covered a wider range of judicial entities.

A total of 40 Brazilian courts received between four and seven FOI requests. The difference in the number of requests submitted to each court was due to website crashes during the submission process or because one of the question topics was incompatible with the superior courts included in the analysis<sup>32</sup>. The majority of the 40 courts each received an average of seven FOI requests. Only one court (TJ-AC) received four requests; the minimum number submitted.

The purpose of submitting the requests was to provide an overview of judicial compliance with Law 12.527/11 and to obtain material information about key issues concerning the internal management of the judicial branch.

As previously stated, both audits sought to replicate the experience of regular citizens. Responses received in the Judicial Branch Audit were analyzed based on the same three metrics as the General Audit: response rate, accuracy rate, and average response time.

The topics selected for requests to the Judicial Branch included:

- Compensation and pay of judges

<sup>30</sup>The complete results are available at <http://transparenciaaudit.net>

<sup>31</sup>In the case of profiles with institutional affiliations, it was possible to ascertain that Internet searches of their names were conducted after making the request. This investigation was conducted through tools available in institutional social networks, which notify users of this type of search. In one case (LinkedIn), one is able to see the profile of the person who made the search.

<sup>32</sup>Federal Supreme Court (Supremo Tribunal Federal), Superior Court of Justice (Superior Tribunal de Justiça), and the Superior Court of Labor (Tribunal Superior do Trabalho).

- Criteria for the promotion of judges
- Mechanisms to prevent nepotism
- Court budgets
- Details regarding new lawsuits filed

### **3. Preparations; procedural rules to ensure realistic responses**

All members of the research team received training on rules and procedures regarding the submission of requests and the recording of responses. To test the preparation of the research team, a pilot evaluation, not included in this report, was conducted with 37 requests.

For each information request, a special form was filled out containing information about the process, such as date of submission, site used for filing the request, protocol number, difficulties encountered, etc<sup>33</sup>. The form also included a field to record general observations to be used as part of a targeted qualitative analysis. All information contained in these forms was synchronized in real-time with a database and verified by the study coordinators<sup>34</sup>.

The submission of requests was carried out without informing the government agency that a transparency audit was underway. All requests were submitted with the same wording, with any differences minimal, such as presentation and signature.

The study adopted the following procedural rules:

- In order not to alert the entity that a transparency audit was underway, requests were submitted during different time-periods over multiple weeks. General Audit requests were submitted during March and April 2014, while requests regarding the Judicial Branch Audit were submitted between August and October 2014.

- We instructed each team member responsible for submitting requests, to look for the virtual means to do so. In some cases, although the organ had a specific digital platform for receiving FOI requests, the team could not find it because of navigation difficul-

<sup>33</sup>The form can be accessed at <https://docs.google.com/forms/d/1W3vUIB9hAivtEUzCQp80-xzE8VNU7cMNpNJJaA0-pLg/viewform?embedded=true>

<sup>34</sup>A database in Google Spreadsheet format was used for these purposes.

ties. In such cases we used alternative mechanisms (e.g., ombudsman portals, Contact Us pages, or general entity email addresses).

Personalized email accounts were created for each user identity and monitored to track responses to information requests. Moreover, keeping in mind that some entities did not submit responses by email, it was necessary to monitor the passive transparency platforms used by the entities to handle requests.

Finally, two researchers evaluated and analyzed the responses. In the General Audit, 85 appeals were filed following the receipt of unsatisfactory responses. Some 42 appeals were filed in the Judicial Branch Audit for the same reason. The email accounts of the simulated users and the passive transparency platforms were no longer monitored after July 1, 2014. Therefore, responses received after this date, were not included in the study. A similar approach was followed in the Judicial Branch Audit, where monitoring of email accounts and passive transparency platforms ceased November 1, 2014.

## 4. Metrics

This section details the three principal metrics used in both evaluations: response rates, accuracy rates and average response times. These three metrics allowed us to analyze primary aspects of compliance with the FOI law by public bodies.

### 4.1 Defining what constitutes a response

The response rate is a basic indicator of the commitment of a public body to its obligations under FOI law. After all, if the government does not even respond to a request, any further transparency analysis is unfeasible.

The study's definition of what constituted a response was broad and comprehensive; any kind of communication sent via email or accessible through a platform that was not an automatically generated response, was not a response about a deadline extension, nor was related to the internal processing of the request<sup>35</sup>. Under this definition, rejections or responses about the unavailability of information are considered valid responses.

## 4.2 Evaluating response accuracy rates

In order to develop a definition of what constitutes an accurate response, the Public Transparency Program (PTP) developed a specific methodology in three successive phases:

1. Defining accuracy evaluation criteria.
2. Coding of all the responses received based on these criteria.
3. Calculating the results and inter-coder reliability statistics.

### 4.2.1 Accuracy evaluation criteria

Although our original goal was to calculate the completeness, clarity and accuracy of each response, the first two proved too difficult to assess in practice, given the wide diversity of 55 different requests and the incongruent inter-subjective perceptions of coders. Coding decisions applied to the metrics of completeness and clarity, simply proved statistically unreliable. This was not the case for accuracy, however, which was the metric included in our final results.

The assessment of accuracy identified whether the response answered the question or could be minimally correlated with the object of the FOI request. This definition can be illustrated with the following example. If we requested a list of all compensation paid monthly to employees, and we received the internal rules governing the remuneration of employees, this response would not be considered accurate. After all, in this hypothetical case, the agency's response appears to evade the question, instead addressing a related theme.

Additionally, the response was not considered accurate when it: (i) transferred the request to another body; (ii) rejected the request, or (iii) communicated that information did not exist.

### 4.2.2 Double coding of responses

To evaluate accuracy, two researchers coded each of the responses independently and assigned them scores i.e., double coding procedure. The process occurred in two stages.

First, points were awarded to each response to determine whether it

<sup>35</sup>For example, a confirmation email to acknowledge receipt.

was coded as fully accurate, moderately accurate or inaccurate. This calculation used a simple ordinal scale described below:



**Accurate response (two points)**

The response is directly related to the FOI request



**Minimally accurate response (one point)**

The response is not directly related to the request; however, the content is sufficiently relevant to be evaluated



**Inaccurate response (zero points)**

The response is not related to the request, which precludes its assessment based on the established criteria

A three-point ordinal scale was selected because it discriminates between different degrees of accuracy without having to make fine-grained distinctions. A scale higher than three would be excessively detailed for a coder who would then have to classify a wide variety of questions. The three-point scale also avoids the pitfalls of a dichotomous scale, which cannot differentiate between degrees of accuracy.

The second stage of evaluation was to calculate the arithmetic mean of accuracy scores for each response, and the average score of different entities, powers and jurisdictions. It is important to note that in order to be considered minimally accurate, an answer had to receive a minimum score of one from both coders.

#### 4.2.3 Testing the reliability of double coding

The objective of using double coding was to increase the reliability of the results, since it reduces individual subjectivity. To test the reliability of the double coding procedure, we used the kappa coefficient; a statistical measure of inter-rater or inter-coder agreement. The kappa coefficient measures the difference in the observed rate of agreement between two coders and the expected rate of agreement if coding had occurred randomly<sup>36</sup>.

The kappa coefficient ranges between zero and one. A coefficient of one means complete agreement: a coefficient of zero means complete

disagreement. The following scale by Landis & Koch (1977) is used to assess the significance of coefficients between zero and one<sup>37</sup>.

**Table 2** Scale of *Kappa* Scores

Result	Agreement
<b>0,00</b>	Poor
<b>0,00 a 0,20</b>	Small
<b>0,21 a 0,40</b>	Moderately Small
<b>0,41 a 0,60</b>	Moderate
<b>0,61 a 0,80</b>	Substantial
<b>0,81 a 1,00</b>	Virtually Perfect

The results of the kappa analysis of the General Audit double coding procedure are as follows:

**Table 3** *Kappa* Score of the General Audit

Variable	N	<i>Kappa</i>	Std. Dev.	Agreement	Expected Agreement	P-value
Accuracy	<b>315</b>	<b>0,6952</b>	<b>0,0438</b>	<b>89,98%</b>	<b>57,30%</b>	<b>0,000</b>

The coding of the accuracy scores shows a high level of agreement, with a kappa coefficient of 0.6952 and a rate of agreement of 87%, well above 80%, the benchmark of excellence in the field of content analysis.

<sup>36</sup>VIEIRA, A. J., & Garrett, J. M. (2005). Understanding interobserver agreement: the kappa statistic. *Family Medicine*, 37(5), 360-363.

<sup>37</sup>LANDIS, J. R., and G. G. Koch. (1977). The measurement of observer agreement for categorical data. *Biometrics* 33: 159–174.

The results of the kappa analysis of the Judicial Branch Audit's double coding procedure are as follows:

**Table 4** *Kappa* score of the Judicial Branch Audit

Variable	N	<i>Kappa</i>	Std. Dev.	Agreement	Expected Agreement	P-value
Accuracy	157	<b>0,8537</b>	<b>0,0636</b>	<b>91.72%</b>	<b>43.39%</b>	<b>0,000</b>

In this case, the kappa coefficient was 0.8537, an almost perfect level agreement, confirming the study's coding procedure as highly consistent and reliable, i.e., that is was unlikely coding had been skewed by the subjective individual views of the coders.

#### 4.3 Timeliness of responses

Compliance with the legal timeline, or timeliness of the response, is assessed with a simple count of the number of days between submission of the request, and receipt of a response. This metric reflects the commitment of the entity to comply with the timeline established by Law 12.527/11. Paragraphs one and two of Article 11 of Law 12.527/11 state that FOI requests must be addressed by the entities within 20 days, plus a ten-day extension if necessary.

The PTP used identical methodologies in both the General and Judicial Branch Audits to measure compliance with the FOI law. However, in addition this study provided qualitative indicators of compliance and commitments to the LAI. Qualitative indicators include examples of positive and negative responses and an analysis of the procedures that citizens must follow to make an information request.

## PART I - GENERAL AUDIT

By Gregory Michener, Rafael Velasco and Karina Furtado

### Chapter 2

# Results

## 1. Introduction

This chapter presents the results of the General Audit conducted by the PTP, and coordinated by FGV EBAPE and the CTS at FGV DIREITO RIO. The results are shown in two formats: stacked Venn diagrams and timeline graphs.

The stacked Venn diagrams summarize the following information:

- Number of submitted requests;
- Number and percentage of requests which received a response (response rate);
- Number and percentage of requests, which received accurate responses (accuracy rate).

The timeline graphs summarize the average number of days it took to receive a response from a particular entity. In order to facilitate comparison, these graphs also include information on the response rate of the respective entity, since receiving quick responses does not mean much if the majority of requests are not answered at all.

## 2. Aggregate analysis

The General Audit consisted of 453 Freedom of Information (FOI) requests submitted to the legislative, executive, and judicial branches of government in the states of São Paulo, Minas Gerais, and Rio de Janeiro, as well as their respective capitals, in addition to the Federal District and the Federal Government.

As shown in Figure 1, the overall response rate of the General Audit was 69%. This means that 31% of requests were not even acknowl-

edged by the assessed entities.

**Figure 1** Aggregate Results

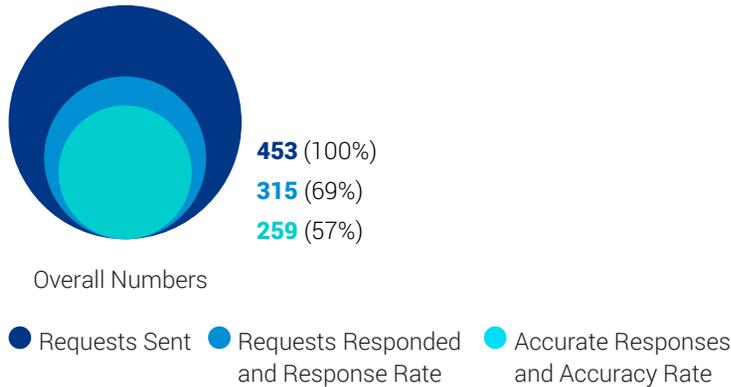
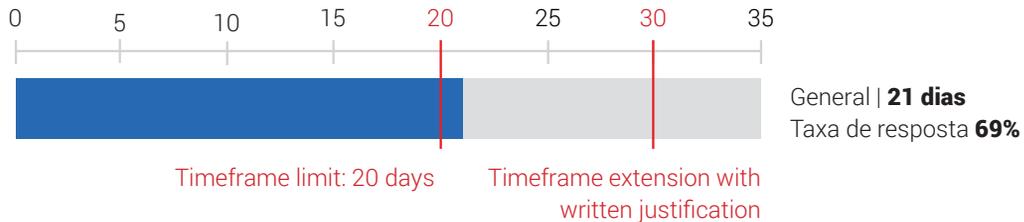


Figure 2 below, shows the average response time for entities analyzed in the General Audit was 21 days.

**Figure 2** Aggregate analysis of average response time



**2.1 Jurisdictional level analysis**

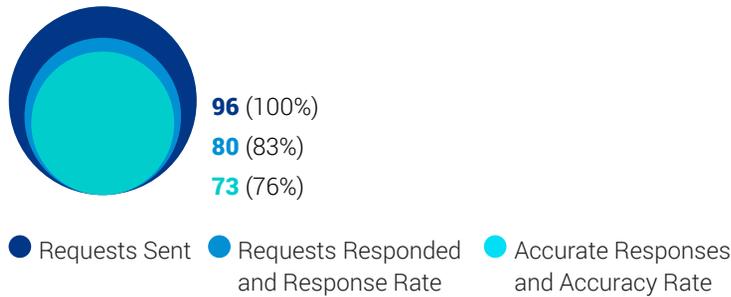
Figures three to eight present results aggregated at the jurisdictional level i.e., federal, state, and municipal, regardless of government branch or entity function. For example, the federal government encompasses entities operating within the legislative<sup>38</sup>, executive<sup>39</sup>, and judiciary<sup>40</sup> powers of government, as well as autonomous entities<sup>41</sup>.

Figure 3 shows the response rate for federal entities was 83% with

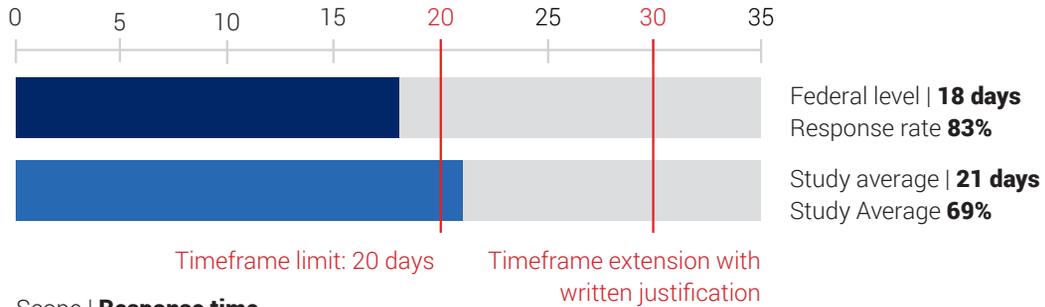
76% accuracy. In addition to having a higher than average response rate, federal entities were also faster in responding to the FOI requests with an average of 18 days compared to the overall average of 21 days (Figure 4).

The results of the three states and the Federal District show signif-

**Figure 3** Federal level results

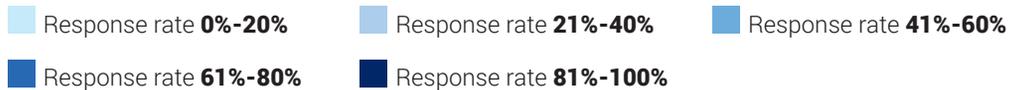


**Figure 4** Average response time at the federal level



Scope | **Response time**

Response rate (%)

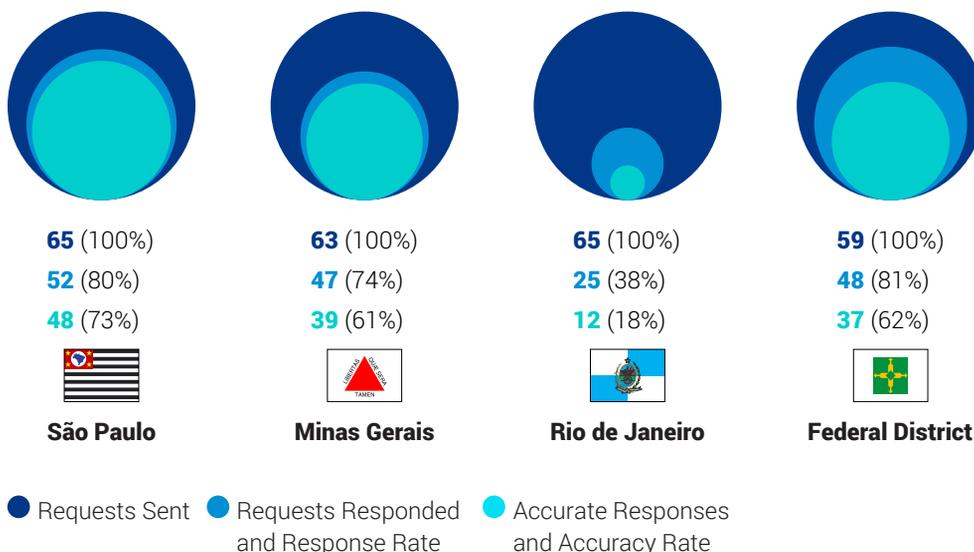


icant variability (Figure 5). On the one hand, the state of São Paulo responded to 80% of requests with 73% accuracy; – only the federal

level has a higher accuracy rate. On the other hand, the state of Rio de Janeiro responded to only 38% of requests submitted, of which less than half (18%) were assessed as accurate.

The response rate of entities in the Federal District was the second highest in the study after the federal level. However, the accuracy rate was much lower than São Paulo and the federal level, and closer to the accuracy rate observed in Minas Gerais, where more than 25% of all FOI requests were not answered, and accurate answers represented only 61% of the total.

**Figure 5** State level results



<sup>38</sup>Federal Senate (Senado Federal) and House of Representatives (Câmara dos Deputados).

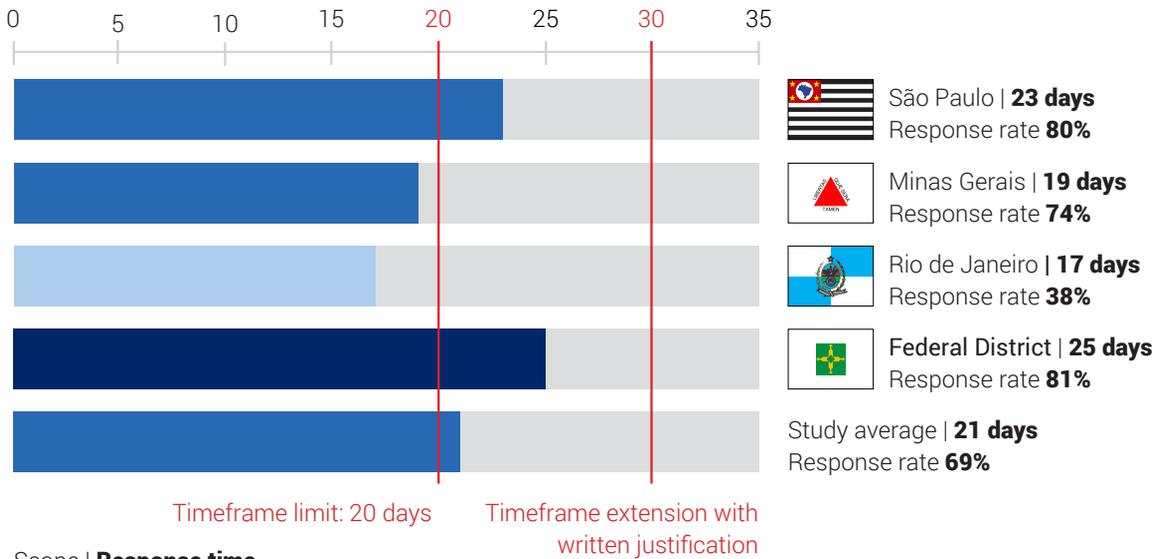
<sup>39</sup>A diverse variety of Federal Government Ministries, Regulating Agencies, and other entities of Indirect Public Administration (Administração Pública Indireta).

<sup>40</sup>Federal Supreme Court (Supremo Tribunal Federal) and Superior Court of Justice (Superior Tribunal de Justiça).

<sup>41</sup>Federal Auditor's Office (Tribunal de Contas da União) and Federal Public Prosecutor's Office (Ministério Público Federal).

In Figure 6, the results suggest an inverse relationship between response rates and timeliness: that those states to answer fewer requests, responded more quickly. On the other hand, the state of São Paulo and the Federal District, which had the highest rates of response and accuracy, required a longer period than the statutory 20 days - but still responded well below the 30-day time limit.

