

## OPACITY TO TRANSPARENCY? EVALUATING BRAZIL'S ACCESS TO INFORMATION LAW AT 5 YEARS

Five years ago, Brazil inaugurated a new civic and administrative paradigm. By implementing an access to public information (ATI) law (12.527/2011), the state officially went from holding a monopoly over ‘official documents’ to serving citizens as a custodian of ‘public information’<sup>1</sup>.

Information is power, and ATI laws have been called ‘revolutionary’ and ‘subversive’ in their stated intents (DARCH; UNDERWOOD, 2010, p. 9). By providing citizens with the right to ask and receive governmental information (passive transparency), barring certain standardized exceptions, and obliging government agencies to publish standardized information such as expenditures, contracts, and administrative details on their respective websites (active transparency), ATI laws help break down the ‘paper curtain’ that separates citizens from the state. In the process, these laws threaten to turn power structures on their head. It is precisely for this reason that ATI laws have been the subject of such remarkable public sector resistance (HOOD, 2010; MICHENER, 2015a; ROBERTS, 2006). Yet function they must; transparency is the “oxygen of democracy”, facilitating the affirmation of democratic rights, and ATI laws provide the broadest legal basis for transparency anywhere.

The basis is especially broad in Brazil. The scope of the Brazilian ATI law is far-reaching, encompassing all levels of government, branches, and all entities responsible for administering public money, from non-profits that provide government services to state-owned-enterprises. Of the 115 ATI laws around the world, the authoritative Right-to-Information Rating now ranks Brazil’s as the 22<sup>nd</sup> strongest – on paper.<sup>2</sup>

Yet five years after the passage of Brazil’s access to information law, how well is Brazil’s ATI law working in practice? On the one hand, ATI laws can foster effective governments and markets, yet at the same time, they tend to induce public sector resistance. Given these countervailing forces, this paper takes inventory of where opacity is yielding to transparency – and where it is not. It does so by analyzing government data and research evaluations conducted across Brazil, placing emphasis on four evaluations carried out by the FGV’s Public Transparency Program since 2014.

This paper is organized as follows. The first part analyzes the incentive structures that help determine whether governments and institutions in Brazil resist or commit to ATI. Here, we also provide background on why Brazil enacted a law, and on the most important deficit in Brazil’s subnational ATI regime: oversight.

The second part examines ATI performance across Brazil, examining and comparing transparency of the judiciary and public prosecutor, and governments at the state, municipal, and federal levels. The data make clear that – 5 years after taking effect – commitments to Brazil’s ATI law are

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<sup>1</sup> The Public Transparency Program of the FGV is joint collaboration between the Brazilian School of Public and Business Administration (EBAPE) and the Law School, DIREITO FGV RIO’s Center for Technology and Society. This report was made possible with funding from the Open Society Foundation.

<sup>2</sup> See, <http://www.rti-rating.org/country-data/>

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relatively weak and incipient in all of these public institutions, with the partial exception of the federal executive. Due to the scarcity of evaluations, the legislative branch is excluded from the broader comparisons contained within this working paper, as are state-owned enterprises.

The third part examines relationships among the performance of public institutions, on the one hand, and demographic or institutional indicators, on the other. We find, for example, that jurisdictions with higher human development indicators (HDI) tend to be more compliant with transparency norms. The relationship is such that a 100 point rise in HDI (on a scale of 450-1000) is associated with a 49% increase in the odds of receiving a response to an ATI request at the state level, and a 101% rise at the municipal level. We also find that designated electronic means of making ATI requests, such as the Brazilian government e-SIC, have a significant effect on the probability and accuracy of responses. Compared to having no designated means of sending requests, an ATI-specific online platform for sending requests is associated with 225% increase in the odds of receiving a responses (SE=0.48,  $p<0.01$ ), and a 75% increases in the odds of receiving an accurate response (SE=0.46,  $p<0.05$ ). These results have important implications for ATI regimes. Above all, they show that governments that commit to implementing FOI tend to be more compliant with law 12.527.

### I. INCENTIVES TO IMPLEMENT AND COMPLY WITH ATI IN BRAZIL

Any evaluation on the practical application of a law must begin by examining incentives. What are the incentives driving Brazil's key political and public sector actors to implement and comply with the country's access to information law?

#### *Background on law 12.527/2011*

The federal government had many good reasons for enacting a law. The right to information was affirmed by article 5 of Brazil's 1988 constitution, but the lack of legislation prevented ATI from being realized effectively in practice. In 2006 the Inter-American Court set an international precedent by mandating that the government of Chile effectively adopt an ATI law (Claude Reyes v. Chile). The same year, President Luiz Inácio Lula da Silva (Lula) promised to pass a law during his reelection campaign. In 2010, the same Court issued a decision with similar implications against the government of Brazil (Gomes Lund v. Brazil). By then, 13 Latin American countries had already adopted ATI laws.

Come the administration of Dilma Rousseff, Brazil was under considerable pressure to pass a law. Similar to Lula, Rousseff prioritized building-up Brazil's 'soft power', its reputation for leadership among developing countries. In 2011, the Rousseff administration co-chaired the newly inaugurated Open Government Partnership together with US President Barack Obama. The same year, Brazil enacted an ATI law, initiated a Truth Commission, and established an open data portal.

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### *Incentives for Monitoring in Brazil*

The need for effective tools to monitor the internal workings of government is more pressing in Brazil than in most other democracies, principally because of its oversized and diverse cabinets (AMORIM NETO, 2000; MICHENER, 2015a). Government cabinets in Brazil typically include upwards of half a dozen parties, many of which have conflicting priorities and loyalties. Whether federal, state, or municipal, most of Brazil's governments are composed of ministers and secretaries who frequently privilege particular and party interests over those of the chief executive or the public. The *Mensalão* and *Petrolão* scandals make clear that Brazil suffers acutely from the many-headed hydra of maladministration: rent-seeking, corruption, inefficiencies, and incompetence, among other ills. Moreover, cabinets that are large and diverse also suffer acute dilemmas in coordinating policy, dilemmas that greater transparency can help alleviate (INDRIDASON; BOWLER, 2014).

