

Accountability and Open Government in Uruguay: the need for a Freedom of Information Law¹

“Sunshine is the best antiseptic”
Louis Brandeis

Introduction

Uruguay is placed 25th in the Transparency International Corruption Perceptions Index and is better positioned than “developed” countries such as Greece or Italy (Transparency International 2007). Uruguay is considering a set of reforms that are part of a worldwide trend for better governance. These reforms arguably include an open government policy and freedom of information (FOI) law (OECD, 2005) The policy making process is very difficult in Uruguay, to a large extent due to key policy makers, veto paralysis and unobservable political moves (Bergara et al 2004). Uruguay is now trying to pass a FOI Law.

Reforms in Uruguay were much more symbolic rather than real. (Panizza 2005). There is increasing discontent among citizens about the poor performance of the state sector. Central state public servants can only be dismissed on very narrow grounds through an arduous process and there are no evaluation frameworks for most of those public servants (Ramos et al 2002). Accountability exists, in a very limited sense of the word. Social accountability (in terms of access to central and local government information by the citizens) is only formally possible through the courts or by the “grace” of the Administration.

This paper argues that an Open Government policy and FOI law are necessary in Uruguay, not only for the sake of modernisation (or “catching up” with other 66 countries)² but in order to foster other reforms and ensure the citizen’s right to know. Drawing from the political economy and development framework this paper will argue that a FOI law will improve Uruguayan governance. A FOI law will allow another dimension of accountability and in the process will change the institutional arrangements towards an open and responsive public administration. Furthermore, this paper will provide guidelines in terms of content and implementation strategy of the current draft. It will also assess the main risks that a FOI law can face.

Firstly, this paper will analyse the links between governance, development and information availability. It will also provide a framework to assess Uruguayan reality in terms of setting up a freedom of information law. Secondly it will assess Uruguayan reality and the current state of the FOI Law. Thirdly, it will make specific recommendations about the enactment and implementation of Open Policy Government and a Freedom of Information Law in Uruguay.

¹ I would like to thank Prof. Rob Laking from the School of Government (Victoria University of Wellington) and Edison Lanza for their generous contributions.

² A usual frontrunner in many public sector reforms, Chile, has recently announced the establishment of a Freedom of Information Law. Chile is following the recommendation given by the Interamerican Human Rights Commission on the case Claude Reyes vs Chile. A summary of the case in English is available at <http://www.access-info.org/data/File/Claude%20Decision%20by%20Inter-American%20Court.doc> (last accessed December 3, 2007)

Governance and Information

Kauffman, Kray and Zoido Lobaton (1999) make the case for the connection between governance and development. This connection is less than perfect, but there seems to be consensus on the fact that a well-managed and accountable government, is more likely to perform well than a non-accountable one. Voice and Accountability are key components towards human development.

As people exercise voice (. i.e. they are able to do something about the problems they face), in order to ensure the quality of the public debate, voice must be an informed one. Then, access to information becomes important. Islam (2003 p.5) discusses how information may affect the political process. It is clear that information is important for the private sector in order to make decisions, but it is equally important to coordinate action within the government. Thus, when the government keeps important information and there are no transparent processes, inefficiencies arise.

Well-educated, informed and critical citizens increasingly demand an open government policy, based on: transparency, accessibility and responsiveness. Transparency implies being exposed to public scrutiny. Public scrutiny cannot happen without access to information.(OECD,2005) Furthermore, as Stiglitz (2002) argues the asymmetry of information between the government and citizens is inevitable. The same discretion that allows a manager to make a decision against the shareholder's interest, allows government officials to pursue their own interest rather than the interests of the citizenry. Of course a democratic governance process involves much more than corporate governance one. Nevertheless the phenomenon is the same: information asymmetry creates difficulties in terms of transparency.

It has always been quite obvious that information (or knowledge) is power, and-it has always been equally obvious that secrecy gives government officials more power. They have no incentives to disclose information that may affect them adversely. Incentives are quite simple: democratic processes are not easy to manage and secrecy provides insulation. Furthermore, it also provides protection against making mistakes and being blamed for them. Also public servants can take the credit for successes that they do not deserve. Inevitably, it gives room for special interests to have a greater influence. (Stiglitz 2002) Anonymity of public servants plays its part in this process too.

The case of the Uruguayan bureaucracy is a strange one. It was built through patronage, but to a certain extent complied with Weberian standards. It is still a politically- responsive bureaucracy rather than a neutral one (Ramos et al 2003). Secrecy of course plays a very important (if not essential) day-to-day role in the Uruguayan State. Even in the reforms that are currently being undertaken, there have been just a few voices in the government raising the topic of access to information. The highly legalistic Uruguayan government environment also helps to enshrine the role of secrecy.