**Figure 6** Average response time at the state level



Scope | **Response time**

Response rate (%)

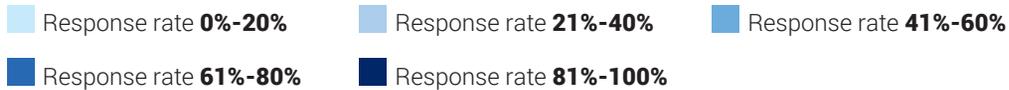
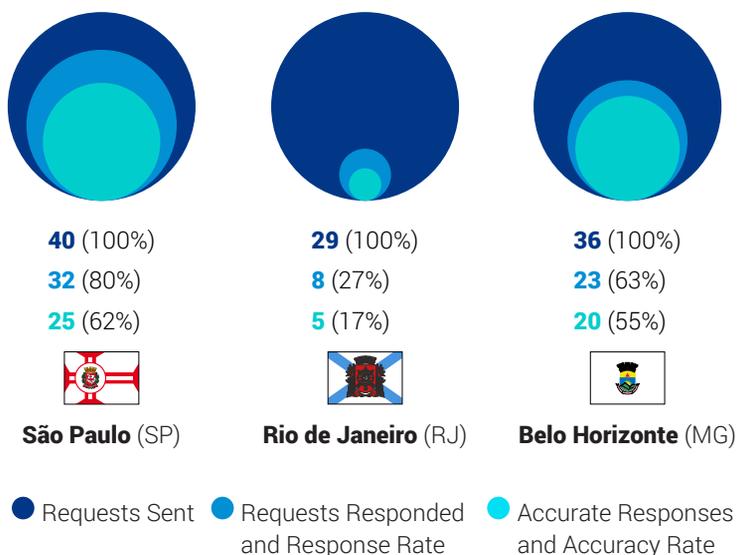


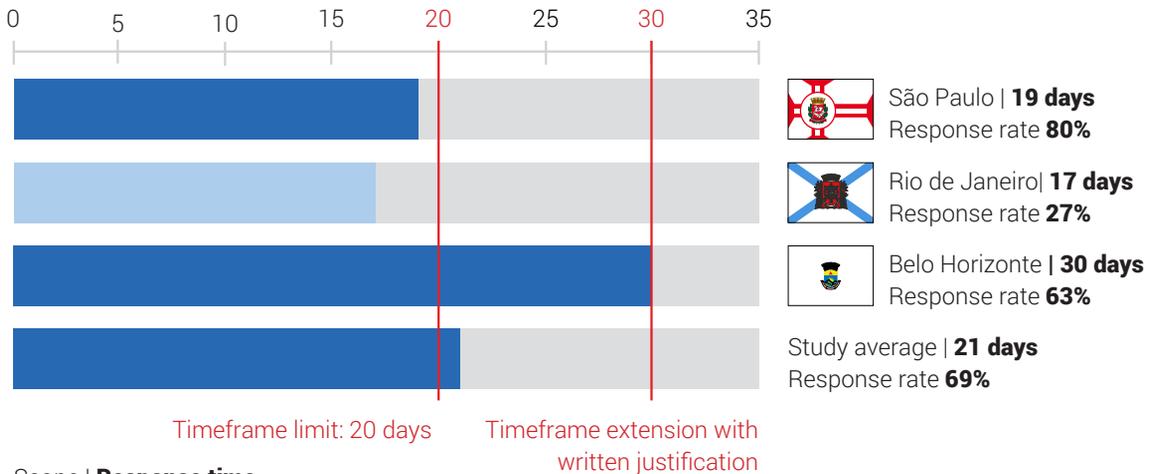
Figure 7 shows the results of the three evaluated municipalities. The city of Rio de Janeiro, repeating the trend found in the state of Rio de Janeiro, had the lowest response rate in the General Audit. Only 27% of all requests were answered, with just 17% answered accurately. In contrast, the city of São Paulo had the highest response rate, with 80% of requests answered and an accuracy rate of 62%, a result slightly higher than that obtained by the city of Belo Horizonte. There, the response rate was 63% and the accuracy rate was 55%.

**Figure 7** Municipal level results



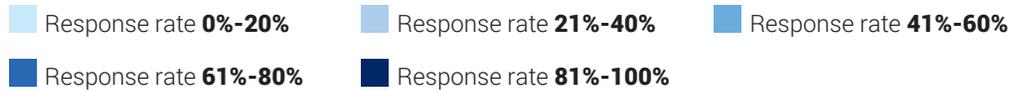
Regarding the timelines of responses (Figure 8), the city of Rio de Janeiro shows a pattern similar to state level, where faster response periods correspond to lower response rates. The city of São Paulo, however, did not follow this trend, with the highest response rate of the three municipalities, as well as also being relatively fast to respond (19 days on average). Belo Horizonte answered, on average, much more slowly than the standard 21 days but within the cap stipulated by the FOI law (30 days). This result suggests that many responses from Belo Horizonte missed the deadlines established by Law 12.527/11.

**Figure 8** Average response time at the municipal level



Scope | **Response time**

Response rate (%)



## 2.2 Analysis by branch of government

Figure 9 shows the results of the analysis by branch of government. These results include autonomous bodies such as prosecutors, audit courts and public defenders. Note the Executive received more requests than any of the other powers; almost five times that of the Judiciary. For this reason we decided to conduct a specific assessment of the Executive branch.

Altogether, response rates for the various branches differed by only eight percentage points. The Judiciary, followed by the Executive, presented the highest response rates. The highest accuracy levels were achieved by the legislative and judicial branches, at just below three-fifths of responses received; a relatively low level of accuracy in terms of this study. In summary, all three branches and autonomous bodies had very similar accuracy rates.

**Figure 9** Results by branch of government

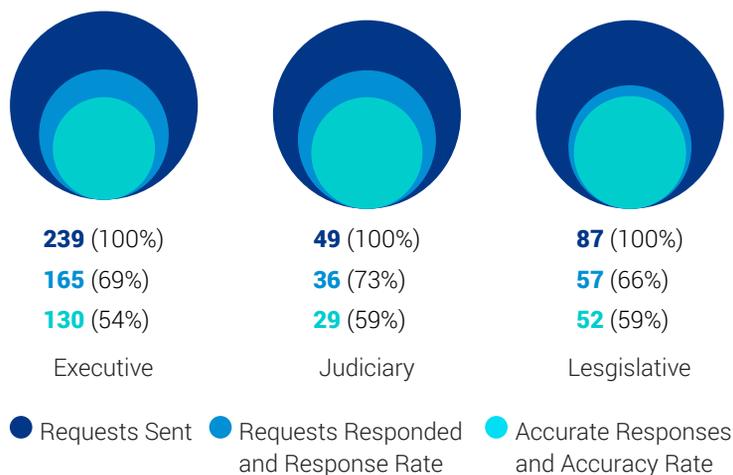
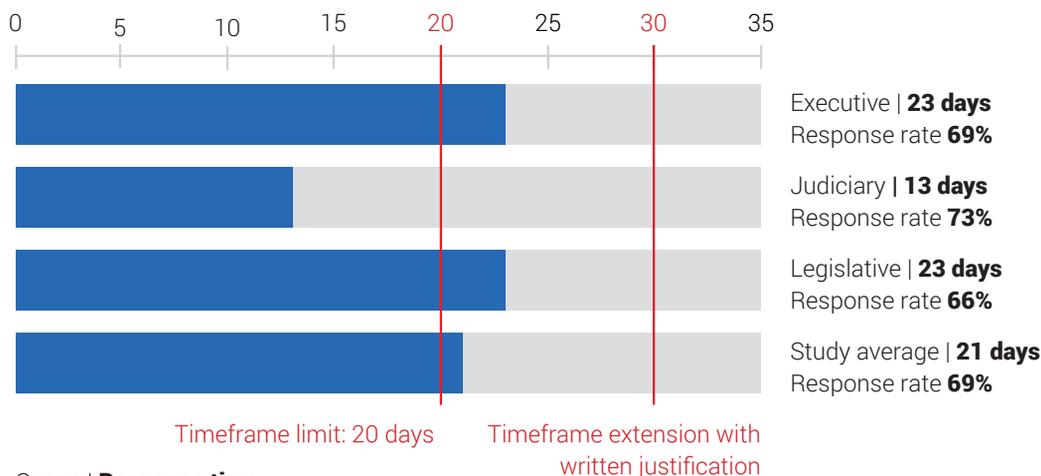


Figure 10 presents the average response times for the different branches of government. The Judiciary responded fastest, with an average response time of 13 days, considerably below the overall average, 21 days. The executive and legislative branches responded in a period slightly above average, but still below the limit of 30 days.

**Figure 10** Average response times by branch of government



Scope | **Response time**

Response rate (%)

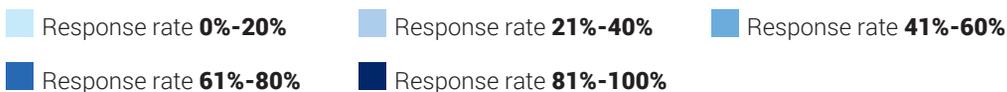


Figure 11 provides an analysis of the performance of the Executive branch disaggregated by jurisdictional level. The Executive was the only branch to receive a minimum number of requests (239) which allowed this type of comparison. The results of the State and Federal Governments are presented below. This is followed by the results of municipal governments compared to Federal Government.

The Executive Branch of the Federal District had an extremely high response rate, but with limited accuracy. The Executive Branch of the Federal Government had response and accuracy rates 10% higher than those of the Executive branches in the states (Sao Paolo, Minas

Gerais and Rio de Janeiro). Again, the state of Rio de Janeiro is clearly an extreme case, with a response rate of 34%, and only slightly more than half of those, deemed accurate. Minas Gerais had some 67% of requests answered of which 57% were assessed as accurate.

**Figure 11** Analysis of Executive branches by jurisdictional level: States and Federal Government

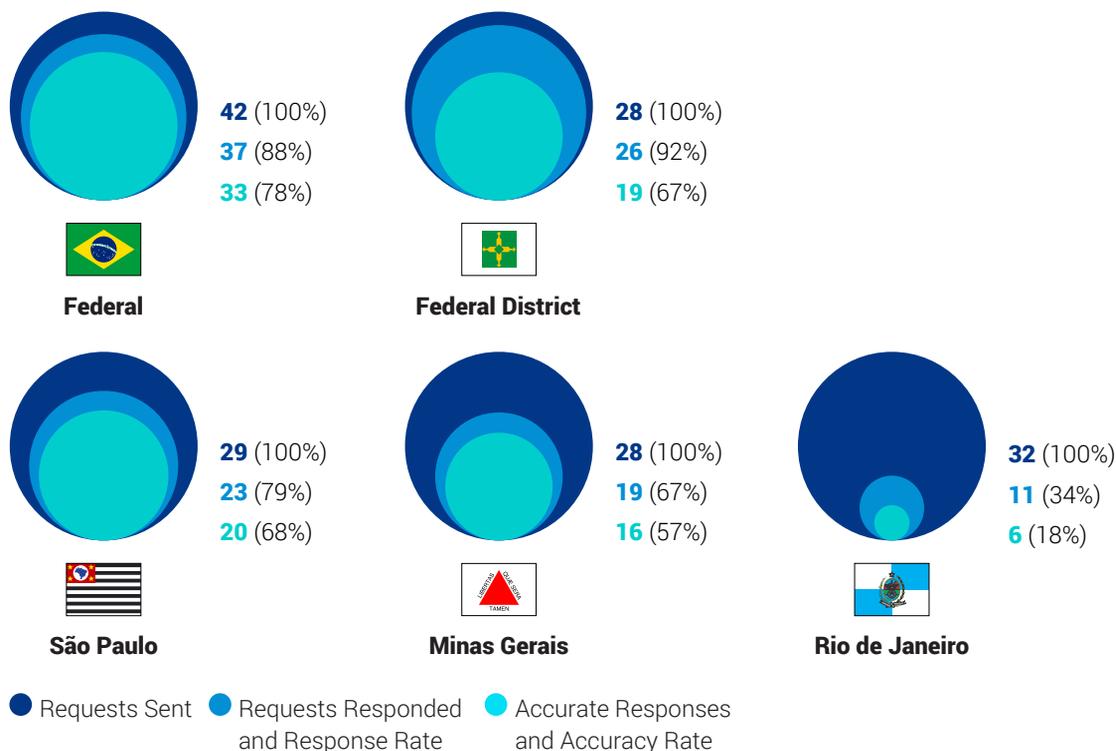
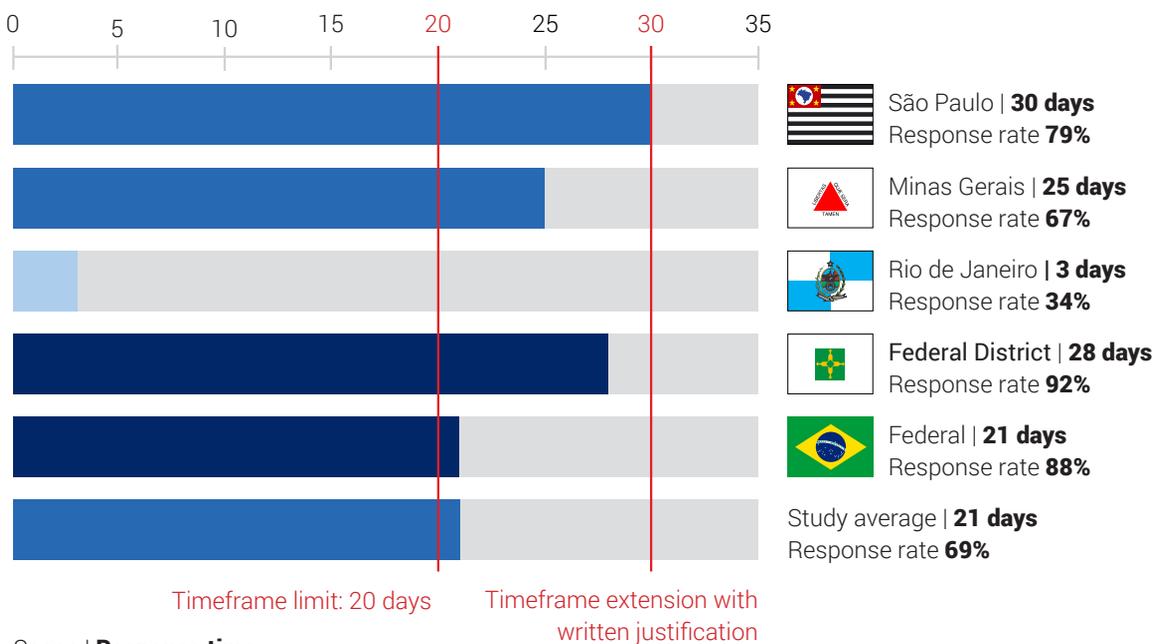


Figure 12 shows the average response time for the executive powers of the three states, the Federal District and the Federal Government. Despite the state of São Paulo having relatively high response and accuracy rates, it took, on average, the time limit of 30 days. Again, this indicates that responses to some of the requests did not comply with the timeline established by Law 12.527/11. The Federal District responded, on average, in 28 days, slightly below the time limit while

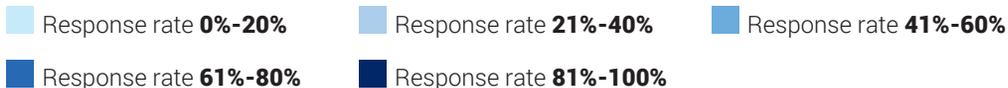
Minas Gerais' responses took an average of 25 days. It is remarkable that all of the aforementioned entities took longer to respond than the aggregate average of 21 days. As before, the results for Rio de Janeiro demonstrate an inverse relationship between response rate and timeliness, i.e., fewer responses are answered more quickly.

**Figure 12** Average response time of executive branches by jurisdictional level: States and Federal Government



Scope | **Response time**

Response rate (%)



As shown in Figure 13, the executive branches of the municipal jurisdictions present wide variations, with almost 40 percentage points between the worst performing jurisdiction (the city of Rio de Janeiro) and a jurisdiction with a moderate performance (Belo Horizonte); and more than 20 points between a jurisdiction with a moderate performance and the best performing jurisdiction, São Paulo. Clearly, the municipality of Rio de Janeiro is well behind the other municipalities regarding compliance with the FOI law.

After the Federal Executive branch (included in the analysis for comparison) São Paulo displays the best response rate, although its accuracy rate is relatively low.

**Figure 13** Analysis of executive branches by jurisdictional level: municipalities and Federal Government

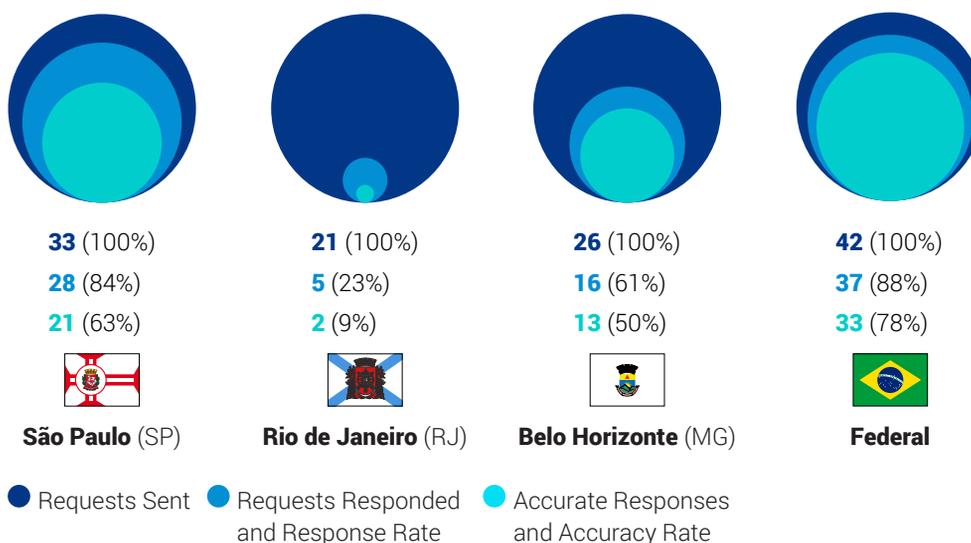
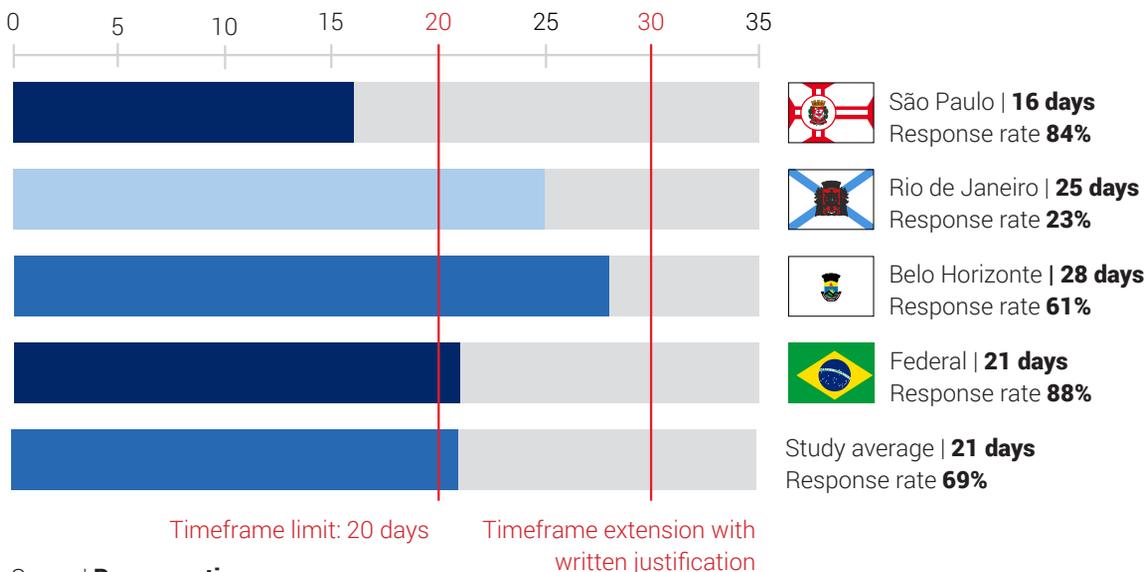


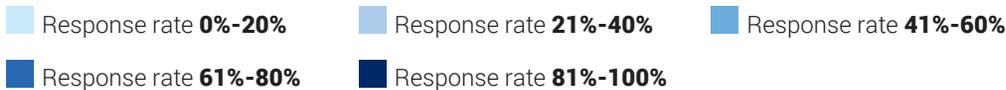
Figure 14 illustrates the average response time for the municipal executive branches. The executive branch of the city of São Paulo responded with remarkable speed; well below the overall average of 21 days. The cities of Belo Horizonte and Rio de Janeiro, on average, took longer than the 20-day limit stipulated in the law, but remained within the 30-day limit allowed with extensions.

**Figure 14** Average response time of Executive branches by jurisdictional level: municipalities and Federal Government



Scope | **Response time**

Response rate (%)



### 3. The Field experiment; user identities and question groups

In order to test the hypothesis that institutional and non-institutional users might be treated differently, the PTP conducted an experiment in which 322 requests were submitted under two different user identity groups. The first consisted of one male and one female volunteer, for whom there were no easily identifiable affiliations to any institution. The second group, also a male and a female, were individuals with easily verifiable affiliations (via Internet search), to FGV EBAPE or CTS at FGV DIREITO RIO.

The questions were submitted under two different groups: Question Group 1 (QG1) and Question Group 2 (QG2). Table 5 shows the distribution of requests between institutional and non-institutional identities.

**Table 5** Distribution of user identities

	Question Group	N° of requests	Institutional identity	Non-institutional identity
Experiment with female identities	QG1	154	77	77
Experiment with male identities	QG2	168	99	69
<b>Total</b>		<b>322</b>	<b>176</b>	<b>146</b>

Statistical tests were performed separately for each group, to test the difference in responses between institutional and non-institutional user identities.

The research design took into account the need to distribute the type of user requests evenly across jurisdictions, so that variations in results across jurisdictions did not influence the results. The distribution of requests by user identity and jurisdiction are presented in Table 6.

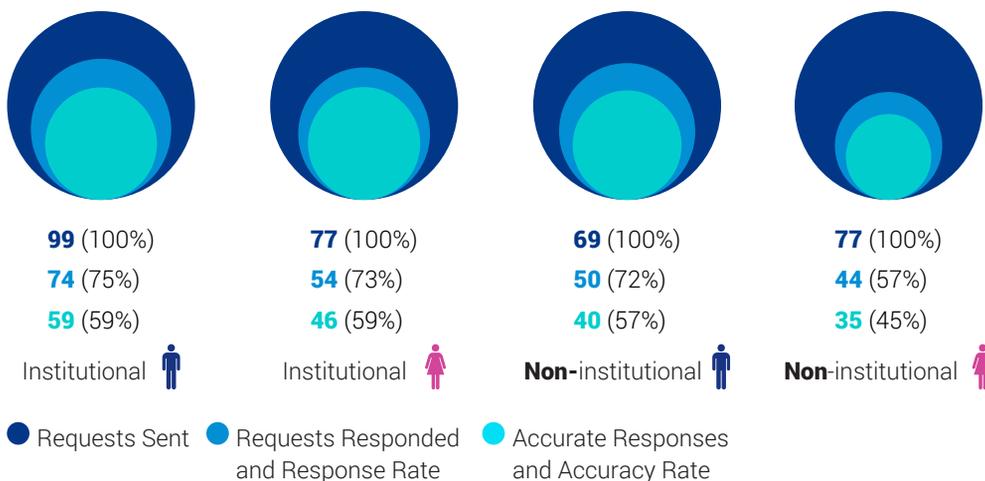
**Table 6** Distribution of requests between institutional and non-institutional identity use

Jurisdiction	Institutional identities	Non-institutional identities
Federal	50%	50%
State (DF, MG, RJ, SP)	55%	45%
Municipalities (BH, SP, RJ)	56%	44%
<b>Total</b>	<b>55%</b>	<b>45%</b>

**3.1 Results; descriptive statistics**

Figure 15 presents the results by user identity, institutional vs. non-institutional, and by gender. The overall audit response rate was 69%. The average response rate of the institutional identity was significantly higher at 74%. On the other hand, the aggregate non-institutional identity had a response rate of only 64.5%, almost 10% below the institutional identity and more than 5% below the average for the entire study. It is also important to highlight that the average accuracy rate was 51% for non-institutional identities against 59% for institutional identities.