For leaders whose parties depend on establishing a reputation for good governance, strong ATI rights make sense – they represent one among many weapons to help coordinate policy, deter the maladministration of coalition partners, and “keep tabs” on the (mis)behavior of friends and allies (CARROLL, 2010; THIES, 2001). They are also appealing to leaders trying to project their countries as socially conscious leaders of good government in the developing world. Unfortunately, most of Brazil's subnational governments do not depend on establishing reputations for good or socially conscious governance. They depend on establishing reputations for the provision of basic good and services, as well as highly visible building and infrastructure projects.

Yet some leaders do think differently. Take the case of the current Governor of Maranhão, Flávio Dino (PCdoB – MA). Coming to power in January 2015, Dino created the Transparency and Control Agency (Secretaria de Transparência e Controle), passed regulations to regiment the federal ATI law (decree 10.217/2015), and launched a transparency portal. Maranhão went from a score of 2.2 out of 10 on the first 2015 edition of the CGU's Brazil Transparency Scale (Escala Brasil Transparente) to the maximum score of 10 in the second. Thanks largely to the Dino administration's promotion of access to information, the state also went from recording 339 requests in 2015 to 1159 in 2016 – more than a threefold increase.

As all politicians, Dino had his reasons for committing to the ATI law. Perhaps most importantly, the Governor took the helm of a state long-dominated by the Sarney family PMDB political dynasty, which had long been accused of systemic corruption and maladministration (see, for example, BOAS, 2013). It was in Dino's interest to ‘throw open the doors’ of one of Brazil's most backwards state administrations and shine a light on what had become of the state government. Political competition and electoral alternation are foremost among the factors that can help instigate or amplify commitments to ATI and other accountability measures. This inference is

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substantiated by a vast body of scholarship on the politics of ATI and other accountability mechanisms (see, for example, BERLINER, 2014; MICHENER, 2015a; PEREIRA; MELO, 2013).

### *The Calculus of Incentives*

Yet for many subnational governments, especially those that are reelected or elected and take over from allies, the calculus of incentives places opacity above transparency. Transparency, after all, means that governments have provided enough information to render themselves susceptible to criticism. Providing no information simply signifies non-compliance, which has particularly low costs when the news media and institutional oversight is weak – or when no oversight exists at all.

Governmental oversight is arguably the most important ingredient in a successful ATI regime (NEUMAN, 2009; NINO, 2010) yet is sorely lacking across Brazil. Research conducted in April 2017<sup>3</sup> shows that 16 of the regulations of Brazil's 27 states<sup>4</sup> and 10 of its 26 state capitals assign oversight responsibility.<sup>5</sup> These are *de jure* statutes for oversight; the *de facto* practice of oversight may be even rarer. By contrast, the Mexican and Chilean ATI laws feature strong information commissioners that exert forceful exogenous incentives for compliance (MICHENER, 2015b). As the next section illustrates, such incentives are needed even among those institutions expected to enforce and uphold the rule of law in Brazil.

## II. GAUGING COMPLIANCE AND IMPLEMENTATION BY THE NUMBERS: EVALUATIONS AND OFFICIAL DATA

### Data Collection and Definitions

The following pages present collected data from two sources. First, we collected and analyzed all known evaluations of compliance with passive transparency (requesting transparency) undertaken by academic and advocate researchers in Brazil.<sup>6</sup> Second, we obtained official data provided by the judiciary, the public prosecutor, subnational governments – including states, state capitals and municipalities – and the federal government. We obtained this information either through interviews, ATI requests, or through official reports and statistics found online.

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<sup>3</sup> The regulations from Amapá, Sergipe, Pará, Aracaju, São Luís and Belém couldn't be found.

<sup>4</sup> The Federal District is always included in all descriptions of 'states'.

<sup>5</sup> The following regulations make reference to designated agencies for oversight: the cities include Belo Horizonte, Boa Vista, Brasília, Campo Grande, Curitiba, Fortaleza, Goiânia, João Pessoa, Maceió, Manaus, Natal, Porto Velho, Recife, Rio Branco, São Paulo, Vitória; the states include AC, AL, CE, DF, GO, PB, PE, PI, PR, SP.

<sup>6</sup> For an overview of evaluations, see, <http://transparencia.ebape.fgv.br/avaliacoes-brasileiras>

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In following with other landmark studies on new ATI laws (CAMAJ, 2016; HAZELL; WORTHY, 2010; MICHENER, 2015b; OPEN SOCIETY JUSTICE INITIATIVE, 2006), this study focuses on compliance with passive transparency first and foremost because it is arguably the best yardstick to gauge commitments to transparency. Active (website based) and open data transparency can easily be cherry-picked, ‘sanitized’, or heavily mediated by officials (MICHENER; BERSCH, 2013, p. 239). Passive transparency, on the other hand, involves the obligation of officials to meet the information demands of citizens, rather than providing data that is easiest to collect. It also means officials have to deliver copies of actual documents – within fixed periods of time – that frequently reflect the ‘rawer’ details of public management.

In analyzing the compliance of public institutions with access to information requests, this study focuses on three basic metrics: response rates, accuracy rates, and request-to-response time in days. While the former is self-explanatory, the latter two variables are defined below.

Response rates are calculated as a percentage of total requests that received responses. A response is defined as any kind of directed communication sent via email or accessible through a platform *that is not* an automatically generated message or an update message related to the internal processing of a request. Denials or responses about the unavailability or inexistence of information are therefore considered valid responses.

Here, the accuracy rate is calculated as a percentage of responses that are scored minimally accurate or better, typically on a three-point scale (0-50-100).<sup>7</sup> Accuracy is defined as a response that provides information on what was requested or that is correlated with the object requested. For example, if details on expenditures are requested and the response provides regulations on expenditures, the response is not accurate. If partial information on expenditures is provided, the response would be scored as minimally accurate. Maximal accuracy is awarded when reasonably complete information is provided.

In line with better practice methods (LACY et al., 2015), responses and accuracy scores in all official studies published by FGV’s Public Transparency Program (FGV-PTP) are double-coded based on established protocols. Coding disagreements are resolved by awarding the maximum score. In gleaning information from evaluations that lack accuracy scores, we normalize any metrics associated with the accuracy of responses, or we omitted accuracy metrics altogether.

### 1.1 Upholding the Rule of Law? The Public Prosecutor and the Judiciary

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<sup>7</sup> In FGV reports, we calculate accuracy scores as the total number of requests that received minimally accurate scores or better. Here, however, we focus on the accuracy of responses in order to place emphasis on the quality of answers.