The link between development and information availability is clear. If information is not available people are unable to access services they are entitled too, corruption is more likely to happen, and hence deprivation of citizen's rights becomes a reality.

Furthermore there is a strong economic cost in terms of efficiency and effectiveness for all actors.

Promoting new governance institutions is always difficult. It is not only about imposing an agenda because international funding or international academia says so; it is about looking at the real needs of the country. Following Grindle's expression, this is about "Good enough Governance"(Grindle 2005) rather than the ideal (and always elusive long list) of "Good Governance."

Uruguay could be classified as an institutionalised and competitive state because there are rules through a stable organisation and there is competition among different programmatic parties. Institutions are acknowledged, and most of the time, issues are solved according to the rule of law. The public sector is being challenged to provide better services (as in Chile or India) .The main debate is, of course, the scope of these services.(Moore quoted by Grindle p.12)

Assuming then that Uruguay is in this group, Moore identifies a set of priorities that these countries have in terms of reforming public institutions. The main areas for intervention are: government accountability (a fully responsible government), government responsiveness to citizen participation, transparency (understood as Open Government policy), provision of basic services to all the population and fairness in access to services. However, anecdotal evidence such as the almost non-existent debate in the country about this topic, the constant demand of citizens for the government to perform better, and endless discussions among public actors about documentation or information that is not available, suggests that the challenge of setting an open government policy and its main instrument, is not being met. It is also significant that countries in the same category (such as Chile) are about to implement a freedom of information law.

Then, it is clear that in the current stage of development, Uruguay needs a FOI law and an Open Government Policy.

The current institutional framework

Uruguay has a long tradition of liberal democracy that goes back to the beginning of the 20th century. It was briefly interrupted by a military dictatorship between 1973-1985. The country is acknowledged as one of the most liberal states in the Latin-American context. Uruguay is regarded as one the most democratic countries in the region. Unlike most of Latin America, Uruguayans believe that democracy is the best way of government (The Economist Intelligence Unit –Latinbarometro Research, 2007). Uruguayan civil society is strong but does not exert a lot of influence in the policy-making process, particularly in budgetary terms (Civicus , 2006). As it has been mentioned, civil society can play a very limited role if information is not timely and efficiently available.

Uruguay has a semi- presidential system and a very independent judicial power. The law system in place follows the European continental model, and therefore has an entrenched constitution and separation of powers. Furthermore, a different court that is independent from the central administration, parliament and the judiciary power, carries out judicial review- (Administrative High Court-Tribunal de lo Contencioso Administrativo). Judicial review is possible after the administrative appeal process takes place (. i.e. this process takes place within the administration). Members of the Tribunal de lo Contencioso Administrativo are usually career judges appointed by the Parliament. It is fair to say that most of the time they are politically neutral.

The central administration is not compelled to disclose information, neither is local government. In fact, the Decree 500/91, which regulates all the central administration activities, establishes that the Administration could share public information with all the persons, corporations, NGO, or other entities. It is very clear that according to the decree this is a faculty of the administration rather than a duty. The administration may exercise its discretion to disclose the information or not, and according to the same decree it should give a rationale for not doing so. In the leading case *Alsina v State*³ (Due Process of Law foundation, 2007 p.73) the Courts have ordered the State to release information about human rights violations in the past dictatorship (1973-1985). However this is not a trend. A recent decision of a lower court denied environmental activists the right to know about a pulp mill investment.⁴ This is probably because of the absence of an appropriate legal procedure. Plaintiffs use a subsidiary legal process called "accion de amparo" which is a special injunction procedure that supposes that a fundamental right is being or is going to be breached. However it is very difficult to prove and it is a very exceptional measure in the Uruguayan legal system.

There is no doubt that the right to information (or "right to know") exists, and is part of the Constitution. Uruguayan Constitution is inspired in ius-naturalism, a legal doctrine that acknowledges that the right of the citizen is previous to the State, and this doctrine allows an extensive interpretation of Human Rights. (Delpiazco, 2006) The General Procedure Code (C.G.P.) regulates most of the legal procedures in Uruguay. This code clearly establishes the principle of publicity of the process (Art.7). This means that all files can be accessed by anyone in any state of the process. It is even possible to follow the case on the Internet. However, the judges can prevent this due to the events in the case (in the local lawyer's jargon is "reservado" or reserved). To a certain extent the legislative power also provides a lot of information on its website about the different laws and initiatives, which helps citizens to realise how parliament is working.⁵ Nevertheless, information about public servants and politician activities are restricted.