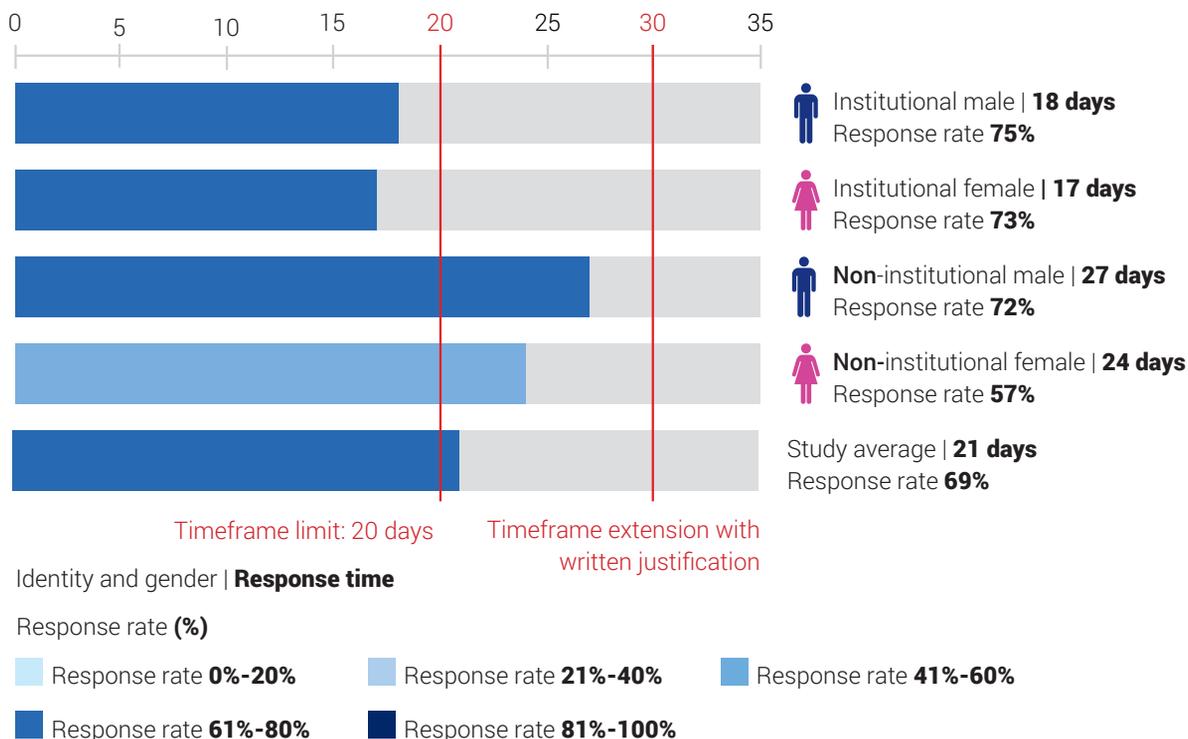
**Figure 15** Field experiment results



The low response rate for non-institutional, female identities is remarkable. The non-institutional female user identity received 15% fewer answers than the institutional profile and almost 15% less than her male counterpart.

Figure 16 shows the response time for each user identity. Institutional users received responses, on average, in 18 days. For non-institutional users that figure rose to 26; eight days more than the institutional identities and four more days than the aggregate study average (21 days).

**Figure 16** Average response time for field experiment



### 3.2 Statistical tests

We used a chi-square test to determine independence between the two qualitative variables being analyzed. Possible differences in sample size were factored into the test, to ensure this would not affect the result. In the case of quantitative variables (average days for response) we used a t-test for comparison of means between groups.

**Table 7** Chi-square test for differences in response rate

	Question Group	N	Institutional identity (%)	Non-institutional identity (%)	Chi-square	Significance (p-value)
Experiment with female identities	QG1	<b>154</b>	<b>70,10%</b>	<b>57%</b>	<b>2,8</b>	<b>0,094*</b>
Experiment with male identities	QG2	<b>168</b>	<b>74,70%</b>	<b>72,50%</b>	<b>0,11</b>	<b>0,740</b>

(\*)p<0,1

Given the results in Table 7, the experiment with QG1 supports the hypothesis that institutional and non-institutional users are treated differently; specifically that response rates might be better for institutional identities than for their non-institutional equivalents. The test for QG1 was significant at a confidence level of 90%, which rejects the null hypothesis (equality between the variables). However, the experiment with QG2, could not confirm independence between the two variables, given that the result is not statistically significant.

**Table 8** Chi-square test of differences in accuracy rates

	Question Group	N	Institutional identity (%)			Non-institutional identity (%)			Chi-square	Significance (p-value)
			0	1	2	0	1	2		
Accuracy score			<b>0</b>	<b>1</b>	<b>2</b>	<b>0</b>	<b>1</b>	<b>2</b>		
Experiment with female identities	GP1	<b>98</b>	<b>15%</b>	<b>17%</b>	<b>69%</b>	<b>20,4%</b>	<b>18,1%</b>	<b>61,3%</b>	<b>0,667</b>	<b>0,717</b>
Experiment with male identities	GP2	<b>124</b>	<b>20%</b>	<b>9%</b>	<b>70%</b>	<b>20%</b>	<b>14%</b>	<b>66%</b>	<b>0,625</b>	<b>0,731</b>

In order to conduct the chi-square test with accuracy as the dependent variable, it was necessary to add categories to the analysis<sup>42</sup>. Table 8 presents the test results.

The chi-square test did not show statistically significant results for either question group. This leads to a rejection of the hypothesis that accuracy rates would be higher for institutional than for non-institutional identities i.e., there is no evidence that an identity with an institutional affiliation influences the accuracy of the response.

We used the average number of days for response from each question group, to test for difference in response times between institutional and non-institutional profiles, and these results are shown in Table 9 below.

**Table 9** T-test of differences in average response time

	Question Group	N	Average response time in days (institutional)	Average response time in days (non-institutional)	Significance (p-value)
Experiment with female identities	GP1	<b>98</b>	<b>17</b>	<b>24</b>	<b>0,065*</b>
Experiment with male identities	GP2	<b>124</b>	<b>18</b>	<b>27</b>	<b>0,015**</b>

(\*):p<0,1

(\*\*):p<0,05

#### 4. Conclusions

To summarize, the results of the field experiment suggest the current rules on access to public information promote discrimination in the treatment of applicants. Non-institutional users were found to receive fewer responses (almost 10% less), on average eight days later.

**Table 10** Results of hypothesis testing

	Institutional affiliation affects response rate?	Institutional affiliation affects accuracy rate?	Institutional affiliation affects timeliness?
Female Identities (GP1)	Confirmed within the sample	<b>Not</b> confirmed within the sample	Confirmed within the sample
Male Identities (GP2)	<b>Not</b> confirmed within the sample	<b>Not</b> confirmed within the sample	<b>Not</b> confirmed within the sample

The results support the general hypothesis of discrimination in terms of response rates and timeliness of responses. Of particular interest, results show that women with an institutional identity received responses, on average, seven days before women with no institutional identity: men with an institutional identity received responses to requests nine days ahead of those without. This infers a prioritization of requests within the public entities based on the institutional status of the applicant.

The influence of institutional affiliation on the accuracy of responses provided by public agencies cannot be affirmed in statistical terms. However, the lack of statistically significant results might suggest that once a public entity decides to respond to an information request it does so impartially, regardless of the individual's institutional affiliation.

<sup>42</sup>Among the possible scores of this variable, we added the requests with a score of 0.5 to requests with a score of 1. We also added those requests with a score of 1.5 to the observations with a score of 2. In this way, the possible classification categories of the accuracy variable, was reduced to 3 (i.e., the accuracy variable may take the values 0, 1 or 2).

It is important to highlight that reducing opportunities for discrimination is possible with the adoption of recognized best practice, in Mexico and Chile for example, where systems explicitly do not require the submission of a citizen's identification card to exercise the fundamental right of access to information: contact details are deemed sufficient.

Obliging official identification introduces risks of discrimination and intimidation, particularly at local level, where staff can easily identify citizens. Preventing discrimination and intimidation is all the more important in those places most in need of freedom of information, for example in areas where criminal organizations have infiltrated government, and where citizens are already likely to pose fewer inquiries about the administration of government.

## **5. Appeals; their place in the study**

### **5.1 Introduction; background and procedure**

We filed 85 appeals as part of the study. Appeals were filed for a random sample of information requests in cases where it was deemed appropriate by our analysts. It is important to note that other FOI law audits rarely include the submission of appeals because they require significant additional work.

Article 15 of Law 12.527/11 stipulates an appeal might be made if the entity rejects or denies the request, or if the quality of response does not meet the user's expectations. The deadline for filing an appeal is ten days following the original response. A citizen then has the right to a second appeal, addressed to a higher authority. According to Article 16 of Law 12.527/11, third round appeals must be filed with the Comptroller General of the Union. However, this option is only available in cases where the body rejecting the second appeal belongs to the Federal Government. Among the 85 appeals submitted, 78 were first round appeals and seven were second round: no third round appeals were filed.

Those cases which resulted in appeals included situations where the public entity:

- claimed the request was improperly filed, generic or not appropriate; and as such, the entity stated, it was unable to provide an

answer;

- demanded the request be submitted in person, as was the case with several executive bodies in the city and state of Rio de Janeiro;
- requested the response be retrieved in person at its headquarters;
- complained of additional work necessary to compile the information requested;
- unjustifiably claimed secrecy;
- responded with a generic or incomplete response;
- sent, in response, a web-link that did not contain the requested information.

## 5.2 Successful appeals; overturning unsatisfactory responses

In numerous cases, the appeals were an important mechanism in obtaining a more accurate response than the initial one. This section presents a few of the successful appeals filed, which reinforce the idea that the appeal process is a useful mechanism to overturn an unsatisfactory initial response to a FOI request.

For example, we requested from the state of São Paulo's Department of Education, a spreadsheet containing a list of all contracts exempt from the bidding process, as well as the values of each contract and the justification for the exemption. We obtained, as a first response, only a generic text on the procurement procedures within the entity. However, after we filed an appeal, the agency provided a detailed table listing all contracts exempt from the bidding process in 2013, in addition to the purpose of the contract and its value.

The PTP observed the same positive effect of an appeal in relation to a request sent to the National Transportation Agency (Agência Nacional de Transportes Terrestres or ANTT). The request asked for information regarding all fines imposed on concessionaries regulated by the agency, e.g., values, number of petitions and justifications. In its first response, ANTT claimed the requested information was confidential based on an internal resolution of the agency<sup>43</sup>. However, after

an appeal in which we explained that the said resolution did not apply to the subject of the request, the agency sent tables containing information on the fines imposed on each concessionary, their value, and explanations broken down by mode of transport (rail, road and terrestrial).

Lastly, a similar case occurred with a request sent to the State University of São Paulo (Universidade Estadual Paulista or UNESP) for information on their integrated program for the development of partnerships with the private sector. We also requested information on the measurement of the university's impact on local and regional development. In the first response, UNESP provided an evasive and generic answer. However, following an appeal, the organization provided information with precise and detailed explanations on their processes, and the measurement of impact on local and regional development.

<sup>43</sup>Resolution ANTT number 442 from 2004, which regulates the FOI law within the agency.

## Capítulo 3

# Best practices and barriers to transparency

### 1. Introduction

The findings presented in the previous chapter provide an estimate of the institutional compliance with the FOI law. However, the content of the answers received can provide additional insights about successful compliance and the existence of barriers in implementing the law. For this reason, we present an analysis of (i) the received responses and best practices, and (ii), observed trends in barriers to transparency.

### 2. Best practices

The cases presented below illustrate how the FOI law can be a powerful tool in helping civil society find relevant public information. Some of the best practices encountered by this study are as follows:

- The Program for Public Transparency at the FGV (PTP/FGV) submitted a request to the Auditor's Office of the State of São Paulo (Tribunal de Contas do Estado de São Paulo or TCE-SP) for lists of all contracts exempted from the bidding process in 2013. The TCE-SP submitted a spreadsheet with reasons to support each waiver, e.g., well recognized legal experience, price, etc., as defined by Law 8.666/93.
- The PTP/FGV submitted a request to the Court of the State of Rio de Janeiro (TJ-RJ) for information the court already had in its active transparency webpage: consolidated and organized information about contracts exempted from the bidding process. By bringing transparency to these contracts, the TJ-RJ has adopted a model useful to other organs. In addition to providing the value, the reason for the contract, and the justification for waiving the bidding process, it allowed access to the entire content of the

contract. Photocopies of all executed contracts exempt from bidding are made available for consultation on its active transparency website.

- The PTP/FGV asked the Ministry of Education for the total amount it had disbursed and what it had been charged, for work undertaken on the construction and contracting of day-care facilities by different municipalities. The Ministry submitted a spreadsheet containing information on works of approximately 9,300 day-care facilities in different municipalities. The spreadsheet included details relating to (i) the total amount committed to each project, (ii) the amount that had been actually paid, and (iii) the percentage of work already completed. The sum of the values committed to day-care facilities throughout Brazil totaled R\$ 9,604,666,930: the magnitude of this value shows the relevance of the topic and hence the need for public administrators to have information properly organized.

- The PTP/FGV issued a request to the House of Representatives for the 2013 parliamentary plenary sessions' attendance roll. The response included specific links to the web page of the active transparency portal of the organ, containing a spreadsheet with the information requested in a format able to be processed by computer.

### **3. Barriers to Public Transparency**

In addition to best practices, this study also identified the opposite, i.e., those practices creating serious obstacles to government transparency and to the effective functioning of Law 12.527/11. Such cases included:

- Requiring the request be submitted in person or that the answer be sought in person, contradicting Article 10, paragraph 2, of the FOI law;
- Rejecting the request based on broad interpretation of the 'additional work' clause;
- Transmitting information in formats not able to be processed by

computers;

- Aggregation of information at a different level to that requested;
- Implementing potentially intimidating procedures, such as necessitating the signing of liability forms, for the use of information.

The study found the following examples of the above listed practices, which might undermine or limit freedom of information.

### **3.1 Requirements that the request be submitted or retrieved in person**

Some public agencies rejected several requests for information submitted by digital means. Many times this justification was based on a specific regulation. For example, the state of Rio de Janeiro issued Decree 43.597/12, which covers entities within the executive branch, and which stipulates that information requests must be submitted in person.

However, the FOI law 12.527/11 does not require that information requests be submitted in person. In fact, the law stipulates that FOI requests to federal, state or local government agencies may be submitted by “any legitimate means”. Moreover, the FOI law actively encourages the use of digital means for the submission of requests. Article 3, III, states that procedures for handling information requests must be compatible with the use of; “communication means made available by technological developments.”

Therefore, the requirement by the state of Rio de Janeiro is illegal and goes beyond the regulatory powers of the executive branch, making the procedure of access to information more restrictive than stipulated by federal law.

For these reasons, the state of Rio de Janeiro’s decree represents a real obstacle to the freedom of information in the state<sup>44</sup>. The requirements stipulated in the decree can completely preclude the exercise of this right, contrary to the objectives of the FOI law and the provisions of Article 5, XXXIII, of the Federal Constitution.

Unfortunately, we encountered barriers, similar to the ones found in the executive branch of the state of Rio de Janeiro, in the following entities:

- Auditor's Office (Tribunal de Contas) of the state of Rio de Janeiro<sup>45</sup>
- Department of Education (Secretaria de Educação) of the state of Rio de Janeiro<sup>46 47</sup>

In other cases, the entity assessed accepted the request sent digitally, but indicated that the answer should be sought in person at its headquarters. This requirement also represents an obstacle to the law, which does not require citizens to be present for a response. It is clear such a requirement could dramatically reduce the effectiveness of the law, especially (but not only) in cases where the applicants reside in other cities or states. The identification of barriers imposed by the governments of the state and city of Rio de Janeiro leads to the conclusion that both have adopted measures contradictory to the spirit of Law 12.527/11.

The requirement that responses to FOI requests be retrieved in person, was found in the following entities:

- Legislative Assembly (Assembleia Legislativa) of the State of São Paulo<sup>48</sup>
- Court of Justice (Tribunal de Justiça) of the Federal District<sup>49</sup>
- Legislative Assembly (Câmara Legislativa) of the Federal District<sup>50</sup>
- The Federal Public Prosecutor's Office (Ministério Público Federal)<sup>51</sup>
- Department of Transportation (Secretaria de Transporte) of Belo Horizonte<sup>52</sup>

<sup>44</sup>Article 8 of Decree 43.597/12 reads as follows: "The interested party must submit a request, in the standard form (Appendix I) along with the statement of responsibility (Appendix II), to the agency or entity that has the required documents."

<sup>45</sup>Request confirmation number (número de protocolo): 149.040.051.441 and 146.010.352.485.

<sup>46</sup>The refusal by this entity is not supported by Municipal Decree 35.606 of 2012, which in art. 8, discusses the possibility of submitting a request via the Internet. We note, nevertheless, refusal by the Department of Education of Rio de Janeiro on the grounds of requiring submission of the request in person.

<sup>47</sup>Request confirmation number (número de protocolo): RIO-5902239-4.

### 3.2 Rejection of the request based on a broad interpretation of the 'undue additional work' clause

Several FOI requests were rejected in the first instance, based on the claim that producing the answer would require additional work in the analysis, interpretation, or gathering of data and information.

There is a normative basis for public bodies to use the clause of 'additional work' to reject an access to information request: for example Article 13, III, of Federal Decree 7.724 of 2012 which regulates Law 12.527/11 at the federal level, in addition to numerous state and municipal decrees<sup>53</sup>. However, several of the entities analyzed used these provisions too broadly, denying legitimate claims, in violation of the FOI law. The same problem was identified by the NGO, Article 19, in its Annual Report to the Regional Alliance for Freedom and Expression and Information (Alianza Regional por la Libre Expresión and Información)(2014)<sup>54</sup>.

It should be noted that it is intrinsic to the FOI requesting process that some degree of additional work will be required of public agencies, especially in cases where the entity has not conducted prior work organizing and consolidating requested information. After all, it is common that the information requested, despite addressing basic issues from the point of view of efficient management of a public body, has not been previously produced.

The additional work claim is particularly unjustified in instances when the FOI request concerns items in Section § 1, Article 8, of Law 12.527/11, which stipulates an obligation to actively disseminate and disclose information, regardless of citizens' requests: it might be considered a blatant abuse of the additional work clause given that the

<sup>48</sup>Request confirmation number (número de protocolo): 645

<sup>49</sup>Request confirmation number (número de protocolo): 2014-068123

<sup>50</sup>Request confirmation number (número de protocolo): 62/2014-OUV

<sup>51</sup>Request confirmation number (número de protocolo): 36783

<sup>52</sup>A request confirmation number was not provided by the entity.

<sup>53</sup>Art. 13 – "The following FOI requests will not be accepted: III – requests which require additional work for the analysis, interpretation, or gathering of data and information, or production services or formatting of data which is outside of the competencies of the entity."

<sup>54</sup>ALIANZA REGIONAL POR LA LIBRE EXPRESIÓN E INFORMACIÓN. Saber más VI: informe regional sobre acceso a información pública y apelaciones (2014).

information requested should already exist independent of the access to information request<sup>55</sup>.

We noted this additional work claim was used to deny access to documents of significant public interest, for example, by the Health Department of the Municipality of São Paulo<sup>56</sup>. We submitted a request to this agency to provide a spreadsheet containing all contracts entered by the agency with a bidding-requirement exemption in 2013. It was expected that this information had already been compiled, as it is required by section VI of art. 7, § 3, of Law 12.527/11.

A similar case occurred with the Department of Education in the City of São Paulo in response to a request for a list of those individuals who had failed the probation period as municipal teachers<sup>57</sup>. Initially the department denied the request claiming confidentiality. Following an appeal, the department denied the request again, on the grounds that to do so would generate additional work in gathering information.

Based on this response, it can be inferred that neither the Department of Education nor the Health Department of São Paulo had the requested data readily available; there would be no reason to decline the requests otherwise. A negative response can only suggest deficient management, if not poor data and archival practices.

These experiences raise an important point: it is essential that public agencies adopt information management mechanisms to ensure the required information is easily accessible. An appropriate archival practice becomes particularly important when related to key information such as public expenditure, procurement, transfers of financial

<sup>55</sup>8th art. It is the duty of public bodies and entities to promote, independently of requirements, the dissemination of information of collective interest that is produced by or under the oversight of the public body. Information must be disseminated through an easy to access medium, and within the entity's area of competency. § 1o Information to be disseminated as part of compliance with art. 8, must include, at minimum: I - record of competence and organizational structure, addresses and telephone numbers of their units and opening hours to the public; II - records of any transfers of financial resources; III - records of expenditures; IV - information concerning bidding procedures, including the respective notices and results, as well as all contracts; V - general data for the monitoring of programs, activities, projects and works of agencies and entities; and VI - answers to frequently asked questions."

<sup>56</sup>Request confirmation number (número de protocolo): 8476.

<sup>57</sup>Request confirmation number (número de protocolo): 8539.

resources, and employee figures, for example.

In addition to the Departments of Health and Education of the State of São Paulo, the following entities also declined requests based on the ‘additional work’ clause:

- The Lower House of the National Legislature (Câmara dos Deputados)<sup>58</sup>
- Legislative Assembly (Assembleia Legislativa) of the State of Minas Gerais<sup>59 60</sup>
- Federal Communications Commission (Ministério das Comunicações)<sup>61</sup>
- Department of Education (Secretaria de Educação) of the State of Minas Gerais<sup>62</sup>

### 3.3 Transmitting information in formats not processable by computers

Some of the FOI requests asked for the information to be formatted in a spreadsheet. This was the case in requests submitted to the entity for all consultancy service contracts and spending on advertising in the previous three years.

As stated earlier, it is crucial that government data is made available to citizens in computable format; that it be “structured to enable its automated processing” thereby allowing applicants, should they so wish, to use and analyze the data in a different way<sup>63</sup>.

In fact, the Brazilian legislature, when drafting Law 12.527 / 11, was concerned with addressing this specific issue, as stated in Article 8, § 3, sections II and III. There is a clear intention in the law, to promote formats processable by computer, as well as open-formats and

<sup>58</sup>Art. 7, VI of the Ato da Mesa nº 45/2012 which regulates Law 12.527/11 in House of Representatives includes the the “additional work” clause.