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Two among the most emblematic rule of law institutions are the judiciary and public prosecutor. Both are powerful, constitutionally autonomous entities, responsible for adjudicating disputes and interpreting the constitution and defending fundamental rights, respectively.

State courts and the offices of the public prosecutor in Brazil offer few markers on the implementation of the law. None have adopted an online ATI-specific platform for access to information (ATI) such as the e-SIC, and most requests have to be channeled through ombudsmen, some of which do not furnish receipts. Table 1 illustrates the paucity of data from state courts and state public prosecutors, with only 1 of 27<sup>8</sup> state courts providing statistics and 7 of 27 state public prosecutor offices.

<b>Table 1. Official Data on Requests and Requesters for State Public Prosecutors (MP) and State Courts (TJ) Numbers for Last Year Available and (2012-16) Aggregated</b>								
TJ / MP	Years	Number of Request	% Responded Requests	Applicant Profile	Citizens	Orgs and businesses	Female	Male
TJ - MT	2016	21	100%	No				
MP - AM	2015 - 2016	35 (71)	100% (100%)	Yes	80% (74.6%)	20% (25.4%)	28.57% (2016)	45.71% (2017)
MP - ES	2016	60	100%	No				
MP - MA	2014	30	100%	No				
MP - MS	2012 - 2016	15 (65)	100% (100%)	Yes	100% (96.66%)	0% (3.33%)	33.25% (17.55%)	66.75% (78.5%)
MP - PA	2012 - 2015	25 (27)	-	No				
MP - RO	2016	62	100%	Yes	93.55%	6.45%	24.56%	75.44%
MP - RS	2013 - 2016	918 (3068)	-	No				

Table 2 presents results from 8 different evaluations that assess elements of the judiciary or the public prosecutor.<sup>9</sup>

<sup>8</sup> The Federal District is counted as a state for the purposes of analysis.

<sup>9</sup> \* Aggregated results from Borges (2015), Michener, Moncau & Velasco (2014), Moncau et al. (2015); \*\* Aggregated results from Michener, Moncau & Velasco (2014), Moncau et al. (2015), Artigo 19 (2014, 2015, 2016);

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Table 2. Passive Transparency Compliance:  
the Public Prosecutor and the Judiciary

Jurisdiction	Number of Requests	Response Rate (%)	Accuracy of Responses (%)	Average Response Time (in days)
State Public Prosecutor Offices*	242	47%	65%	19,1
Federal Public Prosecutor Offices **	36	89%	83%	10,1
State Judiciary***	440	73.6%	45%	22
Federal Judiciary†	148	78.3%	73.8%	19.2

Apart from the offices of state public prosecutors, which respond to less than 1 in every 2 requests, response rates are comparable to better performers, with the federal prosecutor and judiciary responding to approximately 4 out of every 5 requests. The accuracy rate of the federal public prosecutor is particularly encouraging, although the small sample size of requests is far from representative. By contrast, the state courts have markedly weak accuracy rates, meaning that even as they respond to approximately 3 out of every 4 requests, little more than 1 of those 4 requests garners an accurate response, meaning a response that minimally answers the request. As FGV reports show, results can be even lower depending upon the nature of the request.

Such is the case with two studies, one on the judiciary (MICHENER; MONCAU; VELASCO, 2014) and the other on the public prosecutor (MONCAU et al., 2015), undertaken by the Public Transparency Program (FGV) in 2014 and 2015, respectively. These studies focused on questions

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\*\*\* Aggregated results from Michener, Moncau & Velasco (2014), Artigo 19 (2016), Michener (2016); † Aggregated results from Michener, Moncau & Velasco (2014), Artigo19 (2014), Artigo19, (2015).

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of remuneration, budgets, access to information, and policies on evaluating employees, obtaining promotions, and guarding against nepotism. Requesters sent 264 requests to 40 the judiciary; and 193 requests to 29 offices of the public prosecutor. The judiciary responded to 61% of requests but only 26% of these responses were deemed minimally accurate. The public prosecutor's performance proved inferior, with a 51% response rate and a 27% accuracy rate.

The prognosis is not completely negative, however. Public prosecutors in Mato Grosso and Rio de Janeiro responded in an exemplary manner to a request on promotions, sending links to regulation, and all council decisions on promotions (MONCAU et al., 2015, p. 55). Requests to state judiciaries for spreadsheets on remuneration in open formats even prompted institutional change. Within a week of receiving a request from FGV researchers, the president of the state court of Santa Catarina emitted a decision to make all remuneration accessible in open formats, and the state court of Amapá made similar provisions (MICHENER, 2016, p. 119). These examples show how the mere fact of making a request can incite governments to act (GODIN et al., 2008; MICHENER; WORTHY, 2015, p. 17; YADAV, 2013).

Despite these exemplary responses, the numbers should make clear that they represent an exception. The few entities that did respond to requests on remuneration typically sent links that directed researchers to online PDFs, which, on the one hand, sometimes did not work and, on the other, were provided in closed formats, making it impracticable for researchers to aggregate or reuse data. Article 8 (§ 3º II, III) of law 12.527 mandates that data should be provided in open formats when possible.

Other 'opaque' aspects of judicial transparency include descriptions of remuneration that are so truncated or arcane as to be unintelligible, and the difficulty of finding complementary documents – such as allowances (*auxílios*) for meals or the cost of schools for the children of magistrates. The judiciary and public prosecutor's oversight agencies, the National Council of Justice and the National Council of the Public Prosecutor, have issued several resolutions on active transparency.<sup>10</sup> Yet these resolutions are very general and, in the case of remuneration, seem to have been largely ignored.

Although more research on transparency in the judiciary and the public prosecutor's office is needed, the above FGV studies found weak compliance with the passive transparency obligations of law 12.527. The irony is unmistakable; at first glance, the institutional mission of the public prosecutor – to defend fundamental rights – seems to suggest that it might serve as guardian of the ATI law at the subnational level, helping to regulate and enforce ATI. However, as evaluations demonstrate, the state public prosecutor must first be the change it ought to be enforcing.

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<sup>10</sup> For the Public Prosecutor, Resolutions 38 (May 2009), 86 (March 2012), 89 (August 2012); and for the Judiciary, Resolutions 102 (December 2009), 151 (July 2012), and 215 (December 2015).