In 2007 Uruguay launched the Government Agency for E- Government and the Knowledge and Information Society (Agencia para el desarrollo del Gobierno Electrónico y la Sociedad de la Información y el Conocimiento- AGESIC). The agency depends on the Presidency of the Republic and one of its goals is to promote transparency in the public sector through technology. However until now this agency has not considered among its legal instruments, a freedom of information law. The civil society⁶ organised a group in order to push for an access of information framework. The group drafted a project and got the support of some members of the Parliament. The last version of the project will be summarised in the next section. Anecdotal evidence suggests that there is a secrecy environment among public servants. In 1987 the vice President of the Republic (a very distinguished lawyer, freedom fighter and former journalist) asked a journalist not to disclose information

³ A brief summary by the journalist can be found on <http://www.pagina12.com.ar/diario/elpais/1-3239-2002-03-25.html> last visited December 1st 2007

⁴ There is a large controversy about the pulp mill industry in Uruguay

⁵ www.parlamento.gub.uy

⁶ This is the Group is composed by Amnesty International, Archiveros sin fronteras, The National Archives, The Uruguayan Press Association, the World Association of communitarian broadcaster, IELSUR, SERPAJ, Transparency International Uruguayan Chapter, Librarian School of Uruguay,

about vehicle registration in Uruguay⁷. In a local council, an economic director went to explain the budget (which happens to be public) but when a journalist tried to get the minutes of that meeting, they found out that according to the local council it was “secret”⁸

Content of an Open Government Policy in Uruguay

An Open Government Policy should be based on transparency, accessibility and responsiveness. (OECD, 2005), The state sector reform that is supposed to be discussed in Uruguay argues that Uruguay needs an “active, friendly, efficient and sensible state”⁹

This implies that eventually the Uruguayan government may be willing to create an Open Government policy.

The focus in this paper is about transparency as one of the key pillars to any government activity

In terms of transparency, policy should take into account:

- The appropriate legal framework that establishes what should be considered public information. Ideally it should comply with international standards and practise. This framework should include the obligation of the government to proactively disclose information
- A public institution in charge of effectively applying the law to the whole of government. This institute should be as independent and specialised as possible. (Ackerman& Sandoval 2006). The institute can provide training to public servants in terms of Open Government Policy and application of the freedom of information law.
- A freedom of information campaign particularly focused on transparency and designed to empower citizens so they can access the information.
- Different channels to publish official information and to request official information.
- Eventually, a cheap and legal procedure that ensures the right to know for all citizens
- In the long run, the creation of a culture of openness and transparency in the whole of government.
- Greater openness should deliver benefits to citizens through enhanced accountability and more quality in policy-making processes.

The Uruguayan FOI Law last draft and International Standards¹⁰

Toby Mendel (2003) has summarised the international standards that should guide a FOI Law content:

- Principle of Maximum Disclosure: Most Government information should be available to citizens

⁷ Interview in “ En Perspectiva”, El Espectador
<http://www.espectador.com/perspectiva/entrevistas/ent0112032.htm> (last visited December 1st 2007). This probably could have been due to the recent military past and “fears” about disclosing information.

⁸ This case was presented in the Committee as an example by the Civil Society representative Edison Lanza

⁹ Article published in La Republica Online.
<http://www.larepublica.com.uy/larepublica/2006/08/30/politica/221871/tabare-vazquez-quiere-un-estado-activo-amigable-cercano-y-sensible/> (last visited in December 1st 2007).

¹⁰ Due to length restrictions it is not possible to give a full legal assessment about the FOI Draft

- Obligation to publish key information: The state is obliged to publish all relevant information to the citizenry without any request.
- Promotion of Open Policy Government: Engage civil society, provide incentives (and penalties) to public officials in order to comply with the law, promote better record keeping.
- Limited Scope of Exception and clear “harm”: and “public interest”
- Process to facilitate access. The process should be simple and an independent review provided
- Cost. No one should be deterred from accessing information on a cost basis
- Open Meetings: Public bodies meetings should be open to the public.
- Disclosure/ takes precedence

While these principles are generally accepted, there is an extensive debate about who should set it, and which standards government should comply with. This paper uses them for illustrative purposes, in order to explain Uruguayan reality.