<sup>59</sup>The “additional work” clause is based on Decision (Deliberação) 2.555/2013, which regulates the implementation of FOI law within the Legislative Assembly of the State of Minas Gerais.

<sup>60</sup>Request confirmation number (número de protocolo): 37288

<sup>61</sup>Request confirmation number (número de protocolo): 53850.001261/2014-14

<sup>62</sup>Request confirmation number (número de protocolo): EI9Vm7kZ

non-proprietary formats.

For the purposes of the General Audit, we considered the following formats as computer processable: csv, xls, ods, doc, docx and odt<sup>64</sup>. The PDF (Portable Document Format) was considered processable when it was possible to copy the contents, and unprocessable when it was not.

We received various responses in non-processable form, as shown in the list below:

- Federal Auditor's Office (Tribunal de Contas da União)<sup>67</sup>
- Auditor's Office (Tribunal de Contas) of the State of São Paulo<sup>68</sup>
- Lower House of the National Legislature (Câmara dos Deputados)<sup>69</sup>
- City Council (Câmara de Vereadores) of Belo Horizonte<sup>70</sup>

<sup>63</sup>BEGHIN, N. & ZIGONI, C. (orgs), "Avaliando os websites de transparência orçamentária nacionais e sub-nacionais e medindo impactos de dados abertos sobre direitos humanos no Brasil". Brasília: Instituto de Estudos Socioeconômicos, 2014. Available at: <http://www.inesc.org.br/biblioteca/publicacoes/textos/pesquisa-transparencia-orcamentaria-nos-websites-nacionais-e-sub-nacionais> [Accessed on: 29.10.2014]

<sup>64</sup>This is not an exhaustive list. There are many other formats that can be considered processable or readable by computers. It should be noted, however, that only files in proprietary formats were received during this research.

<sup>65</sup>As discussed in the introduction, in order to be considered open format, the data must meet multiple requirements. Automated processing is only one of such requirements. Also, the use of non-proprietary formats is essential for the dissemination of data. For that reason, proprietary formats are not considered in this study. For a more in-depth analysis about compliance with open-data principles see the already mentioned study by BEGHIN & ZIGONI (2014).

<sup>66</sup>In the case of documents in PDF (Portable Document Format) without text layer in which data is non-exportable, they could be recognized with OCR, an optical character-recognition technology. However, it is an alternative that requires specific knowledge and processing capacity. On the other hand, although it allows the extraction of the data, it should be noted this may require time and effort in organizing copied texts, especially for spreadsheets such as those obtained in the Judicial Audit. For these reasons, although readable and understandable by humans, the PDF is not usually considered a format suitable for data processing.

<sup>67</sup>Request confirmation number (número de protocolo): 195987

<sup>68</sup>Request confirmation number (número de protocolo): 1563

<sup>69</sup>Request confirmation number (número de protocolo): F186103136367

<sup>70</sup>Request confirmation number (número de protocolo): 601525

### **3.4 Aggregation of information in a pattern different from the original request**

Some information is only relevant and useful when aggregated or disaggregated at the level requested. For example, we submitted requests to various legislative assemblies and city councils for individualized attendance lists pertaining to members of the assembly and council in 2013 plenary meetings. The request, however, expressly requested that information be aggregated annually, so that it could be possible to rank representatives based on their attendance for each year.

However, instead of submitting the information annually as requested, some entities submitted it disaggregated monthly. The answer, therefore, had no real value because the objective comparison of the presence of different elected representatives was not feasible<sup>71</sup>. Consequently, the answer did not allow us to infer which parliamentarians had higher and lower rates of attendance at plenary sessions; information of clear public interest.

It was interesting to note that by sending the response with a different level of aggregation than requested, the agency complied with Law 12,527/11 in appearance, but in reality imposed an obstacle to transparency.

This problem was encountered with the following entities:

- City Council (Câmara de Vereadores) of Rio de Janeiro<sup>72</sup>
- Legislative Assembly (Assembleia Legislativa) of the State of São Paulo<sup>73</sup>
- Legislative Assembly (Assembleia Legislativa) of the State of Minas Gerais<sup>74</sup>

### **3.5 Implementation of potentially intimidating procedures**

In addition to requiring the filing of information requests in person, the Executive Branch of the state of Rio de Janeiro requires that petitioners complete a 'Statement of Responsibility for Use and Disclo-

<sup>71</sup>A herculean effort would be need to aggregate the data manually

<sup>72</sup>A request confirmation was not provided by the entity.

<sup>73</sup>Request confirmation number (número de protocolo): 643.

<sup>74</sup>Request confirmation number (número de protocolo): 37268

sure of Information<sup>75</sup>. This statement stipulates the person making the request accepts liability for damages arising out of possible ‘mis-use’ of the information received, citing the possibility of criminal libel, slander and defamation charges.

Such requirements might generate practices of self-censorship, especially for citizens without legal knowledge, i.e., the vast majority of the population in Brazil. We, the authors, believe such practices are severely detrimental to an individual’s willingness to use the freedom of information law, and on the freedom of expression itself. In addition to the executive branch of the state of Rio de Janeiro, this practice was also identified in the Auditor’s Office (Tribunal de Contas) of the state of Rio de Janeiro<sup>76</sup>.

A similar practice, although less severe, was observed in the passive transparency platform of the Public Ministry of the state of Minas Gerais (Ministério Público de Minas Gerais), which required citizens, before sending a request for information, to select the following option:

“I declare awareness of, and acceptance that, in accordance with Federal Law 12.527 of November 18, 2011, and Resolution 89/2012 of the National Public Prosecutor’s Council [Conselho Nacional do Ministério Público], inappropriate use of the information obtained from the Public Ministry of the State of Minas Gerais, will be subject to or responsible for legal penalties.”<sup>77</sup>

In this specific case, it is emphasized that the contents of Res. 89/2012 of the National Public Prosecution Council are not made available, which makes it impossible for citizens to become aware as to what they are actually agreeing. As in the case of Rio de Janeiro, the above content might potentially discourage some citizens from seeking or disseminating public information. Also, this type of warning is unnecessary, since illegal practices can clearly result in legal penalties, regardless of the use of information obtained.

<sup>75</sup>“Termo de Responsabilidade pelo Uso e Divulgação da Informação” <http://www.rj.gov.br/web/informacaopublica/exibeconteudo?article-id=1038866>

<sup>76</sup>The requirement of signing the “Statement of Responsibility for Use and Disclosure of Information” is established in Resolution Number 275 of 2013 of the Auditor’s Office of the State of Rio de Janeiro.

<sup>77</sup><http://www.mpmg.mp.br/aceso-a-informacao/requerimento-de-informacao/>

## Chapter 4

# Audit of the platforms used to manage FOI requests

## 1. Introduction

Researchers from the FGV's Program for Public Transparency (PTP/FGV) found great disparity between public entities in terms of the quality and existence of digital platforms for making and receiving FOI requests. This chapter presents the analysis results of 33 digital platforms used for this purpose.

For a FOI law to work, it is important the process for sending requests and receiving responses be as simple as possible. Therefore it is essential that governments adopt digital platforms, which are both efficient and uncomplicated. Ideally a platform should also provide a search tool for citizens to identify responses to similar requests, avoiding costly duplications: Mexico, for example, has such a system and other countries too, are in the process of adopting or implementing such frameworks.

The existence of a digital platform dedicated to FOI requests, simplifies a process that some citizens regard as complicated, scaffolding their inquiry, and since requests are recorded the possibility that a request can be ignored is reduced.

In Brazil, while the access to information system, e-SIC, used by the Federal Government has a number of attributes that facilitate the process, other entities have adopted platforms or systems which impose barriers.

## 2. Information access barriers: a lack of compliant digital platforms

Some Brazilian public entities do not even have a platform specifically designed for receiving FOI requests. Such entities often transferred

this task to their ombudsman site, or ‘Contact Us’ webpage. This option causes some problems, which we describe in the following sections.

### **2.1 Impossibility of filing an appeal**

Law 12.527/11 provides specific guidelines relating to the process of accessing information, for which an ombudsman’s website might prove inadequate. An example is the right to appeal a decision when a FOI request is rejected. Since the ombudsman’s website has no specifically designed tool for filing appeals, the citizen is obliged to file through the same channel that the original, rejected FOI law request was submitted. This can confuse the user, who may then fail to file an appeal at all, unable to find a channel they deem appropriate.

The filing of appeals can play an important role, not only for the user who wants to access specific information, but also for the government. The existence of appeals may indicate, for example, that the department responsible for complying with FOI requests is not operating properly. Thus, tools to facilitate the submission of appeals might help public bodies improve management of resources, for the effective enforcement of freedom of information.

### **2.2 Character limits**

Another example of problems arising from the use of the ombudsman’s website is the character limit. The existence of a limit in the field where users request information sets a clear obstacle to transparency and is a violation of Law 12.527/11, which does not establish any rules as to the length of requests.

## **3. Evaluation of digital platforms**

The FOI law stipulates that public entities should provide an “option on their official Internet websites through which to submit requests.”<sup>78</sup> It does not define, however, the specific features such digital platforms must have, leaving this to the entity’s discretion.

With this in mind, the PTP conducted a specific assessment of 33

<sup>78</sup>Art 10, § 2o, da Lei 12.527/11

government entities' websites through which information requests were submitted. The goal was to identify the characteristics of the best platforms, as well as obstacles presented by those platforms, or ombudsmen websites, and 'Contact Us' webpages, which proved unsatisfactory.

### **3.1 Methodology of evaluation; what constitutes a good FOI digital platform?**

Through the analysis of several different platforms around the world it is possible to identify the main features a good FOI platform must possess. Some of these are present on the e-SIC platform created by Brazil's Federal Government. Despite not having the functionality to allow searches of all requests sent by any and all applicants, and their respective answers, e-SIC is considered a good example of a passive transparency platform, and should be seen as a model for other governmental entities in the country.

Positive attributes of e-SIC include the following characteristics:

- The user registers in the system which grants access to a platform on which all requests sent and responses received, are recorded. When an information request is submitted, the system emails an automatic confirmation of receipt;
- The system sends an automatic email notification when the request is answered;
- The platform has a specific section for the filing of appeals;
- The use of a log-in procedure means that access to the answer is possible regardless of the availability of the confirmation or protocol number.

The following sections discuss in detail the importance of these attributes.

### **3.2 Submission of a confirmation email**

Following submission of an access to information request, an email confirming receipt is of great importance; it reassures the user that the body has received their request, and that the FOI process is actively underway.

### **3.3 Submission of a notification of response**

Sending an email stating that the access to information request has been answered, allows the citizen to become more quickly aware of the information's availability.

### **3.4 Availability of a specific section for filing appeals**

As previously discussed, the ability to file appeals in cases where the answer is unsatisfactory, is an important right of citizens, granted by law. Various platforms however, do not have a specific section for this purpose. Consequently, the citizen is obliged to appeal through the same channel used to request access to information: potentially confusing and discouraging, since it is unclear in the agency's platform whether the right to an appeal exists.

### **3.5 Use of log-in procedure instead of confirmation/protocol numbers**

Several of the platforms audited only allowed citizens to access responses to the requests after inserting the confirmation or protocol number generated when the original request was submitted. These platforms did not offer citizens an alternative mechanism to enable access to the contents of the response in case of the loss of the confirmation/protocol number.

The lack of a log-in feature does not violate the parameters of the FOI law. However, it does make the platform less user-friendly and can pose a problem if the applicant for any reason, does not properly record the number of confirmation/protocol.

### **3.6 Summary**

Given these barriers to access, the PTP/FGV advocates a digital-platform which (i) unifies into a single log-in procedure, all information requests and subsequent responses for a user; and which (ii) prevents instances where the loss of a protocol number means the impossibility of accessing the response.

#### 4. Comparative analysis of digital platforms

The data contained in the table below refers to the digital platforms of all 33 entities analyzed.

**Table 11** Platforms avaiation

Agency	Does it have a specific platform for FOI requests?	Does it send a confirmation e-mail?	Does it send an e-mail to notify that the request has been answered?	Does it have login interface?	Does it have a specific link for appealing?
Federal Government	✓	✓	✓	✓	✓
<b>São Paulo</b> State Government	✓	✓	✓	✗	✓
<b>Minas Gerais</b> State Government	✓	✓	✓	✗	✓
<b>Rio de Janeiro</b> State Government	✗	✗	✓	✗	✗
<b>Federal District</b> Government	✓	✓	✓	✓	✓
<b>São Paulo</b> Municipality Government	✓	✓	✓	✓	✓
<b>Rio de Janeiro</b> Municipality Government	✓	✗	✗	✗	✗
<b>Belo Horizonte</b> Municipality Government	✓	✓	✓	✗	✗
Senate	✓	✗	✓	✗	✗
Lower House of the Natuional Legislature	✗	✗	✓	✗	✗
<b>São Paulo</b> State Legislative Assembly	✓	✓	✓	✗	✗
<b>Minas Gerais</b> State Legislative Assembly	✗	✓	✓	✗	✗
<b>Rio de Janeiro</b> State Legislative Assembly	✓	✓	✓	✓	✗

Agency	Does it have a specific platform for FOI requests?	Does it send a confirmation e-mail?	Does it send an e-mail to notify that the request has been answered?	Does it have login interface?	Does it have a specific link for appealing?
Federal District Legislative Assembly	X	✓	✓	X	X
<b>São Paulo</b> City Council	✓	X	✓	X	X
<b>Rio de Janeiro</b> City Council	✓	✓	✓	X	X
<b>Belo Horizonte</b> City Council	X	✓	✓	X	X
Supreme Court	✓	✓	✓	X	X
Superior Court of Justice	✓	✓	✓	X	X
<b>São Paulo</b> State Court	✓	✓	✓	X	X
<b>Rio de Janeiro</b> State Court	X	X	✓	X	X
Federal District State Court	X	✓	✓	X	X
Federal Public Prosecutor's Office	✓	✓	✓	X	X
<b>São Paulo</b> State Prosecutor's Office	X	X	✓	X	X
<b>Minas Gerais</b> State Prosecutor's Office	X	✓	✓	X	X
<b>Rio de Janeiro</b> State Prosecutor's Office	✓	✓	✓	X	X
<b>Federal District</b> Prosecutor's Office	✓	X	✓	X	X
Federal Auditor's Office	✓	✓	✓	X	✓
Auditor's Office of the State of <b>São Paulo</b>	✓	✓	✓	✓	✓
Auditor's Office of the State of <b>Minas Gerais</b>	✓	✓	✓	X	X
Auditor's Office of the State of <b>Rio de Janeiro</b>	X	X	✓	X	X

It should be noted that a single platform is available to submit FOI requests to the executive branches at the federal, state and municipal levels. Therefore the individual platforms of each entity, i.e., ministries and departments, were not analyzed. The reader should also take into account that the assessment of digital platforms ended on June 30, 2014.

The first column of Table 11 identifies whether or not the entity analyzed, has a specific digital platform for the submissions of FOI requests. The next four columns refer to desirable attributes of a good passive transparency digital platform.

## 5. Conclusions

Taking into account that freedom of information is a constitutionally protected right, it is important that requests based on Law 12.527/11 be handled through dedicated platforms, rather than lumped together with a variety of requests unrelated to FOI, in a platform used for other purposes.

Furthermore, it is recommended that agencies conform to the technological realities and adopt digital platforms to manage FOI requests. Mexico, Chile, parts of India, and Canada, all provide examples of international best practice in this regard.

As previously noted, it is also ideal than any digital platform used to handle FOI requests, features a global search engine to permit the search of previous FOI requests. This would help agencies avoid needless and costly replication of labor at the taxpayer's expense.

## PART II – JUDICIAL BRANCH AUDIT

By Luiz Fernando Moncau, Rafael Velasco, Gregory Michener, Marina Barros, and Jamila Venturini

In contrast to the executive and legislative branches, members of the judiciary are not elected and cannot be removed through a vote. The tenure of judges serves as an important mechanism in promoting their independence but also introduces risks. At one extreme, the judiciary may be captured by special interests while at the other, the judiciary may become so independent, that it is scarcely accountable to the polity. For these reasons, democracy experts caution that the development of accountability mechanisms beginning with greater transparency is critical to ensuring the integrity and legitimacy of the judicial branch of government.

The Program for Public Transparency (PTP/FGV), coordinated by FGV EBAPE and the CTS at FGV DIREITO RIO, conducted an audit of the Brazilian Judicial Branch with the goal of assessing its level of compliance with the FOI law<sup>79</sup>. As mentioned in the introduction, the Judicial Branch Audit used the same methodology as the General Audit, thus there is a high level of comparability between the general and specific findings of the Judicial Branch.

This audit aims to assess the active and passive transparency of the judiciary, through the gathering and analysis of data. Several recent studies have focused on analyzing how the Brazilian judiciary has dealt with the right of freedom of information. These include: “Year 1 Audit of the Freedom of Information law and the Brazilian Judiciary – 2012-2013” by the NGO Article 19, as well as “Transparency Challenges in the Brazilian Justice system” by the Secretariat of Judicial Reform (Secretaria de Reforma do Judiciário) in collaboration with Ar-

<sup>79</sup>Two other recent projects by the FGV DIREITO RIO used data analysis to understand and illuminate from different angles the problems of the Brazilian Justice system. In the analysis Supremo in Numbers a large volume of data on nearly 1.5 million cases of the Supreme Court (Supremo Tribunal Federal) is analyzed from different angles, such as the variety of cases, the geographical distribution, the duration of procedural steps, and so on. Project results can be found in <http://www.fgv.br/supremoemnumeros/> [Accessed on: 30.10.2014]

ticle 19, FGV CEAPG and Gpopai/USP<sup>80 81 82 83</sup>. The current study seeks to add new dimensions to this research.

<sup>80</sup>"Balanço de 1 Ano da Lei de Acesso à Informação Pública Acesso à informação e os Órgãos de Justiça Brasileiros – 2012-2013"

<sup>81</sup>"Desafios da Transparência no Sistema de Justiça Brasileiro"

<sup>82</sup>Center for the Study of Public Administration and Government (Centro de Estudos em Administração Pública e Governo).

<sup>83</sup>Public Policy Research Group/University of São Paulo (Grupo de Pesquisa em Políticas Públicas/University of São Paulo)

## Chapter 5

# Results

## 1. Methodology

The methodology used in the Judicial Branch Audit replicated the methodology used in the General Audit, explained in detail previously in Chapter 1.

We adjusted the methodology in superficial ways to the peculiarities of the judiciary, as well as to meet the scope and objectives of the investigation. The details of these adjustments are described below.

### 1.1 Audit coverage

This audit assessed 40 Brazilian courts, including Superior Courts, Regional Labor Courts, Federal Courts, and Courts of Justice. Table 12 below presents distribution.

**Table 12** Distribution of audited courts

	Courts	Quantity
Superior Courts	Supreme Court ( <b>STF</b> ), <b>STJ</b> and <b>TST</b>	<b>3</b>
Regional Labor Courts	<b>TRTs</b>	<b>5*</b>
Regional Federal Courts	<b>TRFs</b>	<b>5**</b>
State Courts (Tribunais de Justiça)	<b>TJs</b>	<b>27***</b>
<b>Total</b>		<b>40</b>

(\*)TRT of the 1st Region, TRT of the 2nd Region, TRT of the 3rd Region, TRT of the 10th Region and the TRT of the 15th Region.

(\*\*)TRFs of the 1st and 5th Regions.

(\*\*\*)TJs of all the Brazilian states and the Federal District

Seven FOI requests were submitted to each court, making a total of 280. However, one of the requests did not apply to the superior courts, reducing the total number of requests by three. Additionally, 13 requests were canceled for technical reasons. Ultimately, 264 FOI requests were included in the audit.

The following is a list of the 16 requests not included in the audit:

- Three requests about the promotion of judges, (Request Category 4), not submitted because they did not apply to the Superior Courts (Tribunais Superiores Supreme Court (STF), STJ, and TST);
- Two requests with incorrect questions were excluded from the analysis;
- Eleven requests were not submitted due to problems with the websites for the following tribunals: TJ-BA (two requests), TJ-AM (one request), TJ-AC (three requests), TJ-RS (two requests), STJ (one request), TJ-RO (one request), and Supreme Court (STF) (one request). The exclusion of these requests did not impact the assessment of these courts.

## 1.2 Development and submission of requests

Seven request types were developed and submitted to the courts included in the audit. The topics addressed by the requests are shown in Table 13.

## 1.3 Topics of requests

We attempted to frame each request in a clear and concise manner in order to leave little room for interpretation by the entity, thereby reducing the possibilities of a rejection. Thus, legal terminology was used in the development of the questions whenever necessary.

The objective of requests 1, 2, and 7, was to obtain information about the compensation of judges. The so-called National Administrative Reform (Reforma Administrativa do Estado), implemented by Constitutional Amendment Number 19/98, established a ceiling for the compensation of public servants. This constitutional amendment is enforced through a complex web of laws and regulations, which in addition to the constitutional norms, includes the Internal Laws of the

**Table 13** Request Topics of the Judicial Branch Audit

Requests	Topic
Request <b>1</b>	Remuneration for the years 2012 and 2013
Request <b>2</b>	Remuneration for the years 2012 and 2013, with additional details
Request <b>3</b>	Nepotism
Request <b>4</b>	Career Plans and promotions
Request <b>5</b>	Budget for the years 2012 and 2013
Request <b>6</b>	Number of cases judged in the first instance, for the years 2012 and 2013
Request <b>7*</b>	Remuneration, elaborating on Request #1

<sup>(\*)</sup>Request 7 was used very specifically, as detailed below.

National Judiciary (Lei Orgânica da Magistratura Nacional or LOMAN), numerous laws, and Resolutions 13 and 14, 2006, of the National Judicial Council (Conselho Nacional de Justiça or National Judicial Council (CNJ)).<sup>84 85 86 87</sup>

The legal complexities tackled in requests 1, 2, and 7, become even more bewildering given the intricacies of compensation schemes devised for judicial civil servants and judges.

It is accepted as essential to promote greater transparency in the remuneration structure of the judiciary, a task originally attempted

<sup>84</sup>See for example Articles 37, section X to XII, Article 39, § 4o and Article 93, section V.

<sup>85</sup>See for example Articles 61 to 77, which address salaries, benefits and other advantages of the profession, as well as Article 32, which addresses the irreducibility of judges' salaries. The complete law is available at: [http://www.planalto.gov.br/ccivil\\_03/leis/lcp/lcp35.htm](http://www.planalto.gov.br/ccivil_03/leis/lcp/lcp35.htm).