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### 1.2 Municipal and State Compliance with Access to Information in Brazil

That the institutions entrusted to uphold the rule of law respect rules on transparency is critical from the perspective of setting an example, and operating with efficiency and fairness. But should we not expect the same of local governments? Most government happens locally, on the streets, schools, hospitals, and leisure spaces of cities. In short, local government affects the day-to-day of citizens, and governmental dispositions towards upholding the law set the most critical of examples. Yet, on average, this is where transparency tends to be weakest in emerging democracies. The paradox is that local government is closer to citizens and should therefore be easier to hold to account (MICHENER, 2016, p. 15–17). Yet local governments often skimp on disclosure due to uncritical or coopted news media coverage, inadequate oversight, and limited citizen awareness and political participation.

Table 2 presents results on compliance for the executive branches of subnational governments.<sup>11</sup> The results show substantial variation in responsiveness and accuracy, with state capitals showing the highest levels of responsiveness, providing responses to approximately 2 out of every 3 requests. State compliance levels are particularly low. These numbers are partly due to a large number of requests submitted to state police forces, of which barely any received responses (MICHENER; VELASCO, 2015). Overall, the aggregate numbers show that about 1 in every 2 requests are being ignored at the subnational level.

	Municipalities	State Capitals	States
Number of Requests	784	313	610
Response Rate	49.1%	68%	40%
Accuracy Rate	71%	70.4%	39%
Average Response Time (in days)	17.4	19.8	25.4

In 2016, the Public Transparency Program (FGV) released a report on state and municipal transparency in Brazil, which included chapters on the general implementation of the law, information technology and monitoring practices in local government, governmental advertising

<sup>11</sup> Aggregated results from Artigo19 (2014a), Artigo19 (2015a), Borges (2015), Michener, Moncau & Velasco (2014), Michener & Velasco (2015), Michener (2016), Velasco (2017)

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expenditures, public remuneration and inequality, and the transparency of non-profit organizations receiving public contracts (MICHENER, 2016). For all of these different subjects, researchers sent out 313 requests to the capital and second largest cities of states in Brazil. Among these requests, 53 percent received a response, of which 87 percent were deemed minimally accurate or better. Thus when municipalities responded they almost invariably did so accurately. What is most heartening about this result is that these municipalities were also the ones that reported having implemented an ATI unit responded in an accurate manner (PADILHA; MICHENER, 2016). In the 20 municipalities that did not respond to any of the requests FGV researchers sent out, 73 calls were made to understand why responses were not forthcoming. What researchers found was a marked lack of awareness (MICHENER, 2016, p. 179):

- In nearly 50 percent of calls, officials asked why researchers wanted the information. As stated by law 12.527 (article 10 § 3º), requesters have no need to justify their motives, and officials should therefore not be asking such questions.
- Officials in 57 percent of jurisdictions did not know what agency was responsible for complaints regarding access to public information, or transferred the calls of researchers to the wrong agency, such as the information technology (IT) department.
- In 47 percent of calls made, officials asked to call back at a later time.

In short, the results show that officials simply had little knowledge of the law; they had not been trained. The CGU official responsible for federal-subnational cooperation, Álvaro de Souza,<sup>12</sup> explains that local officials justify poor compliance by pointing to problems accessing the internet or the lack of technical abilities. According to Souza, local governments also claim they do not have the budget to comply with the law (SOUZA, 2017).

A few examples, however, make these ‘under-resourced’ arguments difficult to believe. Take the example of Cacaúlândia, a small town of 6268 in the Amazonian state of Rondônia. The municipality had a 2014 annual per capita income of R\$18,460 (about US\$6000). Despite its very humble means, the municipality signed the CGU’s Program for a Transparent Brazil (Programa Brasil Transparente) in 2013, regulated the law the same year (decree 2005), and in 2015 it became one of only 31 cities to achieve a perfect score of 10 on the CGU’s Brazil Transparency Scale (Escala Brasil Transparente). In addition to keeping an updated transparency portal, the three officials who take care of transparency recorded responses to 46 ATI requests between 2014 and 2016, and – to maximize public trust – post meticulous records of power outages on the town’s transparency portal, the result of Rondônia’s precarious grid.

As Cacaúlândia and the FGV’s telephone calls to local governments suggest, non-compliance may have less to do with budgets and technical abilities and more to do with leadership and incentives. Even if a government does not have the budget or technical ability to implement an e-SIC –

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<sup>12</sup> Interview granted do Irene Niskier in March, 8<sup>th</sup>, 2017. Brasília.

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dubious claims, given support from the CGU – elected officials could at least ensure that public servants are educated about the law's obligations.

Clearly, the principal dilemma of implementation and compliance is the lack of oversight. As mentioned earlier, only 16 states and 10 state capitals make reference to entities responsible for oversight,<sup>13</sup> yet whether or not oversight is actually being enforced is an open question.

It is not only the CGU's example that makes clear the importance of oversight and political leadership. The City of São Paulo responded well to requests sent out in a 2014 evaluation by the FGV (MICHENER; MONCAU; VELASCO, 2014). During this period, the Comptroller General of the Municipality hired long-time ATI advocate Fabiano Angélico to take responsibility for the ATI law. Angélico had to negotiate changes to São Paulo's ATI regulation, which, among other deficiencies, allowed just about anyone to classify information and made no provision for sanctions for violating the law. Angélico then set about developing an ATI-specific online platform, as the one offered by the CGU was incompatible with the City's software specifications. Finally, his office worked to perfect a timing alert system, trained department heads, and instated a routine of weekly meetings to work out kinks in the ATI system and handle internal appeals. According to Angélico, when he arrived in 2013 ATI had not been integrated into the routines of the City administration. Had his office not made clear to public servants the need to abide by the law, it simply would not have happened (ANGÉLICO, 2017).

### Markers of Implementation - Requests and Requesters

A first-order marker of oversight and implementation is the presence or absence of statistics on ATI requests (CAMAJ, 2016; HAZELL; WORTHY, 2010; MICHENER, 2015b). The statistics kept by the CGU concerning the federal executive are some of the most extensive in the world. Table 4 illustrates the most basic of these statistics, but other statistics include a plethora of information on requesters:<sup>14</sup> the number of requesters, their sex, profession, legal status (citizen or organization), and levels of education. While we examine the federal executive in later sections, Table 4 serves to provide a benchmark.

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<sup>13</sup> The following regulations make reference to designated agencies for oversight: the cities include Belo Horizonte, Boa Vista, Brasília, Campo Grande, Curitiba, Fortaleza, Goiânia, João Pessoa, Maceió, Manaus, Natal, Porto Velho, Recife, Rio Branco, São Paulo, Vitória; the states include AC, AL, CE, DF, GO, PB, PE, PI, PR, SP.