It is worth mentioning that transparency and publicity of all-government activity are general law principles.(Delpiazzo quoted in Instituto de Derecho Informatico 2006). The Art. 3 recognises this, and establishes:

“All the activities of the subjects obliged by this law should be performed according the principles of access to information and transparency. It is assumed to be public information, all information produced, obtained, held or under control of the government departments and organisms defined in the Article 1 of this law, and by firms and organisation that provide services to the State, regardless their format. The principles of speciality of the public sector, judicial review and due administrative process will be respected. The exercise of the right to access to information can only be limited by restriction to ensure:

The right to privacy

The right to intimacy and inviolability of the correspondence”

The Uruguayan draft obliges all the State Sector (i.e. Central Government, Local Councils, State Owned Enterprises, Non-State public bodies,) as well as any private businesses who have contracted with the state for the provision of public services or exploitation of a public good. Articles 1 and 2 establish this.

Article 1: *“Every person has the right to request, access and receive information from any government department, belonging to the central public administration or the local public administration. This right includes freedom to access written documents such as minutes, files, contracts, and photographic material, as well as in magnetic format, digital format or any other format ...”*

“ This right obliges every public body, meaning state public bodies and non state public bodies”¹¹

Article 2: *This law is applicable to any individual or legal entity that has been awarded through permit, license or other contractual or legal form, the provision of a public service, or the exploitation of a public good, only with regard to the*

¹¹ In English law, non state public bodies would be similar (but not necessarily the same) that Crown Entities.

*provision of the service or the exploitation of the public good. Any private organization that receives subsidies, funds or grants of the State, is also comprehended...*¹²

The draft establishes the obligation to publish key information, setting a minimum, which includes structure, functions, personnel salaries, budget and contracts or public concessions. It also obliges the State to provide a contact person to deal with FOI requests.

In terms of scope there are three reserves in place: defence, commerce and scientific research. The administration cannot deny information without reasons. According to the general administrative law principle followed in Uruguay, the administration should always provide the reasons for its acts. Any document declared legally reserved will become public after ten years. This is established by article 10

Article 10 *The legal reserve pending on any public document will cease after ten years of its declaration. In cases regarding personal information, the reserve period will be extended until 10 years after the death of the individual. After these periods, the document becomes public and can be accessed by anyone...*

There are no special requirements to request public information. Furthermore, the State should try to document every request, even when it is not totally comprehensible. The timeframe to answer the request is 15 working days. The draft provides the possibility of an extension for 10 working days in exceptional circumstances. Therefore the whole period could amount to 5 weeks. Due to the current capacity of the Uruguayan state to manage information and the implementation difficulties that may arise, this period seems reasonable.

Due to possible incompatibilities with bank and tax secrecy provisions, as well as breach of confidence, the principle of maximum disclosure was not specifically mentioned. However it was clear that law should establish any reserve exceptions.(Art.5)

Article 14 of the draft establishes that in principle, consulting public information is free of cost.

... Access to information will be always for free, but reproduction of public information on any format will be charged to the petitioner, who will pay to the organism or firm only the cost price without any surcharge that imply profit or other special tariff..."

The draft also create new administrative faults in the case of: denial of public information, omission of information due to negligence or bad faith, allow access to information that is classified or sensitive private data, misuse of information that the public officer access due to the nature of his/her position.

Overall it is possible to affirm that the Uruguayan law, comply with the international standards on freedom of information

¹² Note this is a loose translation not an official one. There are no official translations available.

Enforcement: a Judicial Approach

As Roberts (2002) suggests there are at least three ways in which FOI laws can be enforced:

- By administrative appeal in front of the state department and the in case of denial the requester should go to the Courts
- By a special commissioner or Ombudsman who recommends disclosure. If the recommendation is not followed then the Courts enforce the right
- A special commissioner or institute is created who has the power to order disclosure. The acts of the commissioner are subject to judicial review on grounds of reasonableness.

In the draft being considered in Uruguay, if the administration denies the provision of public information or simply does not answer the petition, it is possible to go to the courts. There is a special action established called " accion de amparo informativo" (it could be loosely translated as "right to know injunction") in front of the civil courts. The process should last less than a week and there are almost no fees. However lawyers do charge for their services. The jurisdiction has been attributed to Civil Courts, and it is possible to appeal to the Civil Court of Appeal (second instance). The Ombudsman idea was considered but not carefully enough.

Implementation: possible problems

The Government Agency for E- Government and the Knowledge and Information Society (Agencia para el desarrollo del Gobierno Electrónico y la Sociedad de la Información y el Conocimiento- AGESIC) will coordinate the implementation.