<sup>86</sup>See for example Law n° 8.350 of 1991, which sets the value of bonuses for presence in election of justices (Justiça Eleitoral), and Law n° 12.771/2012, which effectively fixes the salaries of the Supreme Court (STF) judges.

<sup>87</sup>Resolutions 13 and 14 address, respectively, "the application of a constitutionally mandated compensation ceiling for members of the bench" and "the application of a constitutionally mandated compensation ceiling for public servants of the Judicial Branch and of the state courts that do not receive a subsidy".

through the adoption of the National Judicial Council (CNJ) Resolution No. 102, of December 15, 2009, almost two years before the adoption of the FOI law.

Resolution 102, amended by Resolution No. 151, 2012, requires the publication of not only the compensation structure of the courts and councils, but also other parameters regarding budgeting and staffing structures<sup>88</sup>. The resolution requires the publication of a table containing information on the base salary of judges, as well as personal benefits, allowances and other discretionary benefits judges may earn. However, these categories are not sufficient to clarify under what rubrics judges are receiving different types of payments. For this reason, FOI requests were formulated to allow an ordinary citizen to gather more detailed information on the remuneration structure of the judiciary in all of the evaluated courts.

As discussed below, we formulated Request Categories 1 and 2 considering this legal and regulatory framework, using the technical terms of the National Judicial Council (CNJ)'s own tables.

Request Category 1 requested the following information:

Consistent with the provisions of the annex of Resolution No. 151 of the National Judicial Council (National Judicial Council (CNJ)), I request the amounts paid to each judge in the form of base salary, personal benefits, subsidies, allowances and other discretionary benefits. Please provide this information in a computer-processable format, following the guidelines established by the National Judicial Council (CNJ), summarized on an annual basis for the years 2012 and 2013.

The table should provide the total annual amount of all compensation categories paid to each judge of this Court during the years 2012 and 2013.

With this request, we sought to obtain data already disclosed by the courts in their electronic sites pursuant to Resolution No. 102/2006, as

<sup>88</sup>National Judicial Council (CNJ)'s Resolution n° 151 amends Article 3°, section VI of Resolution n° 102. This amendment was essential since it establishes a new model for the dissemination of information regarding the "salary, per diem, allowances, and any other monies paid to members of the bench and other public servants under any title..." But more than that, the amendment also forced the judiciary entities to disseminate, via their websites, not only pay, but also the name of the judges. This led to a completely new level of transparency on salaries within the judiciary.

amended by Resolution No. 151/2012 of the National Judicial Council (CNJ). However, the information on the website is often not aggregated by year, and, as such, does not permit citizens to understand the total annual compensation for each judge. Also, data is often not in a computer-processable format, i.e., it is not possible to perform an automated analysis, without for example, a document containing a spreadsheet. Moreover, the data often cannot be obtained in a single query; multiple queries frequently have to be done on the judge's name, for example.

Request Category 2 asked for the following information from the courts:

(a.1) What are all the categories of allowances, as defined in Article 3, section VI and Annex VIII of Resolution 102, as amended by Resolution 151 of the National Judicial Council (CNJ), that public servants and judges of this court can receive? Please summarize, by occupation title and by compensation category, the criteria for receiving such allowances, as well as the maximum monthly amount that judges can receive.

(a.2) For each type of allowance (e.g., meals, transportation, preschool, health care, child-birth assistance, housekeeping, relocation, and other allowances of this nature, as answered in section a.1), we request information on amounts that were paid to each judge, (identified by name), in each of the months of 2012 and 2013.

(b.1) What are all the categories of personal benefits, as defined by Resolution 151 of the National Judicial Council (CNJ), that public servants and judges of this court can receive? Please summarize, by occupation title and benefit category, the criteria for receiving such personal benefits, as well as the maximum amount that can be paid monthly.

(b.2) For each type of personal benefit, e.g., V.P.N.I.<sup>[89]</sup>, extra payment for length of service <sup>[90]</sup>, and retention bonuses<sup>[91]</sup>, in addition to any other personal benefits consistent with the response to section (b.1), I request information regarding the amount paid to each judge, (identified by name), in each of the months during

the years 2012 and 2013.

(c.1) What are all the categories of discretionary benefits, as defined in Resolution 151 of the National Judicial Council (CNJ), which public servants and judges of this court can receive? Please summarize, by occupation title and benefit category, the criteria for receiving such personal benefits, as well as the maximum monthly amount that can be paid.

(c.2) For each discretionary benefit, e.g., constitutional bonus of 1/3 of vacation, paid vacation, advance of vacation payment <sup>[92]</sup>, Christmas bonuses, advance of Christmas bonuses, overtime, substitution, retroactive payments, and other discretionary benefits consistent with the response to section (c.1), we request information on the amounts paid to each judge, (identified by name), in each of the months during the years 2012 and 2013.

(d) In addition to the categories mentioned above and set forth in Resolution 151 of the National Judicial Council (CNJ), are there any other sources of income or funds that judges of this Court can receive?

**These requests asked that the courts disaggregate and detail information on the compensation of judges, which is already publicly available via their online portals. Through these requests we sought to gain a more in-depth understanding of the compensation structure of Brazilian judges.**

Request Category 3 addressed another point of great importance for public management as well as for the Brazilian Judiciary - nepotism. The basis for this request was the National Judicial Council (CNJ) Binding Precedent, (Súmula Vinculante), No. 13<sup>93</sup> of the Supreme Court(STF), as well as Resolution No. 7 from October 18, 2005. The terminology of this resolution was adopted to inquire which procedures have been adopted to prevent nepotism by the courts evaluated. The

<sup>89</sup>Personal Benefit Identifiable by Name or Vantagem Pessoal Nominalmente Identificável

<sup>90</sup>"Adicional por tempo de serviço" in Portuguese.

<sup>91</sup>"Abono de permanência" in Portuguese.

<sup>92</sup>"Antecipação de férias" in Portuguese.

**full text of Request Category 3 is presented here:**

Based on Law 12.527, I would like to request the following information:

Does this Court adopt, in addition to the self declaration form, any other procedure(s) at the time of hiring an employee for an at-will appointment <sup>[94]</sup>, or at the time of the appointment of a civil servant to a position of trust <sup>[95]</sup>, to ensure the absence of family ties with other employees of the Court, which may constitute nepotism as defined by Resolution No. 7 of 2005 of the National Judicial Council (CNJ)?

If this Court adopts the aforementioned procedures, please submit all documents related to these procedures.

**Request Category 4 addressed the criteria for promotion of judges in the Brazilian courts. These requests asked for:**

All internal norms, (e.g., ordinances, resolutions, etc.), of this Court relating to the promotion of judges. I kindly request that the full text of these norms be sent.

(a) All meeting minutes of the relevant authorities, (e.g., special committees, Presidency, etc.), for the decision of the promotion of judges in which this matter has been discussed.

Request Category 5 dealt with the budget, while Category 6 asked for information on the number of new cases in the courts. Information for both is already public and can be found in the report Justice in Numbers, (2014), which is released annually by the National Judicial

<sup>93</sup>The Binding Precedent generally prohibits any official, or body responsible for making a hiring/appointment decision, from appointing, promoting, or recommending for appointment or promotion any relative, friend, or spouse to any agency or department over which the official or body exercises authority or control. This applies to all the branches of the federal government, the states, the federal district and municipalities. See <http://www.stf.jus.br/portal/jurisprudencia/menusumario.asp?sumula=1227> [Accessed on: 27.10.11]

<sup>94</sup>"Cargo em comissão" in Portuguese.

<sup>95</sup>"Função de confiança" in Portuguese.

<sup>96</sup>Justicia em Numeros. Ver: [http://www.National Judicial Council \(CNJ\).jus.br/programas-de-a-a-z/eficiencia-modernizacao-e-transparencia/pj-justica-em-numeros](http://www.National Judicial Council (CNJ).jus.br/programas-de-a-a-z/eficiencia-modernizacao-e-transparencia/pj-justica-em-numeros) [Accessed on : 03.11.2014]

Council (CNJ).<sup>96</sup>

**Request Category 5 read as follows:**

I would like to request the following information based on Law 12.527:

What was the budget of this court during the years 2012 and 2013? I would like to request a detailed breakdown of monies used for the purchase of goods, contracting of services, as well as the amounts used for payroll.

**Request Category 6 read as follows:**

Based on Law 12.527 I would like to request the following:

What was the total number of new cases filed in courts by this body during the years 2012 and 2013?

The goal of requesting this pre-existing information was to identify variations in response rates, as well as calculating the accuracy and average response times (see definition of these metrics in Chapter 1). It also helped us gauge commitments to timely disclosure, as we were able to compare these responses to responses which required greater effort to collect and systematize information.

A court's inability to answer any of the questions in Requests 5 and 6 could indicate serious problems in the implementation of the FOI law. On the other hand, if a court responded appropriately to requests 5 and 6, ignoring or responding inappropriately to all or some of the other requests, it might tell us something about the court's commitment to FOI.

As previously discussed, Request Category 1 specified that answers should be made available in a format to allow the processing of data, as well as its possible combination with other data.

This provision, of computer-processable, formats is one of the principles of open-data and is encouraged by the FOI law<sup>97</sup>. According to the report "Transparency Challenges in the Brazilian Justice System"<sup>98</sup>;

"The most effective form of creating transparency is to publish information in open-formats readable by computers, which allows for the reuse and more efficient analysis of information."<sup>99</sup>

A recent analysis conducted by the Socioeconomic Studies Institute (Instituto de Estudos Socioeconômicos) and the Public Policy Re-

search Group/University of São Paulo (Grupo de Pesquisa em Políticas Públicas/University of São Paulo or Gpopai/USP) analyzed transparency initiatives by different public entities in Brazil; with an emphasis on open-data<sup>100</sup>. Their assessment is that there is; “an enormous distance between reality and the legal requirements which stipulate the publication of budgeting information in an open-format.”

Although our specific purpose was not to analyze compliance with the principles of open-data, the results obtained in the Judicial Branch Audit in response to Request Category 1 showed the challenges are numerous and that courts have not yet duly followed through on their obligations.

As discussed below, the prevailing interpretation is that the availability of data in PDF, (Portable Document Format), or HTML (Hypertext Markup Language), is sufficient to meet the obligations of active transparency in relation to the FOI law. However, it is important to note that these formats limit the extraction of data and are not the most suitable for the processing of data in spreadsheets. Thus, although the information is made available, it is not in a format processable by computers.

Responses that did not comply with the specified format were therefore considered inaccurate. The reason given in many cases was that

<sup>97</sup>According to the Open Knowledge Foundation, open-format data is “data that can be freely used, reused and redistributed by anyone”. When applied to government information, the concept of open-data encourages transparency by allowing citizens to access, reuse and freely share public information. It also creates opportunities for society to participate in and oversee government actions. Making government data available in open-format means, among other things, the ability for automatized processing, the use of non-proprietary formats, and the absence of restrictions based on authoring, patents, branding, or trade secrets. For more information see: Open Knowledge Foundation, “Manual dos dados abertos: governo”. Laboratório Brasileiro de Cultura Digital & NICBr, 2011. Available at: [http://www.w3c.br/pub/Materiais/PublicacoesW3C/Manual\\_Dados\\_Abertos\\_WEB.pdf](http://www.w3c.br/pub/Materiais/PublicacoesW3C/Manual_Dados_Abertos_WEB.pdf) [Accessed on: 02.11.2014].

<sup>98</sup>“Desafios da Transparência no Sistema de Justiça Brasileiro”

<sup>99</sup>SAMPAIO, ALEXANDRE, et.al. “Os desafios da transparência no Judiciário brasileiro.”

<sup>100</sup>BEGHIN, N. & ZIGONI, C. (orgs), “Avaliando os websites de transparência orçamentária nacionais e sub-nacionais e medindo impactos de dados abertos sobre direitos humanos no Brasil”. Brasília: Instituto de Estudos Socioeconômicos, 2014. Available at: <http://www.inesc.org.br/biblioteca/publicacoes/textos/pesquisa-transparencia-orcamentaria-nos-websites-nacionais-e-sub-nacionais> [Accessed on 29.10.2014]

the data was already available to the public pursuant to Resolution No. 102 of the National Judicial Council (CNJ). Therefore, a new wave of requests was submitted under Category 7, the text of which read:

“I am aware that the details of the payroll of judges by month are available in the Transparency Portal of this Court in the format stipulated by Resolution 102 of the National Judicial Council.

In view of this fact, and based on law 12.527, I would like to request the detailed spreadsheets of the payroll of judges for each month of the years 2012 and 2013, in a format processable by computer, which can be .xls or .xlsx (excel), or some other format processable by computer. After all, the format used by the Transparency Portal of this court, that is, .pdf, is not computer-processable, preventing proper data analysis.

It should be highlighted that the preparation of detailed spreadsheets of the judges’ payroll certainly required the use of excel or similar free software, as it is impossible to organize this data directly in a PDF document. Therefore it can be assumed that this body possesses the data in question in the requested format and there is no legitimate argument for refusing to supply this information.

Furthermore, sections II and III of paragraph 3 of Art. 8 of Law 12.527 reinforce the importance that the information contained in the Transparency Portals subject to the law are made available in open and machine-processable formats.”

#### **1.4 User identities: simulating the request process experienced by a regular citizen**

One of the goals of this study was to simulate the process experienced by citizens interested in making use of the FOI law. To accomplish this, seven volunteers made their identities available for the submission of 264 FOI requests. These individuals were employees of FGV EBAPE and CTS at FGV DIREITO RIO. It is important to note that there was no mention of the requesters’ affiliation to these institutions. Only the required information, such as name, identity documents, and email

address were provided. The objective of using multiple identities was to minimize the possibility that entities would realize an audit was underway, possibly skewing responses.

### 1.5 Submission of requests

All requests were submitted via Internet through the most relevant platform for each entity: dedicated platforms for handling FOI requests, ombudsman websites, email or any other platform available. The requests were submitted over a three-week period, between August and October 2014. The only rule was that a single user could not submit two requests on the same day to the same entity. The following table provides details of FOI requests submission.

**Table 14** Requests by identity

Timeframes of requests	Identities	Requests	Total requests issued	Total requests <i>not</i> issued	Total requests planned
Week 1	A/B	1 and 2	77	3	80
Week 2	C/D/G	3, 4 and 7	113	7	120
Week 3	E/F	5 and 6	74	6	80
<b>Total</b>			<b>264</b>	<b>16</b>	<b>280</b>

### 1.6 Appeals

As mentioned in the General Audit, Article 15 of Law 12.527/11 establishes the possibility of appealing against decisions to reject a FOI request.

While the General Audit submitted appeals for a random sample of requests in order to identify differences in the behavior of entities, the Judiciary Audit filed 42 specific appeals for requests 1, 2, 3 and 4, in order to obtain the requested data. (Requests 5 and 6 were not subject to appeals.) The appeals followed the same legal rigor of the original requests, incorporating the appropriate legal terminology.

In summary, appeals were filed because the entity either rejected the FOI request, or the response did not provide the level of detail requested, or was not in the format requested.

Those entities providing the best appeal responses were: the TST, TRF Region 2, TRF Region 1, TJ-DFT and TJ-RR, the latter responding appropriately to two appeals.

### **1.7 Field experiment; testing responses to justified vs. non-justified requests**

The use of more than one identity served a second purpose: to test whether the evaluated organs would respond differently to justified requests versus non-justified requests.

Forcing citizens to justify their FOI requests goes against international standards of freedom of information, and Brazilian law follows best practice in this regard. Article 10, § 3º of Law 12.527/11, prohibits any requirement that the user justify their request. It is possible perhaps that justifying a request might increase the likelihood of receiving a satisfactory response; the audit therefore included a field experiment to explore the paradoxes associated with justifying the practice of a fundamental right.

To conduct this field experiment the identities of users were divided into two groups; one to justify its requests, i.e., clarify the purpose for which information was sought, (e.g., research); whilst the other group provided no explanations. The purpose was to assess whether justified and non-justified requests received equal treatment in terms of timeliness of response, and accuracy. To conduct this experiment without arousing suspicion on the part of the audited agencies, we chose not to send the same requests twice to a particular court. Instead, requests were divided as shown in Table 15, with each entity receiving three justified, and three non-justified. The study aimed at minimizing evidence an audit was underway since it might influence a court's behavior and so compromise the experiment results.

The courts in Group X received requests 1, 3, and 5 with a justification, and requests 2, 4, and 6 without justification. The courts in Group Y received requests 2, 4 and 6 with a justification and requests 1, 3, and 5 without.

## 2. Results

**Table 15** Courts by group

Group X	Group Y
Supreme Court <b>(STF)</b>	STJ
TST	TRT <b>SP</b> / SP Inter
TRT <b>DF</b>	TRT <b>MG</b>
TRT <b>RJ</b>	TRF <b>3</b>
TRT <b>1</b>	TRF <b>4</b>
TRT <b>2</b>	TRF <b>5</b>
(+) 14 TJs	(+) 13 TJs
<b>20</b>	<b>20</b>

This section presents the aggregate results of the Judicial Branch Audit. The audit used the same metrics presented in Chapter 1: response rate, accuracy rate, and timeliness of response.

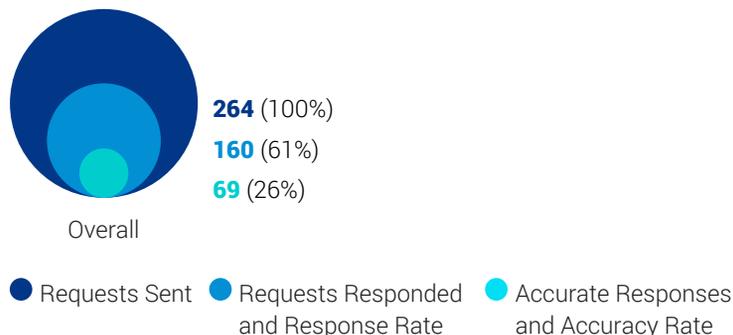
Seven requests were submitted to each of the 40 courts, totaling 264 valid requests. Of these, the courts responded to 160 requests, which corresponds to a response rate of 61%. Some 69 responses (26%) were assessed as accurate. In other words, only 26% of the courts provided directly relevant responses. It is important to note that the FOI law establishes a 20-day period to respond to requests, plus a 10-day extension if properly justified (art. 11, § 1 and § 2).

Regarding the timeliness of the response, the Judiciary responded, on average, within 12 days of request submission.

## 2.1 Results by request category

The results of the audit varied according to request category: this section presents those results.

**Figure 17** Aggregate analysis results of Judicial Branch Audit



### Request Category 1

As previously explained, the first category of requests sought information on the compensation of judges during the years 2012 and 2013 (based on the requirements of the annex of Resolution N<sup>o</sup>. 151 of the National Judicial Council or CNJ). This request asked for the compensation data, by judge and by year, in a computer-processable format. The substance of the request falls in line with the National Judicial Council (CNJ) rule, which stipulates that information must be made available on court Internet sites<sup>101</sup>. However, the majority of courts' websites do not allow for the importation of spreadsheets with aggregate data, nor for the filtering of data by attributes, such as month or name of judge. Given these limitations, the objective of Request Category 1 was to obtain data, which could be aggregated and analyzed.

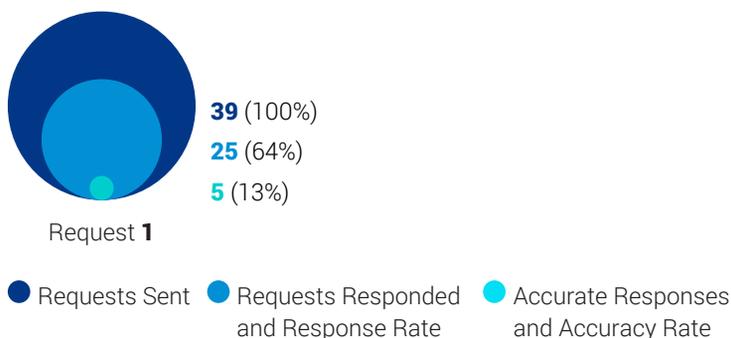
Thirty-nine such requests were submitted. The courts responded to

<sup>101</sup>The National Judicial Council's (CNJ) Resolution No. 102, and its amending Resolution No. 151, stipulate such information be made available on the websites of the Judiciary entities in HTML format (Article 4, paragraph 3), which is not a computer-processable format. Moreover, since no other guidelines are provided regarding the personnel payroll, there are disparities between the different entities' ability to provide the values aggregated on an annual basis.

25 (64%) of these; however, only five (13%) were considered accurate responses.

Those courts whose responses were assessed as accurate, submitted spreadsheets, i.e., provided a file containing the compensation data which could be aggregated by year and by judge. The Supreme Court (STF) and the Court of Justice, Roraima, (TJ-RR) provided the data already summarized on an annual basis. The Supreme Labor Court (TST), Federal Regional Court (TRF) Region 2, and STJ submitted spreadsheets with monthly data, which could be aggregated with computer software to obtain the annual amounts.

**Figure 18** Results of Request Category **One**



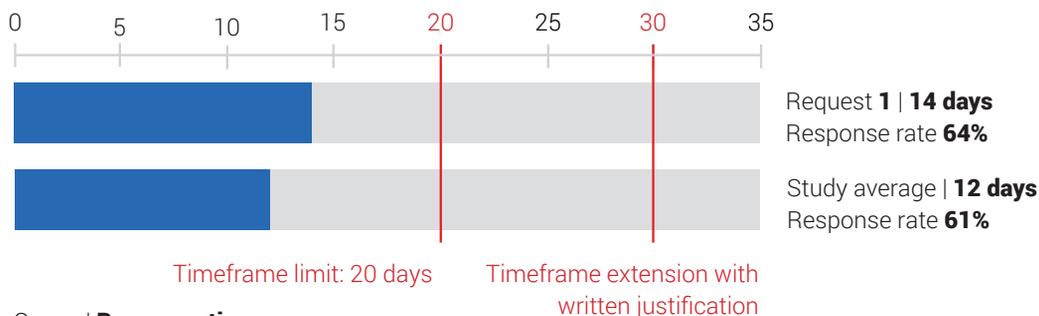
Those responses to merely direct requests to the active transparency links of the relevant data were considered inaccurate, since the format of the data available on those platforms does not allow it to be aggregated on an annual basis. Even within this type of response, there were differences in the quality of service given. For example, some courts provided the specific links to the available information, thereby demonstrating interest in providing a better service to the citizen. Other entities, such as the Court of Justice, Paraíba, (TJ-PB), only mentioned the agency's website without providing a direct link. It is important here to remember Article 11, § 6º, of the FOI law which states that information already available to the public 'must' be provided by the entity, as well as stipulating how the entity might do so<sup>102</sup>.