<sup>14</sup> See, <https://esic.cgu.gov.br/sistema/Relatorios/Anual/RelatorioAnualPedidos.aspx>

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Table 4. Official Government Data on Federal Executive, 2016 and (2012-16)

Number of requesters	Number of Requests	% Responses	% Full or Partial Responses	% Partial Responses	% Denials	Request-to-Response Time in Days	Number of Appeals
57,438 (233,433)	111,669 (446,132)	99.39% (99.8%)	67.55% (71.36%)	6.36% (4.45%)	10.02% (11.64%)	14.61 (14)	14,926 (50,833)

### *Requests*

Examining documents and websites for Brazil's state capitals, researchers were only able to find 2016 data on the number of requests for 9 of Brazil's 26 capital cities.<sup>15</sup> A further 2 had statistics on 2015, João Pessoa and Vitoria. Among state capitals, only Belo Horizonte had statistics on all years since the law took effect (2012-16).

The number of requests per state capital varies immensely (refer to appendix 1). In Curitiba, officials received 1307 requests in 2016. By contrast, citizens of Salvador made 113 requests the same year. In other words, Salvador, a city with a third more people than Curitiba, had nearly 10 times fewer requests.

The statistics for Brazil's states are slightly more complete than for state capitals, but are still quite deficient (refer to appendix 1). Of Brazil's 27 states, 14 had information on the number of requests in 2016.<sup>16</sup> A further 3 had information from 2015 (CE, DF, PE). Less than one-quarter of states possess information on the number of requests received since the law took effect (2012-16).<sup>17</sup>

As for the number of requests, the variation by state is again striking. Citizens and organizations in DF sent more than 8 times the amount of requests (5846) than did their counterparts in Pernambuco (699), which has about three times its population.

Calculating the median requesting rate for states and state capitals, in 2016 we find 1034 requests for states and 257 for state capitals. Even though these numbers are based on a small sample and

<sup>15</sup> Belo Horizonte.

<sup>16</sup> These states are: AL, AM, GO, MA, MG, MT, PB, PE, PR, RN, RS, SC, SP, TO.

<sup>17</sup> These include: AL, MT, PB, RS, SP, and TO.

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admit enormous variation, they are still relatively tiny. That is not to say that the requesting trends of some jurisdictions lack promise. Take São Paulo, one of Brazil's most socio-economically developed states. Its 44.85 million people sent nearly 18,000 requests to the state government in 2016 (0.4 requests per 1000 citizens). This result is approximate to that of Brazil's federal government, which received 111,669 requests in 2016 (0.5 requests per 1000 citizens). By comparison, Canada, a country with a population of 35.85 million and whose ATI law has been in force since 1984, recorded 75,387 requests in 2015-16 (2.1 requests per 1000 citizens).<sup>18</sup> Other Brazilian states show less promising trends than São Paulo, however. Mato Grosso, with a population of 3.3 million, recorded a mere 368 requests (0.1 requests per 1000 citizens).

### *Requesters*

Information on requesters is rare at the subnational level. Of the 11 jurisdictions (among 27 states and their 26 capitals) that possess statistics on requesters, only 2 states, and no municipalities, present data on the *number* of requesters (AM, MG). As for other information, 7 jurisdictions detail whether requests were from citizens or organizations, 6 parse male from female requesters, and 4 and 2 detail education and professions, respectively (refer to appendix for details). Amapá and Minas Gerais' statistics on the number of requesters show approximately twice as few requesters as requests. These numbers are consonant with the international experience, wherein a small number of requesters tend to make up a disproportionately large number of requests (HAZELL; WORTHY, 2010).

From the extant data, we know that the average requester is a university-educated male. This data-point is line with international observations (see, for example, CALLAND; BENTLEY, 2013, p. S96). Statistics on the profession of requesters are uncommon, with only Tocantins and João Pessoa gathering such data. In Tocantins, the second largest requester group by profession has been public servants (28.5%). This result is similar to what occurs within the federal government, where public servants from all levels of government make up nearly 22 percent of requesters. High use of ATI laws by public servants accords with extant knowledge on ATI; laws serve as effective means of information acquisition within governments themselves.

In sum, what is striking about records on requests and requesters in Brazil's states and cities is a) the striking variation in requesting rates among jurisdictions, and, b) statistical deficits within and among Brazil's cities and states.

### *Programa Brasil Transparente and Regulations*

The CGU has worked to remedy weak implementation in the states and municipalities within the constraints of a small budget and limited constitutional reach. One tactic is to have subnational

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<sup>18</sup> See, <https://www.canada.ca/en/treasury-board-secretariat/services/access-information-privacy/statistics-atip/access-information-privacy-statistical-report-2015-16.html#toc2>

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governments sign-on to the *Programa Brasil Transparente* (PBT or in English, ‘Program for a Transparent Brazil’), which is an informal commitment to regulate and implement the ATI law. Because Brazil’s law is constitutional, subnational governments are expected to regulate the application of the law according to their specific needs and institutional configurations. As of May 2017, 1186 municipalities and states had signed the CGU’s PBT. As for state governments and their respective capitals, 6 capital cities and 14 states have yet to sign the agreement.<sup>19</sup> Yet signing the PBT should not be taken as a de facto commitment. Case-in-point, AC-and SE signed the PBT, but have yet to regulate the law.

Furthermore, the regulations elaborated by some governments omit critical provisions of the federal law (refer to MICHENER, 2016, p. 35–36). Perhaps the most brazen break with the federal law is the absence of sanctions for public servants that violate the ATI. States that make no mention of sanctions include AC, AL, GO, MS, RN, RR, RS, and SC; and state capitals include Campo Grande, Teresina, Rio de Janeiro, and Florianopolis. Other provisions are also left out of the regulations of subnational governments. A third of states and a quarter of state capitals include no provision to promote a culture of transparency, as the federal law mandates. Finally, the regulations of 4 states and 6 state capitals establish no committee to reevaluate denied internal appeals, as the federal law does.