Between its goals it has to promote a transparent administration.

AGESIC should:

- control the implementation of the law by all the subjects included in it
- elaborate public policies towards disclosure of information,
- provide advice in case of queries and denounces that citizens may present.
- provide training to public servants

AGESIC should also engage in public campaigns to promote access to information and publish an annual report on this subject.

The main problem of this law is its implementation. The original law project provided the figure of a Commissioner in order to implement the law. It is not clear the reason this suggestion was removed. A legislative Commissioner is also the approach followed in other countries, like New Zealand.

A special unit should have been created. Instead AGESIC will now carry a heavy burden. While AGESIC is supposed to contribute towards a transparent government through ICT's, it was not designed for training of public servants nor to secure the implementation a freedom of information law in the central public administration, let alone the whole of government. AGESIC has a very limited role. Its jurisdiction does not include local governments, the State Owned Enterprises or other public bodies. Furthermore, AGESIC agenda also includes privacy data protection and other sensible topics that require serious coordination with the whole of government. Therefore the agency has many different interests and some of them could probably collide with the implementation of a freedom of information law. It is also likely that AGESIC structure should be enlarged to deal with this new function, which involves more budget that could be allocated to other specific requirements. Moreover

AGESIC should investigate denounces and instruct summaries in order to fulfil its legal mandate, and it will do that against the same agencies that will need as partners towards the implementation of this policy and others more important to Agesic's mission. To put it simply: the agency lacks the political incentives to pursue this agenda.

The other major obstacle in the implementation will be the public servants, who are very used to a secrecy culture. Public officers will continue to refuse public information on a daily basis, until a proper message is sent to them.

While there are no formal evaluations about the capacity and performance of the Uruguayan State, top officers in Uruguay seems to acknowledge the lack of state capacity towards the implementation. This is also another problem: major reorganization will be needed to deal with FOI requests. It is likely that this could also help government officials to promote a State Sector reform.

Conclusions: Towards an effective (but costly) judicial implementation

The content of FOI law seems to comply with the International principles and overseas experiences

The special judicial procedure in place is probably the most effective way to promote the right to know. Uruguayan judges will apply the law according to their tradition (meaning that they will effectively enforce it) but of course this will come at a cost. Firstly, the judges who are supposed to have jurisdiction on this matter are civil ones. The judiciary already has an overload of cases, which they can hardly manage. The special procedure will work, but other procedures will be delayed. Therefore there will be a cost in terms of time, for the judge and for other citizens who await the outcome of their case.

The judiciary has the proper incentive to proceed, but lacks the means which could jeopardise the effectiveness of the system.

Secondly it is also likely that the first FOI request could be about very sensitive issues regarding the military dictatorship period. If the government decides to withhold that information, judges would be in the middle of a political battle. While some may argue that this is their job, violent clashes should be avoided.

It is possible to argue that in the highly legalistic Uruguayan atmosphere the involvement of Judges is essential. Moreover, the message sent by the judges will be heard and the public administration will comply. Thus, a new institution will be created based on the fear of going to court. This scenario is possible (in fact very likely) but it will come at a cost of constant confrontation, time and money. The Civil Society will need to make an important investment in litigation. Furthermore not every citizen in Uruguay has access to lawyer. Even if the fees of an "Accion de Amparo Informativo" were cheap, there will be other problems, such as hiring a lawyer or even approaching one. Poor people may have the usual limitations of not being taken into consideration.

This paper concludes that a special institute with a certain degree of independence is needed for the implementation of this law. Also it would be desirable to promote

research and campaigns, in a more independent manner. In order to balance this institute, a Privacy Commissioner (or equivalent) is also desirable.

AGESIC's role promoting freedom of information in the government and setting standards could be useful (with appropriate funding and jurisdiction). Furthermore it can certainly speed up the requests emulating from the e-petitions format like the many other public administrations. An integrated approach to this subject would certainly coordinate the E-Government Strategy and the Freedom of Information law. Nevertheless, AGESIC should not be the Agency in charge of the whole policy. For the sake of avoiding schizophrenia in AGESIC, another office should be in charge of most of the topics. This is particularly in the areas of control and complaints that should be left to other agencies.

A coherent Open Government policy is also desirable. This law provides some basic tools towards this goal, but is insufficient and could create hidden costs that may operate against its aim. The creation of an institution takes a certain amount of time, and this would not be the exception. It is true that every journey starts with a single step. This step is welcomed; it just needs to be well implemented, to avoid unnecessary costs.

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