It should be noted that some courts are still not up to date regarding the dissemination of data concerning compensation of judges, as stipulated by the National Judicial Council’s (CNJ) Resolution No. 102 of 2009 and amending Resolution No. 151 of 2012. For example, according to TRT Region 10:

“[...] the Department of Information Technology and Communication and the Office of Personnel Coordination and Functional Information [103] are making the necessary adjustments to the personnel system with the objective of meeting the requirements of the National Judicial Council’s (CNJ) Resolutions No. 102 and No. 151.”

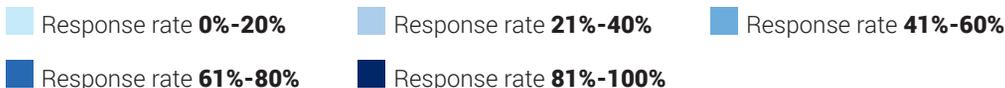
Regarding timeliness, the average response time for Request Category 1 was 14 days. This is illustrated in the following figure.

**Figure 19** Average response time for request category **One**



Scope | **Response time**

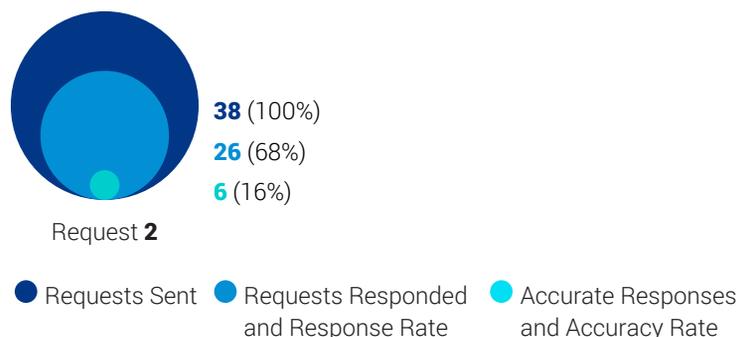
Response rate (%)



<sup>102</sup>Article 11 states that the public body or entity must authorize or provide immediate access to information already available. § 6º, states that if the information requested is already available to the public in printed, electronic or any other media of universal access, the entity must inform the person making the request, in writing, of the mode and location in which the data can be consulted, obtained or copied. This would release the public body or entity of the obligation to provide the data directly, unless the person making the requests does not have the means to complete the process by his/herself.

## Request Category 2

**Figure 20** Results of Request Category **Two**



The second request category also sought information regarding the compensation of judges during the years 2012 and 2013, but requested additional details regarding the different categories of allowances, personal benefits, discretionary benefits and other income or funds. Also this request inquired about the criteria used by each entity to grant such additional income or funds to judges, as well as the maximum monthly amounts allowed.

Thirty-eight (38) requests were submitted within this category and 26 received responses (68%). Of the 26 responses, only six (16%) were assessed as accurate.

Regarding timeliness, the average response time for Request Category 2 was 14 days after the submission of the request, as illustrated in the figure next page.

Request Category 2 did not specify a format for data. Responses were considered accurate solely by the entity's act of responding with the requested data, regardless of whether the format facilitated any analysis of the information provided. The responses of the Superior Labor Court (TST) and Court of Justice, Roraima, (TJ-RR) stood out for the substantial amount of data provided in response to requests.

<sup>103</sup>"Secretaria de Tecnologia da Informação e Comunicações" and "Coordenadoria de Pessoal e de Informações Funcionais", respectively.

**Figure 21** Average response time for request category **Two**



Some 25 days after the submission of the request, the TST provided:

- Two documents in PDF format with the monthly amounts received by each judge in the categories of allowances, personal benefits, and discretionary benefits during the years 2012 and 2013.
- An official document in PDF format, with a digital signature by the Director of the Payroll Department of the Court, which addressed in detail each of the sub-sections of the requests. The explanations included the relevant values and norms.

By the same token, the TJ-RR submitted two files in .zip format, which contained the documents described below. It is worth highlighting that these files were received only four days after the request was submitted. The TJ-RR provided:

- The schedule of allowances paid by the court, its legal basis, the value/percentage/estimate basis and/or criteria/conditions for granting such allowances.
- The schedule of personal benefits paid by the court, its legal basis, the value/percentage/estimate basis and/or criteria/conditions for granting such benefits.

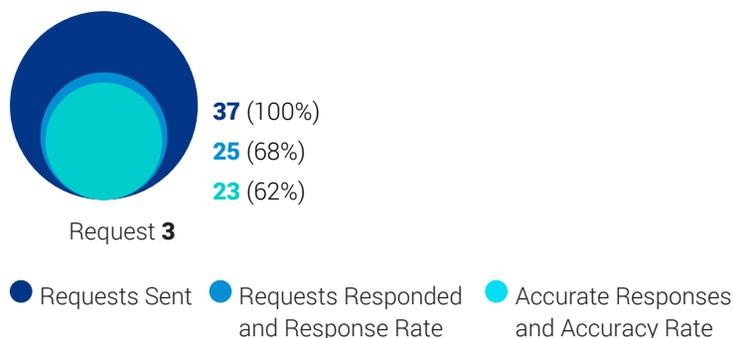
- The schedule of discretionary benefits paid by the court, its legal basis, the value/percentage/estimate basis and/or criteria/conditions for granting such payments.
- Two tables on the discretionary benefits paid to judges monthly, for 2012 and 2013,
- Two tables on the allowances paid to judges, monthly for 2012 and 2013.

The law does not require a specific format for responses to the FOI requests. However, best practice makes use of non-proprietary formats, at the very least, processable by computer, in addition to alignment with the open-data philosophy. These principles increase the chances that citizens will be able to make productive use of the data.

### Request category 3

Request Category 3 asked for information regarding the procedures used by the entity to prevent practices which might be considered nepotism according to Resolution No. 7 of the National Judicial Council (CNJ)<sup>104</sup>. Thirty-seven requests were submitted under this category: the audited entities responded to 25 (68%), and of the responses received, 23 (62%) were evaluated as accurate. As shown in the following figure, this response rate is slightly above the response rate for the audit overall, at 61%.

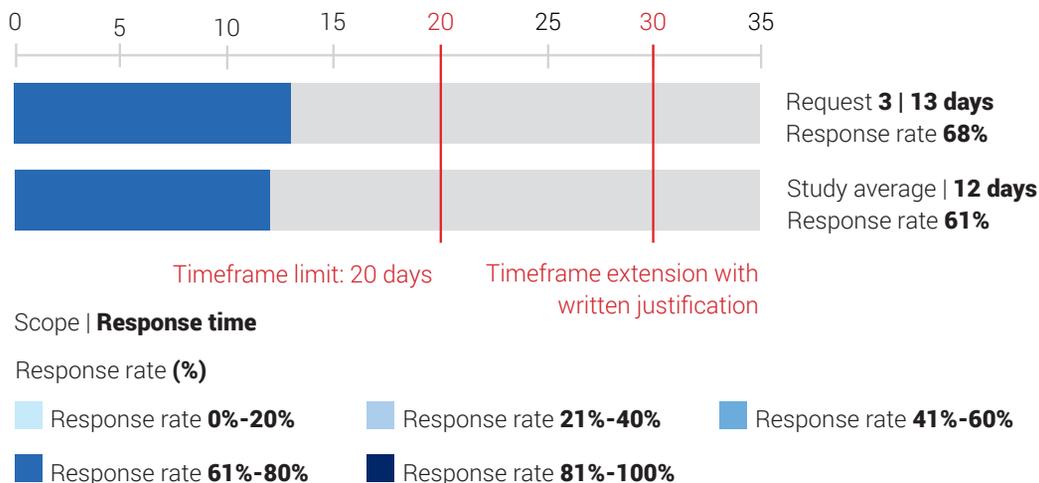
**Figure 22** Results of Request Category **Three**



Despite the high accuracy rate the majority of responses did not contain documents related to the procedures. Most only mentioned the related resolutions and norms adopted by the entity. However, the TST, TRT Region 15, TJ-MT, TJ-TO and TJ-MA included the Declaration of Familial Relationships (or “termo de declaração de parentesco”).

The average response rate for Request Category 3 was 13 days, as shown in the figure below.

**Figure 23** Average response time for request category **Three**

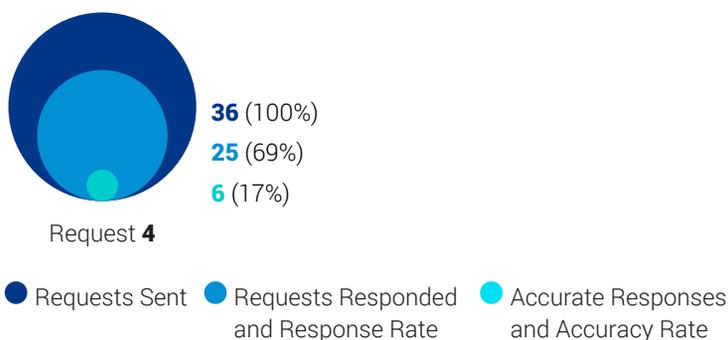


<sup>104</sup>Available at: [http://www.National Judicial Council \(CNJ\).jus.br/atos-administrativos/atos-da-presidencia/323-resolucoes/12121-resolu-no-7-de-18-de-outubro-de-2005-](http://www.National Judicial Council (CNJ).jus.br/atos-administrativos/atos-da-presidencia/323-resolucoes/12121-resolu-no-7-de-18-de-outubro-de-2005-)

### Request category 4

Request Category 4 asked each court for the complete text of the relevant internal norms, as well as the minutes from meetings regarding deliberations pertaining to the promotion of judges. Thirty-six requests were submitted under this category: responses were received for 25 (or 69%), with just six (or 17%), evaluated as accurate. Despite a response rate above the overall average of the Judicial Branch Audit, the accuracy rate was significantly lower.

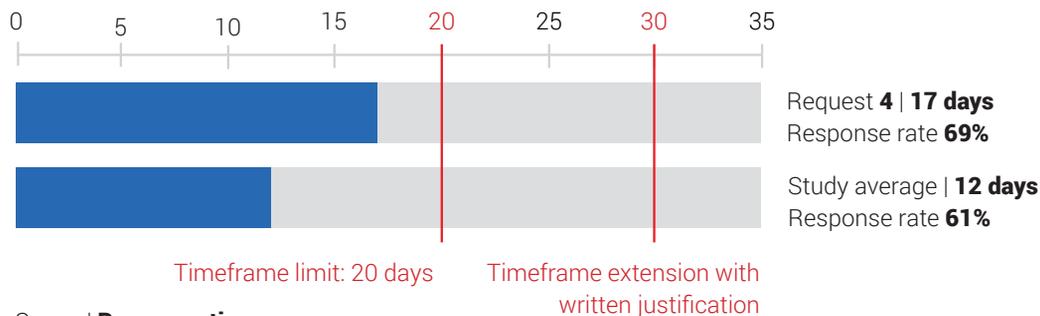
**Figure 24** Results of Request Category **Four**



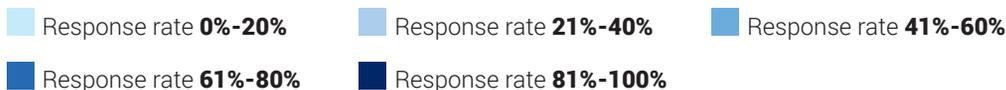
Regarding timeliness, the average response time was 17 days after the submission of the request, as illustrated in the following figure.

Among those entities providing responses evaluated as accurate were TRF Region 1, TJ-DFT, and TJ-RR<sup>105</sup>. The TRF Region 1 first responded five days after the submission of the requests, directing the user to its active transparency portal. An appeal was filed and a response was received 19 days later, some 24 days after the initial submission of the original request. This final response contained the web-links to all of the documents listed in the original FOI law request.

<sup>105</sup>For purposes of the analysis by request category, these three responses were coded as accurate since the final answer was taken into account. On the other hand, for consistency purposes, the aggregated audit results (Table 16) only take into account initial responses. Therefore, since these answers were obtained only after an appeal, they were coded as inaccurate in the aggregated audit results.

**Figure 25** Average response time for request category **Four**Scope | **Response time**

Response rate (%)



The TJ-DFT provided its first response only four days after a request was submitted. However, an appeal was filed since the response was incomplete, only pointing perfunctorily to the website of the court. Following the appeal, the court submitted five scanned documents containing the norms and meeting minutes related to the promotion of judges.

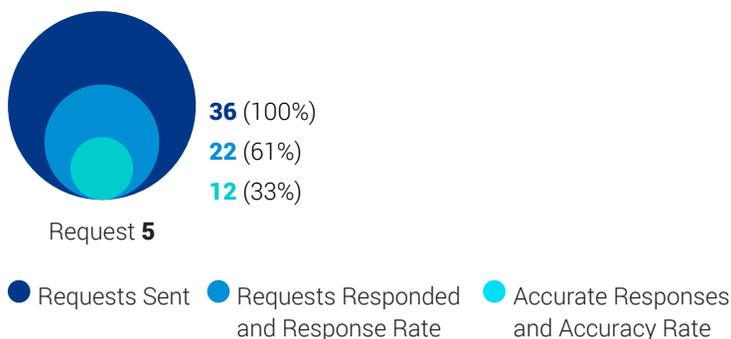
The TJ-RR submitted its first response three days after the request was made. Its final response however, was received 38 days after the initial request, also after the submission of an appeal. The final response by the TJ-RR included two scanned documents in PDF format with the requested norms and meeting minutes.

### Request Category 5

Request Category 5 addressed the budget of the entities for the years 2012 and 2013. We requested a detailed breakdown of monies used for the purchase of goods, the contracting of services, and for payroll costs. Thirty-six requests were submitted, of which 22 received responses (61%). Twelve of those responses (or 33%) were coded as accurate.

The responses received for Request Category 5 highlight the variability in responses to requests for data already published. The responses coded as accurate were those in which: a link was provided to the documents requested; the court submitted a spreadsheet with the requested expenditures (as in the case of TRF Region 2); or the court detailed the expenditures in the body of the response email as in the case of TRFs Region 4 and 15.

**Figure 26** Results of Request Category **Five**



**Figure 27** Average response time for request category **Five**

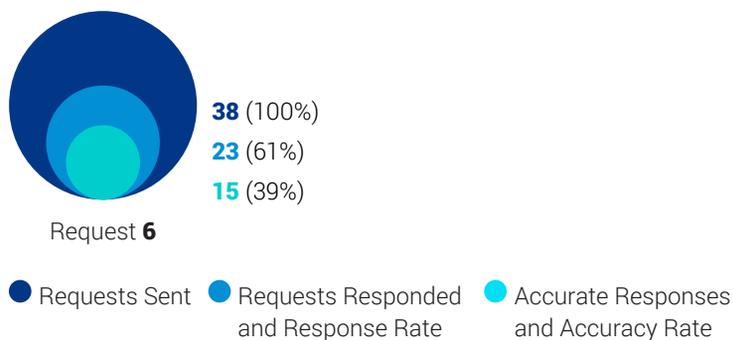


Regarding timeliness, the courts responded to the requests, on average within nine days. This is well below the average response times for the Judicial Branch Audit and the General Audit.

### Request Category 6

Request Category 6 sought information firstly regarding the quantity of new cases filed during the years 2012 and 2013. Thirty-eight requests were submitted, of which 23 (61%) received responses, 15 of them accurate; an accuracy rate of 39%.

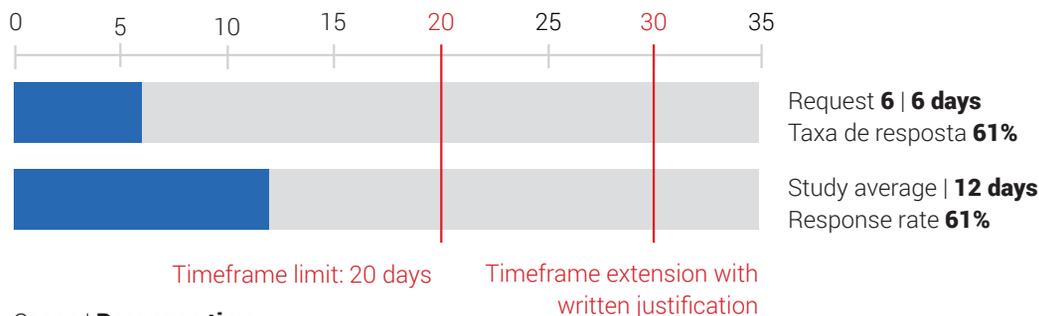
**Figure 28** Results of Request Category Six



Similarly to Request Category 5, the responses to Request Category 6 were received in a short period, the average response time being six days, as shown in the following figure.

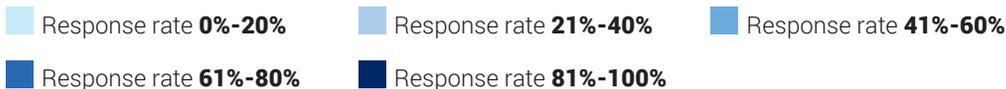
When requests did not specify a format or a level of detail, the accu-

**Figure 29** Average response time for Request Category **Six**



Scope | **Response time**

Response rate (%)



racy rate was higher than those which did (Request Categories 1, 2, 3, 4 and 7).

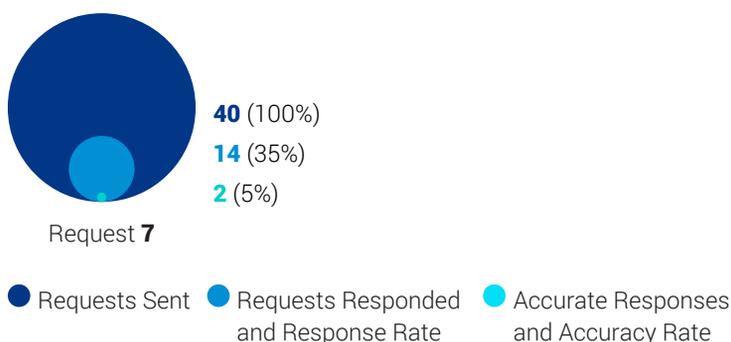
We also observed that the average response time for those responses assessed as accurate, was well below the 20-day deadline stipulated in Article 11 of the FOI law. It is worth highlighting the cases of TJ-DFT and TJ-MG which submitted satisfactory answers in a single day. The TJ-DFT submitted the complete annual reports in PDF format, while TJ-MG provided instructions on how to find the requested information on the court’s website.

### Request Category 7

This category also asked for information about the compensation of judges during the years 2012 and 2013. These requests, however, asked for the information in a computer-processable format<sup>106</sup>.

A total of 40 requests were submitted of which 14 received responses (35%), with two responses assessed as accurate (5%).

**Figure 30** Results of Request Category **Seven**



<sup>106</sup>These requests are based on Article 8 of Law 12.527/11 which reinforces the importance that the information contained in the transparency portals of entities subject to the law be provided in open-format and are processable by computer. According to Article 8: "It is the duty of public bodies and entities to promote, regardless of requirements, the dissemination through readily accessible means, within its ability, of information of public or general interest produced by, or under custody of the agency. [...] § 3 The sites addressed by § 2 must, per regulation, among others, comply with the following requirements: [...] II – enable the production of reports in a variety of electronic formats, including open- and non-proprietary formats, such as spreadsheets and text, with the goal of facilitating the analysis of the information; III – enable automated processing by external systems in open-formats, structured and readable by computers; [...]".

The audited courts were relatively fast in responding to the requests. As shown below, the average response rate was 11 days.

**Figure 31** Average response time for Request Category **Seven**



We must commend the performance of the TST, which submitted its responses within ten days. The response included two spreadsheets in a proprietary-format; not ideal practice, but which are processable by computer (.xls). The spreadsheets included information regarding the monthly compensation of judges, including base salary, personal benefits, subsidy for the position of trust, allowances, and discretionary benefits during the years 2012 and 2013.

Another notable response – but in a negative sense, - came from the Supreme Court (STF). It stated that the court’s transparency portal did not have the function of exporting the data into excel or other machine-processable formats. According to the court’s response:

“The information is exported directly from the database into a PDF format, therefore, an intermediate phase of aggregating the data is not possible.”

This is not the case we believe. The court should have still been able to comply with the request despite not having the capacity to aggre-

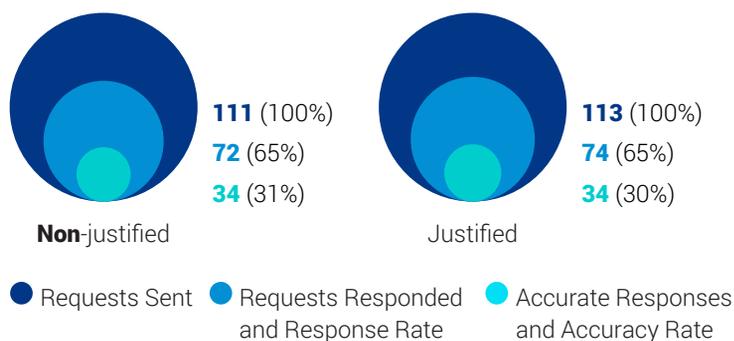
gate the data using the court's software, since nearly all database programs have an option to export data into non-proprietary formats, such as a comma-delimited or tab-delimited format. Once in this format, data could be aggregated or analyzed, by a myriad of non-proprietary computer programs. Therefore, the court should have been able to export the data requested, directly into one of these formats instead of directly into the PDF.

As has been repeatedly stated, the FOI law requires that data be provided in an open-format and be processable by computer. Therefore, the very fact that the Supreme Court's (STF) software cannot export public interest data into the stipulated format suggests the need to update the court's system to comply with legal requirements.

## 2.2 Detailed results

This section presents response and accuracy rates, as well as the average response times of the field experiment: justified requests vs. non-justified requests.