### *Dedicated Requesting Platforms*

As the Third Part of this paper will show, the official online channels through which citizens request information significantly impacts how well governments respond.. Positively, more and more states and municipalities are adopting the electronic access to information platform developed by the federal Comptroller General (known as the e-SIC). The benefit of these systems is that they provide receipts, and permit requests, appeals, and responses to be made and monitored online. Despite the fact that the CGU freely provides software and technical instruction for the implementation of e-SICs, 8 states and 12 state capitals still have no such systems.<sup>20</sup>

Having examined subnational markers of implementation, including requests, requesters, signed commitments (PBT), regulations, and electronic requesting systems (e-SIC), the evidence shows that – 5 years after ATI law 12.527 took effect – implementation at the subnational level is spotty at best. The numbers on compliance, analyzed earlier, confirm this basic assessment.

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<sup>19</sup> State capitals that have not yet signed the PBT include: Aracaju, Belém, Cuiabá, Rio de Janeiro, Salvador, and Teresina; and states include: AL, BA, CE, GO, MA, MT, PA, PB, PE, PR, RJ, RR, SC, SP.

<sup>20</sup> States that have implemented no e-SIC-type systems include AL, AP, CE, ES, PR, RJ, RN, SE; and state capitals include Belo Horizonte, Cuiabá, Curitiba, Fortaleza, João Pessoa, Manaus, Natal, Porto, Rio Branco, Rio de Janeiro, Salvador, and Vitória.

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### **The Federal Government and Three Challenges for Fuller and Fairer Access**

As official government statistics suggest (refer to Table 4), the federal government is operating at a higher level than all other institutions in Brazil. There is a clear reason why: strong oversight by the Comptroller General (CGU). Yet strong oversight can only have so much influence over the disposition of individual agencies and officials. In this sense, the federal government's statistics on response rates - 99.39% - are difficult to accept at face value. Nevertheless, multiple academic and advocacy-based evaluations have found high levels of compliance with the access to information law.

Seven evaluations by researchers in Brazil have issued 860 requests, of which 93.5% received responses (ARTIGO 19, 2014; ARTIGO 19, 2015; BORGES, 2015; MICHENER, 2016a; MICHENER; MONCAU; VELASCO, 2014, MICHENER & VELASCO, 2015; VELASCO, 2017). Fully 80% of these responses were deemed to be minimally accurate or better, and the average response time was 16 days. These numbers are significantly above state and municipal numbers, (refer to Table 4), and appear to be higher than the numbers of many developing countries (see, for example, HAZELL; WORTHY, 2010). Notwithstanding challenges to be discussed below, the federal government is well on its way to establishing an impressive culture of transparency.

Yet problems persist at the federal level, let alone Brazil's other branches and levels of government. First, the quality and completeness of responses cannot be gleaned from statistics presented herein. The FGV is one of few organizations that judges some element of the 'quality' of requests, and it does so by asking whether the response 'minimally answers the request made' – not the most compelling definition of quality. While the federal executive does present information on responses that provide 'full' versus 'partial' information<sup>21</sup> it is difficult to know what 'partial' or 'full' mean. Does a response such as, 'the information you have requested does not exist' constitute a full response or a partial response? Certainly, claims of inexistence are problematic around the world (see for example, ALIANZA REGIONAL POR LA LIBRE EXPRESIÓN E INFORMACIÓN, 2014, p. 27, 85, 101, 130.). It is easy to present statistics of near perfect responsiveness when a host of insubstantial answers may constitute a 'response', including, "we do not have the information"; "the information is classified"; "fulfilling your request implies additional work we do not need to provide", among others.<sup>22</sup> Greater qualitative analysis is needed to shed light on the question of response quality.

A second set of challenges relates to omissions or loopholes in the law. What are the criteria for classifying documents or for producing or not producing documents? Public interest tests and harm tests should be adopted to better orient officials on what to classify. After all, the law provides that

<sup>21</sup> See, <https://esic.cgu.gov.br/sistema/Relatorios/Anual/RelatorioAnualPedidos.aspx>

<sup>22</sup> Article 13 (III) of the federal regulation 7724 allows for this widely abused exception.

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secrecy be the exception, and openness the rule. In addition to classification problems, article 13 (III) of the federal regulation, decree 7724, provides for several gaping loopholes, where officials may deem requests “disproportionate”, “unreasonable”, or inform requesters that requests are unanswerable because they require “additional work in analysis, interpretation, or consolidation [...] or services of production and data mediation [...] that is not the competence of the institution”. These exceptions are abused all too frequently, and lengthy appeals are required to justify and satisfy legitimate requests for public information.

Finally, a third set of challenges relate to the legal obligation that requesters identify themselves in order to obtain information. Along with Artigo 19 Brasil and Transparency International Brasil, the PTP-FGV has submitted a briefing paper to the CGU as a means of mitigating the negative effects of self-identification in ATI regimes (PATERSON; MCDONAGH, 2010). Forcing requesters to self-identify means that public servants are able to Google requesters, resulting in discriminatory responses or even verbal or physical intimidation (MICHENER; FURTADO RODRIGUES, 2014; VELASCO, 2017).

By virtue of a field experiment conducted by the FGV's Rafael Velasco (2017), empirical proof of discrimination in Brazil's ATI regime is practically incontrovertible. Velasco sent out requests from two sets of identity: FGV professors with identifiable internet profiles, and requesters with no internet profile whatsoever. The FGV requests received nearly twice as many responses as the non-FGV requests. The only possible explanation is the Googling of requesters, which was further validated by several phone calls that FGV researchers received from inquisitive public servants who had indeed Googled requesters. Moving forward, the idea is to have requesters provide personal information exclusively to an oversight agency such as the CGU; that, in turn, would then send out the request to the designated agency without any identifying information, in order to protect the requester.

The challenges of response quality, non-disclosure loopholes, and the negative effects of requester self-identification represent only a few of many challenges faced by the ATI law in Brazil, much less other countries. These challenges leave aside a whole range of issues related to active transparency and open data, which merit a separate analysis altogether. For the time being, it is important to move beyond the mere description of challenges and statistics for passive transparency in order to better isolate key variables affecting response and accuracy rates.

### III. TEASING OUT ASSOCIATIONS FROM THE DATA: GOVERNMENT RESPONSIVENESS, REQUESTING PLATFORMS AND LEVELS OF DEVELOPMENT

In order to better understand the relationship between government responses to ATI requests and institutional and demographic variables, we put together a dataset consisting of 3282 FOI requests from 9 independent evaluations of passive transparency undertaken between 2013 and the end of

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2016 (ARTIGO 19, 2014; ARTIGO 19, 2016, p. 19; )When evaluations used different scales to score responses, results were transformed into a common scale so as to maximize comparability. We re-coded all the evaluations to create a dummy variable for response accuracy, where 1 is assigned when a response was “accurate”.<sup>23</sup> Demographic data is from the Human Development Index (HDI), recorded by the Brazilian Institute for Geography and Statistics (IBGE).

The analysis was carried out using pooled Poisson and Logistic regressions, controlling for fixed effects due to the different timing and diverse authors represented, and using robust standard errors. This empirical strategy met the needs of a highly unbalanced data structure. Put differently, we were precluded from using panel data analysis due to the large number of non-contiguous data in the panel, and its non-random nature, which gave rise to problems of endogeneity.

It is important to mention that the purpose of the following sections is to explore relationships between compliance to ATI in Brazil, on the one hand, and institutional and demographic characteristics, on the other. Correlation obviously does not constitute a declaration of causality, especially given potential dilemmas of endogeneity.

### Descriptive Statistics

Table 5 presents all results from our database of 3282 requests. Requests made to federal bodies had a higher response rate (91%), on average, than state (53%) or municipal bodies (49%). Note that these ‘levels’ aggregate the results from all three branches of government. Other important data, such as the means of request, response time, and the accuracy of response were recorded in some but not all of the original studies.

Table 5. Descriptive statistics of requests included in the analysis

		Federal Level		State Level		Municipal Level		Total Number of Requests	Average Response Rate
		Number of Requests	Response Rate	Number of Requests	Response Rate	Number of requests	Response Rate		
<b>Total</b>		<b>1100</b>	<b>91%</b>	<b>1373</b>	<b>53%</b>	<b>809</b>	<b>49%</b>	<b>3282</b>	<b>65%</b>
Year	2013	474	95%			0		474	95%
	2014	374	93%	692	59%	105	60%	1171	70%
	2015	42	90%	636	45%	0		678	48%
	2016	210	81%	45	64%	704	48%	959	56%
Branch of Gov.	Auton.	36	89%	242	47%	0		278	52%
	Executive	860	93%	610	40%	784	49%	2254	63%
	Judiciary	148	78%	440	74%	0		588	75%

<sup>23</sup> The threshold of 0.75 was used to qualify a response as accuracy.

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	Legislative	56	95%	81	54%	25	56%	162	69%
Means of Request	Non-designated	4	75%	162	35%	165	24%	331	30%
	Designated	19	79%	284	54%	31	71%	334	57%
	FOI System	343	85%	533	61%	290	55%	1166	66%
	Not registered	734	95%	394	48%	323	55%	1451	73%
Accuracy of Response*	0	78 (26%)		289 (63%)		170 (43%)		537 (47%)	
	1	218 (74%)		167(37%)		226 (57%)		611 (53%)	
	Not registered	709		267		3		979	
Average Response Time (days)*		16		23		18		18	

\* Applies only for responded requests.

For the purposes of our study, we classified the means of sending requests into three types, with all of them being online: a) ATI-specific platforms such as the e-SIC; b) Designated channels of sending ATI requests, which may not be specific systems that permit requesters to accompany their petitions, but are explicitly designated for ATI (often ombudsmen); and, c) non-designated channels: any general communication channel, such as a generic email or a ‘contact us’ form. Table 5 illustrates that most requests were made through ATI-specific platforms, especially at the Federal Level. It is clear that requests sent using this channel tend to have a higher response rate, on average. Overall, however, only 53% of the responses were considered accurate, with this percentage being much higher at the federal level (74%).

**Regarding the timeliness of responses, average response time was 18 days. However 33% of the responses in our sample took longer than the 20-day term established by law, and almost 50% of those went even beyond the 30-day maximum.**

### Analysis of Responsiveness

First, we explore which variables are associated with responsiveness. Results for the logistic regressions are shown in Table 6, illustrating odds ratios. In the first regression, the response (dummy variable) is regressed by the branch and level of government, in the second regression, the channel by which requests are sent is added to the model, and regressions 3 to 5 illustrate the sample divided by the level of government. Note that in regressions 4 and 5, we added human development index (HDI) scores in order to control for different levels of development between subnational jurisdictions.

The results suggest that, for requests sent through a designated channel, the odds of response are 98% higher (SE=0.41,  $p<0.01$ ) compared to a non-designated channel, and for those sent through an ATI-specific platform, they are 225% higher (SE=0.48,  $p<0.01$ ). These effects appear to be even higher at the municipal level, where, compared to non-designated channels, sending a request

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through a designated channel is associated with an increase of 272% (SE=1.90,  $p < 0.05$ ) in the odds of a response and 352% (SE=1.04,  $p < 0.01$ ) when it is sent through an ATI-specific platform. At the state level, the use of an ATI-specific platform is associated with an increase of 134% (SE=0.47,  $p < 0.01$ ) in the odds of response. Here, however, whether the system is designated or non-designated seems to make no significant difference.

As expected, we also found a significant and positive relationship between levels of development at the subnational level (models 4 and 5) and responsiveness. For instance, an additional point on the HDI<sup>24</sup> is associated with 0.4% greater odds of a response to a request at the state level and 0.7% at the municipal level. Therefore, an increase in 100 points – the approximate difference between many parts of the state of Pará and Rio Grande do Sul – would thus be associated with 49% and 101% higher odds of receiving a response.

Table 6. Analysis of Responsiveness

VARIABLES	(1)	(2)	(3) Federal Level	(4) State Level	(5) Municipal Level
Designated Channel		1.98*** (0.41)	1.27 (1.95)	1.40 (0.36)	3.72** (1.90)
ATI-Specific System		3.25*** (0.48)	2.32 (3.25)	2.33*** (0.48)	4.52*** (1.04)
Branch_Executive	2.36*** (0.48)	2.32*** (0.49)	0.71 (0.69)	1.85** (0.45)	2.34* (1.15)
Branch_Judiciary	1.30 (0.22)	2.02*** (0.39)	0.34 (0.31)	2.34*** (0.47)	
Branch_Legislative	2.07*** (0.49)	1.93*** (0.48)	1.10 (1.09)	1.72* (0.52)	
Level_State	0.28*** (0.05)	0.24*** (0.05)			
Level_Municipal	0.17*** (0.03)	0.24*** (0.04)			
HDI (*1000)				1.004*** (0.001)	1.007*** (0.002)
Constant	0.23** (0.15)	1.55 (0.46)	3.87 (6.20)	0.02*** (0.02)	0.00*** (0.00)
Year fixed effects	Yes	Yes	Yes	Yes	Yes
Author fixed effects	Yes	Yes	Yes	Yes	Yes
Observations	3,282	1,831	366	979	486

Odds Ratios reported. Robust SE in parentheses

\*\*\*  $p < 0.01$ , \*\*  $p < 0.05$ , \*  $p < 0.1$

<sup>24</sup> Refers to one-thousandth in the original HDI scale.