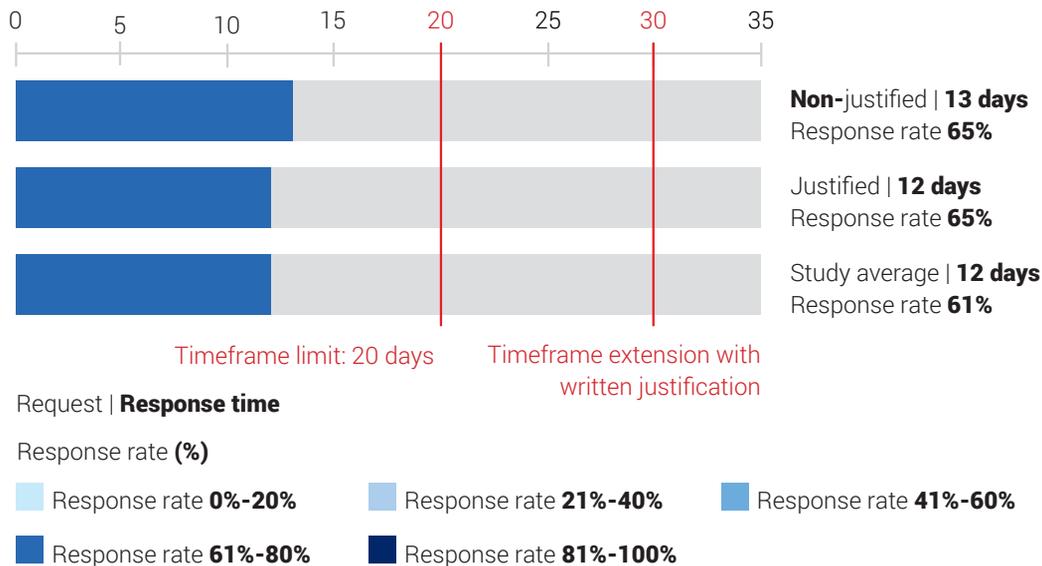
**Figure 32** Field experiment results: response and accuracy rates



User identities A, C, and E did not provide explanations for their requests, i.e., the requests were non-justified. Identities B, D, and F justified their requests based on academic research or professional reasons.

A total of 113 justified requests and 111 non-justified requests were submitted<sup>107</sup>. There was no difference in the response rate between

**Figure 33** Field experiment results: average response time



the two groups, both with at 65%. The accuracy rate was also similar: 30% (34 accurate answers) for justified requests vs. 31% (34 accurate responses) for non-justified requests.

The results of the field experiment suggest the audited courts did not differentiate between justified and non-justified requests. From this perspective, the courts' practices comply with Article 10, § 3 of the FOI law which prohibits any rules which might oblige requesters to justify access to public information requests."<sup>108</sup>

Nevertheless, one court did base its rejection of a request on the grounds that it lacked "sufficient justification"; namely in the three rejections by the Court of Justice of the State of Santa Catarina (or TJ-SC)<sup>109</sup>. In its rejections, the TJ-SC referenced a decision by the entity from 2006, in which a request was rejected because the information

<sup>107</sup>The difference in the number of submissions under each category is the result of deviations in the research, which are explained in the methodology section of this chapter.

<sup>108</sup>Available at: [http://www.planalto.gov.br/ccivil\\_03/\\_ato2011-2014/2011/lei/l12527.htm](http://www.planalto.gov.br/ccivil_03/_ato2011-2014/2011/lei/l12527.htm)

<sup>109</sup>Out of seven requests submitted to the Court, the TJ-SC rejected three, did not respond to two, and responded to two others inaccurately or with minimal accuracy

“was not made available for personal use”, and because insufficient explanations were provided regarding the “reasons for making the request”.

These responses illustrate one of the potential barriers to freedom of information; a broad interpretation of exemptions included in the FOI law (outlined further in Chapter 6, Barriers to Transparency and Access).

### 2.3 Analysis of the courts

The following table shows a list of the audited courts, ranked by accuracy. For consistency purposes, this table only takes into account the first response submitted by the courts: not responses obtained after filing appeals.

The ranking table shows inadequate performance by the majority of the courts with respect to both response and accuracy rates. The State Courts (Tribunais Estaduais) had an average accuracy rate of 14%, well below the total average of 24%. Moreover, the TJ-AM, TJ-AP and the TJ-PA did not respond to any of the FOI requests.

The Superior Courts (Tribunais Superiores) and the Regional Courts (Tribunais Regionais) had the best performance<sup>110</sup>. Among the 12 top-ranked courts are the Superior Labor Court (TST), the Supreme Court, (STF), the Regional Federal Court (TRF) Region 4, the Regional Labor Court (TRT) Region 15, and the TRT Region 1.

The TRF Region 5, TRT Region 2, and the TRF Region 1, had very low response and accuracy rates. These courts ranked 19th (both TRT Regions 5 and 2) and 22nd, respectively.

Among the state courts, two stood out for their positive performance; the already mentioned Courts of Justice TJ-RR, and the TJ-RJ, ranking among the top 12 best performing tribunals.

Regarding timeliness of response, some of the results obtained by this study raise serious questions concerning the courts’ abilities to respond to FOI requests, demonstrating a potential focus on legal compliance with the timeline stipulated, rather than with providing accurate and useful responses. The cases of the TJ-RN, TJ-BA, TJ-RS

<sup>110</sup>Including Federal (Federais) and Labor (de Trabalho) Courts.

and TRF Region 1 illustrate this point. These courts used only half of the response period permitted by the FOI law, but achieved accuracy rates of zero. Such practice could represent a barrier to freedom of information, indicating an emphasis on generating any response, as opposed to one that might actually meet the needs of the user – true access to information. It is important to note that the FOI law permits a ten-day extension beyond the 20-day period, through a justified request (Article 11, paragraph 2).

Overall, the average response time for most of the courts is below the 20 days established by the law. The only courts which did not comply with this were; the TRT Region 1, TJ-AC and TJ-AL.

**Table 16** Court ranking

Court	Ranking	Precision rate	Average response rate	Response rate	Number of requests sent	Number of received answers	Number of precise answers
Superior Labor Court (TST)	1°	83%	16	100%	6	6	5
Supreme Court (STF)	2°	80%	7	80%	5	4	4
TRF 4th Region	3°	57%	5	86%	7	6	4
TRT 15th Region	3°	57%	10	86%	7	6	4
TRT 1st Region	3°	57%	23	86%	7	6	4
Tribunal Justiça Estadual (TJ RR)	4°	50%	10	100%	6	6	3
TRT (10th Region)	5°	43%	11	86%	7	6	3
TRF (2nd Region)	5°	43%	17	86%	7	6	3
TRF (3rd Region)	6°	43%	13	71%	7	5	3
TRT (3rd Region)	7°	43%	15	57%	7	4	3
Superior Justice Court (STJ)	8°	40%	16	80%	5	4	2
Rio de Janeiro State Court (TJ RJ)	9°	33%	4	83%	6	5	2
Federal District State Court (TJ DF)	10°	29%	13	86%	7	6	2
Santa Catarina State Court (TJ SC)	11°	29%	17	71%	7	5	2
Espírito Santo State Court (TJ ES)	12°	29%	13	57%	7	4	2
Maranhão State Court (TJ MA)	12°	29%	21	57%	7	4	2
Ceará State Court (TJ CE)	13°	29%	13	43%	7	3	2
Rondônia State Court (TJ RO)	14°	17%	8	67%	6	4	1

Court	Ranking	Precision rate	Average response rate	Response rate	Number of requests sent	Number of received answers	Number of precise answers
Mato Grosso State Court (TJ <b>MT</b> )	15°	14%	17	100%	7	7	1
Paraná State Court (TJ <b>PR</b> )	15°	14%	19	100%	7	7	1
Minas Gerais State Court (TJ <b>MG</b> )	16°	14%	8	71%	7	5	1
Tocantins State Court (TJ <b>TO</b> )	16°	14%	11	71%	7	5	1
Mato Grosso do Sul State Court (TJ <b>MS</b> )	16°	14%	14	71%	7	5	1
São Paulo State Court (TJ <b>SP</b> )	16°	14%	20	71%	7	5	1
Goiás State Court (TJ <b>GO</b> )	17°	14%	5	57%	7	4	1
Paraíba State Court (TJ <b>PB</b> )	18°	14%	10	43%	7	3	1
Piauí State Court (TJ <b>PI</b> )	18°	14%	17	43%	7	3	1
Pernambuco State Court (TJ <b>PE</b> )	19°	14%	4	29%	7	2	1
TRT (2nd Region)	19°	14%	4	29%	7	2	1
TRF (5th Region)	19°	14%	14	29%	7	2	1
Sergipe State Court (TJ <b>SE</b> )	20°	0%	3	71%	7	5	0
Rio Grande do Norte State Court (TJ <b>RN</b> )	20°	0%	8	71%	7	5	0
Bahia State Court (TJ <b>BA</b> )	21°	0%	11	60%	5	3	0
TRF (1st Region)	22°	0%	2	43%	7	3	0
Rio Grande do Sul State Court (TJ <b>RS</b> )	23°	0%	11	40%	5	2	0
Acre State Court (TJ <b>AC</b> )	24°	0%	27	25%	4	1	0
Alagoas State Court (TJ <b>AL</b> )	25°	0%	32	14%	7	1	0
Amazonas State Court (TJ <b>AM</b> )	26°	0%	0	0%	6	0	0
Amapá State Court (TJ <b>AP</b> )	26°	0%	0	0%	7	0	0
Pará State Court (TJ <b>PA</b> )	26°	0%	0	0%	7	0	0

## Chapter 6

# Barriers to transparency and access

When the PTP/FGV analyzed the responses of the Brazilian courts to the study's FOI requests, it became evident that many challenges remain in guaranteeing the right to public information. This section highlights the main obstacles to achieving compliance with the FOI law.

Both the General and Judiciary Branch Audits identified some key barriers and challenges. However, certain practices in the judiciary merit specific attention. Here we identified a culture of excessively legalistic justifications in which unfounded rationales for the denial of FOI requests were commonplace. In many instances we observed that responses pointed to a complex maze of legal norms, with responses so complicated that it was impossible to understand the basis for the court's decision.

Therefore the challenge for Brazilian courts is to find a balance between responding with clarity and simplicity, while continuing to properly explain the basis for the denial of FOI requests.

In an attempt to categorize the challenges encountered, the barriers to FOI are divided as follows:

- Bureaucratic barriers: - regarding the method of submitting the request (e.g., specific platform, email, in-person, etc.), requirements for the request (e.g., required information, etc.), or selection of the appropriate entity/department responsible for handling requests;
- Legalistic, or broad interpretation of the law barriers: - regarding the legal basis for the rejection of requests, or cases in which broad interpretations of the exemptions included in the FOI law were used;
- Technical barriers: – regarding the format or the level of aggregation of the requested information, which could preclude the visualization or analysis of the information requested.

The following sections provide a more detailed analysis of these three types of barriers.

## 1. Bureaucratic barriers

Among the bureaucratic barriers identified by the evaluators, two stood out:

- The response that the body or entity to which the request had been submitted was incorrect, or that the body or entity did not possess the information requested.
- The response that the request was not submitted in an appropriate format or that the request did not comply with a formal requirement.

An example of the first bureaucratic barrier identified, is the response of the Supreme Court (STF) to a request under Request Category 1. The court's response stated:

"I inform you that the amounts paid under the per-diem rubric are the responsibility of the Department of Administration and Finance [Secretaria de Administração e Finanças]."

In this case, the person responsible for the answer recognized that the per-diem information was relevant and pertinent and directed the user to the department responsible for the information. This practice, despite complying with Article 11, § 1º, section III of the FOI law, does not comply with the best practice identified in the audit – forwarding of the request to the appropriate entity.<sup>111</sup>

A similar situation occurred twice in the states of Rio Grande do Norte (RN) and Sergipe (SE). For example, the TJ-RN states:

"This General Justice Ombudsman [Ouvidoria Geral de Justiça] has its purpose described in Res. 026/2010<sup>112</sup>. Thus, as a permanent channel of intercommunication, we inform you, Sir, that your

<sup>111</sup>Article 11. The public body or entity must authorize or provide immediate access to the information available. § 1o If it were not possible to provide immediate access, as described above, the body or entity receiving the request must, within 20 (twenty) days: III – inform the citizen that the body or entity does not possess the information, indicate, if within its knowledge, the body of organ that has the information, or even submit the request to such body or entity, informing the citizen that the information request has been forwarded.

request does not pertain to this Ombudsman. The transparency portal of the Judicial Branch has the information requested.”

In this case a legal norm is cited as a justification for not providing the information. However, the referenced legal norm, which predates the FOI law, establishes in its Article 3, § 1º that it behooves the ombudsman to “appropriately engage the various entities of the judicial branch in the search for information, which will be analyzed, evaluated and turned over to users whenever requested.”

With the signing of Law 12.527/11, the TJ-RN issued a norm specifically addressing the FOI law. Res. 016/2012<sup>113</sup>. This norm designates the ombudsman as the entity responsible for receiving and handling FOI requests, until the approval of state legislation addressing the subject. Thus it remains unclear to a citizen searching for information which bureaucratic procedure to follow. The final result in this case was that an email was received a few days after making the request:

“In response to case no. 2014-1712 registered with the Ombudsman, we inform you, Sir, that following numerous attempts to contact you via telephone on the 9th day of this month and this year, we were informed that the contact number does not belong to you but rather to a Mrs. Juliana. Therefore, based on art. 10, III, B, we consider this request closed.”

In this instance, the case was closed despite having other forms of contact available<sup>114</sup>. Moreover, it is not possible to deduce to which norm “art. 10, III, B” refers.

Bureaucratic barriers were also identified with the Courts of Justice (Tribunais de Justiça) of the states of Parana and Sergipe. The former responded to all the requests submitted, but only one requests was answered accurately (Request Category 3). The other responses stated that the court did not accept requests in digital format; only in-person or via regular mail, the postal address for which was supplied. This

<sup>112</sup>Available at: <http://sistemasdis-01.tjrj.jus.br/servidorDeArquivos/pages/documentos/4112.pdf> [Accessed on: 30.10.2014]

<sup>113</sup>Available at: <http://sistemasdis-01.tjrj.jus.br/servidorDeArquivos/pages/documentos/4112.pdf>

<sup>114</sup>It should be noted that the provision of various forms of contact was beyond the requirements of Article 10 of the FOI law, as well as of Article 12 of Decree 7.724/2012.

practice is against the rules of Law 12.527/11, which state:

“Art. 10. Any interested party can submit freedom of information requests to the bodies and entities references in Article 1 of this law, by any legitimate means. Such requests must contain the applicant’s identification and description of the required information.

[...]

§ 2o The public bodies and entities must enable an alternative to submit freedom of information requests through official sites on the Internet.”

In relation to the second category of bureaucratic barriers, (i.e., that a particular request was not submitted in an appropriate format or did not comply with a formal requirement), we encountered some cases in which the rejection of the requests was based on the supposed absence of required information, such as a justification for making the request. As previously explained, this requirement is explicitly prohibited under the FOI law.

Examples of this type of case include the three rejections by the TJ-SC, and one rejection by the TJ-MT (regarding Request category 4). The latter provided the following response:

“Regarding the requested minutes, the interested party in waiting must provide the relevant bodies of this court with the explanatory reasons that justify the request.”

## **2. Legal and regulatory barriers, and misuse of exemptions**

### **2.1. Excessively broad interpretation of exemptions**

Brazilian legislation provides for limited exceptions from disclosure in which freedom of information may be refused or curtailed. These exceptions can be summarized as follows:

- Fiscal or judicial secrecy, as per article 22 of the FOI law<sup>115</sup>;
- Information sensitive to national security, as per article 23 of the FOI law<sup>116</sup>;
- Personal information, which might affect the intimacy, privacy,

honor or image of those involved, as provided by article 31 of the FOI law<sup>117</sup>.

In addition to the cases included in Law 12.527/11, Decree no. 7724/2012 (which regulates the FOI law within the Federal Executive Branch) includes three types of requests which may be rejected. These include requests that are: i) generic, ii) disproportionate or unreasonable, iii) require additional work, analysis, interpretation or consolidation of data and information, or require the production or processing of data outside the competency of the agency or entity.

As the following pages show, a potentially overbroad interpretation of these exceptions has been used to justify the refusal of legitimate FOI requests.

### **2.1.1 Disproportionate or unreasonable requests**

Within this rubric, the aforementioned case of the TJ-SC is notable. Of seven requests submitted, the TJ-SC rejected three, and did not respond to two. In all three rejections the court offered the same justification and narrative, changing only specific issues for each request

<sup>115</sup>Art. 22. The provisions of this law do not exclude the other legal hypotheses of legal confidentiality and secrecy and judicial secrecy, nor the hypothesis of trade secret arising from the direct use of economic activity by the state or by individuals or private entities that have any link with the government.

<sup>116</sup>Art. 23. The security of society and the state are considered essential, therefore it is subject to secret classification, information for which its dissemination or access could: I - endanger the defense and national sovereignty or the integrity of the national territory; II - harm or jeopardize the conduct of negotiations or international relations of the country, or that have been provided in confidence by other states and international organizations; III - endanger the life, security, or health of the population; IV - present high risk to the financial, economic or monetary stability of the country; V- harm or pose a risk to strategic plans or operations of the armed forces; VI - harm or pose a risk to research projects and scientific and technological development, as well as systems, goods, facilities or areas of national strategic interest; VII - endanger the safety of institutions and domestic or foreign authorities and their families; or VIII - compromise intelligence activities, as well as investigation or surveillance in progress, related to the prevention or prosecution of offenses.

<sup>117</sup>Article 19, Balanço de 1 ano da Lei de Acesso à Informação Pública: acesso à informação e os órgãos de justiça brasileiros – 2012-2013. São Paulo: Article 19, 2013. Available at: [http://artigo19.org/wp-content/uploads/2014/01/balanco\\_1\\_ano\\_lei\\_acesso.pdf](http://artigo19.org/wp-content/uploads/2014/01/balanco_1_ano_lei_acesso.pdf) [Accessed on: 03.11.2014]

and the date of the decision. The argument that a request was disproportionate, generic, or that it demanded additional work was frequently presented in notices of rejection: for example, in the rejections by the TJ-DFT and Regional Labor Court (TRT) Region 1, to Request Category 2. Another notable response of rejection on the grounds of disproportionate work was the TRF Region 4's argument that staff limitations made it impossible to meet the requester's "private" research needs:

"As a matter of policy, public servants of this Court are not available to conduct private research. The human capacity of this public body, except for performance of the necessary administrative activities, is primarily engaged in providing support for the main activity of any court, the delivery of judicial services." (Request category 1)<sup>118</sup>

It hardly bears asserting that public bodies have a responsibility to meet the demands of passive transparency as stipulated by law. Accordingly, ensuring compliance with this, should be incorporated into the administrative routines of the judiciary.

It is also important to highlight the fact that two courts (the TST and TJ-RR) answered the same question accurately and in a period considered reasonable. The example of these courts seems to indicate that in principle, such requests can be answered without placing great burdens on entities.

### **2.1.2 Generic requests or requests requiring additional work**

In the case of negative responses in Request Category 4, the TRF Region 2 and TJ-SC both argued that the requests were generic and disproportionate. The TRF Region 2 states:

"As can be easily seen, the requests for information (a) and (b) the email included below are generic. Therefore, based on DECREE No. 7.724 OF MAY 16, 2012, which regulates the aforementioned statute, particularly article 12, III and article 12, it is legally impossible to fulfill the request." (emphasis in the original)

Meanwhile, the response of the TJ-SC reads as follows:

<sup>118</sup>Despite providing an inadequate response to this request, the TRF Region 4 provided accurate responses to four of the seven requests submitted.

“In this case, compiling the requested information would be burdensome, given the extensive list of names of the judges that were promoted. It should also be pointed out that the interested party did not even indicate the period requested.”

The TJ-SC’s complaint regarding the volume of information requested was also highlighted by the TJ-RR in its initial response. On appeal however, the latter reversed its decision, providing the requested information. Cases such as these demonstrate the broad spectrum of interpretations employed by public servants, which render access to information more discretionary than it should be.

## **2.2 Misinterpretation of Exceptions; – active transparency and the format of documents**

As previously discussed, Article 11 of the FOI law stipulates that in cases where the information is already available to the public, the entity must indicate precise steps for the user to follow in order to obtain the information. This is not a valid exception for rejecting a request, but rather an instruction on how to provide the information in such cases<sup>119</sup>.

Some requests in this audit asked for information already public, but requested in a specific format (i.e., Requests 1 and 7, which asked for files processable by computer) or in a different aggregation to that originally published (Request Category 2). All these requests concerned the remuneration of judges<sup>120</sup>.

Some of the requests were denied on the basis of justifications presented in the previous section; however, others were answered inaccurately in that they simply made reference to the transparency portals and ignored the specificity of a request.

<sup>119</sup>As discussed below, such directions are not always observed by the courts, which, when indicating that the information is available on the transparency portals, fail to instruct the user on how to obtain it.

<sup>120</sup>In order to improve the formulation of the requests in this audit, we conducted an overview of active transparency practices about the information available on the remuneration of judges and the courts’ servers. The practices are very heterogeneous, with different ways of presenting data, and of aggregation and format possibilities. It should be noted that only the TJ-RJ, TJ-MG, TJ-BA provide data processable by computer on their websites.

### 2.2.1 Requests for information already available in active transparency platforms

In some cases, courts have held that compliance with the rules of active transparency exempted them from having to provide the same information in their responses. One example can be found in the response of the TJ-RS, which at first directed the user to the transparency portal where it is possible to do a search per month. In response to an appeal, the court stated:

“We reiterate the points of the previous communication, stating that we do not have the data in the format requested, and noting that the TJRS uses a similar tool [modelo de disponibilização] to the one used by the National Judicial Council (CNJ). Moreover, the data available in the transparency site follows the recommendations of the National Judicial Council’s (CNJ) Resolution No. 151, and is collected monthly, directly from the payment stubs of public servants and judges, with no spreadsheet in the requested format, which can be assembled by interested parties from the information published on the transparency site”.

It is important to note that the transparency tool mentioned in the response presents the data in HTML format, as determined by the National Judicial Council (CNJ). However, this format makes the analysis of data difficult; one of the reasons we issued the requests in the first place. Moreover, the tool does not make data available for 2012, the time period specifically requested<sup>121</sup>.

In response to the same question, the TJ-GO stated; - “all the requested data is freely accessible to the general public through the Transparency Portal, the world wide web (Internet)”, offering no additional information on how to access said data.

<sup>121</sup>The request stated: “I hereby would like to request, based on Law 12.527, the following information: Consistent with the provisions of the only Annex of Resolution No. 151 of the National Judicial Council (National Judicial Council (CNJ)), I request that the Court provide a table in a computer-processable format, following the pattern of the resolution of the National Judicial Council (CNJ), summarized on an annual basis for the years 2012 and 2013, the amounts paid to each judge in the form of base salary, personal benefits, subsidies, allowances and other discretionary benefits. The table should provide the total annual amount of the compensation elements paid to each judge of this Court during the years 2012 and 2013.”