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### Analysis of the Accuracy of Responses

Another important outcome variable is the accuracy of responses. Here, we include only those requests that received a response and for which accuracy was evaluated. The results of the logistic regressions are displayed in Table 7, below.

Table 7. Analysis of the Accuracy of Responses

VARIABLES	(1)	(2)	(3) Federal Level	(4) State Level	(5) Municipal Level
Means_Designated		2.04** (0.68)		1.53 (0.74)	1.52 (0.99)
ATI-Specific Sys.		1.75** (0.46)		2.03* (0.83)	0.89 (0.33)
Branch_Executive	0.47* (0.19)	0.49* (0.20)	0.58 (0.74)	0.48 (0.22)	0.37 (0.25)
Branch_Judiciary	0.43** (0.17)	0.48* (0.20)	0.87 (1.15)	0.78 (0.35)	
Branch_Legislative	0.63 (0.28)	0.69 (0.31)	0.81 (1.06)	0.75 (0.37)	
Level_State	0.31*** (0.06)	0.35*** (0.07)			
Level_Municipal	0.30*** (0.06)	0.29*** (0.06)			
HDI (*1000)				1.01** (0.00)	1.00 (0.00)
Constant	4.12*** (1.65)	2.10 (1.06)	2.00 (2.45)	0.01** (0.02)	2.07 (5.05)
Year fixed effects	Yes	Yes	Yes	Yes	Yes
Author fixed effects	Yes	Yes	Yes	Yes	Yes
Observations	1,148	939	286	425	218

Odds Ratios reported. Robust SE in parentheses

\*\*\* p<0.01, \*\* p<0.05, \* p<0.1

With respect to the different levels of government, results show that the odds of receiving an accurate response from institutions at the state or municipal level is 65% (SE=0.07, p<0.01) and 71% (SE=0.06, p<0.01) lower, respectively, than it is at the federal level.

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Regarding the channel through which requests are sent, the results suggest that designated means have 104% (SE=0.68,  $p<0.05$ ) higher odds of receiving an accurate response when compared to non-designated means. Meanwhile, when using an ATI-specific system, the odds of receiving an accurate response are, on average, 75% (SE=0.46,  $p<0.05$ ) higher.

We also controlled for levels of development at the subnational levels (models 4 and 5). The results suggest that an additional one point on the HDI is associated with a 1% (SE=0.002,  $p<0.05$ ) increase in the odds ratio of accuracy at the state level. A similarly significant relationship did not occur at the municipal level.

In sum, the online channel by which citizens are forced to make requests has a strong influence on the responsiveness of governments and the accuracy of their responses. This is equal to what occurs with scores on the human development index.

### CONCLUSION AND RECOMMENDATIONS

This paper has examined how well state institutions across Brazil have complied with and implemented the access to information (ATI) law, which took effect 5 years ago on May 16<sup>th</sup> 2012. Evidence shows that the glass is barely half full, if that. Whereas the federal government and some states and municipalities have made considerable headway in implementing and complying with the ATI law, most institutions have far to go. These include most subnational governments and even state-level rule of law institutions, such as state public prosecutor (Ministério Público) offices and many parts of the judiciary. The most redeeming thing that can be said about the law to date is that the federal executive has in many ways set an example and made headway in influencing and enabling other parts of government.

Observing markers of the ATI law's implementation across Brazil, the outlook is, on the whole, not positive. Taking into account the sum of all states and state capitals, fewer than half fulfill basic markers of implementation, such as public statistics on requests or requesters, ATI-specific online platforms for requesting, accompanying, and appealing information, signed commitments to the federally led Transparent Brazil Program (Programa Brasil Transparente), and dedicated oversight agency actively overseeing the law. Where we do find statistics on requests, we encounter striking variation, with locales such as Curitiba and Brasilia exhibiting requesting rates that surpass cities and even states many times more populous. For Brazil's judiciary and public prosecutor, we find even fewer markers of implementation, with public statistics on requests being exceedingly rare.

Observing metrics on compliance with passive transparency obligations derived from 9 research evaluations undertaken since 2012, we find similarly varied results. While federal compliance is high – even higher than the totals available in most democratically advanced countries – state and municipal compliance vary considerably. In general, however, approximately one-in-every-two

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requests is effectively ignored, and of the 50% or so that obtain a response, about half of those are deemed accurate. What this ultimately means is that about one-in-every-four requests receives at least a minimally accurate response. These numbers are even lower for the offices of state public prosecutors and state courts.

By means of final recommendations, the FGV's Public Transparency Program proposes that, to secure the vital flow of public information from the Brazilian state to citizens, businesses, organizations, and the state itself, the following 5 recommendations ought to be adopted:

1. That all jurisdictions assign oversight responsibilities to a central agency, preferably an information commission. Information Commissions are Twenty-First Century institutions for the information age, adopted by the world's leading access to information (ATI) regimes, such as those of Mexico, Chile, the UK, and India. The lack of oversight is Brazil's most important ATI deficit at the state and municipal levels of government.
2. That all agencies at all levels of government implement ATI units to oversee compliance, implementation, regulation, and promotion of the law.
3. That all agencies and jurisdictions adopt ATI-specific online platforms by which citizens can request information, accompany responses, and launch appeals. As the third part of this paper shows, such platforms dramatically improve compliance.
4. That all jurisdictions adopt identity-neutral means of requesting information or protection for requesters. As studies detailed have proven, officials are actively Googling requesters, which is having an effect on the quality of responses. One solution is to have requesters register with a central authority and for that authority to send out requests without identity markers.
5. That reforms to be considered to a) fill gaps in the regulations of many subnational governments, such as the absence of sanctions; b) clarify or amend the exceptions relating to article 13 of federal decree 7724, whose ambiguity have made them key loopholes for recalcitrant officials; and, c) provide for harm and public interest tests to better justify information reserved as classified.

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