A similar response was received from the TJ-DFT, which said, in response to the same question: “It is our understanding, unless otherwise proven, that there is no need for this Sub-secretary to provide the information requested, since the data is already available on the Transparency Portal”.

Again, there are some problems with this response. Firstly, it did not clearly indicate the precise location where citizens could obtain the data requested, only the generic address of the portal. Secondly, the availability of information only in a format different to that requested, was used to exempt the body from responsibility for responding to the request. The result is that citizens do not get the information in the format and aggregation pattern required.

The TRT region 15 provides the webpage address, or URL (Uniform Resource Locator), to the site containing the information requested: however, this URL provides more than 200 pages, and PDFs with monthly figures. In regards to this data, the court states:

“We emphasize that the values provided by TRT 15 in its ‘Transparency’ pages are in accordance with the National Judicial Council (CNJ) Resolution No. 102/2009, as amended by National Judicial Council (CNJ) Resolution No. 151/2012.”

Given these examples, it is important to emphasize that the issue of format is no minor detail. It is the format which often determines a citizen’s ability to obtain the requested data and conduct cross-tabulations and comparisons to give meaning to the raw and disaggregated values. This was precisely the point of Request Category 1.

For the second request, which asked for a publicly unavailable breakdown of data, responses were often similar. In addition to not providing the correct format, responses did not address the most basic questions of applicants. The TRT Region 10, for example, in its initial response stated:

“[...] I inform you that the data requested by the interested party should be accessed on the Court’s transparency page, where they are published in the format determined by Resolution No. 102 of the National Judicial Council, as amended by Resolution No. 151 of the same entity.”

Upon appeal, the court responded by reiterating its interpretation of compliance with active transparency standards, insisting it was the responsibility of the citizen to organize the data. In the words of the court:

“The technical body affirms, categorically, that it is in compliance with the stipulations of Res. 102 of the National Judicial Council (CNJ), as amended by Res. 151 of the same entity, norms which are consistent with Law 12.527/11. The decision made does not merit mending due, mostly, to its full regulatory compliance. The interpretation of the requested data is the responsibility of the applicant, independently of the format in which the data is presented, provided that it meets the legal norms, as characterized here.”

What can be observed in this type of response is that the transparency portals can serve as justification for the denial of FOI requests. The prevailing interpretation of the courts is worrying, since it seems to infer that their obligations regarding FOI requests are limited to complying with the standards of the National Judicial Council (CNJ), ignoring the possibility that citizens may request additional data or data in other formats.

### **2.2.2 Questions regarding data format**

This situation is evident in Request Category 7, in which the applicant explicitly specified being aware of the existing active transparency requirements and justified the request based on the FOI law:

“I am aware that in the Transparency Portal of this court, the details of the payroll of judges by month are already available in the format stipulated by Resolution 102 of the National Judicial Council.

In view of this, and based on law 12.527, I would like to request spreadsheets detailing the pay of judges for each month during the years 2012 and 2013, in a format processable by computer, which can be .xls or .xlsx (excel), or some other format processable by computer. After all, the format used by the Transparency Portal of this court, that is, .pdf, is not computer-processable, preventing proper data analysis. [...]

In this case, the response rate was significantly lower than for the other question categories, and reasons given for not supplying information were varied: the TJ-BA for example, stated that:

“To obtain information in files with the specific formats requested it is necessary to directly contact the responsible department, in this case the Human Resources Department, by telephone: (71) 3372-1649 / 3372-1665 / 3372-1650, to find a better solution to your problem.”

The question is raised here as to why the department responsible for processing FOI requests did not forward this one to the correct department, especially since the response implies knowledge of the information requested and its location.

The TJ-MG, in turn, stated that it uses the PDF format, which could be exported into a text- editing format. While this assertion may be true, the files are presented on a monthly basis and contain large numbers of pages, rendering information extremely difficult to process. The court justified its decision as follows:

“The adoption, by the Tribunal de Justiça do Estado de Minas Gerais [Court of Justice of the State of Minas Gerais], of documents in PDF format for the publication of information regarding payroll, is based on the need to preserve the credibility and reliability of such data.”

This response seems contradictory: on one hand it states the PDF format ensures the data’s reliability, while on the other, it states that this format allows for the export of data into editable text. If the latter is true, what would then prevent a user from exporting the data into text, and creating a new PDF identical to the original, but with adulterated data? The issue of credibility and reliability is crucial and must be addressed in the dialog and norms regulating freedom of information and transparency. However in this case, it does not justify a rejection of the request. There are mechanisms available such as electronic signatures, for various formats, which could help address the issues of credibility and reliability.

The court’s interpretation is that it is complying with the stipulations of the FOI law, as can be read in its response:

“The published PDF documents comply with the norms established by the Freedom of Information Law, item II of § 3 of art. 8, which states “such as spreadsheets and text”, and presents a non-exhaustive list of suggestions.”

Again, this response is of little relevance to the average user, and appears to serve only as justification for failure to provide the spreadsheet requested.

It should be noted that the format of remuneration data presented in the court’s active transparency portal is fragmented and does not allow for a historical and comparative analysis. Search tools and filters, for example, at times restrict queries to one month or judge per search.

In general, while the aforementioned FOI requests were not explicitly denied, the courts only provided data already available in the active transparency portals, ignoring the specificity of the applicant’s request for a different format or level of aggregation.

This is particularly true for responses to Requests 1, 2 and 7. Some examples follow:

- In the case of Request Category 1, the TRT Region 15 directed the user to its transparency portal, where, although it was possible to obtain monthly files in PDF format, each file had an average of 100 pages and did not include the judges’ names (only giving compensation figures by position). In this particular case, not only was the information incomplete, but its presentation precluded any processing of the data which might permit a more in-depth analysis.
- The TJ-MT complied with part of the request by describing the types of allowances, personal benefits, and discretionary benefits received by judges. However, the court directed the user to its website, where data is available by month in an HTML format. The website did not permit downloading of the data aggregated, (either by month or year) for further computer processing. Furthermore, Resolution 151/2012 only permits the viewing of data pertaining to one judge; to obtain an aggregate overview of all the judges it would be necessary to download information, one by one, for each of the 250-plus judges of the court.

This practice is observed in numerous courts including the TJ-RS, TJ-RO, and TRF Region 2, among others. Again and again the courts' responses claim that the data requested is already available on their respective websites. However, again and again, the data available on these sites is, as the study shows, fragmented or not processable by computer.

Request Category 7 was formulated in order to address the issue of receiving a high number of responses to Requests 1 and 2, which simply directed the users to the active transparency websites. In Request 7, the interested party explicitly stated its knowledge about the information already available on the active transparency sites, and requested data in very specific format, (spreadsheets), and level of aggregation. Some courts, such as the Supreme Court (STF), responded to this question with the justification that their system did not allow for the export of spreadsheets. Other courts, such as TJ-MG and TJ-BA, justified their response on the alleged impossibility of submitting the data in a format processable by computer based on Article 4 of Law 12.527/11.

Another notable response to the requests for data in specific formats came from the TJ-ES, which claimed its format, "is not only processable but also editable"; moreover, that authorization would be required "from a superior", before a response could be given.

The response by the TJ-CE merits special mention. Regarding the request for norms and minutes addressing the promotion of judges, the TJ-CE recommended the purchase of a book "Division Code and Judiciary Organization of the Judicial branch of the State of Ceara" (Código de Divisão e Organização Judiciária do Poder Judiciário Estadual Cearense) available in bookstores. Alternatively one might consult the book on the court's website: the response did not contain a link to the file, or to the specific information requested.

## Chapter 7

# Evaluating the platforms used to manage freedom of information requests

The evaluation of platforms involved identifying and assessing the tools provided to citizens, by which they can submit FOI requests to the courts via Internet. This audit used the same criteria as the General Audit, namely: (i) the existence of a platform dedicated specifically to the submission of FOI requests; (ii) confirmation of receipt of the request and notification when the request is answered; (iii) the possibility of tracking the request; and (iv), a section for filing appeals.

Of the 40 courts analyzed, 33 of them (82.5%) were found to have no formal platform to handle FOI requests; instead, this responsibility was transferred to the ombudsman.

In many cases the ombudsman site makes available a list of options, such as 'Complaints', 'Suggestions', and 'Talk to the Inspector', but does not display an option for 'Access to Information'. We believe employing the ombudsman's website for FOI requests can generate considerable problems, which we outline in the following pages.

Law 12.527/11 stipulates specific rules in the procedures for requesting information; procedures which are not observed by the ombudsman websites. An example is the right to appeal decisions rejecting a FOI request. There is no specific tool for filing appeals and the citizen has no alternative but to submit a new request. This complicates the process and may confuse the user, who might then simply give up, due to the lack of appropriate fields.

Many ombudsmen sites have character limits, which can become barriers to passive transparency. This is the case of the TJ-BA, TJ-RS, TJ-TO and the Superior Labor Court, (Tribunal Superior do Trabalho), the TST.

Some platforms require the user to provide a telephone number. While this might conceivably facilitate contact with a citizen, it might also represent an undue requirement of the applicant, since Law 12.527/11 asks only for simple identification; name and CPF number (similar to a social security number), or ID (Registro Geral or RG). As we saw earlier in the case of the TJ-RN, the court rejected the request based on the grounds that the telephone number provided was incorrect.

The practice of the TJ-SE should also be noted, where serious navigation difficulties were encountered. The TJ-SE's website features a link to the ombudsman site, but there is no easily identifiable link on the main page for a form concerning FOI requests. Requests sent to the ombudsman, however, are returned with the following message:

"The Ombudsman is not the appropriate entity to provide clarifications related to the Freedom of Information Law for this Court of Justice. Based on the attached Articles 3 and 5 of the Ordinance 32/2012 of the JT/SE such duties are the responsibility of the Citizen Services Division [Divisão de Serviços ao Cidadão]. This time, please submit your request through the appropriate channel, which can be found on the home page of the Court of Justice of Sergipe [Tribunal de Justiça de Sergipe] available at: Menu Principal>Transparência>Solicitação de Informação or directly at: <http://www.tjse.jus.br/tjnet/solicitaInformacao/solicitacao.wsp>"

Despite the accuracy of the response sent by TJ-SE regarding the precise location of the form to submit FOI requests, the link is difficult to access and the process complex: all citizens currently have to enter this process with the ombudsman in order to find the correct procedure for submitting requests.

Another issue in relation to the TJ-SE platform, was the malfunctioning of the FOI request platform, which sometimes returned a 'Not Found' message: the same problem occurred with the TJ-DFT.

Other sites also had technical problems when FOI requests were submitted. These include the TJ-RS, TJ-AC, TJ-RO, TJ-AM, and the STJ.

## Conclusion

The General Audit and the Judicial Branch Audit conducted by the Public Transparency Program, coordinated by FGV EBAPE and CTS at FGV DIREITO RIO, illustrate considerable heterogeneity in commitments to transparency.

The results of both audits suggest the need for new and renewed efforts to fully comply with the legal obligation of Brazil's new freedom of information (FOI) law – 12.527/11. Response rates for the General Audit and the Judicial Branch Audit were fairly similar: 69% and 61%, respectively. These figures show that, on average, one out of three requests was completely ignored. The accuracy rates of responses – a more important metric because it measured the percentage of directly relevant answers – were significantly lower: 57% for the General Audit and an alarming 26% for the Judicial Branch Audit.

However, although these numbers are relatively low, the commitment to transparency by Brazilian public entities is not monolithically negative. Two and a half years after the FOI law came into effect, significant differences in compliance are visible across the public sector. These range from moderately good adherence to the law by the Federal Government and the State and Cities of São Paulo, to extraordinarily poor compliance by the State and City of Rio de Janeiro.

The Judicial Branch Audit clearly showed how institutional commitments are crucial for implementation and compliance. For example, among the courts with the best results is the State Tribunal of Roraima; unexpected of a small rural state with a budget a fraction of the size of courts in wealthier regions. In this sense, countries such as India and Mexico have shown the world that, sometimes, guaranteeing the right of access to information has little to do with wealth or bureaucratic sophistication, and more to do with leadership and commitment.

## The Scope of Research

Combined, both audits included 717 FOI requests: 453 in the General Audit and 264 in the Judicial Branch Audit. These requests were submitted to 173 different Brazilian public entities.

In the General Audit, requests were submitted based on 55 questions to 133 public bodies belonging to all the branches of government in eight jurisdictions: the states of São Paulo, Minas Gerais and Rio de Janeiro, as well as their respective capitals, in addition to the Federal District and the Federal Government. We chose to evaluate a larger number of entities in different branches of government on a wide range of topics. The General Audit, in this sense, is exploratory in nature and serves to provide an overview of salient positive and negative trends, including overall commitments to public transparency and to Law 12.527/11.

We submitted virtually the same seven requests to 40 courts of justice as part of the Judicial Branch Audit. The courts included three Superior Courts (Tribunais Superiores), the Supreme Court (Supremo Tribunal Federal, or STF), the Superior Court of Justice (Supremo Tribunal Federal or STJ) and the Superior Labor Court (Tribunal Superior do Trabalho (TST), five Federal Regional Courts (Tribunais Regionais Federais), five Regional Labor Courts (Tribunais Regionais do Trabalho), 26 State Courts (Tribunais de Justica dos Estados), in addition to the Court of Justice of the Federal District and Territories (Tribunal de Justicia do Distrito Federal e Territorios).

Our request topics were selected to reflect current challenges to Brazil and the Brazilian courts. These topics included the remuneration and promotion of judges, the prevention of nepotism, and the administrative management of courts. The information obtained in the course of this research serves as a first step for future work regarding the judiciary.

## Methodology

We designed the methodology to be academically rigorous, but also straightforward and replicable. Replicability is essential so that the findings of transparency audits conducted by national and internation-

al entities can be compared with each other. Comparison of findings across audits is currently not possible due to the diversity of definitions and metrics used.

Within this context, the Transparency Audit Network is attempting to build a network of national and international institutions interested in public transparency, which can conduct parallel audits using the same metrics, to better enable the comparison of results across institutions. The Transparency Audit Network is an initiative supported by the Open Society Foundation (OSF) and coordinated by the Public Transparency Program, in turn coordinated by EBAPE and CTS at FGV DIREITO RIO.

As detailed in Chapter 1, we selected three straightforward metrics for the analysis: response rate, accuracy rate, and average response time. We also included a field experiment in each audit. The first field experiment in the General Audit tested whether discriminatory practices existed in the provision of access to public information. The second field experiment in the Judicial Branch Audit sought to identify whether justified FOI requests (i.e., requests which explained the reasons for the request) would receive more satisfactory responses than requests with no justification.

The field experiments generated intriguing results, although further tests are needed to confirm the inferences derived. The most remarkable results were observed when analyzing two sets of male and female identities. If one is to perform an Internet search of the first set, one will find individuals with clear institutional affiliations to the FGV (the 'institutional identities'). If the same procedure is followed for the second set of identities, no identifiable profile on the World Wide Web is found, (the 'non-institutional identities'). These two sets of users submitted 322 requests and received considerably different responses. The two users with non-institutional identities received approximately 10% fewer responses than those with institutional identities - a statistically significant result. Non-institutional identities also received 8% fewer accurate responses. In addition, the researchers of the FGV received their responses in 17.5 days on average, compared to the pair with no clear institutional affiliations, who received responses eight days later on average, in 25.5 days.

These findings reinforce the hypothesis that there may be discrimi-

natory practices in the processing of FOI requests based on the institutional affiliation of the interested party. They provide good reason to reconsider the legal requirement that interested parties must reveal their identity, as stipulated under Article 10 of Law 12.527/11. Such legal requirements, which can be encountered around the world, may be doing more harm than good when it comes to maximizing public information rights.

The digital platforms and communication methods for submitting FOI requests, responses, and appeals were also evaluated. The platform e-SIC, developed by the Comptroller General of the Union, (Controladoria Geral da União, or CGU) deserves special commendation. This platform has numerous functions that facilitate the FOI requesting process.

It should be noted that the international community is moving toward the use of similar platforms. Mexico, for example, will soon employ a single portal: for making FOI requests; for appealing; and for responding to FOI petitions in all branches and levels of government. Considering that Brazil's e-SIC platform is freely available to any public entity, there can be few justifications for using ombudsmen's platforms or the 'Contact Us' pages, both of which are inadequate for submitting and handling FOI requests. The lack of dedicated platforms for FOI is particularly troublesome in the case of the judiciary since only a very small number of courts have specific passive transparency platforms.

### **Institutional challenges**

This analysis identified several gaps with regards to the fulfillment of the right of freedom of information. Section II of Law 12.527/11 stipulates that on receiving an unsatisfactory response, requesters can submit up to two appeals. However, the filing of a third, to a dedicated entity for handling such appeals, is only possible at the federal level, in which the Comptroller General, (CGU), is the relevant body. Under the current framework, third-level appeals to independent entities are not possible at the federal, state, or municipal level within the judicial and legislative branches.

Other institutional challenges identified in the analysis, relate to the way in which the various jurisdictions regulate Law 12.527/11. Many

states as yet do not regulate the implementation of the FOI law. On the other hand, some states, such as Rio de Janeiro, have introduced illegal regulations. Here, the regulations preclude the submission of requests via digital means and also require petitioners to sign an absurd statement of liability. These requirements create serious limitations to exercising the right for freedom of information, and can only be interpreted as purposively antagonistic.

On a final note, the identification requirement, as previously mentioned, may represent a serious disincentive for practicing freedom of information rights. It is not difficult to imagine applicants being intimidated or coerced in small municipalities, where they can easily be identified.

Given the above challenges, we consider it necessary to strengthen the FOI law through concerted efforts. Institutions such as the Public Prosecutor, (Ministério Público), can and should expand their efforts to enforce the Law 12.527/11.

## General recommendations

Throughout this report, the Program for Public Transparency, coordinated by EBAPE and the CTS FGV RIGHT RIO, identified a number of best practices and international ‘gold-standards’ that can serve as a model for Brazilian government agencies. We also identified obstacles to public transparency that must be rectified. Below we present some of our principal recommendations in summary form:

- Revoke or modify state and local ordinances, which establish procedures limiting the fundamental right of freedom of information, such as the requirement that the request be made or the answer sought, in person.
- Revoke or modify rules requiring the applicant to provide personal identification, as this creates the potential for discrimination and intimidation. In an ideal scenario, the citizen should be required to inform only a means of contact, as indicated by the Model Inter-American Law on Access to Information of the Organization of American States.
- The Institute for Access to Public Information and Data Protec-

tion (Instituto Federal de Acceso a la Información y Protección de Datos, or IFAI), in Mexico provides a prime example for Brazil to follow with regards to oversight and institutionalization of the FOI law. Unlike Mexico, Brazil lacks a regulatory agency with the power to regulate and enforce the FOI law in all spheres of government (i.e., at federal, state and municipal level, as well as all branches and autonomous bodies).

- Create new or improved channels for requesting information by citizens, observing the provisions of FOI law. Of note here is the need to avoid unnecessary or excessive bureaucratic obstacles that may prevent or limit the exercise of the right of freedom of information. Preference should be given to the platform e-SIC, in place of ombudsman services or ‘Contact Us’ pages, which insufficiently address obligations imposed by the Law 12.527/11.
- The various bodies and authorities should take steps to ensure that legitimate claims are not rejected based on broad and unreasonable interpretation of the ‘additional work’ clause.
- Delimit the range of possible interpretations of exceptions to the right of freedom of information.
- Government should respond to public information requests at the level of detail requested by citizens. There should be compliance with the FOI law, with regard to the use of open and non-proprietary formats, and adoption of the principles of open data across the board, including passive transparency, according to the recommendations of international bodies and the commitment made by Brazil to the Open Government Partnership.

### **Specific recommendations for the Judicial Branch**

As we saw earlier, Resolution No. 102 of the National Judicial Council, (CNJ), addresses the issues of active transparency practices, with regard to budgetary and financial data, and personnel and remuneration structures. This norm is important, and a positive step towards detailing the transparency obligations of the entities of the judiciary. The results of the judicial evaluation show however, that this resolu-

tion is often interpreted as a justification for not responding to FOI requests targeting information not included in the resolution. Moreover, the resolution is also used as a justification for rejecting requests asking for data in formats and/or aggregation levels different to those established by the resolution. Both of these practices are against the FOI law.

Considering that one goal of Resolution 102 is to; - “standardize the presentation of information in order to make it intelligible and comparable for the benefit of effective public oversight of public spending”, the following changes are proposed:

- A reformulation of Article 4, paragraph 3, of Resolution 102 of the National Judicial Council, (CNJ). This article states that information must be published in hypertext (HTML) format, to fit the provisions of Article 8, § 3, sections II and III of the FOI law. The aforementioned sections of the FOI law enable; - “the recording of reports in various electronic formats, including open- and non-proprietary, such as spreadsheets and text, in order to facilitate the analysis of information”, and; - “the automated access by external systems in open-formats, structured and readable by computer.”
- A modifying of the resolution to permit data queries relating to remuneration not only on an individual, and month-to-month basis, but also on remuneration aggregated annually and by employee. The data should be made available in a way that permits its processing and analysis.

It is important to note that the aforementioned resolution is clear in its purpose and that the National Judicial Council (CNJ) could not anticipate its interpretation by the courts. However, evidence presented herein makes clear the limitations in implementation. It is therefore essential to review the points listed above in order to align judicial bodies with best practices of promoting and complying to freedom of information provision. It is also important that the National Judicial Council (CNJ) monitor and enforce the active transparency practices of the judiciary for which, as we have seen, there is significant heterogeneity.

## Next steps

Law 12.527/11 represents a significant achievement in the legislative history of the country. However, the task of changing the culture of secrecy that prevailed for decades will not be instantaneous. It is not enough to introduce a Freedom of Information Law, for public transparency to become a reality. There must also be both political and administrative commitments, and the broader use of the law by civil society.

This study should suggest that grounds for conducting further research and evaluation on transparency, are very fertile. This study adhered to one of many possible research designs, and there is a need for more research to be undertaken in order to understand the workings of FOI law in other regions, especially outside the major metropolitan centers. Likewise, ample space exists for conducting specific assessments by sector, in areas such as health, education, public safety, and urban mobility, among others. Finally, the transparency of some agencies has not been scrutinized in sufficient detail. Such entities include state and local prosecutors, entities of the indirect public administration, and also private and non-profit entities receiving state funds. The Program for Public Transparency at the FGV aims to undertake concerted efforts towards a better understanding of compliance with Brazil's new FOI law. In doing so, it hopes to contribute to greater commitments to transparency in Brazil and internationally.

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